

AMICUS BRIEF

PREPARED BY

THE CORNELL INTERNATIONAL HUMAN RIGHTS CLINIC

**ROBERT F. KENNEDY CENTER FOR JUSTICE & HUMAN
RIGHTS**

AND

ASSOCIATION NOMADESC

PRESENTED BEFORE

THE COLOMBIAN CONSTITUTIONAL COURT

(CASE NO. D-7933)

PRESIDING JUDGE HON. LUIS ERNESTO VARGAS SILVA

**PALACE OF JUSTICE BUILDING, BOGOTA, D.C.
STREET 12 NO. 7-65
BOGOTA
COLOMBIA**

NOVEMBER 2009

I. INTRODUCTION

The issue presented before the honorable Constitutional Court of Colombia in this case is whether Article 183 of Law 115 of 1994, which authorizes public educational institutions to implement charges for education, violates articles 44, 67, and 93 of the Colombian Constitution.¹ Article 93 of the Colombian Constitution incorporates international treaties and conventions ratified by Colombia into its constitutional framework.² The Court is asked in this case to consider whether Article 183 of Law 115 contravenes Colombia's international legal obligation to provide public education without charge as such obligation has been incorporated in Colombia's constitutional framework pursuant to Article 93.

Nearly every country in Latin America³ is bound by the same international legal obligation as Colombia to provide free education. The constitutions and legislation of these countries reaffirm their international and regional obligations to guarantee this right to their people. Moreover, many of these nations have in fact extended free public education to individuals in their country in accordance with their legal obligations.

Amici respectfully submit this brief to show that countries with similar economic positions as Colombia are fulfilling their international legal obligations to provide free education by: (1) incorporating this duty into their constitutions and national legislation; (2) interpreting constitutional and legislative guarantees consistently with these obligations; and (3) fulfilling their legal commitments to free education in practice. *Amici* respectfully request that the Court take into account the constitutions, legislations and practice of other Latin American countries in evaluating the constitutionality of Article 183 of Law 115 of 1994.

II. AMICI'S INTEREST IN THE CASE

The Cornell Law School International Human Rights Clinic provides students with an opportunity to apply international human rights law and theory through the practice of human rights advocacy in active human rights cases and projects. Under the supervision of experienced human rights attorneys and in collaboration with human rights advocacy groups, students work on projects involving impact litigation, legal assistance, counseling, and legislative advocacy. Recently, Clinic projects in Latin America, Europe, and Asia have included in-country fact-finding, thematic reports, and testimony before treaty monitoring bodies, *amicus* briefs and other reports filed to United Nations officials, national courts, and judicial bench books.

The Robert F. Kennedy Center for Justice & Human Rights (RFK Center) is a nonprofit charitable organization that works to realize the ideal of a peaceful and just world. The RFK

¹ Law No. 115, Feb. 8, 1994, D.O. 41.214.

² Colombian Constitution, art. 93 [Const.] (1991) *available at* http://confinder.richmond.edu/admin/docs/colombia_const2.pdf.

³ Latin America is defined as all countries and territories in the Americas where a language derived from Latin is spoken: Spanish, Portuguese, and French, and the creole languages based upon these Romance languages. *See* The Cambridge History of Latin America (Leslie Bethell, ed., Cambridge University Press, 2009). For purposes of this brief, "Latin America" means the following countries: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela.

Center engages in long-term partnerships with human rights defenders around the world, including in Colombia, to initiate and support social justice movements through litigation, advocacy, and technical initiatives. The RFK Center has also worked with governments, intergovernmental organizations, international financial institutions, and corporations to achieve sustainable social change.

Association NOMADESC is a human rights organization in Colombia working to protect and improve the situation of Colombia's internally displaced persons, especially its Afro-descendants and indigenous peoples. NOMADESC has documented and publicized the human rights abuses in south-west Colombia throughout the country, held workshops and training programs in the displaced communities on human rights and conflict resolution, and coordinated the campaign, *Prohibido Olvidar*, a national and international movement against privatization, corruption and the imposition of penalties for social protests.

Amici have worked extensively on the right to education issue. Their work includes on-the-ground research in Colombia, Guatemala, and the Dominican Republic, where *Amici* collected detailed accounts from Afro-descendants and indigenous community members about the state of the right to education in their communities. In Colombia, *Amici* visited the cities of Bogotá, Cali (in the Valle del Cauca region) and Popayán (in the Cauca region). They conducted meetings with nearly 100 people, including Afro-Colombian leaders, indigenous school teachers, education reform activists, and government representatives, including a vice-minister of education, a senator, and an assistant magistrate justice of this honorable Constitutional Court. Information gathered on these fact-finding missions is included in the report, *Right to Education of Afro-descendants and Indigenous Peoples in the Americas* (the "Report").⁴

The Report, attached hereto, addresses States' obligations to fulfill the right to education equally and without discrimination and examines the failure to meet those obligations in the Americas focusing on three specific countries: Colombia, Guatemala, and the Dominican Republic. The Report has been submitted to the Inter-American Commission on Human Rights in a thematic hearing, the Preparatory Committee of the Durban Review Conference, the United Nations Forum on Minority Issues and the Right to Education, and the Organization of American States (OAS) Working Group responsible for preparing a Draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance.

III. LATIN AMERICAN COUNTRIES ARE BOUND UNDER INTERNATIONAL LAW TO IMMEDIATELY PROVIDE FREE PRIMARY EDUCATION AND TO PROGRESSIVELY PROVIDE FREE SECONDARY AND TERTIARY EDUCATION.

Several international and regional treaties and documents require States parties to guarantee and provide education without cost. The instruments that most clearly establish the right to free education are the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), Charter of the Organization of American States (OAS Charter) and the American

⁴ ROBERT F. KENNEDY CENTER FOR JUSTICE & HUMAN RIGHTS, RIGHT TO EDUCATION OF AFRO-DESCENDANTS AND INDIGENOUS PEOPLES IN THE AMERICAS (2008).

Declaration on the Rights and Duties of Man.⁵ The provisions in these documents that directly relate to the obligation of States parties to provide free education are quoted in Annex A hereto. The chart below illustrates that all Latin American countries are bound by at least one of these instruments and most countries, including Colombia, are bound by all of these instruments.

LATIN AMERICAN STATES' TREATY RATIFICATION: THE RIGHT TO FREE EDUCATION					
Country	International Covenant on Economic, Social and Cultural Rights	Convention on the Rights of the Child	Protocol of San Salvador	OAS Charter	American Declaration on the Rights and Duties of Man⁶
Argentina	√	√	√	√	√
Bolivia	√	√	√	√	√
Brazil	√	√	√	√	√
Chile	√	√		√	√
Colombia	√	√	√	√	√
Costa Rica	√	√	√	√	√

⁵ American Declaration on the Rights and Duties of Man art. XII, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992) [hereinafter American Declaration]; Charter of the Organization of American States arts. 34 & 49, 119 U.N.T.S. 3, *entered into force* Dec. 13, 1951; amended by Protocol of Buenos Aires, 721 U.N.T.S. 324, O.A.S. Treaty Series, No. 1-A, *entered into force* Feb. 27, 1970; amended by Protocol of Cartagena, O.A.S. Treaty Series, No. 66, 25 LL.M. 527, *entered into force* Nov. 16, 1988; amended by Protocol of Washington, 1-E Rev. OEA Documents Officials OEA/Ser.A/2 Add. 3 (SEPF), 33 LL.M. 1005, *entered into force* Sept. 25, 1997; amended by Protocol of Managua, 1-F Rev. OEA Documents Officials OEA/Ser.A/2 Add.4 (SEPF), 33 LL.M. 1009, *entered into force* Jan. 29, 1996 [hereinafter OAS Charter]; Organization of American States, American Convention on Human Rights art. 26, Nov. 22, 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention]; Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights art. 13, Nov. 17, 1988, O.A.S. Treaty Series No. 69 [hereinafter Protocol of San Salvador]; International Covenant on Economic, Social and Cultural Rights arts. 13 & 14, Jan. 3, 1976, 993 U.N.T.S. 3 [hereinafter ICESCR]; Convention on the Rights of the Child art. 28, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

⁶ The American Declaration is binding as customary international law and/or binding because the State party is also a member of the OAS and the American Declaration binds all OAS members. *See* Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10, ¶¶ 35–45 (July 14, 1989).

LATIN AMERICAN STATES' TREATY RATIFICATION: THE RIGHT TO FREE EDUCATION					
Country	International Covenant on Economic, Social and Cultural Rights	Convention on the Rights of the Child	Protocol of San Salvador	OAS Charter	American Declaration on the Rights and Duties of Man⁶
Cuba		√		√ ⁷	√
Dominican Republic	√	√		√	√
Ecuador	√	√	√	√	√
El Salvador	√	√	√	√	√
Guatemala	√	√	√	√	√
Haiti		√		√	√
Honduras	√	√		√	√
Mexico	√	√	√	√	√
Nicaragua	√	√		√	√
Panama	√	√	√	√	√
Paraguay	√	√	√	√	√
Peru	√	√	√	√	√
Uruguay	√	√	√	√	√
Venezuela	√	√		√	√

States parties to the treaties and documents cited in the chart above, including Colombia, must immediately provide free primary education and progressively provide free secondary and tertiary education. The Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) requires that primary education

⁷ On June 3, 2009, the Ministers of Foreign Affairs of the Americas adopted Resolution AG/RES.2438 (XXXIX-O/09), nullifying the effect in the Organization of American States (OAS) of the 1962 Resolution excluding the Government of Cuba from its participation in the Inter-American system. The new resolution states that the participation of the Republic of Cuba in the OAS will depend on the process of dialogue initiated at the Cuban government's request, and in accordance with the practices, purposes, and principles of the OAS.

be “compulsory and accessible to all *without cost*”⁸ and states that “[e]very child has the right to *free* and compulsory education, at least in the elementary phase.”⁹ With respect to secondary and tertiary levels, the Protocol allows for the progressive introduction of education without cost; however, there is no such limitation on primary education.¹⁰ Thus, a State party to the Protocol of San Salvador must make free primary education immediately available upon treaty ratification.

Additionally, the International Covenant on Economic, Social and Cultural Rights (ICESCR), which came into effect decades earlier than the Protocol of San Salvador, also requires that States parties provide free primary education.¹¹ It mandates that “[p]rimary education shall be compulsory and available *free* to all.”¹² The ICESCR, however, obligates States parties who have not implemented free primary education upon ratification of the Covenant to adopt a plan within two years of ratification.¹³ This plan must specify a fixed number of years within which the country will implement “[t]he principle of compulsory education *free* of charge for all.”¹⁴ Notably, Colombia has yet to adopt such a plan in accordance with its obligations under the ICESCR.

Similarly, the Convention on the Rights of the Child (CRC), the Charter of the Organization of American States (OAS Charter), and the American Declaration on the Rights and Duties of Man (American Declaration) unequivocally call for States to provide free primary education without charge. The CRC requires that States parties “[m]ake primary education compulsory and available *free* to all.”¹⁵ The OAS Charter provides that “[e]lementary education, compulsory for children of school age, shall also be offered to all others who can benefit from it. When provided by the State it shall be *without charge*.”¹⁶ Lastly, the American Declaration proclaims that “[e]very person has the right to receive, *free*, at least a primary education.”¹⁷

In contrast to the requirement to immediately implement free primary education, the obligation to ensure free secondary and higher education is progressive.¹⁸ “Progressive implementation” means that States parties are not obligated to realize these rights immediately

⁸ Protocol of San Salvador, *supra* note 5, at art. 13(3)(a) (emphasis added).

⁹ *Id.* at art. 16 (emphasis added).

¹⁰ *Id.* at art. 13(3) (emphasis added).

The States Parties to this Protocol recognize that in order to achieve the full exercise of the right to education:

(a). Primary education should be compulsory and accessible to all without cost;

(b). Secondary education in its different forms, including technical and vocational secondary education, should be made generally available and accessible to all by every appropriate means, and in particular, by the progressive introduction of free education;

(c). Higher education should be made equally accessible to all, on the basis of individual capacity, by every appropriate means, and in particular, by the progressive introduction of free education

¹¹ ICESCR, *supra* note 5, at arts. 13(2) & 14.

¹² *Id.* at art. 13(2)(a).

¹³ *Id.* at art. 14.

¹⁴ *Id.* (emphasis added).

¹⁵ CRC, *supra* note 5, at art. 28(1)(a) (emphasis added).

¹⁶ OAS Charter, *supra* note 5, at art. 49(a) (emphasis added).

¹⁷ American Declaration, *supra* note 5, at art. XII (emphasis added).

¹⁸ American Convention, *supra* note 5, at art. 26; ICESCR, *supra* note 5, at art. 13; CRC, *supra* note 5, at art. 28.

upon ratification; rather, States may fulfill these rights over time.¹⁹ Although secondary and tertiary education must be made progressively free, the ICESCR, CRC, and regional conventions requiring progressive implementation of secondary and tertiary education do not specify the time period within which this must occur.²⁰ However, to the extent that States parties already provide free secondary and tertiary education, as Colombia does for some students, they may not subsequently retrogress, discontinue, or limit this provision in any way.²¹

According to the Committee on Economic, Social and Cultural Rights (CESCR), the body that monitors State party compliance with the ICESCR, the progressive implementation requirement means that “States parties have a specific and continuing obligation ... to move as expeditiously and effectively as possible ... towards the full realization” of the right to education as defined in regional and international law.²² Even though States parties can realize the right to secondary and tertiary education progressively over time, States are obligated to immediately take steps toward the full realization of these rights.²³ According to the CESCR, “while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant’s entry into force for the States concerned.”²⁴ Furthermore, “[s]uch steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.”²⁵

Additionally, the obligation to provide free secondary and tertiary education under the ICESCR is subject to States parties’ maximum available resources.²⁶ Notably, however, this provision is not subject to similar limitation under the Protocol of San Salvador.²⁷ The CESCR points out that States parties cannot avoid their obligations to provide free primary education on the grounds that the necessary resources are not available.²⁸ The CRC reaffirms that a State’s lack of resources is not justification for its failure to provide free primary education.²⁹ Indeed,

¹⁹ See Sital Kalantry, Jocelyn E. Getgen & Steven Arrigg Koh, *Enhancing Enforcement of Economic, Social and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR*, 32 HUM. RTS. Q. ___ (2010) (publication forthcoming) (on file with authors).

²⁰ See Protocol of San Salvador, *supra* note 5, at art. 13; ICESCR, *supra* note 5, at art. 13; CRC, *supra* note 5, at art. 28(1).

²¹ Committee on Economic Social and Cultural Rights (CESCR), General Comment No. 3 on the Nature of States Parties’ Obligations, ¶ 9, U.N. Doc. E/1991/23 (1991) [hereinafter General Comment 3]; Limburg Principles on the Implementation of the International Convention on Economic Social and Cultural Rights, ¶¶ 70, Annex, U.N. Doc. E/CN.4/1987/17 (2-6 June 1986) [hereinafter Limburg Principles]; Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, ¶ 5, U.N. Doc. E/C.12/2000/13 (22-26 Jan. 1997) [hereinafter Maastricht Guidelines].

²² See Committee on Economic Social and Cultural Rights (CESCR), General Comment 13 on the Right to Education, ¶ 44, U.N. Doc. E/C.12/1999/10 (1999) [hereinafter General Comment 13] (citing General Comment 3, *supra* note 21, at ¶ 9).

²³ *Id.* at ¶ 43.

²⁴ General Comment 3, *supra* note 21, at ¶ 2.

²⁵ *Id.*

²⁶ ICESCR, *supra* note 5, at art. 2; General Comment 3, *supra* note 21, at ¶ 9. Resources can mean money, natural resources, human resources, technology and information. See KLAUS DIETER BEITER, THE PROTECTION OF THE RIGHT TO EDUCATION BY INTERNATIONAL LAW 382 (Martinus Nijhoff Publishers 2005) [hereinafter DIETER BEITER].

²⁷ See Protocol of San Salvador, *supra* note 5.

²⁸ Committee on Economic, Social, and Cultural Rights (CESCR), General Comment 11 on Plans of Action for Primary Education, ¶ 9, U.N. Doc. E/C.12/199/4 (1999); DIETER BEITER, *supra* note 26, 515.

²⁹ See CRC, *supra* note 5, at art. 4.

Article 4 of the CRC states that “[w]ith regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of International co-operation.”³⁰

IV. LATIN AMERICAN COUNTRIES HAVE INCORPORATED THEIR INTERNATIONAL LEGAL OBLIGATIONS TO PROVIDE FREE EDUCATION INTO THEIR CONSTITUTIONS AND NATIONAL LEGISLATION.

