

LEARNING FROM THE *YEAN AND BOSICO* CASE: CAN THE REPARATION MEASURES ORDERED IN THE *GUAYUBÍN* CASE REALLY PRODUCE POSITIVE CHANGES?

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Résumé de l'article

Cet article analyse la probabilité que la décision *Guayubín* rendue par la Cour interaméricaine des droits de l'homme contribue de manière concrète à l'amélioration de la situation des migrants haïtiens en République Dominicaine et de leurs descendants. Une première section s'attarde à décrire le contexte socio-historique entourant la problématique. Puis, l'article regarde l'impact concret de la première décision sur la question, le cas *Yean et Bosico*, sur la situation qu'elle a examinée. Finalement, une tentative de prédiction est mise de l'avant quant aux mesures de réparation de la décision *Guayubín* étant les plus susceptibles d'être respectées, et si ces mesures pourraient avoir un impact positif.

LEARNING FROM THE *YEAN AND BOSICO* CASE: CAN THE REPARATION MEASURES ORDERED IN THE *GUAYUBÍN* CASE REALLY PRODUCE POSITIVE CHANGES?

*Marie-Pier Dupont and Philippe-André Rodriguez**

"In order to achieve our rights, it is necessary to have our voices heard beyond the borders."

Sonia Pierre¹

This article analyses the likelihood that the *Guayubín* Case delivered by the Inter-American Court of Human Rights effectively contributes to the improvement of the situation of Haitian migrants in the Dominican Republic and their descendants. It does so by first describing the socio-historical context surrounding the issue. It then looks at the concrete impact of the first decision on the issue, the *Yean and Bosico* Case, on the situation it addressed. Finally, it attempts to predict which reparations measures of the *Guayubín* judgment are most likely to be complied with, and whether these measures might have a positive impact.

Cet article analyse la probabilité que la décision *Guayubín* rendue par la Cour interaméricaine des droits de l'homme contribue de manière concrète à l'amélioration de la situation des migrants haïtiens en République Dominicaine et de leurs descendants. Une première section s'attarde à décrire le contexte socio-historique entourant la problématique. Puis, l'article regarde l'impact concret de la première décision sur la question, le cas *Yean et Bosico*, sur la situation qu'elle a examinée. Finalement, une tentative de prédiction est mise de l'avant quant aux mesures de réparation de la décision *Guayubín* étant les plus susceptibles d'être respectées, et si ces mesures pourraient avoir un impact positif.

Este artículo analiza la probabilidad de que la decisión "Guayubín" de la Corte Interamericana de Derechos Humanos contribuya de manera concreta a la mejoría de la situación de los migrantes haitianos en República Dominicana y de sus descendientes. La primera sección describe el contexto socio-histórico de la problemática. Luego, el artículo observa el impacto concreto de la primera decisión relativa a la cuestión, el caso "Yean y Bosico", sobre la situación allí examinada. Finalmente, el artículo intentará predecir cuáles de las medidas de reparación serán probablemente acatadas, y si estas medidas podrían llegar a tener un impacto positivo.

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In November 2012, the Inter-American Court of Human Rights (IACHR) delivered its second judgment on the issue of Haitian migrant and Dominico-Haitians rights in the Dominican Republic. For decades now, this group has suffered from systematic discrimination and its members have had their human rights violated in many different ways. These two decisions are two prime examples of the variety of such violations, and they also represent two similar attempts for achieving positive change. However, the first of these decisions, the *Yean and Bosico* case², did not produce the expected improvements. The new decision by the Court, the *Guayubín* case³, will not only most likely become a new staple decision for the standards on the use of force by law enforcement officials; but it has also been viewed as providing new hopes for the rights of Haitian migrants and Dominicans of Haitian descent in the Dominican Republic. Why should we expect that the outcome will be different this time around? This article proposes to expose the structural limitations that the implementation of this latter decision will have to face by first exposing the socio-historical context surrounding Haitian migrants in the Dominican Republic. It will then analyze the concrete impacts of the *Yean and Bosico* case on the situation it addressed. After looking at the response from the Dominican government to the reparations measures ordered by the Court, the article will try to predict the measures of the *Guayubín* judgment that will most likely be complied with and how these measures might have an impact on the situation of Haitian migrants and their descendants in the country.

I. The socio-historical context

In many ways, the national self-understanding of the Dominicans, or *Dominicanidad*, has been constructed historically in opposition to the Dominican construction of the Haitian national identity, or *Haitianidad*. How has this been possible? “Identity – Hegel famously asserted in his *Differenzschrift* – is the identity of identity and non-identity.”⁴ For the German philosopher, the human mind recognizes itself through external manifestations that are either outside of it or opposed to it, so that these externalizations are at the same time both mind and non-mind.⁵ In other words, identity is first and foremost a recognition of what is the Other, not the Self.

If this conception of “identity in difference” has been criticized by various famous philosophers since its original publication in 1801,⁶ it still helps shed light on what could be described as the dialectical construction of *Dominicanidad*. This is especially noteworthy given the fact that, as Susan Buck-Morss has forcefully

² *Case of the Girls Yean and Bosico (Dominican Republic)* (2005), Inter-Am Ct HR (Ser C) No 251.

³ *Case of Nadege Dorzema et al (Dominican Republic)* (2012), Inter-Am Ct HR (Ser C) No 251. [Guayubín].

⁴ Georg Wilhelm Friedrich Hegel, *The difference between Fichte's and Schelling's system of philosophy* (Albany, New York.: State University of New York Press, 1977(1801)) at 46.

⁵ *Ibid.*

⁶ See e.g. Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* (London: Routledge, 2001 (1921)) at 62 (“it is evident that identity is not a relation between objects” at 5.5301).

demonstrated, the Haitian revolution of 1791-1804 has not only deeply influenced Hegel's work, but might even have triggered the reasoning at the basis of his *Phenomenology of the Spirit*.⁷

Of course, the story does not end here. If the historiography of nationalism in the twentieth century has taught us anything, it is that identities, including the national one, are not a given, but that they rather are social constructs.⁸ Hegel himself held a similar view by pointing to the ongoing "subjectivisation" of the identity absolute, which itself leads to a relation of domination in the determination of the cultural, and thus subjective, understanding of this absolute. Within this relation, identity becomes an object of non-rational faith.⁹

Nationality has been one of most powerful source of the construction of identities since the 19th century. But nationality and nationalism in general are the result of more than just identity. André Lecours recently put it very synthetically: "nationalism represents the coupling of political processes linked to identity, interests and mobilization."¹⁰ In other words, the process through which something is depicted as "Other" (identity) is highly politicized and ultimately refers to what those in position to determine the content of that otherness (mobilization) desire the self to become (interests).

When it comes to the Dominican Republic, this group is made up of a small number of families in place since the Spanish colonial days. As is often the case in Central America, this *élite* is whiter than the majority of the population. As Ernesto Sagás explains in his *Race and politics in the Dominican Republic*, this white minority racialized and blackened the non-Dominican Haitian in order to stay in power as long as possible.¹¹ Indeed, by the end of the Spanish regime in Santo Domingo, the lower classes were in favor of the annexation of the province to Haiti, which was admired for its perceived republican institutions and egalitarian society. The white upper class thus understood that if they wanted to remain in place, they had to use the racial card and make Haiti the enemy by depicting it as barbarous and backward because of its African origins. The Dominicans, in comparison, were the proud heirs of Europe, cultivated and civilized.¹²

This trend has only increased since then, and *antihaitianismo* has become a major theme of Dominican national identity. It was further increased by the fact that Haitians started to migrate to the neighboring country, as the Dominican Republic developed faster and more consistently than its neighbor for geographical and

⁷ Susan Buck-Morss, "Hegel and Haiti" (2000) 26:4 *Critical Inquiry* 821.

⁸ See e.g. Benedict Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism*, 3d ed (London: Verso, 2006 (1983)).

⁹ Georg Wilhelm Friedrich Hegel, *Faith and knowledge* (Albany, New York: State University of New York Press, 1977 (1802)) at 61.

¹⁰ André Lecours, "Sub-state nationalism in the Western World: explaining continued appeal" (2012) 11:3 *Ethnopolitics* at 270.

¹¹ Ernesto Sagás, *Race and politics in the Dominican Republic* (Gainesville, FL.: University Press of Florida, 2000).

¹² *Ibid* at 29.

political reasons.¹³ This, for example, led Joaquín Balaguer, former president of the Dominican Republic and one of the most important political and intellectual figure in the history of the country, to depict this movement as a “contamination” of the country by Haitians, adding that it has forced some of the “best” families from “pure” Spanish origins to leave the country.¹⁴ *Antihaitianismo* also resurfaced in the 1990’s when a syndicalist from Haitian origins, José Francisco Peña Gómez, ran for the presidency. His opponents, and notably Balaguer and former president Leonel Fernández, used *antihaitianismo* to attack him personally, a very successful strategy that ultimately won them the elections.¹⁵

Even if nowadays the political discourse is not as openly discriminatory, *antihaitianismo* is still present in the everyday life of Dominicans, albeit in a more subtle way. This added subtlety became necessary following the international campaign on the issue during the 1980’s.¹⁶

One of the new ways through which *antihaitianismo* subsists is in the pages of daily newspapers. Indeed, as a recent study by the independent media monitoring institution *Espacio Insular* shows, the media are nowadays a major protagonist in the perpetuation of racist stereotypes associated with Haitians.¹⁷ Indeed, contrary to what could be assumed given the aforementioned importance of the Haitian question in the Dominican political discourse, the study observes that none of the major newspapers of the country, including *Hoy*, *El Caribe*, *Listín Diario*, *El Nacional*, *Nuevo Diario* and *El Día* have a journalist either based in or solely assigned to cover Haiti.¹⁸ The authors specify that

The information related to the socio-political situation in Haiti published in the Dominican media during the period analyzed [March 2004 – March 2007] comes almost entirely from international news agencies, which presents the case of Haiti as a “non-viable state”, and the social, political and economic dynamics as a permanent chaos which lacks the institutions that should characterize a modern state.¹⁹

The authors of the study conclude that “the media have played a great role in

¹³ Jared Diamond, “Intra-island and inter-island comparisons” in Jared Diamond & James A. Robinson, eds, *Natural Experiments of history* (Cambridge: Cambridge University Press, 2010). See also André Corten, *L’État faible: Haïti et République Dominicaine*, 3d ed (Montréal: Mémoire d’encrier, 2011).

¹⁴ See Joaquín Balaguer, *La isla al revés: Haití y el destino dominicano* (Santo Domingo: Corripio, 1983).

¹⁵ Bridget Wooding & Richard Moseley-Williams, *Needed but unwanted: Haitian immigrants and their descendants in the Dominican Republic* (London: CIIR Press, 2004) at 22 [Wooding & Moseley-Williams].

¹⁶ *Ibid* at 74.