The constitutions and national legislation of nearly all Latin American countries incorporate their international and regional legal obligations to guarantee free primary education. The constitutions and national legislation of some Latin American countries go even further by requiring the State to provide secondary and tertiary education without cost. In Annex B attached, we have included all provisions from the constitutions and national legislation of Latin American countries that require the government of each such country to provide free education to its people. Although a detailed list of all provisions are included in Annex B, below we provide some examples of constitutions and national legislation of Latin American countries that incorporate the right to free education.

The Mexican constitution is one example of a constitution that incorporates the right to free education. Notably, Mexico’s Constitution states that “[e]very individual has the right to receive an education”³¹ and “[a]ll education imparted by the State shall be *free*.”³² Similarly, Costa Rica’s Constitution requires that preschool and basic education be free and paid for by the government.³³ Additionally, the Constitution of Uruguay guarantees additional rights by declaring “*free* official primary, intermediate, advanced, industrial, and physical education ... to be of social utility. . . .”³⁴

In addition to incorporating international obligations into their constitutions, many Latin American countries have adopted legislation that requires them to provide free education. For example, the Comprehensive Protection of the Rights of Children and Adolescents (Law 26.061) adopted by Argentina guarantees the right to free education at all levels of education,³⁵ and Article 39 of the Federal Education Act mandates budget allocations in education in order to effectively implement the right.³⁶

Additionally, Uruguay’s educational laws and policies have consistently strengthened commitments to free education by reaffirming right to education principles and increasing

³⁰ *Id.*

³¹ Mexican Constitution, art. 3 [Const.], *as amended*, (1917), *available at* <http://www.ilstu.edu/class/hist263/docs/1917const.html>.

³² *Id.* at art. 4.

³³ Costa Rican Constitution, art. 78 [Const.] (1997), *available at* http://www.costaricalaw.com/legalnet/constitutional_law/constitenglish.html.

³⁴ Uruguayan Constitution, art. 71 [Const.] (2004), *available at* <http://www.right-to-education.org/country-node/401/country-constitutional>.

³⁵ Law No. 26.061, Oct. 26, 2005, B.O., *available at* <http://www.acnur.org/biblioteca/pdf/3793.pdf>.

³⁶ Law No. 24.195, Apr. 24, 1993, B.O., *available at* http://www.me.gov.ar/consejo/cf_leyfederal.html.

budgetary allocations to extend educational access to the country's poor.³⁷ Under Article 6(2) of Education Law 15.739 of 1985, Uruguay committed the National Public Education Administration to the principle of free education.³⁸ Continuing with these commitments, Article 18 of the new General Education Law 18.437 of 2008 establishes the principle of free education and declares that free education assures effective compliance with the right to education, universal access and retention in the education system.³⁹ Furthermore, Article 19 of the General Education Law of 2008 mandates that [t]he State shall provide the necessary resources to guarantee the right to education and to assure the promises established by the present law[,]” including those sufficient to guarantee free education.⁴⁰

In addition to providing constitutional and legislative guarantees to ensure the right to free education, Latin American courts interpret domestic laws in accordance with relevant international and regional obligations. For example, in Costa Rica, the Constitutional Court interpreted the Constitution as guaranteeing state-sponsored free education when parents filed a petition against a state educational institution for refusing to enroll their son after they could not afford to pay the “voluntary contributions” that the school required for enrollment.⁴¹ Specifically, the Court has declared that educational fees imposed by educational institutions violate Article 78, which states that “[p]reschool and general basic education are obligatory. These and diversified education in the public system are *free* and supported by the Nation.”⁴² The Court reasoned that “[c]onditioning school attendance on the payment of a sum of money, no matter what it is called, is to ignore what the Constitution provides . . .” in violation of the fundamental right to education.⁴³ Thus, the Costa Rican Constitutional Court has declared that school fees or charges of any kind, whether direct or indirect, are unconstitutional.

Similarly, Chilean courts have upheld the right to free education as a constitutional guarantee and fundamental right. In particular, the Court ruled that expelling or publicly humiliating students whose parents failed to pay school fees is unconstitutional.⁴⁴ Thus, upholding the fundamental right to education over any alleged right to collect parents’ debts in the form of voluntary or other school fees.⁴⁵ As a result, Chile’s jurisprudence reinforces the Constitution’s mandate requiring the State to “finance a *gratuitous* system designed to ensure access to the entire population.”⁴⁶

³⁷ Law No. 15.739, Mar. 28, 1985, D.O. 21924, *available at* <http://200.40.229.134/leyes/AccesoTextoLey.asp?Ley=15739&Anchor>; Law No 18.437, Dec. 12, 2008, D.O. 27654, *available at* <http://200.40.229.134/leyes/AccesoTextoLey.asp?Ley=18437&Anchor>; KATARINA TOMASEVSKI, FREE OR FEE: 2006 GLOBAL REPORT 195 (2006) [hereinafter TOMASEVSKI 2006 REPORT].

³⁸ Law No. 15.739, *supra* note 37, at art. 6(2).

³⁹ Law No 18.437, *supra* note 37, at art. 18.

⁴⁰ *Id.* at art. 19 (translated by author).

⁴¹ Constitutional Chamber of the Supreme Court of Justice of Costa Rica, Decision, 10/5/2000, No. 2000-03954 of 14:55 of May 10, 2000.

⁴² Costa Rican Constitution, art. 78, *supra* note 33.

⁴³ Decision, 10/5/2000, No. 2000-03954, *supra* note 41 (translated by author).

⁴⁴ *Elgueta Olivares con Rubio Catalán (Director de Colegio Cancura)*, writ of protection, San Miguel Court of Appeals, No. 8531-2001.

⁴⁵ TOMASEVSKI 2006 REPORT, *supra* note 37, at 192; Universidad Diego Portales Report (2003) at 414–416, *available at* <http://www.derechoshumanos.udp.cl/wp-content/uploads/2009/07/edu.pdf>.

⁴⁶ Chilean Constitution, art. 19(10) (2005) *available at* <http://www.right-to-education.org/country-node/320/country-constitutional> (emphasis added).

Colombia, however, remains the only country in Latin America whose laws explicitly authorize its educational institutions to implement charges at all levels of education.⁴⁷

V. LATIN AMERICAN COUNTRIES' PRACTICES AND OUTCOMES INDICATE A COMMITMENT TO GUARANTEE THE RIGHT TO FREE EDUCATION IN ACCORDANCE WITH INTERNATIONAL AND REGIONAL LAW.

Ensuring effective implementation of legal guarantees to provide free education depends upon resource allocation to education, and several Latin American countries' indicators demonstrate commitments to guaranteeing the right to free education in practice despite challenging economic and political climates. For example, Mexico, a country structurally committed to free education in its Constitution (*see* Annex B, *infra*), has increased Gross National Product (GNP) expenditures on education from 4.5% in 1999 to 5.6% in 2006.⁴⁸ The country's total expenditures on education for 2006 were 26% of its annual budget, an amount adequate to ensure and sustain universal basic education.⁴⁹ Other examples of countries that have been found to have adequate budgetary commitments to the right to free education in practice include Argentina (4.0%), Brazil (4.1%), Panama (4.1%) and Uruguay (3.0%).⁵⁰ These countries demonstrate that it is possible to comply both structurally and in practice with international and regional legal obligations to guarantee free education without extraordinary resource allocation on education.

Moreover, when governments commit in practice to ensure the right to free education, indicators measuring education access, retention and quality can remain acceptably high and improve over time. For instance, Mexico's net enrollment ratios in primary education are high and have improved over time (97% in 1999 to 98% in 2006), demonstrating near-universal access at the primary education level.⁵¹ With regard to primary school retention, ratios measuring the proportion of students who complete grade five improved from 89% in 1999 to 94% in 2006.⁵² Furthermore, primary student-to-teacher ratios indicate that quality has not diminished over time. Although no improvements were made from 1999 to 2006 (27 to 1 and 28 to 1, respectively), these ratios do show an improvement from the 1991 primary level student-to-teacher ratio of 31 to 1.⁵³

Argentina's education indicators provide another example of positive outcomes in education access, retention and quality when the State commits to guaranteeing the right to free education. In Argentina, for example, adult literacy levels (98%) and net enrollment ratios

⁴⁷ TOMASEVSKI 2006 REPORT, *supra* note 37, at 201.

⁴⁸In 2006, the Gross National Product (GNP) per capita of Mexico was \$7,830. OVERCOMING INEQUALITY: WHY GOVERNANCE MATTERS 366, tbl. 11, UNESCO (2009), *available at* <http://unesdoc.unesco.org/images/0017/001776/177683e.pdf> [hereinafter UNESCO EFA REPORT].

⁴⁹ *Id.*; TOMASEVSKI 2006 REPORT, *supra* note 37, 185 (citing Financiación y gestión de la educación en América Latina y el Caribe, CEPAL, Julio de 2002, mimeographed).

⁵⁰ TOMASEVSKI 2006 REPORT, *supra* note 37, at 185.

⁵¹ UNESCO EFA REPORT, *supra* note 48, at 374, tbl. 12.

⁵² *Id.* at 319, tbl. 7.

⁵³ *Id.* at 382, tbl. 13.

(99%) remained high from 1999 to 2006.⁵⁴ Additionally, the percentage of Argentina's students completing grade five remained at 90% during the same time period, indicating continued retention at the primary education level.⁵⁵ Furthermore, decreases in primary level student-to-teacher ratios (from 22 to 1 in 1999 to 17 to 1 in 2006)⁵⁶ signal improvements in educational quality in the country over time.

Finally, Brazil's structural commitment to the right to free education (*see* Annex B, *infra*) correlates with education indicators that show acceptably high levels and improvements in access and quality over time. For example, although illiteracy levels still reach 10%, Brazil's net enrollment ratio improved from 91% in 1999 to 94% in 2006,⁵⁷ suggesting that access to education is also improving. Moreover, quality seems to be improving as well given that student-to-teacher ratios dropped from 26 to 1 in 1999 to 21 to 1 in 2006.⁵⁸ These examples suggest that guaranteeing the right to free education in practice is possible and can lead to progressive—and even positive—outcomes in education.

VI. CONCLUSION

According to international and regional human rights treaties, Colombia is generally obligated to immediately provide free primary education for all citizens and to progressively implement free secondary and tertiary education. These obligations have been incorporated into Colombia's Constitution through Article 93. This honorable Court must decide whether Article 183 of Law 115 contravenes Colombia's constitutional obligations to provide public education without charge.

This brief has provided the Court with comparative research on the laws and practice of Latin American countries. Based on our research, we conclude that (1) all Latin American countries are bound by international treaties or instruments that require them to provide free education (*see* chart in Section III above), (2) nearly all Latin American countries incorporate the obligation to provide free primary education into their national constitutions and or legislation, and some even incorporate obligation to provide free secondary and tertiary education (*see* Annex B), and (3) anecdotal evidence from several Latin American countries suggests that in practice they are providing free education to their people (*see* Section V).

Colombia remains the only country in Latin America that explicitly authorizes educational institutions to charge fees, even at the primary level. *Amici's* on-the-ground research has shown that Colombia's failure to provide free education equally and without discrimination is not only a legal or doctrinal problem, but has a significant impact on the lives of countless Colombians. *Amici* witnessed that public institutions in Colombia charge fees, even for primary education, and that these fees prevent many children from attending school and effectively deny them the right to access education equally and without discrimination. Every other Latin American country (*see* Annex B, *infra*) has incorporated its international and regional legal

⁵⁴ *Id.* at 270, 374, tbl. 12.

⁵⁵ *Id.* at 319, tbl. 7.

⁵⁶ UNESCO EFA REPORT, *supra* note 48, at 351, tbl. 10A.

⁵⁷ *Id.* at 374, tbl. 12.

⁵⁸ *Id.* at 382, tbl. 13.

obligations to provide the right to free education into its domestic legal systems. Article 183 of Law 115 of 1994 contradicts this prevailing trend in the region.

For the foregoing reasons, *Amici* respectfully request that the Court consider this regional comparative analysis when evaluating the constitutionality of Article 183 of Law 115 and refer to the constitutional law and practice of other countries in Latin America to provide free education when making its decision.

Annex A: INTERNATIONAL AND REGIONAL DOCUMENTS ON THE RIGHT TO FREE EDUCATION

INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESR)	CONVENTION ON THE RIGHTS OF THE CHILD (CRC)	ADDITIONAL PROTOCOL TO THE AMERICAN CONVENTION IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS (PROTOCOL OF SAN SALVADOR)	CHARTER OF THE ORGANIZATION OF AMERICAN STATES (OAS CHARTER)	AMERICAN DECLARATION ON THE RIGHTS AND DUTIES OF MAN
<p>“ [p]rimary education shall be compulsory and available <i>free</i> to all;”ⁱ</p> <p>“[s]econdary education ... shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of <i>free</i> education;”ⁱⁱ</p> <p>“[h]igher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of <i>free</i> education;”ⁱⁱⁱ</p> <p>“[e]ach State Party ... which, at the time of becoming a Party, has not been able to secure ... compulsory primary education, <i>free</i> of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years ... of the principle of compulsory education <i>free</i> of charge for all.”^{iv}</p>	<p>“[m]ake primary education compulsory and available <i>free</i> to all;”^v</p> <p>“[e]ncourage the development of different forms of secondary education...”^{vi}</p> <p>“ ... take appropriate measures such as the introduction of <i>free</i> education and offering financial assistance in case of need;”^{vii}</p>	<p>“[p]rimary education should be compulsory and accessible to all <i>without cost</i>;”^{viii}</p> <p>“[s]econdary education ... should be made generally available and accessible to all by every appropriate means, and in particular, by the progressive introduction of <i>free</i> education;”^{ix}</p> <p>“[h]igher education should be made equally accessible to all, on the basis of individual capacity, by every appropriate means, and in particular, by the progressive introduction of <i>free</i> education;”^x</p> <p>“ [e]very child ... has the right to <i>free</i> and compulsory education, at least in the elementary phase, and to continue his training at higher levels of the educational system.”^{xi}</p>	<p>“[e]lementary education, compulsory for children of school age, shall also be offered to all others who can benefit from it. ... [and] when provided by the State it shall be <i>without charge</i>;”^{xii}</p>	<p>“[e]very person has the right to receive, <i>free</i>, at least a primary education.”^{xiii}</p>

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- ⁱ International Covenant on Economic, Social and Cultural Rights art. 13 (2)(a), Jan. 3, 1976, 993 U.N.T.S. 3 (emphasis added).
- ⁱⁱ *Id.* at art. 13(2)(b) (emphasis added).
- ⁱⁱⁱ *Id.* at art. 13(2)(c) (emphasis added).
- ^{iv} *Id.* at art. 14 (emphasis added).
- ^v Convention on the Rights of the Child art. 28(1)(a), Nov. 20, 1989, 1577 U.N.T.S. 3 (emphasis added).
- ^{vi} *Id.* at art. 28(1)(b).
- ^{vii} *Id.* (emphasis added).
- ^{viii} Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights, art.13(3)(a), Nov. 17, 1988, O.A.S. Treaty Series No. (emphasis added).
- ^{ix} *Id.* at art. 13(3)(b) (emphasis added).
- ^x *Id.* at art. 13(3)(c) (emphasis added).
- ^{xi} *Id.* at art. 16 (emphasis added).
- ^{xii} Charter of the Organization of American States (OAS Charter), art. 49(a) 119 U.N.T.S. 3, *entered into force* December 13, 1951; amended by Protocol of Buenos Aires, 721 U.N.T.S. 324, O.A.S Treaty Series, No. 1-A, *entered into force* Feb. 27, 1970; amended by Protocol of Cartagena, O.A.S. Treaty Series, No. 66,25 LL.M. 527, *entered into force* Nov. 16, 1988; amended by Protocol of Washington, 1-E Rev. OEA Documents Officials OEA/Ser.A/2 Add. 3 (SEPF), 33 LL.M. 1005, *entered into force* September 25, 1997; amended by Protocol of Managua, 1-F Rev. OEA Documents Officials OEA/Ser.A/2 Add.4 (SEPF), 33 LL.M. 1009, *entered into force* January 29, 1996 (emphasis added).
- ^{xiii} American Declaration on the Rights and Duties of Man, arts. XII, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992) (emphasis added).