¹⁷ Grupo de Apoyo a Repatriados y Refugiados (GARR), *República Dominicana/Haití: tendencias en la prensa sobre temáticas de la isla* (Santo Domingo: Editora Buho, 2009).

¹⁸ *Ibid* at 145.

¹⁹ *Ibid* at 145. (“Las informaciones relacionadas con la situación sociopolítica de Haití publicadas en los medios de comunicación dominicanos en el periodo analizado, provienen case en su totalidad de fuentes de agencias de noticias internacionales, en las que se presenta el case haitiano como ‘Estado inviable’, y la dinámica social, política y económica en un caos permanente y carente de la institucionalidad que debe caracteriza a un Estado moderno.” [Translated by author].)

the diffusion of xenophobic ideas [towards Haitians] and racist prejudices, and especially the printed press.”²⁰ This was done mainly through “the reproduction of the great myths about immigrants” such as the fact that “the Haitian migrants are projected as a threat to the Dominican sovereignty, customs and cultural traditions.”²¹ They also note that around 90% of the sources of information in the Dominican written media on the themes of migration and Dominico-Haitian relations come from official institutions, and that this leads more often than not to a biased view on these questions, as it excludes differing opinions on these issues.²²

This discriminatory view is usually even more evident in editorials. For example, an editorial from the newspaper *El Caribe* asserted that when it came to frontier incidents between Haitians and Dominicans, “[t]here is a constant in each of these confrontations: they all start with an aggression by an Haitian against a Dominican.”²³ Editorialists also help spread throughout the country the belief that there is a conspiracy by international institutions against the Dominican State to the effect that the country is left alone to deal with the “Haitian problem”. Commenting on a 2009 report by the *United Nations Development Program* which deplored the discrimination against Haitians, an editorial in the pages of *El Nacional* claimed that this criticism “is part of a sinister plan against the country”, adding that “Haitian work here without documents and never have they been denied the right to health, education or any public service.”²⁴ In fact, two years earlier, in the pages of the same newspaper, an editorial described the country as one of the most tolerant and supportive of undocumented immigrants, pointing to “the conditions in which Haitians enter, work and settle” in the country.²⁵

The view that the Dominican Republic does not discriminate towards Haitians is also repeated *ad nauseam* by public officials. For example, in its report submitted to the United Nations Human Rights Committee for its fifth periodic report, the State pointed to “the falsity of the contention that the Dominican Republic does not offer due protection to Haitians who live and work in the country, as all persons have an equal right to lead a full life in the Dominican Republic as long as they abide by its migration laws.”²⁶ It was also visible in the official reaction to the first important decision by the Inter-American Court of Human Rights on the case of Haitian migrants and their descendants, the *Yean and Bosico* case, which will be

²⁰ *Ibid* at 28. (“Los medios de comunicación han desempeñado un rol relevante en la difusión de estas ideas xenófobas y prejuicios racistas, en especial los impresos.” [Translated by author]).

²¹ *Ibid* at 144. (“Los y las migrantes haitianos/as se proyectant como un peligro para la soberanía, costumbres y tradiciones culturales dominicanas.” [Translated by author]).

²² *Ibid* at 145.

²³ “Editorial de *El Caribe* : Para reflexionar”, *El Caribe* (9 December 2005) 2, cited in *Ibid* at 59 (“Hay una constante en cada uno de los enfrentamientos: comienzan con la agresión de un haitiano a un dominicano [...]” [Translated by author]).

²⁴ “Radar” *El Nacional* (7 October 2009) 2 (“Los haitianos trabajan aquí sin documentos y jamás se les ha negado derecho a la salud, la educación ni a ningún servicio público.” [Translated by author]).

²⁵ “Injusticia” *El Nacional* (3 March 2007) cited in *supra* note 17 at 67.

²⁶ United Nations Human Rights Committee, *Consideration of reports submitted by States Parties under article 40 of the Covenant*, Fifth periodic report, UNHRCOR, 55th Sess, Supp No 40, UN Doc A/55/40, (22 January 2010), para 46.

analyzed in the next section. As David Baluarte explains, following the decision stating that the State was found guilty of discrimination towards the Dominico-Haitians, “[t]he vice-President soon after denied the validity of the Court’s holdings and declared that the country was under siege by international organizations intent upon discrediting the Dominican Republic before the world community.”²⁷

The media coverage of the *Guayubín* case follows the same pattern. All of the aforementioned six major newspapers in the country decided to simply use the article written by the Spanish international news agency EFE to report that the Inter American Court of Human Rights would hear the case.²⁸ As for the decision itself, the same six newspapers simply published the press release from the Court online.²⁹ This strategy helped lessen the impact the decision had on public opinion, as it appears to be deemed important enough to be covered by local journalists. Furthermore, the answer from State officials reported by the media went in the same direction of delegitimizing the decision. In particular, the newspaper *El Diario Libre* reported the declaration of the Director of Immigration, José Ricardo Taveras Blanco, in which he refuted the outcome of the decision. Taveras knows that the vast majority of the population has little or no knowledge of the details of either the functioning of the Inter-American system of human rights or the case itself. He first claimed that the Court had no real jurisdiction over the State since the *American Convention on Human Rights* has not been ratified by the Dominican Congress (something which is legally inaccurate). He also asserted that the incident itself was a “simple military pursuit” in which the gunshots were aimed not at the victims, but rather towards the tires of the vehicle, the soldiers being allegedly unaware that it transported human beings. He added that he saw the Court as “maintaining a belligerent attitude with the States” which amounted to “interference in the internal affairs of the state.”³⁰

Therefore, one has to take into consideration this hostile context for any reparation to the *Guayubín* case to be complied with. This is not to say that any change is impossible, but rather that if this reality is neglected, there is a risk that these attempts at reparation will simply worsen the situation, as the next section will show.