ANNEX B: DOMESTIC INCORPORATION OF INTERNATIONAL AND REGIONAL TREATIES PROTECTING THE RIGHT TO FREE EDUCATION IN LATIN AMERICAN COUNTRIES

COUNTRY	RELEVANT CONSTITUTIONAL PROVISIONS	RELEVANT LEGISLATION AND PUBLIC POLICIES
Argentina	<p>Artículo 75(19): “Sancionar leyes de organización de base de la educación . . . que garanticen los principios de <i>gratuidad</i> y equidad de la educación pública estatal y la autonomía y autarquía de la universidades nacionales.”¹</p>	<p>Ley de Educación Nacional (Ley No. 26.206) Artículo 4: “El Estado nacional, las provincias y la Ciudad Autónoma de Buenos Aires tienen la responsabilidad principal e indelegable de proveer una educación integral, permanente y de calidad para todos/as los/as habitantes de la Nación, garantizando la igualdad, <i>gratuidad</i> y equidad en el ejercicio de este derecho, con la participación de las organizaciones sociales y las familias.”</p> <p>Artículo 11(h): “Garantizar a todos/as el acceso y las condiciones para la permanencia y el egreso de los diferentes niveles del sistema educativo, asegurando la <i>gratuidad</i> de los servicios de gestión estatal, en todos los niveles y modalidades.”²</p> <p>Ley de Financiamiento Educativo (Ley No. 26.075) Artículo 3: “El presupuesto consolidado del Gobierno nacional, las provincias y la Ciudad Autónoma de Buenos Aires destinado a la educación, la ciencia y la tecnología se incrementará progresivamente hasta alcanzar, en el año 2010, una participación del SEIS POR CIENTO (6%) en el Producto Interno Bruto (PIB).”³</p> <p>Ley Federal de Educación (Ley No. 24.195) Artículo 39: “El Estado Nacional, las Provincias y la Municipalidad de la Ciudad de Buenos Aires se obligan, mediante la asignación en los respectivos presupuestos educativos, a garantizar el principio de <i>gratuidad</i>, en los servicios estatales, en todos los niveles y regímenes especiales”⁴</p>

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COUNTRY	RELEVANT CONSTITUTIONAL PROVISIONS	RELEVANT LEGISLATION AND PUBLIC POLICIES
		<p>Ley de Protección Integral de los Derechos de las Niñas, Niños y Adolescentes (Ley 26.061 de 2005) Artículo 15: “Las niñas, niños y adolescentes tienen derecho a la educación pública y <i>gratuita</i>”</p> <p>Artículo 16: “La educación pública será <i>gratuita</i> en todos los servicios estatales, niveles y regímenes especiales, de conformidad con lo establecido en el ordenamiento jurídico vigente.”⁵</p>
<p>Bolivia</p>	<p>Artículo 17: “Toda persona tiene derecho a recibir educación en todos los niveles de manera universal, productiva, <i>gratuita</i>, integral e intercultural, sin discriminación.”</p> <p>Artículo 77: “La educación constituye una función suprema y primera responsabilidad financiera del Estado, que tiene la obligación indeclinable de sostenerla, garantizarla y gestionarla.”⁶</p>	<p>Proyecto: Nueva Ley de la Educación Boliviana Artículo 1: “Es fiscal y <i>gratuita</i> en todo el Sistema Educativo y obligatoria en los diferentes niveles y modalidades del subsistema de educación regular, con igualdad de oportunidades sin discriminación social, cultural, lingüística ni económica.”⁷</p> <p>Ley de la Reforma Educativa (Ley No. 1565) Artículo 1(2): “Es universal, <i>gratuita</i> en todos los establecimientos fiscales y obligatoria en el nivel primario, porque contiene postulados democráticos básicos y porque todo boliviano tiene derecho a igualdad de oportunidades.”</p> <p>Artículo 46: “El Estado, conforme a los preceptos constitucionales, ofrece educación fiscal <i>gratuita</i> a todos, En consecuencia, y priorizando la educación primaria, el Estado atiende los niveles pre-escolar primario, secundario y el área de educación alternativa de los</p>

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COUNTRY	RELEVANT CONSTITUTIONAL PROVISIONS	RELEVANT LEGISLATION AND PUBLIC POLICIES
		establecimientos fiscales del Sistema Educativo Nacional y de las entidades que hubieran suscrito, convenio o con el Estado, con recursos financieros que provienen de las siguientes fuentes: el Tesoro General de la Nación, Tesoros Municipales y el Presupuesto de inversión pública.” ⁸
Brasil	<p>Artículo 206: “La enseñanza será administrada con la base de los siguientes principios: IV. <i>Gratuidad</i> de enseñanza pública en establecimientos oficiales. . . .”</p> <p>Artículo 208: “El deber del Estado en relación a la enseñanza será efectuado inmediatamente a garantizar: (I). [E]nseñanza <i>gratuita</i> y obligatoria, asegurada, inclusive, la oferta gratuita para los que no tuvieron el acceso a la edad apropiada. (II) [P]rogresiva universalización de la enseñanza secundaria. (V) [A]cceso a la enseñanza de niveles superiores, investigación, y creación artística, según a la capacidad de cada individuo”⁹</p>	<p>Fondo de Mantenimiento y Desarrollo de la Enseñanza Fundamental (FUNDEF) Este fondo fue introducido para asegurar el gasto mínimo por estudiante y un pago mínimo especial por maestros.¹⁰ “El Fondo reafirmó la necesidad de los estados, el Distrito Federal y distritos municipales a cumplir con las provisiones de la Constitución de 1988 de Brasil estipulando que el 25% del ingreso de impuestos y otros ingresos transferidos han de ser alocado al mantenimiento y desarrollo del sistema educativo. Los estados deben de alocar 60 por ciento de este fondo a la educación básica desde el año 1998, asegurando que 15 por ciento del ingreso de impuestos son alocados en esta área.”¹¹</p> <p>Decreto 14/96 (1996): Exige al Gobierno Federal de “asumir la responsabilidad a suplementar la cantidad alocada al FUNDEF en caso que la cantidad alocado por estudiante es menos del nivel mínimo definido por la nación.”¹²</p> <p>Ley de Directrices y Bases de la Educación Nacional (Ley No. 9.394) Título III, Artículo 4:</p>

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COUNTRY	RELEVANT CONSTITUTIONAL PROVISIONS	RELEVANT LEGISLATION AND PUBLIC POLICIES
		<p>“El deber del Estado en relación a la educación pública será efectiva inmediatamente garantizando:</p> <p>I – enseñanza fundamental, obligatoria y <i>gratuita</i>, inclusive, para los que no tuvieron el acceso a la edad apropiada.</p> <p>II – progresiva exención de obligatoriedad y <i>gratuidad</i> a la enseñanza mediana.”¹³</p>
Chile	<p>Artículo 19 (10): “La educación básica es obligatoria: debiendo el Estado financiar un sistema <i>gratuito</i> con tal objeto, destinado a asegurar el acceso a ella de toda la población.”¹⁴</p>	<p>Ley General de Educación (Ley No. 20.370) Artículo 4: “La educación es un derecho de todas las personas. Corresponde preferentemente a los padres el derecho y el deber de educar a sus hijos; al Estado, el deber de otorgar especial protección al ejercicio de este derecho y, en general, a la comunidad, el deber de contribuir al desarrollo y perfeccionamiento de la educación. Es deber del Estado promover la educación parvularia en todos sus niveles y garantizar el acceso <i>gratuito</i> y el financiamiento fiscal”¹⁵</p>
Costa Rica	<p>Artículo 78 (1): “La educación general básica es obligatoria, ésta, la preescolar y la educación diversificada son <i>gratuitas</i> y costeadas por la Nación.”¹⁶</p>	<p>Ley Fundamental de Educación (Ley No. 2160) Artículo 8: “La enseñanza primaria es obligatoria; ésta, la pre-escolar y la media son <i>gratuitas</i> y costeadas por la Nación.”¹⁷</p> <p>Código de la Niñez y la Adolescencia Artículo 59: “La educación preescolar, la educación general básica y la educación diversificada serán <i>gratuitas</i>, obligatorias y costeadas por el Estado. El acceso a la enseñanza obligatoria y <i>gratuita</i> será un derecho fundamental. La falta de acciones gubernamentales para facilitararlo y garantizarlo constituirá una violación del Derecho e importará responsabilidad de la autoridad competente.”¹⁸</p>
Cuba	<p>Artículo 39: “En su política educativa y cultural se atiende a</p>	<p>Ley de Nacionalización General y Gratuita de la Enseñanza (Ley s/n de 6 de junio de 1961)</p>

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COUNTRY	RELEVANT CONSTITUTIONAL PROVISIONS	RELEVANT LEGISLATION AND PUBLIC POLICIES
	<p>los postulados siguientes: b) la enseñanza es función del Estado y es <i>gratuita</i>”¹⁹</p> <p>Artículo 51: “Todos tienen derecho a la educación. Este derecho está garantizado por el amplio y <i>gratuito</i> sistema de escuelas, seminternados, internados y becas, en todos los tipos y niveles de enseñanza, y por la <i>gratuidad</i> del material escolar”²⁰</p>	<p>“La enseñanza de impartirse <i>gratuitamente</i> para garantizar el derecho a todos los ciudadanos a recibirla sin distinciones ni privilegios.”</p> <p>Artículo 1: “Se declara pública la función de la enseñanza y <i>gratuita</i> su prestación. Corresponde al estado ejercer dicha función a través de los organismos creados al efecto con arreglo a las disposiciones legales vigentes.”²¹</p>
<p>República Dominicana</p>	<p>Artículo 8 (16): “La libertad de enseñanza. La educación primaria será obligatoria. Es deber del Estado proporcionar la educación fundamental a todos los habitantes del territorio nacional y tomar las providencias necesarias para eliminar el analfabetismo. Tanto la educación primaria y secundaria, como la que se ofrezca en las escuelas agronómicas, vocacionales, artísticas, comerciales, de artes manuales y de economía doméstica serán <i>gratuitas</i>. . . .”²²</p>	<p>Ley Orgánica de Educación (Ley No. 66-97) Artículo 4(m): “Los estudiantes tienen derecho a recibir una educación apropiada y <i>gratuita</i>, incluyendo a los superdotados, a los afectados físicos y a los alumnos con problemas de aprendizaje, los cuales deberán recibir una educación especial.”²³</p> <p>Sistema para la Protección de los Derechos Fundamentales del Niño y el Adolescente (Ley No. 136-03) Artículo 45, Párrafo I: “La educación básica es obligatoria y <i>gratuita</i>. Tanto los padres y madres como el Estado son responsables de garantizar los medios para que todos los niños y niñas completen su educación primaria básica.” “En ningún caso podrá negarse la educación a los niños, niñas y adolescentes alegando razones como: la ausencia de los padres, representantes o responsables, la carencia de documentos de identidad o recursos económicos o cualquier otra causa que vulnere sus derechos.”²⁴</p>

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COUNTRY	RELEVANT CONSTITUTIONAL PROVISIONS	RELEVANT LEGISLATION AND PUBLIC POLICIES
		<p>Artículo 46: “Para el ejercicio del derecho a la educación de los niños, niñas y adolescentes, el Estado Secretaria de Estado de Educación, debe garantizar:</p> <ul style="list-style-type: none"> a) El acceso a la educación inicial a partir de los tres años; b) La enseñanza básica obligatoria y <i>gratuita</i>”²⁵
Ecuador	<p>Artículo 28: “La educación pública será universal y lacia en todos sus niveles, y <i>gratuita</i> hasta el tercer nivel de educación superior inclusive.”²⁶</p>	<p>Ley de Educación (Ley No. 127) Artículo 2 (e): “La educación oficial es laica y <i>gratuita</i> en todos sus niveles.”</p> <p>Artículo 18: “La educación oficial es <i>gratuita</i> en todos los niveles.”</p> <p>Artículo 19: “El Estado tiene el deber de facilitar el sostenimiento de la educación en todos los niveles y modalidades del sistema.”</p> <p>Artículo 21: “Los establecimientos de educación particular no <i>gratuitos</i> se sujetarán, para el cobro de matrículas y pensiones, a las que fije el Ministerio de Educación.” “Quienes no cumplan con lo dispuesto en el inciso precedente serán sancionados por el Ministerio de Educación con una multa”²⁷</p> <p>Código de la Niñez y la Adolescencia(Ley No. 100) Artículo 37: “La educación pública es laica en todos sus niveles, obligatoria hasta el décimo año de educación básica y <i>gratuita</i> hasta el bachillerato o su equivalencia.”²⁸</p>
El Salvador	Artículo 56:	Ley General de Educación (Decreto No. 917)

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	<p>“La educación parvularia, básica y especial será <i>gratuita</i> cuando la imparta el Estado.”²⁹</p>	<p>Artículo 5: “La Educación Parvularia y Básica es obligatoria y juntamente con la Especial será <i>gratuita</i> cuando la imparta el estado.”</p> <p>Artículo 20: “La Educación Básica comprende regularmente nueve años de estudio del primero al noveno grados y se organiza en tres ciclos de tres años cada uno, iniciándose normalmente a los siete años de edad. Será obligatoria y <i>gratuita</i> cuando la imparta el Estado.”³⁰</p>
<p>Guatemala</p>	<p>Artículo 74: “Educación obligatoria. Los habitantes tienen el derecho y la obligación de recibir la educación inicial, preprimaria, primaria y básica, dentro de los límites de edad que fije la ley. La educación impartida por el Estado es <i>gratuita</i>.”³¹</p>	<p>Ley de Educación Nacional (Decreto Legislativo No. 12 de 1991) Artículo 33: “Son obligaciones del Estado las siguientes: . . . [p]ropiciar una educación <i>gratuita</i> y obligatoria dentro de los límites de edad que fija el reglamento de esta ley.”³²</p> <p>Políticas educativas 2008–2012 Política educativa no. 2: “... La Constitución de la Republica y los compromisos de los Acuerdos de Paz establecen la obligatoriedad de la educación inicial, la educación preprimaria, primaria y ciclo básico del nivel medio . . . La educación impartida por el Estado es <i>gratuita</i>. En tal sentido, el Plan de Educación 2008-2012 plantea la estrategia de ampliación de cobertura en todos los niveles.”³³</p>
<p>Haití</p>	<p>Artículo 32 (1): “Educación es la responsabilidad del Estado y sus divisiones territoriales. Deben de proveer la educación <i>gratuitamente</i> a todos . . .”</p> <p>Artículo 32 (3): “Educación primaria es obligatoria bajo las</p>	

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COUNTRY	RELEVANT CONSTITUTIONAL PROVISIONS	RELEVANT LEGISLATION AND PUBLIC POLICIES
	<p>leyes penales. El Estado debe de proveer facilidades de aulas y materiales de enseñanza a estudiantes de escuelas primarias <i>sin cobros.</i>”</p> <p>Artículo 208: “Educación superior es <i>gratuita.</i>”³⁴</p>	
Honduras	<p>Artículo 171: “La educación impartida oficialmente será <i>gratuita</i> y la básica será además, obligatoria y totalmente costada por el Estado.”³⁵</p>	<p>Ley Orgánica de Educación (Decreto No. 791) Artículo 4: “La educación es impartida en los establecimientos oficiales, es <i>gratuita</i> en todos sus niveles.”³⁶</p>
México	<p>Artículo 3: “Todo individuo tiene derecho a recibir una educación. El Estado – Federación, Estados, Distrito Federal y municipios- impartirá educación preescolar, primaria y secundaria. La educación primaria y la secundaria son obligatorias. IV. Toda la educación que el Estado imparta será <i>gratuita.</i>”³⁷</p>	<p>Ley General de Educación de 2006 Artículo 6: “La educación que el Estado imparta será <i>gratuita.</i> Las donaciones destinadas a dicha educación en ningún caso se entenderán como contraprestaciones del servicio educativo.”³⁸</p>
Nicaragua	<p>Artículo 121: “El acceso a la educación es libre e igual para todos los nicaragüenses. La enseñanza primaria es <i>gratuita</i> y obligatoria en los centros del Estado. La enseñanza secundaria es <i>gratuita</i> en los centros del Estado, sin perjuicio de las contribuciones voluntarias que puedan hacer los padres de familia. Nadie podrá ser excluido en ninguna forma de un centro estatal por razones económicas.”³⁹</p>	<p>Ley General de Educación (Ley No. 582) VIII: “La enseñanza primaria es gratuita y obligatoria en los centros del Estado.” Artículo 8: “El ingreso a la educación pública es libre, <i>gratuito</i> e igual para todos los y las nicaragüenses. El Estado y sus dependencias correspondientes, garantizan el acceso a la educación pública a todos los nicaragüenses.”</p>