²⁷ David Baluarte, “Inter-American justice comes to the Dominican Republic: an island shakes as human rights and sovereignty clash” (2006) 12:2 Human Rights Brief 25 at 28.

²⁸ See e.g. EFE, “RD ante la corte internacional”, *Listín Diario* (22 June 2012), online: Listín Diario <<http://www.listin.com.do/las-mundiales/2012/6/22/237138/RD-ante-la-corte-internacional>>.

²⁹ Odalis Mejía, “Republica Dominicana lleva cuatro fallos internacionales”, *Hoy* (1 December 2012), online: Hoy <<http://hoy.do/el-pais/2012/12/1/456963/Republica-Dominicana-lleva-cuatro-fallos-internacionales>> (The newspaper *Hoy* published an additional article by one of its journalists on its website, which was a simple enumeration of the different condemnation of the country’s action by different international tribunals in the last few years.). EFE, “Amnistia Internacional: fallo de la CorteIDH es ‘vergüenza’ para RD”, *Listín Diario* (1 December 2012) online: Listín Diario <<http://www.listin.com.do/la-republica/2012/11/30/257083/Amnistia-Internacional-fallo-de-la-CorteIDH-es-vergüenza-para-RD>>.

³⁰ Y. Alcántara & R. Mateo, “Migración deplora la condena contra el país”, *El Diario Libre*, (1 December 2012), online: El Diario Libre <http://www.diariolibre.com/noticias/2012/12/01/i361931_migracion-deplora-condena-contra-paas.html>.

II. Analysis

When one looks closely at the complex socio-historical context surrounding the relationship between the Dominican State and the Dominico-Haitian community in the Dominican Republic, it becomes clear that it must have an impact on the way the country receives international decisions ordering a specific treatment of that group. More specifically, this context clearly shapes the level of cooperation that the Dominican government will demonstrate when dealing with international and regional criticism of the treatment towards that specific group.

As stated above, since the 1980's the Dominican Republic has received a lot of international attention in relation with the treatment suffered by Haitian migrant workers and their descendants in the country, more specifically in sugar cane plantations.³¹ When criticism arises in a multilateral context that uses a non-binding process of cooperation and discussion to address those issues (for example, the United Nations), the Dominican Government is usually more cooperative and will admit to some degree that there is a need for improvement in some sectors.³² That being said, when it is a court that has binding power over the State, the relationship with that institution tends to be less friendly and, unfortunately, more adversarial. These elements all demonstrate the presence of a pattern of reaction with regards to the decisions of the Inter-American Court of Human Rights by the Dominican government. Hence, to anticipate the results that the *Guayubín* Case judgment will have, one must look at the impact of the previous decision from the same court on the rights of the Haitian migrant community in the Dominican Republic, the *Yean and Bosico* case.

Although the facts of these two decisions are different, the aforementioned socio-historical context remains equally relevant. Thus, the next section will take a closer look at the specific facts of both cases, keeping in mind the larger background presented above. This will be important when comparing the two judgments and the possibility for the *Guayubín* case decision to bring concrete changes to the situation of Haitian migrants in the Dominican Republic.

First of all, this section will go over the facts of the *Yean and Bosico* decision and the reparations that were ordered by the Court. Then, it will analyze the compliance of the Dominican government with the judgment and the repercussion of this decision a little less than 10 years after the case. The second part of this section will address the context specific to the *Guayubín* case and the reparations ordered by the Court. Then, the links between the two cases and the reason why it is expected that some of the orders from the Court are more likely than others to be put in place by the Dominican State will be explored. In the case of those reparations less likely to be complied with, we will try to build upon the social context developed in the first

³¹ Wooding & Moseley-Williams, *supra* note 15.

³² For example of this behavior, see United Nations Human Rights Committee, *Cuestiones relativas al Quinto informe de Republica Dominicana a proposito de los derechos enunciados en el Pacto Internacional de Derechos Civiles y Politicos*, UNHCROR, 104th Sess, Supp No 40, UN Doc A/67/40 (Vol. I).

part of this article to create some recommendations on how these measures could be realized.

A. **The Case of Dilcia Yean and Violeta Bosico**

While the *Guayubín* case dealt with Haitian migrants of adult age, the *Yean and Bosico* case involved the rights of children of Haitian migrant workers in the Dominican Republic.

These children are often born on the Dominican soil, or arrive there at a really young age. Therefore, more often than not they have no, or very little, links with Haiti: the culture and language they see as their own are generally Dominican. In this context, the premise of the case is that these children, although they could, according to the Haitian Constitution³³, acquire the Haitian citizenship through their blood ties with the country (*jus sanguinis*), are *de facto* stateless if the Dominican State refuses to grant them the Dominican nationality. When the facts of this case arose, the Dominican Constitution provided for *jus soli* (nationality granted on the base that you are born on the soil of a country) with the exception of children of persons that are in transit.³⁴ “This exclusion, normally applicable only to diplomats or tourists, is [...] extended to undocumented Haitians despite the fact that many parents may have been in the country for years rather than the 10 days specified elsewhere in the Constitution as a reasonable period to be in transit.”³⁵

In this specific instance, the issue of the case concerned the impossibility for two children to receive their birth certificate, making it impossible for the girls to obtain identity documents. Because of that impossibility, one of the girls was unable to pursue the regular education program available and both felt at risk of being sent back to Haiti at any moment since they did not have any documents to prove that they were born on Dominican soil.³⁶

When taking into consideration all of the elements of the case, “the Inter-American Court found that the Dominican Republic had violated the girls’ rights to nationality, equality before the law, a juridical personality, a name, and special protection as children, in conjunction with the state’s obligation to respect the rights guaranteed in the Convention.”³⁷ More specifically, the Court analyzed the doctrine of *jus soli* and the rights and obligations encompassed in article 20 of the American Convention, which stated that the right to a nationality had two aspects: “the right to have a nationality from the perspective of granting the individual a ‘minimal measure of legal protection in international relations through the link his nationality establishes between him and the State in question; and second the protection accorded the

³³ *Constitution de la République d’Haïti, 10 mars 1987*, section 11 (Port-au Prince, Haïti).

³⁴ *Constitución de la República Dominicana*, January 26th 2010, section 18 (Santo Domingo, Dominican Republic) [Dominican Constitution].

³⁵ James Ferguson, “The Haitian Migrant Minority in the Dominican Republic” in Taryn Lesser, Berta Fernandez-Alfaro et al, eds, *Intra-Caribbean Migration and the Conflict Nexus* (Ottawa: Human Right Internet, 2006) 308 at 334.

³⁶ Yean and Bosico, *supra* note 2 at para 109.

³⁷ Baluarte, *supra* note 27 at 27.

individual against the arbitrary deprivation of his nationality, without that are tied to the nationality of the individual”³⁸ Furthermore, the Court recalled that “States have the obligation not to adopt practices or laws concerning the granting of nationality, the application of which fosters an increase in the number of stateless persons.”³⁹

As for reparations, the Court first recalled that the judgment itself should be seen as a form of compensation, and it affirmed that this was the appropriate one for the family members of the girls. When dealing with the specific circumstances of this case,

The Court ordered that the Dominican Republic publish the sentence nationally, as well as organize a public act of recognition of responsibility to apologize to the plaintiffs within the first six months of the date of the sentence. Further, the Court gave the State one year to pay \$ 8,000 to each plaintiff and \$ 6,000 to the three entities that represented them. Additionally, the Court ordered that the Dominican Republic implement legislative and administrative measures to ensure the non-discriminatory issuance of birth certificates and establish an effective judicial procedure to challenge the process. The Court also called on the Dominican government to guarantee free access to elementary education, independent of a child’s heritage or origin.⁴⁰

In the judgment, the Court indicated that it would follow up on the compliance of the State with the orders of the Court. Since the judgment, there has been to this date four different reports on the actions of the State to comply with the judgment (2007, 2009, 2010, and 2011). According to these reports, some of the reparations were dealt with rapidly enough. For example, in 2007 the Court could testify that all the payments for non-pecuniary damages had been done to the victims and their representatives.⁴¹ Unfortunately, as of 2011, the State had not sent the Court any specific documents on the legislative measures put in place to make the late birth registration process more accessible and to establish an appeal procedure.⁴² Moreover, although the State had seemed to improve its cooperation with the representatives of the victims, the Dominican officials had yet to make any official statement to announce the recognition of their international responsibility and apologize to the victims.⁴³

The reluctance of the Dominican Republic to follow the judgment of the Inter-American Court was certainly a sign of things to come.

First of all, “In the days and weeks following the release of the Inter-American Court of Human Rights *Yean and Bosico* decision, human rights observers

³⁸ *Yean and Bosico*, *supra* note 2 at para 139.

³⁹ *Ibid* at para 142.

⁴⁰ Baluarte, *supra* note 27 at 27.

⁴¹ *The Yean and Bosico Children (Republica Dominicana)*, “Supervision de cumplimiento de sentencia”, (28 November 2007), Inter-Am Ct HR.

⁴² *The Yean and Bosico Children (Republica Dominicana)*, “Supervision de cumplimiento de sentencia”, (10 October 2011), Inter-Am Ct HR [Cumplimiento, 2011].

⁴³ *Ibid*, at para 11.

noted the re-emergence of a “furious debate” in Dominican society.”⁴⁴ Then, in 2004, Migration Law 285-04⁴⁵ was passed. This law created many special exceptions for the birth registration of children born from a woman that is lacking Dominican identity documents, providing that they should be included in the “transit” category. “This ‘in transit’ exception was codified into law via the 2004 General Law on Migration 285-04, providing that only children of those individuals deemed to be “residents” born on Dominican Soil are entitled to Dominican citizenship.”⁴⁶ More specifically, these mothers receive a pink certificate (compared to the regular white certificate), they are registered in a foreigners book and then referred to the consulate of their country of origin to register the birth of their child.⁴⁷

Later on, in April 2005, a few months before the judgment, the Dominican government, through the Secretary of Labor, announced measures to “dehaitianize” the country. “Additionally, the tragic murder of a Dominican woman in the northwest region of Hatillo Palma in May 2005 set off a wave of violence against Haitians and Dominicans of Haitian descent. In the midst of this violence, the Dominican immigration authority initiated a campaign of massive expulsions and forcibly deported over 2,000 individuals in one weekend.”⁴⁸ These waves of massive expulsions and deportation are unfortunately a common occurrence in border communities and even in the capital, Santo Domingo.