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COUNTRY	RELEVANT CONSTITUTIONAL PROVISIONS	RELEVANT LEGISLATION AND PUBLIC POLICIES
		<p>Artículo 23 (c): “La Educación Secundaria constituye el tercer nivel de la Educación Básica Regular, es <i>gratuita</i> cuando se impartan en centros del estado y dura cinco años .”⁴⁰</p>
Panamá	<p>Artículo 91: “La educación oficial es <i>gratuita</i> en todos los niveles pre-universitarios. Es obligatorio el primer nivel de enseñanza o educación básica general. La educación <i>gratuidad</i> implica para el Estado proporcionar al educando todos los útiles necesarios para su aprendizaje mientras complete su educación básica general.”⁴¹</p>	<p>Ley Orgánica de Educación (Ley No. 47) Artículo 41: “La educación primaria es <i>gratuita</i> y obligatoria. La obligatoriedad de la enseñanza se refiere no solo a la obligación del niño de recibirla, sino también a la obligación que tiene el Estado de impartirla.”</p> <p>Artículo 69: “Aunque toda educación pública es <i>gratuita</i> el Órgano Ejecutivo queda facultado para establecer un derecho de matrícula anual para cursar estudios secundarios, profesionales, vocacionales o universitarios.”⁴²</p>
Paraguay	<p>Artículo 76: “La educación escolar básica es obligatoria. En las escuelas públicas tendrá carácter <i>gratuito</i>.”⁴³</p>	<p>Reforma Educativa de 1993 Desde el inicio del proceso de la reforma educativa en 1993, la educación básica se ha extendido a nueve años de duración, para edades desde 6 a 15 años.⁴⁴</p> <p>Código de la Niñez y Adolescencia Artículo 28: “El Estado asegurará la educación preprimaria y primaria <i>gratuita</i> para los niños, niñas y adolescentes, proveyéndoles de las condiciones necesarias para el acceso y permanencia en la escuela.”⁴⁵</p> <p>Ley General de Educación (Ley No. 1264) Artículo 32: “La educación escolar básica comprende nueve grados y es</p>

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COUNTRY	RELEVANT CONSTITUTIONAL PROVISIONS	RELEVANT LEGISLATION AND PUBLIC POLICIES
		obligatoria. Será <i>gratuita</i> en las escuelas públicas de gestión oficial, con la inclusión del preescolar. La <i>gratuidad</i> se extenderá progresivamente a los programas de complemento nutricional y al suministro de útiles escolares para los alumnos de escasos recursos. La <i>gratuidad</i> podrá ser ampliada a otros niveles, instituciones o sujetos atendiendo a los recursos presupuestarios.” ⁴⁶
Perú	<p>Artículo 17: “La educación inicial, primaria y secundaria son obligatorias. En las instituciones del Estado, la educación es <i>gratuita</i>. En las universidades públicas el Estado garantiza el derecho a educarse <i>gratuitamente</i> a los alumnos que mantengan un rendimiento satisfactorio y no cuenten con los recursos económicos necesarios para cubrir los costos de educación. . . .”⁴⁷</p>	<p>Ley General de Educación (Ley No. 28044) Artículo 4: “La educación es un servicio público; cuando lo provee el Estado es <i>gratuita</i> en todos sus niveles y modalidades, de acuerdo con lo establecido en la Constitución Política y en la presente ley. En la Educación Inicial y Primaria se complementa obligatoriamente con programas de alimentación, salud y entrega de materiales educativos.”</p> <p>Artículo 21(b): “Proveer y administrar servicios educativos públicos <i>gratuitos</i> y de calidad para garantizar el acceso universal a la Educación Básica y una oferta educativa equitativa en todo el sistema.”⁴⁸</p>
Uruguay	<p>Artículo 71: “Declarase de utilidad social la <i>gratuidad</i> de la enseñanza oficial primaria, media, superior, industrial y artística y de la educación física”⁴⁹</p>	<p>Ley No. 18.437 Artículo 15: “La educación estatal se regirá por los principios de <i>gratuidad</i>, de laicidad y de igualdad de oportunidades, además de los principios y fines establecidos en los títulos anteriores. Toda institución estatal dedicada a la educación deberá velar en el ámbito de su competencia por la aplicación efectiva de estos principios.”</p> <p>Artículo 16: “El principio de <i>gratuidad</i> asegurará el cumplimiento efectivo del derecho a la educación y la universalización del acceso y</p>

ANNEX B: DOMESTIC INCORPORATION OF INTERNATIONAL AND REGIONAL TREATIES PROTECTING THE RIGHT TO FREE EDUCATION IN LATIN AMERICAN COUNTRIES

COUNTRY	RELEVANT CONSTITUTIONAL PROVISIONS	RELEVANT LEGISLATION AND PUBLIC POLICIES
		<p>permanencia de las personas en el sistema educativo.”⁵⁰</p> <p>Ley General de Educación (Ley No. 15739) Artículo 6 (2): “La Administración Nacional de Educación Pública tendrá los siguientes cometidos Afirmar en forma integral los principios de laicidad, <i>gratuidad</i> y obligatoriedad de la enseñanza.”⁵¹</p> <p>Ley de Educación Inicial (Ley No. 17015) Artículo 3: “Declárase de interés social la <i>gratuidad</i> de la educación inicial que brinda el Estado.”⁵²</p>
<p>Venezuela</p>	<p>Artículo 102: “La educación es un derecho humano y un deber social fundamental, es democrática, <i>gratuita</i> y obligatoria. El Estado la asumirá como función indeclinable y de máximo interés en todos sus niveles y modalidades”</p> <p>Artículo 103: “La educación es obligatoria en todos sus niveles, desde el maternal hasta el nivel medio diversificado. La impartida en las instituciones del Estado es <i>gratuita</i> hasta el pregrado universitario. A tal fin, el Estado realizará una inversión prioritaria, de conformidad con las recomendaciones de la Organización de las Naciones Unidas.”⁵³</p>	<p>Ley Orgánica de Educación (Ley No. 2635) Artículo 2: “[I]a educación es función primordial e indeclinable del Estado, así como derecho permanente e irrenunciable de la persona.”⁵⁴</p> <p>Artículo 8: “La educación que se imparta en los institutos oficiales será <i>gratuita</i> en todos sus niveles y modalidades.”⁵⁵</p> <p>Ley Orgánica para la Protección del Niño y del Adolescente (Ley No. 5266) Artículo 53: “Derecho a la Educación. Todos los niños y adolescentes tienen derecho a la educación. Asimismo, tienen derecho a ser inscritos y recibir educación en una escuela, plantel o instituto oficial, de carácter <i>gratuito</i> y cercano a su residencia.</p> <p>El Estado debe crear y sostener escuelas, planteles e institutos</p>

ANNEX B: DOMESTIC INCORPORATION OF INTERNATIONAL AND REGIONAL TREATIES PROTECTING THE RIGHT TO FREE EDUCATION IN LATIN AMERICAN COUNTRIES

COUNTRY	RELEVANT CONSTITUTIONAL PROVISIONS	RELEVANT LEGISLATION AND PUBLIC POLICIES
		<p>oficiales de educación, de carácter <i>gratuito</i>, que cuenten con los espacios físicos, instalaciones y recursos pedagógicos para brindar una educación integral de la más alta calidad. En consecuencia, debe garantizar un presupuesto suficiente para tal fin.”⁵⁶</p> <p>Ley de Universidades de 1970 Artículo 11: “En las Universidades Nacionales los estudios ordinarios son <i>gratuitos</i>; sin embargo, los alumnos que deban repetir el curso total o parcialmente por haber sido aplazados, pagarán el arancel que establezca el Reglamento.”⁵⁷</p>

¹ Constitución Argentina, art. 75, § 19 (1994), *disponible en* http://www.argentina.gov.ar/argentina/portal/documentos/constitucion_nacional.pdf (énfasis suplido).

² Argentina, Ley de Educación Nacional Nro. 26.206 (2006) arts. 4 & 11, § h, *disponible en* http://www.me.gov.ar/doc_pdf/ley_de_educ_nac.pdf (énfasis suplido).

³ Argentina, Ley de Financiamiento Educativo Nro. 26.075 (2006) art. 3, *disponible en* http://www.me.gov.ar/doc_pdf/ley26075.pdf.

⁴ O.N.U. Comité de los Derechos del Niño, *Informes periódicos que los Estados Partes debían presentar en 1998, Argentina*, ¶ 425, O.N.U. Doc. CRC/C/70/Add.10 (26 de febrero de 2002) (énfasis suplido).

⁵ Argentina, Ley de Protección Integral de los Derechos de la Niñas, Niños y Adolescentes Nro. 26.061 (2005), arts. 15 & 16, *disponible en* <http://infoleg.mecon.gov.ar/infolegInternet/anexos/110000-114999/110778/norma.htm> (énfasis suplido).

⁶ Constitución de Bolivia, arts. 17 & 77 (2007), *disponible en* <http://www.right-to-education.org/node/310>.

⁷ Bolivia, Proyecto de Nueva Ley de Educación Boliviana (2006) art. 1, *disponible en* <http://www.minedu.gov.bo/minedu/nley/nuevaley14sept.pdf> (énfasis suplido).

⁸ Bolivia, Ley de la Reforma Educativa Nro. 1565 (1994) arts. 1, §2, & 46, *disponible en* http://www.oei.es/quipu/bolivia/Ley_Reforma_Educativa_1565.pdf (énfasis suplido).

⁹ Constitución de Brasil, arts. 206, § IV & 208, §§ I, II, V (2005), *disponible en* <http://www.right-to-education.org/country-node/312/country-constitutional> (énfasis suplido) (traducido por autor).

¹⁰ O.N.U. Consejo Econ. & Soc. [ECOSOC], *Informes iniciales presentados por los Estados Partes de conformidad con los artículos 16 y 17 del Pacto, Brasil*, ¶ 758, O.N.U. Doc. E/1990/5/Add.53 (21 de agosto de 2001) (traducido por autor).

¹¹ *Id.* en ¶ 759 (traducido por autor).

¹² *Id.* (traducido por autor).

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- ¹³ *Vea Ley de Directrices y Bases de la Educación Nacional Nro.9.394 (1994) título III., art. 4,§ I, disponible en http://www.oei.es/quipu/brasil/Lei_Diretrizes_9394.pdf (énfasis suplido) (traducido por autor).*
- ¹⁴ *Constitución de Chile, art. 19, § 10 (2005) disponible en <http://pdba.georgetown.edu/Constitutions/Chile/chile05.html> (énfasis suplido).*
- ¹⁵ *Chile, Ley General de Educación Nro. 20.370 (2009) art. 4, disponible en <http://www.leychile.cl/Navegar?idLey=20370> (énfasis suplido).*
- ¹⁶ *Constitución de Costa Rica, art. 78, § 1 (1997), disponible en <http://www.constitution.org/cons/costaric.htm> (énfasis suplido).*
- ¹⁷ *Costa Rica, Ley Fundamental de Educación Nro. 2160 (1957) art. 8, disponible en http://www.oei.es/quipu/costarica/Ley_2160.pdf (énfasis suplido).*
- ¹⁸ *Costa Rica, Código de la Niñez y Adolescencia (1998) art. 59, disponible en http://www.oei.es/quipu/costarica/Cod_Ninez_Adoles.pdf (énfasis suplido).*
- ¹⁹ *Constitución de Cuba, art. 39 (1975), disponible en <http://www.right-to-education.org/country-node/328/country-constitutional> (énfasis suplido).*
- ²⁰ *Constitución de Cuba, art. 51 (1975), disponible en <http://www.right-to-education.org/country-node/328/country-constitutional> (énfasis suplido).*
- ²¹ *Cuba, Ley de Nacionalización General y Gratuita de la Enseñanza (1961) art. 1, disponible en http://www.oei.es/quipu/cuba/Ley_educ.pdf (énfasis suplido).*
- ²² *Constitución de la República Dominicana (2002), art. 8, §16, disponible en <http://pdba.georgetown.edu/Constitutions/DomRep/domrep02.html> (énfasis suplido).*
- ²³ *República Dominicana, Ley Orgánica de la Educación Nro. 66-97 (1997) art. 4, § m, disponible en http://www.oei.es/quipu/dominicana/LeyEdu66_97.pdf (énfasis suplido).*
- ²⁴ *Republica Dominicana, Sistema para la Protección de los Derechos Fundamentales del Niño y el Adolescente Nro. 136-03 (2003) art. 45 (énfasis suplido).*
- ²⁵ *Id.* (énfasis suplido).
- ²⁶ *Constitución de Ecuador, art. 28 (2008), disponible en <http://pdba.georgetown.edu/Constitutions/Ecuador/ecuador08.html> (énfasis suplido).*
- ²⁷ *Ecuador, Ley de Educación Nro. 127 (1983) arts. 2, § e, 18, 19 & 21, disponible en http://www.oei.es/quipu/ecuador/Ley_educ_127.pdf (énfasis suplido).*
- ²⁸ *Ecuador, Código de la Niñez y la Adolescencia, Ley Nro. 100 (2003) art. 37, disponible en http://www.oei.es/quipu/ecuador/Cod_ninez.pdf (énfasis suplido).*
- ²⁹ *Constitución del Salvador, art. 56 (1983), disponible en <http://pdba.georgetown.edu/Constitutions/ElSal/constitucion2003.pdf> (énfasis suplido).*
- ³⁰ *El Salvador, Ley General de Educación, Decreto Nro. 917 (1996) arts. 5 & 20, disponible en http://www.oei.es/quipu/salvador/Ley_educ.pdf (énfasis suplido).*
- ³¹ *Constitución de Guatemala, art. 74 (1985), disponible en <http://pdba.georgetown.edu/Constitutions/Guate/guate93.html> (énfasis suplido).*
- ³² *Guatemala, Ley de Educación Nacional, Decreto Legislativo Nro. 12 (1991) art. 32, disponible en http://www.oei.es/quipu/guatemala/Ley_Educacion_Nacional.pdf (énfasis suplido).*
- ³³ *MINISTERIO DE EDUCACIÓN, POLÍTICAS EDUCATIVAS 2008-2012 (2008) § 2, disponible en http://www.mineduc.gob.gt/uploads/pdf/MATRIZ_POLITICAS_EDUCATIVAS_2008.pdf (énfasis suplido).*
- ³⁴ *Constitución de Haití, arts. 32, §§1 & 3, 208 (1987), disponible en <http://pdba.georgetown.edu/constitutions/haiti/haiti1987.html> (énfasis suplido) (traducido por autor).*
- ³⁵ *Constitución de Honduras, art. 171 (1991), disponible en <http://www.right-to-education.org/country-node/350/country-constitutional> (énfasis suplido).*
- ³⁶ *Honduras, Ley Orgánica de Educación, Decreto Nro. 791 (1996) art. 4, disponible en http://www.oei.es/quipu/honduras/Ley_educ.pdf (énfasis suplido).*
- ³⁷ *Constitución de México, art. 3 (2008), disponible en <http://www.baja.com/bajnew.htm> (énfasis suplido).*
- ³⁸ *México, Ley General de Educación (2006) art. 6, disponible en http://www.oei.es/quipu/mexico/Ley_gen_educ.pdf (énfasis suplido).*
- ³⁹ *Constitución de Nicaragua, art. 121 (2007), disponible en <http://www.right-to-education.org/country-node/643/country-constitutional> (énfasis suplido).*
- ⁴⁰ *Nicaragua, Ley General de Educación Nro. 582 (2006) arts. VII, 8 & 23, §c, disponible en http://www.oei.es/quipu/mexico/Ley_gen_educ.pdf (énfasis suplido).*
- ⁴¹ *Constitución de Panamá, art. 91(1972), disponible en <http://pdba.georgetown.edu/Constitutions/Panama/panama1994.html> (énfasis suplido).*
- ⁴² *Panamá, Ley Orgánica de Educación Nro. 47(1946) arts. 41 & 69, disponible en http://www.oei.es/quipu/panama/Ley_Org_Educ.pdf (énfasis suplido).*
- ⁴³ *Constitución de Paraguay, art. 76 (1992), disponible en <http://pdba.georgetown.edu/Constitutions/Paraguay/para1992.html> (énfasis suplido).*

⁴⁴ O.N.U. Comité sobre los Derechos del Niño, *Informes periódicos que los Estados Partes debían presentar en 1997, Paraguay*, ¶ 179, O.N.U. Doc. CRC/C/65/Add.12 (15 de marzo de 2001).

⁴⁵ *Id.* en ¶ 181.

⁴⁶ Paraguay, Ley General de Educación Nro. 1264 (1998) art. 32, *disponible en* http://www.oei.es/quipu/paraguay/ley_general_de_educacion.pdf (énfasis suplido).

⁴⁷ Constitución de Perú, art. 17 (1993), *disponible en* <http://pdba.georgetown.edu/Constitutions/Peru/per93reforms05.html> (énfasis suplido).

⁴⁸ Perú, Ley General de Educación Nro. 28044 (2003) arts. 4 & 21, § b, *disponible en* http://www.oei.es/quipu/peru/ley_general_educacion.pdf (énfasis suplido).

⁴⁹ Constitución de Uruguay art. 71 (1967), *disponible en* <http://pdba.georgetown.edu/Constitutions/Uruguay/uruguay04.html> (énfasis suplido).

⁵⁰ Uruguay, Ley Nro. 18.437 (2008) arts. 15 & 16, *disponible en* http://www.oei.es/pdf2/ley_educacion_uruguay.pdf (énfasis suplido).