A few months after the judgment in the *Yean and Bosico* case, where the Court denounced the discrimination inherent to the General Migration Law⁴⁹, the Supreme Court of the Dominican Republic had to pronounce a judgment on the constitutionality of Migration Law 285-04.⁵⁰ Even amongst Dominican jurists, this decision is considered as contradictory and badly researched as it is “widely regarded as political discourse rather than constitution interpretation.”⁵¹ The decision upheld the provision of the law that permitted Haitian migrant workers and their children to enter the “in transit” exception of the Constitution. Further, it ceded “the right to interpret the Dominican Constitution to the legislature and, rather than clarifying legal citizenship, confuses the concept. [...] [T]his decision [...] def[ies] the Court’s order for institutional reparations and sets a bad precedent for future legislative measures.”⁵²

Following that decision, in 2007, the Junta Central Electoral, the government institution in charge of birth registrations and issuance of other identity documents, put in place a policy that had for effect to denationalize anybody who would have received Dominican identity documents under “irregular” circumstances.

⁴⁴ Stacie Kosinski, “State of uncertainty: Citizenship, Statelessness and discrimination in the Dominican Republic” (2009) 32 *BC Int’l & Comp L Rev* 377 at 388 [Kosinski].

⁴⁵ *Ley General de Migración* (Dominican Republic), 21 July 2004.

⁴⁶ *Ibid* at 383.

⁴⁷ *Ibid*, note 28.

⁴⁸ Baluarte, *supra* note 27 at 26.

⁴⁹ *Yean and Bosico*, *supra* note 2 at 239.

⁵⁰ Suprema Corte de Justicia, *Sentencia del 14 de diciembre del 2005*, 14 December 2004 (No 9).

⁵¹ Baluarte, *supra* note 27 at 28.

⁵² *Ibid* at 28.

Circular No. 17, an internal instructional memorandum dated March 29, 2007, orders all civil registry officials to suspend processing identity documents for children found to be born of “foreign parents” who were issued birth certificates under what they deem to be “irregular circumstances”. Individuals are then subjected to investigation by the JCE, despite the JCE’s lack of legal authority to conduct such inquiries. Further, the application of Circular No. 17 is subjective and unjust in that it provides no criteria by which civil registry officials are to determine “irregularity” and there is no prescribed time limit for the investigatory period. Circular No. 17 appears specifically aimed at targeting Dominicans of Haitian descent.⁵³

In fact, the Dominican Republic receives major immigration flows from no other country and according to the Open Society Initiative report, some officials have replaced “foreign” by “Haitian” in official documents.⁵⁴

The final action was taken when the Dominican Republic adopted a new Constitution⁵⁵, in 2010, in which a restriction to the granting of nationality of the basis of *jus soli* was inserted. Section 18(3) of the Constitution now states that anyone born on the territory of the Dominican Republic is Dominican, with the exception of children of diplomat, children of persons in transit and children of parents who are residing illegally on Dominican territory.⁵⁶ This article goes directly against the judgment of the IACHR in the *Yean and Bosico* case, which stated that the migratory status of the parents could not be passed to their children⁵⁷ and the advisory opinion on the *Judicial Conditions and rights of the Undocumented migrants*.⁵⁸

Following the adoption of the new Constitution, in 2010, the United Nations Committee on Economic, Social and Cultural rights issued a report on articles 16 and 17 of the International Covenant on Economic, Social and Cultural rights. The Committee recalled its concerns that there was still discrimination in the country against Haitians and Dominicans of Haitians Descent. Furthermore, it regretted:

[...] that after that five years after the judgment by the Inter-American Court of Human Rights in the *Yean and Bosico* case, children of Haitian descent born in the State party continue to suffer discrimination, in particular through the revocation of identity documents as a result of the application of Law No. 285-04 on Migration of 2004, Resolution No. 017 by the Dominican Electoral Board in 2007, and article 18.3 of the Constitution of 2010. The Committee notes that the non-renewal of residency documents has increased the exposure of Haitian children and

⁵³ Open Society Justice Initiative and the Center for Justice and International Law, “Submission to the United Nations Human Rights Committee: Review of the Dominican Republic”, (2012) at para 35, online: OHCHR <http://www2.ohchr.org/english/bodies/hrc/docs/ngos/OSJI_and_CJIL_DominicanRepublic_HRC104.pdf>.

⁵⁴ *Ibid.*

⁵⁵ Dominican Constitution, *supra* note 34.

⁵⁶ *Ibid* at section 18(3).

⁵⁷ *Yean and Bosico*, *supra* note 2 at para 156.

⁵⁸ See *Judicial Conditions and rights of the Undocumented Migrants* (2003), Advisory Opinion OC 18/03, Inter-Am Ct HR (Ser A) No 18.

Dominican children of Haitian descent, especially, to discriminatory practices. The Committee is also concerned that the aforementioned Law No. 285-04 on Migration expanded groups of children denied their right to Dominican nationality making them effectively stateless and that this law is applicable retroactively. The Committee is in particular concerned that the approach taken by Law No. 285-04 on Migration of 2004 has been integrated into the 2010 Constitution of the State party (art. 2, para. 2).⁵⁹

This concern expressed by the United Nations tends to demonstrate the general skepticism towards the Dominican Republic's desire to make any change to the treatment received by Haitian migrants or their descendant in the country.

As it was demonstrated previously, the Dominican Republic will likely comply with any reparation ordered by the Court that does not imply any change to the policies of the country. However, a reparation that entails more structural changes, such as new legislations, will not be as easily observed, especially considering the context outlined in the first section of this article.

Looking at the events described above, one can start to appreciate the scope of obstacles that the *Guayubín* judgment will have to face before being completely complied with.