⁵¹ Uruguay, Ley General de Educación Nro. 15739 (1985) art. 6, §2, *disponible en* http://www.oei.es/quipu/uruguay/ley_15739.pdf (énfasis suplido).

⁵² Uruguay, Ley de Educación Inicial Nro. 17015 (1998) art.3, *disponible en* http://www.oei.es/quipu/uruguay/ley_17015.pdf (énfasis suplido).


⁵³ Constitución de Venezuela, art. 102 (1999), *disponible en* <http://pdba.georgetown.edu/Constitutions/Venezuela/ven1999.html> (énfasis suplido).

⁵⁴ O.N.U. Consejo Econ. & Soc. [ECOSOC], *Segundos informes periódicos presentados por los Estados Partes de conformidad con los artículos 16 y 17 del Pacto, Venezuela*, ¶ 312, O.N.U. Doc. E/1990/6/Add.19 (8 de julio de 1998).

⁵⁵ O.N.U. Comité sobre los Derechos del Niño, *Informes iniciales que los Estados Partes deben presentar en 1992, Venezuela*, ¶160, O.N.U. Doc. CRC/C/3/Add.54 (énfasis suplido).

⁵⁶ Venezuela, Ley Orgánica de Protección del Adolescente Nro. 5266 (1998) art. 53, *disponible en* http://www.oei.es/quipu/venezuela/ley_proteccion_nino.pdf. (énfasis suplido).

⁵⁷ Ley de Universidades (1970) art. 11, *disponible en* http://www.oei.es/quipu/venezuela/Ley_de_universidades.pdf (énfasis suplido).



**RIGHT to EDUCATION
of AFRO-DESCENDANTS
and INDIGENOUS PEOPLES
in the AMERICAS:**

Achieving Dignity and Equality for All



Cornell University
Law School

Lawyers in the Best Sense



UNIVERSITY of
VIRGINIA
SCHOOL OF LAW



**Right to Education of Afro-descendants and
Indigenous Peoples in the Americas**

**Report prepared for a thematic hearing before the Inter-American
Commission on Human Rights**

Right to Education of Afro-descendants and Indigenous Peoples in the Americas

**Report prepared for a thematic hearing before the Inter-American
Commission on Human Rights¹**

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¹ The report was prepared by the Robert F. Kennedy Center for Justice and Human Rights (formerly the Robert F. Kennedy Memorial Center for Human Rights) (Monika Kalra Varma, Director, Marselha Gonçalves Margerin, Program Officer and Fernanda Katz Ellenberg, Pro Bono Attorney), in collaboration with Cornell Law School International Human Rights Clinic (Professor Sital Kalantry, Jocelyn Getgen ('07), Steven Arrigg Koh ('08)) and University of Virginia School of Law International Human Rights Clinic (Professor Deena Hurwitz, Olayemi Abayomi ('09), Heather Axford ('07), Lauren Bertini ('08), Janet Boysen ('08), Sarah Davis ('10), Kate Flatley ('08), Kristin Flood ('08), Rebecca Freeman ('09), Jennifer Jessie ('09), David Plante ('09), Caitlin Stapleton ('09), and Gabriel Walters ('09)).

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I. EXECUTIVE SUMMARY

As the Inter-American Commission on Human Rights (hereinafter “the Commission”) adopts and begins to examine standards and guidelines for the guarantee of economic, social and cultural rights, the Robert F. Kennedy Center for Justice and Human Rights (formerly the Robert F. Kennedy Memorial Center for Human Rights) (hereinafter “the RFK Center”)¹ requested a general interest hearing to discuss the state of the right to education in the Americas.² In the hearing, and through a comprehensive report, the RFK Center and its partners, international human rights clinics from Cornell Law School and University of Virginia School of Law, and witnesses from the region, will focus on the right to education of Afro-descendants and indigenous peoples in the Americas. As a means to demonstrate the overall state of education in the Americas, the hearing and report provide detailed accounts regarding the status of the right to education in Colombia and Guatemala, as well as an overview of the Dominican Republic.

In addition to the obligations stemming from the American Declaration on the Rights and Duties of Man (hereinafter “the American Declaration”),³ Article 26 of the American Convention on Human Rights (hereinafter “the American Convention”) requires that State Parties take steps to progressively achieve full realization of the right to education.⁴ In connection, Article 1 of the American Convention establishes State obligations to respect rights without discrimination.⁵ Furthermore, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (hereinafter “the Protocol of San Salvador”) explicitly recognizes a universal right to education (Article 13), and the right of every child to free and compulsory [primary] education (Article 16), without discrimination (Article 3).⁶ Article 13 of the Inter-American Democratic Charter resolves that, “[t]he promotion and observance of economic, social and cultural rights are inherently linked to integral development, equitable economic growth, and to the consolidation of democracy in states of the hemisphere.”⁷ Thus, the importance of determining Organization of American States (hereinafter “the OAS”) Member States’ obligations in contributing to economic, social and cultural rights, through working to improve the right to education, cannot be over-emphasized.

¹ This project was undertaken by the RFK Center in partnership with its Human Rights Laureates Berenice Celeyta (NOMADESC), 1998 RFK Human Rights Laureate from Colombia, Amilcar Mendez Urizar (CERJ), 1990 RFK Human Rights Laureate from Guatemala, and Sonia Pierre (MUDHA), 2006 RFK Human Rights Laureate from Dominican Republic. RFK Center human rights laureates arranged and participated in many meetings and were very involved in the on-the ground investigations. RFK Center human rights laureates also identified the witnesses testifying at the hearing before the Commission.

² In the interest of time, a general interest hearing pursuant to the Inter-American Commission’s Rules of Procedure was sought without the presence of the State governments. *See* Rules of Procedure of the Inter-American Commission on Human Rights, art. 64, 109th Sp. Sess. (2000), amended 126th Sess. (2006) *available at* <http://www.cidh.org/basicos/English/Basic18.Rules%20of%20Procedure%20of%20the%20Commission.htm> (last visited July 16, 2008).

³ *See* American Declaration on the Rights and Duties of Man, arts. II, IX, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992) [hereinafter American Declaration].

⁴ *See* American Convention on Human Rights, art. 26, O.A.S. Treaty Series No. 36, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter American Convention].

⁵ *See id.* at art. 1.

⁶ *See* Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights, arts. 3, 13 & 16, O.A.S. Treaty Series No. 69, Nov. 17, 1988 [hereinafter Protocol of San Salvador].

⁷ *See* Inter-American Democratic Charter, art. 13 (2001).

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The right to education functions as a multiplier right: it “unlocks other rights when guaranteed, while its denial precludes the enjoyment of all human rights and perpetuates poverty.”⁸ Minority populations face particular obstacles in attaining quality education due to institutionalized discrimination, language and cultural barriers, and geographic isolation. In most Latin American and Caribbean countries, the failure to provide quality education for Afro-descendants and indigenous peoples is a significant problem. Though their countries’ constitutions and membership in the OAS guarantee the right to education, the majority of Afro-descendants and indigenous peoples have little to no adequate primary or secondary education. Further, facing centuries of entrenched structural discrimination, very few, if any, enjoy access to higher education.

The Report addresses States’ obligations to fulfill the right to education without discrimination and examines the failure to meet those obligations in three specific countries: Colombia, Guatemala, and the Dominican Republic.⁹

A. LEGAL FRAMEWORK AND METHODOLOGY

Section II surveys States’ immediate and progressive obligations under the inter-American system to provide education to all persons within their jurisdictions. States parties are immediately obligated to provide to all persons within their jurisdictions education without discrimination, compulsory and free primary education, and equal protection under the law.¹⁰ Additionally, States parties must progressively realize the right to secondary and higher education, within the parameters of the concept of “reasonable time” contemplated by the inter-American human rights system.¹¹ The most vulnerable populations, including Afro-descendant, indigenous peoples, children, and women, are entitled to education on an equal basis and without discrimination.¹²

Section III of this Report discusses its methodology, which analyzes the lawful realization of the right to education through the structural, process, and outcome indicators recommended by the Commission.¹³ The Commission’s Guidelines for Preparation of Progress Indicators in the Area of Economic, Social, and Cultural Rights permit an examination of the State’s institutional framework for providing education, the quality and extent of State action, and the impact of State action on the

⁸ KATARINA TOMASEVSKI, HUMAN RIGHTS OBLIGATIONS IN EDUCATION: THE 4-A SCHEME 47 (2006).

⁹ In preparation for this report, investigations focused more extensively on the status of the right to education in Colombia and Guatemala. Hence, we only provide a brief overview of the situation in the Dominican Republic.

¹⁰ See American Convention, *supra* note 4, at art. 26; Protocol of San Salvador, *supra* note 6, at arts. 13 & 16; O.A.S. Charter, arts. 34 & 49 [hereinafter OAS Charter]; Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, (Convention of Belém do Pará), art. 5, Jun. 9, 1994, 33 I.L.M. 1534 (1994) [hereinafter Convention of Belém do Pará]; American Declaration, *supra* note 3, at arts. II & IX.

¹¹ See Suárez Rosero Case, 1997 Inter-Am. Ct. H.R. (ser. C) No. 35, at para. 72 (Nov. 12, 1997), *available at* http://www.wcl.american.edu/humright/hracademy/corteidh/seriecpdf_ing/seriec_35_ing.pdf?rd=1; *see also* American Convention, *supra* note 4, at art. 26; Protocol of San Salvador, *supra* note 6, at arts. 13(3)(b)–(c); Convention of Belém do Pará, *supra* note 10, at art. 8(b); OAS Charter, *supra* note 10, at art. 49.

¹² See Convention of Belém do Pará, *supra* note 10, at arts. 6 & 8; Draft Inter-American Convention Against Racism and All Forms of Discrimination and Intolerance, art. 6, OAS, Doc. OEA/Ser. G, CP/CAJP-2357/06, *adopted* 18 April 2006.

¹³ See INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, GUIDELINES FOR PREPARATION OF PROGRESS INDICATORS IN THE AREA OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS, OEA/Ser/L/V/II.129 (Doc. 5), at ¶ 30–32 (Oct. 5, 2007), *available at* <http://www.cidh.org/pdf%20files/Guideline%20october%202007%20eng.pdf> [hereinafter GUIDELINES].

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targeted populations.¹⁴ In evaluating the quality of education provided, this report adds to the methodological approach the “4-A Right to Education Framework” proposed by the former U.N. Special Rapporteur on Education, Katarina Tomasevski.¹⁵ It includes an additional factor, accountability, proposed by the Woodrow Wilson School of Public and International Affairs.¹⁶ This framework measures the scope of the State’s obligations, taking into account structural discrimination through reference to five essential elements of education: availability, accessibility, acceptability, adaptability, and accountability.¹⁷ This framework is referred to herein as the “5-A Right to Education Framework.”

B. COUNTRY PROFILE: COLOMBIA

Section IV offers a case study on the status of the right to education in Colombia of Afro-Colombians and indigenous peoples. The “5-A Right to Education Framework,” analyzed through the structural, process and outcome indicators proposed by the Commission, suggests that Colombia is in violation of Inter-American treaties that require it to provide education to Afro-Colombians and indigenous peoples equally and without discrimination. In particular, Colombia is in violation of: 1) Articles 13 and 16 of the Protocol of San Salvador by its failure to immediately provide free primary education to all;¹⁸ and 2) Articles 1, 19 and 24 of the American Convention,¹⁹ Article 3 of the Protocol of San Salvador,²⁰ and Articles 4 and 6 of the Convention of Belém do Pará by failing to provide education without discrimination and equal protection.²¹ Furthermore, Colombia is obligated to progressively realize secondary and higher education rights under Article 19 and Article 26 of the American Convention,²² Article 13 of the Protocol of San Salvador,²³ and Article 8 of the Convention of Belém do Pará.²⁴

The lack of equality in education for Afro-Colombians and indigenous peoples is illustrated by the outcome indicators. For example, 33.4 percent of indigenous peoples and 31.3 percent of Afro-Colombians in Colombia are illiterate, a rate nearly three times that of the rest of the population.²⁵ Furthermore, only 18 percent of indigenous people and 13 percent of Afro-Colombians who are over eighteen years-old have completed primary education.²⁶ Afro-Colombians and indigenous peoples together constitute a sizeable minority in Colombia—25 percent of

¹⁴ See *id.*

¹⁵ See Committee on Economic Social and Cultural Rights (CESCR), *General Comment 13 on the Right to Education*, ¶ 6, U.N. Doc. E/C.12/1999/10 (1999), available at [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.1999.10.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/E.C.12.1999.10.En?OpenDocument) [hereinafter General Comment 13].

¹⁶ See PRINCETON UNIVERSITY WOODROW WILSON SCHOOL OF INTERNATIONAL AFFAIRS, *FREE TO LEARN: A RIGHTS BASED APPROACH TO UNIVERSAL PRIMARY EDUCATION IN KENYA* 30 (2006), available at http://www.princeton.edu/research/final_reports/f05wws591i.pdf [hereinafter WOODROW WILSON FRAMEWORK].

¹⁷ See *id.*

¹⁸ See Protocol of San Salvador, *supra* note 6, at arts. 13 & 16.

¹⁹ See American Convention, *supra* note 4, at arts. 1, 19 & 24.

²⁰ See Protocol of San Salvador, *supra* note 6, at art. 3.

²¹ See Convention of Belém do Pará, *supra* note 10, at arts. 4 & 6.

²² See American Convention, *supra* note 4, at arts. 19 & 26.

²³ See Protocol of San Salvador, *supra* note 6, at art. 13.

²⁴ See Convention of Belém do Pará, *supra* note 10, at art. 8.

²⁵ See ENRIQUE SÁNCHEZ & PAOLA GARCÍA, WORLD BANK, *MÁS ALLÁ DE LOS PROMEDIOS: AFRODESCENDIENTES EN AMÉRICA LATINA* 16, 38 (2006), available at www.acnur.org/biblioteca/pdf/4558.pdf.

²⁶ See PROCURADURÍA GENERAL DE LA NACIÓN, *EL DERECHO A LA EDUCACIÓN: LA EDUCACIÓN EN LA PERSPECTIVA DE LOS DERECHOS HUMANOS* 159 (2006).

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Colombia's population is Afro-Colombian and 2 percent consists of indigenous peoples.²⁷ Despite this, at the post-graduate levels, only 0.71 percent of enrolled students are indigenous and 7.07 percent are Afro-Colombian.²⁸

Colombia's Constitution deviates from Colombia's inter-American and international treaty obligations by requiring certain people—those who can afford to pay—to pay for public education.²⁹ The failure to guarantee free primary education to children clearly violates Articles 13 and 16 of the Protocol of San Salvador. Despite this structural failure in Colombia's domestic law, numerous provisions of the Constitution and Constitutional Court decisions have provided robust protections for the right to education. Constitutional Court decisions and domestic laws generally conform to the “5-A Right to Education Framework.”

There are numerous process indicators in Colombia that are intended to protect the right to education, such as agencies, plans, and programs. There is a Ministry of Education, which institutes Ten-Year National Developmental Plans on education, an ombudsman who brings claims to enforce violations of the right to education, and an agency in charge of administering issues related to internally displaced people. These process protections, however, have not been adequate in scope and coverage to guarantee education to all.

The outcome indicators highlight the disparities in education among minorities and non-minorities in Colombia. First, problems with availability exist as a result of dilapidated or non-existent educational structures and the lack of quality teachers, particularly in areas with large minority populations. Second, education is both economically and physically inaccessible for many minorities. Minorities, who tend to be disproportionately poor, are often unable to afford matriculation fees and ancillary items such as uniforms and transportation. Minorities face additional hurdles as a result of structural discrimination inherited from the legacies of colonization, slavery, and inequality. Third, with respect to the acceptability of education, the increased public funding for poor quality private education has led to a crisis of educational quality for minorities who are forced to attend “garage schools.”³⁰ Fourth, education is not entirely adaptable to the needs and backgrounds of Afro-Colombians and indigenous peoples. Fifth, while there are mechanisms for accountability such as *tutela* actions, they are of limited utility in making wider policy changes.

The violent internal conflict in Colombia has had a devastating impact on the education of minorities. Afro-Colombian and indigenous peoples have been disproportionately displaced and forced into extreme poverty as a result of the conflict. Displacement naturally disrupts education and, in Colombia, the poorest are among those who have the least access to education. Although ending the decades-long conflict is an important priority for the government, Colombia must recognize that guaranteeing that all children receive quality education can be an important step in the peace process. The Commission has observed in its special report on Colombia in 1999 that 15 percent of members of paramilitary groups are minors and that in some areas the number rises to 50

²⁷ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, ANNUAL REPORT 2006, ¶ 31, *available at* <http://www.cidh.oas.org/annualrep/2006eng/Chap.4a.htm>.