B. The case of Nadège Dorzema et al

Depending on the sources, it is believed that there are between 200 000 and two millions Haitians or Dominican of Haitian Descent in the Dominican Republic.⁶⁰ In the year following the *Guayubín* massacre, Human Rights Watch published a report estimating that more than 10 000 deportations were happening every year, although they believed that the real numbers were probably closer to 30 000.⁶¹ This shows that when the events⁶² of this case occurred, there was a lot of activity at the border between Haiti and the Dominican Republic and that this activity was related mostly to migration flows between the two countries. Further, one has to remember that, although the *Guayubín* judgment was delivered seven years after the *Yean and Bosico* judgment, the events of both cases are only three years apart, and both are inscribed within the same socio-historical context.

For the case at hand, the Court ordered the following reparations:

⁵⁹ Committee on Economic, Social and Cultural Rights, *Considerations of reports submitted by State Parties under article 16 and 17 of the Covenant*, UNESCOR, 45th Sess, 2010 UN Doc E/C.12/DOM/CO/3, at para 11, online: OHCHR <www2.ohchr.org/english/bodies/cescr/docs/co/E.C.12.DOM.CO.3.doc>.

⁶⁰ Wooding & Moseley-Williams, *supra* note 15 at 32. The largest numbers are typically associated with the opponents to Haitian immigration in the Dominican Republic.

⁶¹ Human Rights Watch, "Dominican Republic - "Illegal people": Haitians and Dominico-Haitians in the Dominican Republic", (April 2002) 14 (1(B)) at 17, online: Human Rights Watch <<http://www.hrw.org/reports/2002/domrep/domrep0402.pdf>>.

⁶² For details on the specific facts of this case, please refer to the judgment itself or to one of the other article of this special edition.

- The Dominican Government has to re-open the investigation of the case, in the ordinary jurisdiction to prosecute and appropriately punish those who would be found responsible. Further, the Court asked that the State removes all obstacles to this investigation and ensure that all the institutions necessary for the investigation have appropriate resources to perform their duties;⁶³
- Within one year of the notification of the judgment, the Dominican State shall find the whereabouts of the bodies of the deceased victims and, after confirmation of genetic relation, repatriate and deliver the bodies to their next of kin in Haiti. The State will assume all costs associated with these operations;⁶⁴
- The State has the responsibility to provide immediately, without any charges, the medical and psychological treatment required by the victims, including any medication needed, free of charges. The specific circumstances and needs of the victims must be taken into account by the State and the treatment necessary must be agreed with by the victims. This treatment shall be given the closest possible to their residence, and if the victim are not residing in the Dominican Republic, the State shall give them a pre-determined amount to cover their medical treatments;⁶⁵
- The State shall publish the official summary of the judgment in the official gazette of the Dominican Republic, once in a national newspaper that has large circulation in the Dominican Republic and once, translated in French and Creole, in a Haitian newspaper that has widespread circulation. This must be done within six months of the notification of the judgment;⁶⁶
- The Court determined that it was necessary for the Dominican Republic, in agreement with the victims and their representatives, to organize a public recognition of their international responsibility, within six months of the notification of the judgment;⁶⁷
- The State, to enhance the institutional capacities of the bodies responsible for respecting and guaranteeing human rights, will have to obligation to train members of the armed forced, border control agents and agents responsible for migratory procedure. This training shall be done in compliance with the case law from

⁶³ *Guayubín*, *supra* note 3 at para 249 (a), (b) and (c).

⁶⁴ *Ibid* at para 253.

⁶⁵ *Ibid* at para 259-261.

⁶⁶ *Ibid* at para 263.

⁶⁷ *Ibid* at para 265.

the Court and include specific elements enumerated by the Court;⁶⁸

- The Court found it relevant to order the State to organize a campaign on the rights of regular and irregular migrants on the Dominican territory, following the terms of this judgment;⁶⁹
- The State will have to modify its domestic law to adapt it to the international standards on the use of force by law enforcement agents;⁷⁰
- Finally, the court ordered specific pecuniary and non-pecuniary damage for the victims and their next of kin, to be paid within one year of the notification of the judgment.⁷¹

As can be easily noticed, the Court ordered many more reparation measures for the *Guayubín* case than in *Yean and Bosico*. This can be associated with the fact that this last case implied less human rights violations. Considering the general context of discrimination against Haitian migrants and Dominico-Haitians in the Dominican Republic, which the Court recalled in the *Guayubín* decision⁷², it is difficult to assume that the attitude of the government towards certain reparation measures will be more cooperative than it was seven years ago. But, this time around, the Court addressed the issue of discrimination in a more direct way, making it possible to believe that the judgment could contribute to bring structural changes within the country.

The analysis of the reparations measures and the likeliness of the compliance by the Dominican Republic should start by the comparison between the measures that were ordered in both cases. Hence, in the two instances, the Court ordered the State to make payments for pecuniary and non-pecuniary damages. These payments were done by the Dominican Republic in a timely manner the first time and there is no reason why this should not happen with the *Guayubín* case. The amounts are higher (as the number of victims) but nothing suggests that the Dominican Republic would refuse to pay this time around. It is important to note that this kind of reparation does not entail any recognition by the State that discrimination exists in the country.

As for the publication, this reparation measure was complied with in the *Yean and Bosico* case, although it was not published before September 2009.⁷³ As of October 2011, the Dominican Republic had not coordinated with the victims and their representatives to carry the act of acknowledgment of their international responsibility and apology to the victims.⁷⁴

⁶⁸ *Ibid* at para 270.

⁶⁹ *Ibid* at para 272.

⁷⁰ *Ibid* at para 275.

⁷¹ *Ibid* at para 284-289.

⁷² *Ibid* at para 272.

⁷³ *The Yean and Bosico Children (Republica Dominicana)*, “Supervision de cumplimiento de sentencia”, (27 August 2010), Inter-Am Ct HR at para 10.

⁷⁴ Cumplimiento, 2011, *supra* note 42 at para 11.

One of the most important reparation measures that the Court ordered in both cases is certainly the adoption of legislative measures that would incorporate the international obligations of the State. In 2010 and 2011, the Dominican Republic informed the Court that it made changes to its domestic legal regime but it did not provide the institution with any details on how these changes would improve the birth registration process of Dominican children of Haitian descent or ensure the protection of their human rights.⁷⁵ In the *Guayubín* case, the Court ordered the State to adapt its domestic laws to the international standards on the use of force by law enforcement officials. Although this is an important measure that would imply a certain amount of political cooperation, it is not a measure that asks the State to directly address the issue of discrimination against Haitian migrants in the country. As such, it has certainly a more promising possibility of being complied with than the measure ordered in the *Yean and Bosico* case. Further, during the proceedings in the Inter-American system, the Dominican Republic has brought important changes to its legislation regulating the military jurisdiction.⁷⁶ The new legislation “determined the competence of the ordinary jurisdiction to try offenses committed by military personnel, establishing that the military jurisdiction was exclusively for disciplinary offenses and offenses of a strict military nature.”⁷⁷ Although this might not have been done with the primary objective of cooperating with the Court, it can still be seen as a step forward in terms of changing internal dispositions in order to address a situation involving human rights violations.

In the *Guayubín* case, some additional measures were ordered: the obligation to re-investigate on the events, to find and bring the bodies to Haiti and to offer free medical and psychological treatments to the survivors. If one considers that these measures are complementary to the pecuniary and non-pecuniary damages and are inherent to the specific facts of this case, the Dominican Republic is likely to comply with them in the same way that they would comply with payments of sums of money. Those reparations are not imposing any recognition of responsibility of the State, especially any responsibility towards Haitian migrants in the Dominican Republic. Further, this type of reparation is not addressing the structural problem of discrimination in the country. It merely limits the damages done by the events that occurred in the case of *Guayubín*.

In contrast, the *Guayubín* judgment imposed on the Dominican Republic the obligation to take two affirmative actions relating to the human rights of Haitian migrants in the country. First, the Court ordered the State to put in place a human rights training program for specific groups of law enforcement officials, more specifically, members of the armed forces, border control agents and agents responsible for migratory procedures. This program will have to address: 1) the use of force; 2) the principle of equality and non-discrimination particularly when applied to migrants; and 3) due process in relation with the detention and deportation of irregular migrants. The Court further asked that this program should be offered permanently as

⁷⁵ *Ibid* at para 13-17.

⁷⁶ *Guayubín*, *supra* note 3 at para 279.

⁷⁷ *Ibid*.

part of a system of continuing education and that the Dominican Republic submit a report to the Court on this program, for the next three years. The objectives of this program are extremely important. In a country where there is a proven history of discrimination from State agents against a specific group of persons, it is important to challenge the general beliefs and educate the agents, and the population in general, on the human rights to which this group is entitled. In this regard, the second affirmative action laid upon the State is to create a media campaign on the rights of regular and irregular Haitian Migrant in the Dominican Republic.

Seeing the current social context in the Dominican Republic, no one can contest the necessity of those two reparation measures. But, if one compares them to the measures that have been complied with in the past by the Dominican government, it will be found that measures that asks the government to recognize the rights of Haitian migrants in the country, or to take action in order to protect those rights are not likely to be complied with. Even with the best intentions in the world, it would be difficult for a government to change drastically the general climate of discrimination against a minority group in the country. But, with initiatives such as the ones ordered by the Court, and with the cooperation from the Dominican government to create more of the same type of program, there could be a slow but steady change in the way that regular and irregular Haitian migrants and Dominicans of Haitian descent are treated in the Dominican Republic.

Only time will tell what the impact of the *Guayubín* decision will be on the situation of Haitian migrants and Dominicans of Haitian descent in the Dominican Republic. However, as this article has tried to show, if the specific socio-historical context of structural discrimination towards everything related to Haiti, or *antihaitianismo*, is not taken into serious consideration, the decision might have no effect at all, or even worsen the situation, as has been the case with the *Yean and Bosico* judgment.

One of the most direct effect of this reality is that while the State will most likely agree to comply with measures that will not affect the situation as a whole, any reparation that imply direct legislative changes might be perceived as a threat to the sovereignty of the government. It is quite evident, for instance, that the judges of the Inter-American Court did not expect that one of its decision would lead to an inclusion in the new Constitution of an article institutionalizing the exclusion of children of irregular migrants from the *jus soli* doctrine when they wrote their decision.

This is not to say that any long-term changes are not within reach. In fact, the Court has shown that it has learned from its previous shortcomings by including in the decision non-legislative reparations that have the potential to improve the public opinion of Haitian migrants and their descendants in the country. In particular, the

ordering of a media campaign on the rights of Haitian migrants on the Dominican territory could prove to be extremely beneficial.

The stakes are high regarding the condition of Haitian migrants and their descendants in the Dominican Republic. The situation is still very tense, and all the time and energy already put towards this decision could be wasted if everybody involved does not take the right approach. A glimmer of hope however appeared on the horizon when the Dominican State decided to make some modification to its law concerning military trials for human rights violations in years between the events of the *Guayubín* case and the judgment from the IACHR. It is therefore possible to look towards the future with cautious optimism to see lasting improvements.