²⁸ *See* VICE MINISTER OF PRESCHOOL, BASIC, AND MEDIUM EDUCATION, MINISTRY OF EDUCATION, DIRECTION OF ORDER AND EQUITY (2007), *available at* www.mineducacion.gov (last visited Mar. 10, 2008).

²⁹ Political Constitution of Colombia, art. 67 (1991).

³⁰ As noted *infra*, “garage schools” are private schools that are publicly funded and are springing up in several underserved parts of Colombia. These schools impose fees and lack quality teachers, curricula, and learning materials.

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percent.³¹ The Commission has also noted that paramilitary groups go to low-income areas or camps of displaced persons, offering sums of money to attract children to their ranks.³² A viable education can offer an attractive alternative for children who may be recruited to enlist as soldiers in the internal conflict.

C. COUNTRY PROFILE: GUATEMALA

Section V offers a case study on the status of the right to education in Guatemala for Afro-descendants and indigenous peoples. By failing to implement effective measures to fulfill the right to education within the “5-A Right to Education Framework,” Guatemala has failed to meet its obligations under the Inter-American human rights system to Afro-descendants and indigenous peoples. The failure to effectively provide education to all its citizens, especially compulsory and free primary education without discrimination and with equal protection under the law, violates the following obligations: Articles 19 and 26 of the American Convention, in connection with Article 1;³³ Articles 13 and 16 of the Protocol of San Salvador;³⁴ and Article 5 of the Convention of Belém do Pará.³⁵ Furthermore, Guatemala is obligated to progressively realize secondary and higher education rights under Articles 19 and 26 of the American Convention,³⁶ Article 13 of the Protocol of San Salvador,³⁷ and Article 8 of the Convention of Belém do Pará.³⁸

Guatemala’s failure to provide quality education also violates both its Constitution and domestic law. The right to education is guaranteed by the Constitution (Articles 71 and 74), which declares that education is obligatory and shall be provided free of cost. Additionally, the Peace Accords of 1996 establish binding goals aimed at improving education and a number of domestic laws purport to provide education by addressing bilingual education and literacy rates.

However, Guatemala’s political, ethnic and geographic realities—the violent 36-year civil war, the diversity of language and traditions of the people, and the rural nature of the country—prevent easy implementation of these laws. Guatemala’s educational attainment and literacy rates are among the lowest in Latin America and literacy rates for indigenous populations are distinctly lower than for the rest of the Guatemalan population.³⁹

The availability of education in Guatemala is compromised because the government has failed to devote adequate funding and resources; schools are overcrowded, teacher training and salaries are deficient, and there is an insufficient number of school facilities. For example, although

³¹ See INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, THIRD REPORT ON THE HUMAN RIGHTS SITUATION IN COLOMBIA, ch. 13, ¶ 62 (1999), available at <http://www.cidh.org/countryrep/Colom99en/table%20of%20contents.htm> (last visited July 16, 2008).

³² See *id.*

³³ See American Convention, *supra* note 4, at arts. 19 & 24.

³⁴ See Protocol of San Salvador, *supra* note 6, at arts. 13 & 16.

³⁵ See Convention of Belém do Pará, *supra* note 10, at art. 5.

³⁶ See American Convention, *supra* note 4, at arts. 19 & 26.

³⁷ See Protocol of San Salvador, *supra* note 6, at art. 13.

³⁸ See Convention of Belém do Pará, *supra* note 10, at arts. 4, 6 & 8.

³⁹ LUISA MARIA MAZARIEGOS ET AL., EDUCACIÓN E IDIOMA: ACCESO Y DIVERSIDAD ÉTNICO-CULTURAL 1994–2004, ESTUDIO 1360 (2005); KELLY HALLMAN ET AL., MULTIPLE DISADVANTAGES OF MAYAN FEMALES: THE EFFECTS OF GENDER, ETHNICITY, POVERTY, AND RESIDENCE ON EDUCATION IN GUATEMALA 2 (2006), available at http://www.usaid.gov/gt/docs/disadvantages_mayan_females.pdf. “Along with the occurrence and timing of initial school enrollment, continuation in school (retention) and grade repetition are the basic factors determining educational attainment.” HALLMAN ET AL., *supra*, at 8.

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Guatemala's education budget doubled between 2000 and 2005,⁴⁰ the government spent just 1.8 percent of its GDP on education in 2007, which is well below the Latin America and Caribbean average of 4.7 percent.⁴¹ Deficiencies in expenditures, infrastructure, and teacher supply and quality are generally even worse for indigenous and Afro-descendant communities, compounding their disadvantage and impeding their already inferior prospects.

Education is also inaccessible to many Guatemalans due to the remote locations of schools and the economic need for children to work rather than attend school. The government has concentrated on achieving universal coverage of primary education, which it measures using enrollment figures. This measurement method alone, however, ignores significant problems, including completion of primary school, repetition of grades, failing, and dropping out of school. Indeed, among children who entered first grade on time, more than half were delayed or expelled within that same year.⁴²

Cultural and language gaps, and the failure of the State to provide adequate bilingual schools, make education unacceptable for many Afro-descendants and indigenous peoples. Guatemala also fails to effectively adapt its education system to the unique needs of the rural farming population, a significant proportion of whom are Afro-descendants and indigenous peoples. The result is a disparity in attainment of education, both at the primary and secondary levels, for Afro-descendants and indigenous peoples,⁴³ in violation of Guatemala's regional, international, and domestic legal obligations.

D. COUNTRY OVERVIEW: DOMINICAN REPUBLIC

Section VI provides a brief overview of the right to education of Afro-descendants in the Dominican Republic. Process and outcome indicators in the Dominican Republic demonstrate that it has failed to meet its legal obligations to provide quality education to all. The Dominican Republic fails to comply with its Constitution, domestic legislation, and regional and international laws guaranteeing the right to education for all children without discrimination. Instead, the government maintains practices that deny children, especially Dominican children of Haitian descent, the means to access education. The Dominican Republic has violated Articles 1, 19 and 26 of the American Convention⁴⁴ in connection with Articles 18 and 20.⁴⁵ The government has also

⁴⁰ EMILIO PORTA & JOSE R. LAGUNA, PRESENT STATE OF EDUCATION FOR ALL: THE CASE OF GUATEMALA (2007), available at <http://unesdoc.unesco.org/images/0015/001555/155575e.pdf>.

⁴¹ DR. SERGIO FERNANDO MORALES ALVARADO, INFORME ANUAL CIRCUNSTANCIADO: TOMO I, SITUACION DE LOS DERECHOS HUMANOS EN GUATEMALA 76 (2007), available at http://www.pdh.org.gt/images/files/Informes_anuales/INFORME07_TOMO_I.pdf. The Ombudsman's report notes that the 1.8 percent GDP spent on education in 2007 was a decrease from the Guatemalan high of 2.6 percent in 2001. See *id.*

⁴² UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION (UNESCO), THE STATE OF EDUCATION IN LATIN AMERICA AND THE CARIBBEAN: GUARANTEEING QUALITY EDUCATION FOR ALL, UNESCO 113 (2007), available at <http://unesdoc.unesco.org/images/0015/001528/152895e.pdf>.

⁴³ WORLD BANK, PROJECT APPRAISAL DOCUMENT ON A PROPOSED LOAN IN THE AMOUNT OF \$80.0 MILLION TO THE REPUBLIC OF GUATEMALA FOR AN EDUCATION QUALITY AND SECONDARY EDUCATION PROJECT, REPORT NO. 36712-GT 141 (2007), available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/02/09/000310607_20070209102837/Rend ered/PDF/36712core0GT0R20071002311.pdf.

⁴⁴ See American Convention, *supra* note 4, at arts. 1, 19 & 26.

⁴⁵ See *id.* at arts. 18 & 19.

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failed to undertake measures to curb the statelessness that impedes the social development of children of Haitian ancestry by limiting access to primary education and barring access to secondary and higher education.

The Dominican Republic's Constitution and existing domestic legislation appear to uphold the principle of free and compulsory education to all without discrimination, but the texts are far removed from the reality on the ground. The Constitution and domestic laws guarantee the right to education and establish compulsory primary education for all "inhabitants of the national territory."⁴⁶ The Constitution also guarantees that at least primary and secondary education will be free.⁴⁷ Despite these laws' guarantees, the government effectively denies Dominican-born children of Haitian ancestry access to education due to the discriminatory effects of birth registration regulations.

The Dominican Republic government's policy refuses to recognize the citizenship of or provide identity documents to Dominican children born to undocumented residents. Because identification proving citizenship is required for obtaining almost any type of service, the government's refusal to provide documents recognizing the Dominican citizenship of children born to Haitian descendants has effectively barred them from many of the essential rights and protections citizenship affords, including the right to education. This practice is common, despite Article 11(1) of the Dominican Constitution, which grants Dominican nationality to those born in the Dominican Republic, and a 2005 decision rendered by the Inter-American Court of Human Rights in the *Yean and Bosico vs. Dominican Republic* case, which requires the non-discriminatory issuance of birth certificates to all children born in the Dominican Republic.⁴⁸

E. RECOMMENDATIONS

Section VII of the Report lays out recommendations to the Commission and each of Colombia, Guatemala, and the Dominican Republic, including country-specific recommendations both to the Commission and to each relevant government. To the Commission, the report puts forth the following general recommendations regarding the right to education for Afro-descendants and indigenous peoples in the Americas:

1. Establish an Inter-American Special Rapporteurship on Economic, Social and Cultural Rights to ensure the protection of and commitment to economic, social and cultural rights in the Americas and to investigate violations of the right to education for Afro-descendants and indigenous peoples commencing with investigations of the situation in each of Colombia, Guatemala, and the Dominican Republic.
2. Urge both the Special Rapporteur on the Rights of Persons of African Descent and Racial Discrimination and the Special Rapporteur on the Rights of Indigenous Peoples,

⁴⁶ See Constitution of the Dominican Republic, art. 8(16), (2002) ("It is the duty of the State to distribute fundamental education to all inhabitants of the national territory and to take the necessary measures to eliminate illiteracy."); see generally, Law 66-97, Organic Education Law of the Dominican Republic (1997) (reiterating at art. 1 the Constitution's guarantee of the right to education for all inhabitants of the country).

⁴⁷ See Constitution of the Dominican Republic, art. 8(16) (2002) ("Primary and secondary education as well as education offered in the agricultural, vocational, art, merchant, artisan and domestic economy trades will be free.").

⁴⁸ *Yean and Bosico Children v. Dominican Republic*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 130 (Sept. 8, 2005), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_130_esp.pdf.

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to investigate, report, and make recommendations regarding the right to education of Afro-descendants and indigenous peoples in the Americas commencing with investigations of the situation in each of Colombia, Guatemala, and the Dominican Republic.

3. In addition to the structural, process, and outcome indicators that the Commission advocates in analyzing economic, social and cultural rights, adopt a framework that uses availability, accessibility, acceptability, adaptability, and accountability as measures for assessing violations of the right to education. This framework is further described in Section III (Methodology) of this Report.
4. Include assessments of the right to education in a separate economic, social and cultural rights chapter of its annual reports.

II. A LEGAL FRAMEWORK ON THE RIGHT TO EDUCATION

A. THE RIGHT TO EDUCATION IS VITALLY IMPORTANT BECAUSE IT IS A ‘MULTIPLIER’ RIGHT: ITS REALIZATION BOTH ADVANCES THE RIGHT TO EQUALITY AND ENHANCES OTHER RELATED RIGHTS AND FREEDOMS.

1. Fulfilment of the right to education facilitates realization of the fundamental rights to non-discrimination and equality.

The right to education “functions as a multiplier, enhancing all rights and freedoms when it is guaranteed while jeopardizing them all when it is violated.”¹ States must provide to persons within their jurisdictions the right to education free of discrimination of any kind.² As an obligation *erga omnes*, the principle of non-discrimination “binds all States and gives rise to effects with regard to third parties, including individuals.”³ The Inter-American Court of Human Rights (hereinafter “the Inter-American Court” or “the Court”) has stated that:

In compliance with this obligation, States must abstain from carrying out any action that, in any way, directly or indirectly, is aimed at creating situations of de jure or de facto discrimination. This translates, for example, into the prohibition to enact laws, in the broadest sense, formulate civil, administrative or any other measures, or encourage acts or practices of their officials, in implementation or interpretation of the law that discriminates against a specific group of persons because of their race, gender, color or other reasons.⁴

¹ KATARINA TOMASEVSKI, HUMAN RIGHTS OBLIGATIONS IN EDUCATION: THE 4-A SCHEME (2006).

² Organization of American States, American Convention on Human Rights (American Convention) art. 1, Nov. 22, 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention]; Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) art. 3, Nov. 17, 1988, O.A.S. Treaty Series No. 69 [hereinafter Protocol of San Salvador]; International Covenant on Economic, Social and Cultural Rights art. 2(2), Jan. 3, 1976, 993 U.N.T.S. 3 [hereinafter ICESCR].

³ Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, at 110 (Sept. 17, 2003) [hereinafter Advisory Opinion OC-18/03]. (“At the existing stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the realm of jus cogens.” *Id.* at ¶ 101.)

The principle of equality before the law and non-discrimination permeates every act of the powers of the State, in all their manifestations, related to respecting and ensuring human rights. Indeed, this principle may be considered peremptory under general international law, inasmuch as it applies to all States, whether or not they are party to a specific international treaty, and gives rise to effects with regard to third parties, including individuals. This implies that the State, both internationally and in its domestic legal system, and by means of the acts of any of its powers or of third parties who act under its tolerance, acquiescence or negligence, cannot behave in a way that is contrary to the principle of equality and non-discrimination, to the detriment of a determined group of persons.

Id. at ¶ 100. See also American Convention, *supra* note 2, at art. 24; American Declaration on the Rights and Duties of Man (American Declaration) art. II, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992) [hereinafter American Declaration]; ICESCR, *supra* note 2, at art. 2; International Covenant on Civil and Political Rights (ICCPR) art. 2, Dec. 16, 1966, 999 U.N.T.S. 17.

⁴ Advisory Opinion OC-18/03, *supra* note 3, at ¶ 103.

Non-discrimination is a prerequisite to the enjoyment by all of the right to education.⁵ Moreover, the realization of the right to education for marginalized communities has the long-term potential to diminish the discrimination that they routinely face.⁶ Education helps develop tolerance, appreciation and respect for difference.⁷ A meaningful education, defined as education that is available, accessible, acceptable and adaptable,⁸ and for which there are appropriate mechanisms to hold the government accountable,⁹ is essential to transcending poverty. It is, moreover, fundamental to the ability of each individual to participate in and contribute to all economic, social, cultural, civil, and political aspects of society.¹⁰

2. Realizing the right to education enhances other rights and freedoms, while restricting or violating the right to education jeopardizes those rights and freedoms.

The right to education is both itself a fundamental human right and an essential means to promote a number of other rights and freedoms.¹¹ Education, for example, can directly affect one's income, employment opportunities, access to justice and ability to participate in government.¹² However, the right to education is complicated in the case of Afro-descendants and indigenous peoples because State-provided education is generally constructed through and measured by non-indigenous standards, values and philosophies.¹³ When education is used as a means of assimilation, the rights of minority groups are often negatively impacted.¹⁴ For example, States may use the education system for the introduction of a national language "to the detriment of the languages and

⁵ TOMASEVSKI, *supra* note 1, at 45. "[A]ccess to education largely reflects the inherited inequalities: girls will often have lower enrollment rate[s] than boys, while members of minorities or migrants may in practice be excluded." *Id.*

⁶ *Id.* at 44.

There are two approaches to tackling educational exclusion. One defines the task as reaching the un-reached, enhancing the 'integrability' of the excluded The other approach defines exclusion as a process whereby people are pushed to the edge of society and prevented from participating. Tackling exclusion requires halting and reversing exclusionary policies and practices, not only countering their effects. The focus moves from the excluded (called 'vulnerable' or 'disadvantaged' or 'marginalized') to the factors that lead to their exclusion. Denials of human rights are often among the key factors, especially for girls and women. Although these two approaches differ, both view education as the key to eliminating exclusion because most factors leading to exclusion can be mitigated by education.

⁷ See Convention on the Rights of the Child arts. 29(1)(c)-(d), Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

⁸ TOMASEVSKI, *supra* note 1, *passim*.

⁹ PRINCETON UNIVERSITY WOODROW WILSON SCHOOL OF INTERNATIONAL AFFAIRS, FREE TO LEARN: A RIGHTS BASED APPROACH TO UNIVERSAL PRIMARY EDUCATION IN KENYA 30 (2006), available at http://www.princeton.edu/research/final_reports/f05wws591i.pdf [hereinafter WOODROW WILSON FRAMEWORK].

¹⁰ TOMASEVSKI, *supra* note 1, at 47. "[T]he right to education unlocks other rights when guaranteed, while its denial precludes the enjoyment of all human rights and perpetuates poverty." *Id.*

¹¹ See Committee on Economic Social and Cultural Rights (CESCR), *General Comment 13 on the Right to Education*, ¶¶ 1 & 31, U.N. Doc. E/C.12/1999/10 (1999), available at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.1999.10.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.1999.10.En?OpenDocument) [hereinafter General Comment 13].

¹² *Id.* at ¶¶ 1 & 4.

¹³ The Coolangatta Statement on Indigenous Peoples' Rights in Education, World Indigenous Peoples' Conference on Education, Hilo, Hawai'i, Aug. 6, 1999 [hereinafter Coolangatta Statement].

¹⁴ See *id.*, *passim*; Draft American Declaration on the Rights of Indigenous Peoples art. X (Rejection of Assimilation) and art. XIV (Education), Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, *Classification of Provisions That Could Facilitate Consensus*, OEA/Ser.K/XVI, GT/DADIN/doc.329/08, 4 Mar. 2008, available at: http://scm.oas.org/doc_public/ENGLISH/HIST_08/CP19750E07.doc; U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 8, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) ("Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.").

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cultures of ethnic minorities and indigenous groups. For such groups, however, the right to education is an essential means to preserve and strengthen their cultural identity.”¹⁵

Obtaining an education provides otherwise marginalized individuals with the tools needed to rise out of poverty and participate more fully in their communities and governments.¹⁶ Fulfilling the right to education is linked to the realization of the right to food¹⁷ and the right to health,¹⁸ by giving people the economic foundations to access proper nutrition and health care. The right to education, for example, directly enhances the right to health when an educational system incorporates health education into its curriculum.¹⁹

Education “enhances social mobility and helps . . . people to escape from discrimination based on social status.”²⁰ Not only does a lack of education negatively affect, for example, the right to work²¹ and the right to social security,²² but it can also be used as a means to justify excluding individuals from fully participating in their communities and government.²³ A central purpose of education is to “enable everyone to participate effectively in a democratic and pluralistic society.”²⁴ However, States may regulate the right to participate in government on the basis of education;²⁵ thus, the absence of a meaningful education may effectively prevent participation in government. Similarly, Article 13(1) of the American Convention calls upon the State to ensure freedom of expression within its jurisdiction, including the right to “seek, receive, and impart information and ideas of all kinds.”²⁶ Likewise, education should be directed toward the full development of the human personality and human dignity.²⁷ The development of the human personality is the “most fundamental” educational objective common to both the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights (hereinafter “ICESCR”).²⁸

Furthermore, a lack of education directly affects access to justice. Article 25(2) of the American Convention guarantees that States Parties will “ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the State; develop the possibilities of judicial remedy; and ensure that the competent authorities shall enforce such remedies when granted.”²⁹ However, a person who lacks a basic education will often be unaware of her rights and will be less likely to seek legal recourse. Indigenous peoples often are denied access to justice because, among other things, they do not speak the majority

¹⁵ Fons Coomans, *Content and Scope of the Right to Education as a Human Right and Obstacles to Its Realization*, in HUMAN RIGHTS IN EDUCATION, SCIENCE AND CULTURE: LEGAL DEVELOPMENTS AND CHALLENGES 183, 185 (Yvonne Donders & Vladimir Volodin eds., 2007).

¹⁶ General Comment 13, *supra* note 11, at ¶ 1; Protocol of San Salvador, *supra* note 2, at art. 13(2); American Convention, *supra* note 2, at art. 23(2).

¹⁷ See Protocol of San Salvador, *supra* note 2, at art. 12.

¹⁸ See *id.* at art. 10.

¹⁹ See *id.* at art. 10(2)(e).

²⁰ Coomans, *supra* note 15, at 185.

²¹ See Protocol of San Salvador, *supra* note 2, at art. 6.

²² See *id.* at art. 9.

²³ General Comment 13, *supra* note 11, at ¶ 1.

²⁴ Protocol of San Salvador, *supra* note 2, at art. 13(2).

²⁵ American Convention, *supra* note 2, at art. 23(2).

²⁶ *Id.* at art. 13(1).

²⁷ Protocol of San Salvador, *supra* note 2, at art. 13(2); ICESCR, *supra* note 2, at art. 13(1).

²⁸ General Comment 13, *supra* note 11, at ¶ 4.

²⁹ American Convention, *supra* note 2, at art. 25(2).

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language.³⁰ States must ensure that indigenous peoples can understand and be understood in legal proceedings, through the provision of interpreters or by other appropriate means.³¹

While the right to education must be fulfilled for all persons, it requires special attention with respect to Afro-descendants and indigenous peoples because they are often the most marginalized and impoverished.³² Indigenous peoples possess “the right to have the dignity and diversity of their cultures, traditions, histories and aspirations, which shall be appropriately reflected in education and public information.”³³ To fulfill the right to education for indigenous peoples, States must provide an education that is adaptable to their needs. This includes providing indigenous peoples access to education in the context of their own cultures and in their own languages.³⁴ State education plans all too often are devised and implemented in the majority language and imbued with non-indigenous standards, philosophies and values. They result in indigenous peoples being assimilated into mainstream culture, while denying their cultural identities.³⁵

B. STATES PARTIES HAVE IMMEDIATE AND PROGRESSIVE OBLIGATIONS UNDER REGIONAL AND INTERNATIONAL LAW TO FULFILL THE RIGHT TO EDUCATION FOR ALL PERSONS WITHOUT DISCRIMINATION.

1. States Parties must immediately provide education to all without discrimination, free and compulsory primary education, and equal protection under the law.

Under the regional and international legal systems, OAS Member States have both immediate and progressive obligations to fulfill the right to education. States’ immediate obligations are to provide compulsory primary education³⁶ that is free to all, without discrimination on any basis, and to ensure that all persons within their jurisdictions receive equal protection under the law.³⁷

³⁰ See, e.g., Inter-American Commission on Human Rights, *Access to Justice As A Guarantee of Economic, Social and Cultural Rights, A Review of the Standards Adopted by the Inter-American System of Human Rights*, OEA/Ser.L/V/II.129, Doc. 4, 7 Sept. 2007, at para. 86 [hereinafter *Access to Justice*].

³¹ U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 13(2), U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter U.N. Declaration on the Rights of Indigenous Peoples].

³² U.N. EDUCATIONAL SCIENTIFIC AND CULTURAL ORGANIZATION (UNESCO), EDUCATION FOR ALL GLOBAL MONITORING REPORT 2007 (2007), at 214-15, available at <http://unesdoc.unesco.org/images/0014/001477/147794E.pdf>:

In the sphere of education, disadvantage and marginalization of members of a group due to, for instance, ethnic origin often do not exist in isolation, but interact with other factors, including the disparity between urban and rural regions in the sense that in rural areas there are often fewer schools available than in urban areas. Also, in peripheral and remote areas, school facilities are often of lower quality than in the capital, and teachers are overall less willing to work in remote areas Research on this issue relating to the situation in Guatemala . . . shows that rural and indigenous children are the most excluded from education either because they have no access at all to school or because they drop out. *Id.*

³³ U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 31, at art. 15(1).

³⁴ *Id.* at art. 14(3).

³⁵ Coolangatta Statement, *supra* note 13, at para. 1.3.1.

³⁶ Although international human rights law does not define the scope of “primary education,” international organizations such as UNESCO have developed guidelines for understanding the concept. See Coomans, *supra* note 15, at 198 (“Primary education relates to the first layer of a formal school system: it usually begins between the ages of five and seven and lasts approximately six years, but in any case no fewer than four years.”).

³⁷ See American Convention, *supra* note 2, at arts. 1, 24 & 26; Protocol of San Salvador, *supra* note 2, at arts. 1, 3, 13 & 16.

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This section will discuss these immediate obligations, as found in regional and international human rights instruments. OAS Member States' progressive obligations will be discussed in the following section.

This Report examines the obligations of Colombia, Guatemala, and the Dominican Republic to respect, protect and fulfill the rights to education, non-discrimination and equality. These country profiles illustrate human rights violations that are widespread throughout the Americas. All OAS Member States are called upon to abide by their human rights obligations, whether under the American Convention on Human Rights³⁸ or, for those States that have not ratified the American Convention, the American Declaration.³⁹ The relevant domestic laws of Colombia, Guatemala, and the Dominican Republic will be discussed in their respective country profile sections of this Report.

a. Regional treaty obligations:

- American Convention

Right to Education: Article 26 of the American Convention obligates Colombia, Guatemala, and the Dominican Republic to “adopt measures . . . with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, *educational*, scientific, and cultural standards set forth in the Charter. . . .”⁴⁰ Although the full panoply of these rights is to be achieved progressively, the obligation to “adopt measures” is immediately binding upon States Parties.⁴¹ States Parties undertake to adopt legislative or other measures to give effect to the rights named in the American Convention.⁴² Furthermore, minor children have the right to special protection as required by their condition as minors.⁴³

Rights to Non-Discrimination and Equal Protection: Additionally, Article 1 of the American Convention obligates Colombia, Guatemala and the Dominican Republic to protect all persons within their jurisdictions from discrimination, guaranteeing them “the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, *national or social origin, economic status, birth, or any other social condition.*”⁴⁴ Also, Article 24 guarantees the right to equal protection and affirms that all persons are “entitled, without discrimination, to equal protection of the law.”⁴⁵

³⁸ Twenty-five of the 35 OAS Member States have ratified the American Convention, including Colombia (28 May 1973), Guatemala (27 Apr. 1978), and the Dominican Republic (21 January 1978). See <http://www.cidh.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm> (last visited July 18, 2008).

³⁹ The OAS Member States that have not ratified the American Convention include: Antigua and Barbuda; Bahamas; Belize; Canada; Guyana; Saint Kitts and Nevis; Saint Lucia; Saint Vincent and the Grenadines; and the United States. *Id.* Nonetheless, these Member States have human rights obligations under the American Declaration, as “the text that defines the human rights referred to in the [OAS] Charter.” Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10, at ¶¶ 35-45 (July 14, 1989). See also Mary and Carrie Dann v. United States, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 5 rev. 1 ¶¶ 95-98 (2002).

⁴⁰ American Convention, *supra* note 2, at art. 26 (emphasis added).

⁴¹ *Id.*

⁴² *Id.* at art. 2.

⁴³ *Id.* at art. 19.

⁴⁴ *Id.* at art. 1 (emphasis added).

⁴⁵ *Id.* at art. 24.

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Although neither the Commission nor the Court has directly addressed the issue of non-discrimination with respect to the right to education, the Commission has recognized the immediate obligation of non-discrimination with regard to other social, economic, and cultural rights. In *Luis Rolando Cuscul Pivaral v. Guatemala*, the Commission addressed the issue of the right to health for persons living with HIV/AIDS.⁴⁶ The Commission concluded that Guatemala has an immediate obligation of non-discrimination in its fulfillment of the right to health and “the State cannot guarantee the right to health in a discriminatory manner.”⁴⁷

The Commission has specifically addressed the immediate obligation to take steps to ensure the progressive realization of the rights protected by Article 26 of the American Convention. For example, in *Milton García Fajardo et al. v. Nicaragua*, the Commission held that the Government of Nicaragua violated Article 26 by failing to take adequate steps to ensure the labor rights of workers.⁴⁸ Additionally, in its 1993 Annual Report, the Commission affirmed that implicit in Article 26 is the “commitment of states to take steps with the aim to achieving progressively the full realization of economic, social and cultural rights”⁴⁹

- Protocol of San Salvador

Right to Education: Article 13 of the Protocol of San Salvador protects the right to education. Specifically, Article 13(3)(a) of the Protocol of San Salvador calls on Colombia and Guatemala⁵⁰ to ensure that primary education be “compulsory and accessible to all without cost.”⁵¹ Article 16 reiterates, “Every child has the right to free and compulsory education, at least in the elementary phase, and to continue his training at higher levels of the educational system.”⁵²

Right to Non-Discrimination: The Protocol of San Salvador mirrors the language of the American Convention and protects the right to non-discrimination under Article 3.⁵³ States Parties “undertake to guarantee the exercise of the rights set forth herein without discrimination of any kind for reasons related to race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition.”⁵⁴ This guarantee of the right to non-discrimination applies in all circumstances to Afro-descendants and indigenous peoples, and especially to their rights in education.

⁴⁶ Luis Rolando Cuscul Pivaral et al. v. Guatemala, Case 642/03, Inter-Am. C.H.R., Report No. 32/05, OEA/Ser.L/V/II.124, doc. 5 (2005).

⁴⁷ *Id.* at ¶ 43.

⁴⁸ Milton García Fajardo et al. v. Nicaragua, Case 11.281, Inter-Am. C.H.R., Report No. 100/01, OEA/Ser./L/V/II.114 doc. 5 rev. 1 ¶ 98 (2001).

⁴⁹ ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1993, OEA/Ser.L/V/II.85 Doc. 9 rev. (1994) [hereinafter IACHR ANNUAL REPORT 1993].

⁵⁰ The Dominican Republic has signed but not ratified the Protocol of San Salvador. For a full list of Colombia’s, the Dominican Republic’s and Guatemala’s signature and ratification dates, see Annex To The Legal Framework, *infra*.

⁵¹ Protocol of San Salvador, *supra* note 2, at art. 13.

⁵² *Id.* at art. 16.

⁵³ *Id.* at art. 3.

⁵⁴ *Id.* at art. 3.

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- Convention of Belém do Pará

Right to Education: The Convention of Belém do Pará recognizes that “every woman is entitled to free and full exercise of her civil, political, economic, social and cultural rights.”⁵⁵ Furthermore, every woman “may rely on the full protection of those rights as embodied in regional and international instruments on human rights.”⁵⁶ Women have the right to be educated “free of stereotyped patterns of behavior and social and cultural practices based on concepts of inferiority or subordination.”⁵⁷

Right to Non-Discrimination: The Convention of Belém do Pará recognizes the right of women to be free from all forms of discrimination.⁵⁸ It further requires States to “take special account of the vulnerability of women to violence by reason of . . . their race or ethnic background or their status as migrants, refugees or displaced persons.”⁵⁹ States must pay similar attention to the vulnerabilities of women who are susceptible to violence because of pregnancy, disability, age, socioeconomic disadvantage, armed conflict, or because they are deprived of their freedom.⁶⁰ Sex-based violence often prevents or substantially limits access to education for women and girls. A lack of education compounds the disadvantages listed above, preventing women and girls from overcoming their vulnerabilities or breaking the cycle of poverty.

Right to Equality: The Convention of Belém do Pará reaffirms the right of women to equal protection before the law and of the law.⁶¹

- Charter of the Organization of American States (hereinafter the “OAS Charter”)

Right to Education: Under Article 34, Member States have agreed to achieve “equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development” through equitable income distribution, “rapid eradication of illiteracy and expansion of educational opportunities for all.”⁶² Article 49 creates further duties for Member States to take steps to “ensure the effective exercise of the right to education” by providing compulsory primary education that “shall be without charge” when provided by the State.⁶³

⁵⁵ Convention of Belém do Pará, *supra* note 10, at art. 5.

⁵⁶ *Id.* at art. 5.

⁵⁷ *Id.* at art. 6(b).

⁵⁸ *Id.* at art. 6(a).

⁵⁹ *Id.* at art. 9.

⁶⁰ Convention of Belém do Pará, *supra* note 10, at art. 9.

⁶¹ *Id.* at art. 4(f).

⁶² Charter of the Organization of American States (OAS Charter) art. 34(h), 119 U.N.T.S. 3, *entered into force* December 13, 1951; amended by Protocol of Buenos Aires, 721 U.N.T.S. 324, O.A.S. Treaty Series, No. 1-A, *entered into force* Feb. 27, 1970; amended by Protocol of Cartagena, O.A.S. Treaty Series, No. 66, 25 I.L.M. 527, *entered into force* Nov. 16, 1988; amended by Protocol of Washington, 1-E Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add. 3 (SEPF), 33 I.L.M. 1005, *entered into force* September 25, 1997; amended by Protocol of Managua, 1-F Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add.4 (SEPF), 33 I.L.M. 1009, *entered into force* January 29, 1996 [hereinafter OAS Charter].

⁶³ OAS Charter, *supra* note 62, at art. 49.

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Rights to Equality and Non-Discrimination. Article 3(l) of the OAS Charter “proclaim[s] the fundamental rights of the individual without distinction as to race, nationality, creed, or sex.”⁶⁴ Article 16 requires states to exercise their jurisdiction equally over all their inhabitants.⁶⁵ In addition, Article 34 obligates states to undertake basic objectives of “equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development”⁶⁶ One of the enumerated goals to achieving equality is to eradicate illiteracy and expand educational opportunities for all.⁶⁷ Furthermore, Article 45(a) guarantees a right to material well-being and spiritual development without discrimination of any kind.⁶⁸

- American Declaration

Rights to Education and Equality of Opportunity: Article XII of the American Declaration declares the right to free primary education, which includes the right to equality of opportunity “based on the principles of liberty, morality and human solidarity.”⁶⁹

Right to Equality before Law: Article II of the American Declaration establishes a right to equality before the law without discrimination.⁷⁰

In light of these various regional obligations, Colombia, Guatemala, and the Dominican Republic have the duty to ensure the right to education for all, especially for Afro-descendants and indigenous peoples who have faced structural and systematic discrimination and have been excluded from all sectors of society.

These obligations have been enforced through inter-American jurisprudence. In 1979, the president of Argentina issued a decree prohibiting the practice of the Jehovah’s Witness religion in Argentina.⁷¹ As a result, 300 primary school children were expelled from school or denied enrollment for religious reasons. In response, the Commission held, in *Jehovah’s Witnesses v. Argentina*, that the State had violated the right to education as established under Article XII of the American Declaration.⁷²

⁶⁴ *Id.* at art. 3(1).

⁶⁵ *Id.* at art. 16.

⁶⁶ *Id.* at art. 34.

⁶⁷ *Id.* at art. 34(h).

⁶⁸ OAS Charter, *supra* note 62, at art. 45(a).

⁶⁹ American Declaration, *supra* note 3, at art. XII.

⁷⁰ *Id.* at art. II.

⁷¹ *Jehovah’s Witnesses v. Argentina*, Case No. 2137, Inter-Am. C.H.R., OEA/Ser.L/V/II.47, doc. 13, rev. 1 (1979).

⁷² *Id.*

b. International treaty obligations:

The drafters of the American Convention intended that the advisory jurisdiction of the Inter-American Court be construed “in the broadest terms possible.”⁷³ In its first advisory opinion, the Court determined conclusively that it could interpret “any international treaty applicable in the American States, *regardless of whether it be bilateral or multilateral, whatever be the principal purpose of such a treaty, and whether or not non-Member States of the inter-American system are or have the right to become parties thereto.*”⁷⁴ As noted above, OC-1/82 gives the Court jurisdiction *ratione materiae*⁷⁵ to issue advisory opinions interpreting “other treaties concerning the protection of human rights in the American states.”⁷⁶ Like Article 38 of the Statute of the International Court of Justice, delineating the sources of international law, this Advisory Opinion opened the door for the Inter-American Court to consider any and all international treaties and instruments applicable to the American States in reaching decisions.

- ICESCR⁷⁷

Right to Education: The most wide-ranging and comprehensive international provisions guaranteeing the right to education are Articles 13 and 14 of the ICESCR.⁷⁸ Specifically, Article 13 recognizes the right to education for all and that “primary education shall be compulsory and available free to all.”⁷⁹ Article 14 gives States that have not secured free compulsory primary education two years to “adopt a detailed plan of action for the progressive realization . . . of compulsory education free of charge for all.”⁸⁰ Moreover, States have an immediate obligation to “take steps” toward the full realization of Article 13.⁸¹ Steps taken must be “deliberate, concrete and targeted towards the full realization of the right to education.”⁸²

Rights to Non-Discrimination and Equality: Article 2(2) of the ICESCR requires States to guarantee all of the rights set forth in the treaty, including the right to education, without discrimination of any kind.⁸³ Furthermore, Article 3 ensures the equal rights of men and women to the enjoyment of all economic, social and cultural rights in the ICESCR.⁸⁴

⁷³ “Other Treaties” Subject to the Consultative Jurisdiction of the Court (Art. 64 of the American Convention on Human Rights), Advisory Opinion OC-1/82, Inter-Am. Ct. H.R. (ser. A) No. 1, at 17 (Sept. 24, 1982) [hereinafter “Other Treaties” Advisory Opinion].

⁷⁴ *Id.* at para 52 (emphasis added).

⁷⁵ See American Convention, *supra* note 2, at art. 64(1).

⁷⁶ “Other Treaties” Advisory Opinion, *supra* note 73, at 12.

⁷⁷ Twenty-six of the 35 OAS Member States have ratified the ICESCR.

⁷⁸ ICESCR, *supra* note 2.

⁷⁹ *Id.* at art. 13.

⁸⁰ *Id.* at art. 14.

⁸¹ General Comment 13, *supra* note 11, at ¶ 43.

⁸² *Id.* (internal quotations omitted).

⁸³ ICESCR, *supra* note 2, at art. 2(2).

⁸⁴ *Id.* at art. 3.

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- International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter the “ICERD”)⁸⁵

Right to Education: Article 5(e)(v) of the ICERD guarantees the equal protection of the right to education and training without discrimination on account of race, color, or national or ethnic origin.⁸⁶

Right to Non-Discrimination: Various articles under the ICERD protect the right to non-discrimination. Specifically, Article 1(1) defines racial discrimination as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise . . . of human rights”⁸⁷ Additionally, Article 1(4) recognizes that States may need to enact affirmative action measures to achieve non-discrimination and eradicate structural discrimination, provided that “such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.”⁸⁸

- Convention on the Rights of the Child (hereinafter the “CRC”)⁸⁹

Right to Education: Article 28 of the CRC recognizes the right of the child to education, including the right to free, available and compulsory primary education; secondary education that is generally available and accessible to every child; higher education accessible to all on the basis of capacity by every appropriate means; and vocational training that is available to all.⁹⁰

Right to Non-Discrimination: Under Article 2(1), States undertake to ensure the rights of the child without discrimination of any kind against children and their parents or legal guardians.⁹¹

- Convention on the Elimination of All Forms of Discrimination against Women (hereinafter the “CEDAW”) and its Optional Protocol⁹²

Right to Education: Article 10 of CEDAW protects the equal right of women and men to education, and mandates that States take all appropriate steps to eradicate discrimination against women and girls in education.⁹³

Right to Non-Discrimination and Equality: Article 1 of CEDAW defines discrimination against women as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women . . . of human

⁸⁵ Thirty-three of the 35 OAS Member States have ratified the ICERD.

⁸⁶ International Convention on the Elimination of All Forms of Discrimination art 5(e)(v), Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter ICERD].

⁸⁷ *Id.* at art. 1(1).

⁸⁸ *Id.* at art. 1(4).

⁸⁹ Thirty-four of the 35 OAS Member States have ratified the CRC.

⁹⁰ CRC, *supra* note 7, at art. 28.

⁹¹ *Id.* at art. 2(1).

⁹² Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]. Thirty-four of the 35 OAS Member States have ratified the CEDAW.

⁹³ *Id.* at art. 10.

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rights. . . .”⁹⁴ In addition to prohibiting discrimination, States undertake to guarantee equality of men and women in their constitutions, legislation, and other necessary means.⁹⁵

- UNESCO Convention Against Discrimination in Education

The U.N. Educational, Scientific, and Cultural Organization (UNESCO), established in 1945, “promotes international co-operation among its 193 Member States and six Associate Members in the fields of education, science, culture and communication.”⁹⁶ Among its foundational documents is the Convention Against Discrimination in Education,⁹⁷ which affirms the “diversity of national educational systems,” while asserting UNESCO’s “duty not only to proscribe any form of discrimination in education but also to promote equality of opportunity and treatment for all in education.”⁹⁸

Right to Education: The Preamble of the Convention Against Discrimination in Education recalls the terms of UNESCO’s Constitution, its purpose being to “institute[e] collaboration among the nations with a view to furthering for all universal respect for human rights and equality of educational opportunity.”⁹⁹ Article 1(1) explains that “the term ‘education’ refers to all types and levels of education, and includes access to education, the standard and quality of education, and the conditions under which it is given.”¹⁰⁰

Right to Non-Discrimination: As defined in Article 1(1) of the UNESCO Convention, “discrimination” includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education”¹⁰¹ Under Article 3, States undertake to “abrogate any statutory provisions and any administrative instructions and to discontinue any administrative practices which involve

⁹⁴ *Id.* at art. 1.

⁹⁵ *Id.* at art. 2.

⁹⁶ *See*, http://portal.unesco.org/en/ev.php-URL_ID=3328&URL_DO=DO_TOPIC&URL_SECTION=201.html. Colombia joined UNESCO 31 Oct. 1947; Guatemala joined 2 Jan. 1950; and the Dominican Republic joined 4 Nov. 1946), *see* <http://erc.unesco.org/portal/UNESCOMemberStates.asp?language=en>. All three countries have permanent delegations at UNESCO headquarters in Paris, and maintain national commissions for the purpose of associating their governmental and non-governmental bodies with the work of the Organization. *Comisión Nacional Guatemalteca de Cooperación con la UNESCO* (est.: 02 June 1950); *see*:

http://portal.unesco.org/geography/en/ev.php-RL_ID=2501&URL_DO=DO_TOPIC&URL_SECTION=201.html.

Comisión Colombiana de Cooperación con la UNESCO (est.: 1947), *see*:

http://portal.unesco.org/geography/en/ev.php-RL_ID=2493&URL_DO=DO_TOPIC&URL_SECTION=201.html.

Comisión Nacional Dominicana para la UNESCO (est.: 1965 by a Presidential Mandate), *see*

http://portal.unesco.org/geography/en/ev.php-RL_ID=2497&URL_DO=DO_TOPIC&URL_SECTION=201.html.

⁹⁷ UNESCO Convention Against Discrimination in Education, May 22, 1962, 429 U.N.T.S. 93, *available at*:

http://portal.unesco.org/en/ev.php-RL_ID=12949&URL_DO=DO_TOPIC&URL_SECTION=201.html#ENTRY. [hereinafter UNESCO Convention]. Guatemala became a party to the Convention 4 Feb. 1983, and the Dominican Republic became a party 30 Aug. 1977. Colombia has not ratified the UNESCO Convention Against Discrimination in Education.

⁹⁸ *Id.* at preamble.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at art. 1(1).

¹⁰¹ *Id.*

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discrimination in education;” and to “ensure, by legislation where necessary, that there is no discrimination in the admission of pupils to educational institutions.”¹⁰²

- United Nations Declaration on the Rights of Indigenous Peoples (hereinafter the “UN Declaration”)

In September 2007, the United Nations General Assembly adopted the U.N. Declaration on the Rights of Indigenous Peoples,¹⁰³ with a majority of 144 states in favor, four votes against, and 11 abstentions, including Colombia. While the Declaration is non-binding, it represents two decades of negotiations between governments and indigenous peoples and establishes a universal framework of minimum standards for the survival, dignity, well-being, and rights of the world’s indigenous peoples.¹⁰⁴

Right to Education: Article 15(1) of the UN Declaration affirms the right of indigenous peoples “to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.”¹⁰⁵ It provides that “indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.”¹⁰⁶ Further, “States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.”¹⁰⁷

Right to Non-Discrimination: Article 2 of the UN Declaration prohibits discrimination against indigenous peoples and individuals, in particular based on their indigenous origin or identity, and asserts their right to be free and equal to all other peoples.¹⁰⁸

2. States Parties are obligated to realize progressively the right to secondary and higher education, using the maximum available resources.

In addition to their immediate obligations, States have progressive obligations under regional and international law. While the right to free and compulsory primary education is of immediate effect, States must progressively realize the right to secondary and higher education, using the maximum available resources.¹⁰⁹ “Progressive realization means that States parties have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realization” of the right to education as defined by regional and international law.¹¹⁰ *The progressive nature of the obligation does not mean that economic, social and cultural rights are unenforceable.*¹¹¹ In fact, the

¹⁰² UNESCO Convention, *supra* note 97, at art. 3.

¹⁰³ U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 31.

¹⁰⁴ Office of the United Nations High Commissioner for Human Rights, <http://www2.ohchr.org/english/issues/indigenous/declaration.htm> (last visited Mar. 10, 2008). Australia, Canada, New Zealand, and the United States voted against the Declaration; the 11 abstentions were entered by Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa, and Ukraine. *Id.*

¹⁰⁵ U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 31, at art. 15(1).

¹⁰⁶ *Id.* at art. 15(2).

¹⁰⁷ *Id.* at art. 15(3).

¹⁰⁸ *Id.* at art. 2.

¹⁰⁹ General Comment 13, *supra* note 11, at ¶¶ 13, 14, 20 & 45.

¹¹⁰ *Id.* at ¶ 44.

¹¹¹ IACHR ANNUAL REPORT 1993, *supra* note 49.

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Inter-American Commission and the Committee on Economic, Social and Cultural Rights have noted repeatedly that the principle of progressive realization may not be used by States as a pretext for the non-enforcement of these rights.¹¹² A brief synopsis of States' progressive obligations follows.

a. Regional treaty obligations:

- American Convention

States “undertake to adopt measures . . . with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States.”¹¹³

In addition to the immediate obligation to take steps toward progressive realization, Article 26 of the American Convention on Human Rights also imposes an obligation on States to use the maximum available resources to attain economic, social and cultural rights. The Commission stated in its 1993 Annual Report: “[t]he rationale behind the principle of progressive realization is that governments are under the obligation to ensure conditions that, according to the state’s material resources, will advance gradually and consistently toward the fullest achievement of these rights.”¹¹⁴ Moreover, as a State’s available resources increase, the State must increase its protection of economic, social, educational, and cultural rights.¹¹⁵

- Protocol of San Salvador

Articles 13(3)(b) and (c) of the Protocol of San Salvador provide that secondary and tertiary education should be increasingly accessible through States’ “progressive introduction of free education.”¹¹⁶

- Convention of Belém do Pará

The Convention of Belém do Pará obligates States to “undertake progressively specific measures,” including “the development of formal and informal educational programs appropriate to every level of the educational process, to counteract prejudices, customs and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on the stereotyped roles for men and women”¹¹⁷

¹¹²See *The Nature of States Parties Obligations, General Comment No. 3*, U.N. ESCOR, Comm. on Econ., Soc., and Cultural Rts., 5th Sess., Supp. No. 3, at ¶ 9, U.N. Doc. E/1991/23 (1990) [hereinafter General Comment 3]; The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Jan. 26, 1997, ¶ 8, reprinted in INT’L COMM’N OF JURISTS, ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A COMPILATION OF ESSENTIAL DOCUMENTS 79 (1997), and in 20 HUM. RTS. Q. 691 (1998), available at <http://www.law.uu.nl/english/sim/instr/maastricht.asp>; IACHR ANNUAL REPORT 1993, *supra* note 49.

¹¹³ American Convention, *supra* note 2, at art. 26.

¹¹⁴ IACHR ANNUAL REPORT 1993, *supra* note 49.

¹¹⁵ *Id.*

¹¹⁶ Protocol of San Salvador, *supra* note 2, at arts. 13(3)(b)-(c).

¹¹⁷ Convention of Belém do Pará, *supra* note 10, at art. 8(b).

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- OAS Charter

The OAS Charter stipulates that secondary education “shall be extended progressively to as much of the population as possible, with a view to social improvement.”¹¹⁸

b. International treaty obligations:

- ICESCR

The language found in the ICESCR mirrors that found in the Protocol of San Salvador. The ICESCR makes clear the distinction that States must prioritize free primary education, but may introduce free education at the secondary and tertiary levels progressively.¹¹⁹

The ICESCR also requires States Parties to progressively realize economic, social and cultural rights to the “maximum of [their] available resources.”¹²⁰ The U.N. Committee on Economic, Social and Cultural Rights notes in General Comment 3 that, “even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights”¹²¹ Consequently, resource constraints do not relieve States of their obligation to progressively achieve the right to education.

Both the Commission and the U.N. Committee on Economic, Social and Cultural Rights have recognized that the requirement of progressive realization includes an obligation to avoid regressive measures, i.e., measures that move a State away from its realization of a particular economic, social or cultural right. The Commission has concluded that States “are not permitted to create laws or interpret them in a manner that entails retrogression in . . . rights won”¹²² Moreover, the Commission has established that States must “ensure conditions . . . will advance gradually and consistently toward the fullest achievement of these rights.”¹²³

- CRC

The distinction between primary and other levels of education is found again in the CRC. “[W]ith a view to achieving [the right to education for every child] progressively,” States must provide for free and compulsory primary education immediately, but may progressively introduce free education at the secondary and tertiary levels.¹²⁴

3. Under regional and international law, vulnerable populations—in particular, Afro-descendants and indigenous peoples—have an equal right to education.

As discussed above, States have obligations to ensure the right to education for all, including marginalized populations such as Afro-descendants, indigenous peoples, and women. The right to

¹¹⁸ OAS Charter, *supra* note 62, at art. 49.

¹¹⁹ ICESCR, *supra* note 2, at arts. 13(2)(b)-(c).

¹²⁰ *Id.* at art. 2.

¹²¹ General Comment 3, *supra* note 112, at ¶ 11.

¹²² Milton García Fajardo et al. v. Nicaragua, *supra* note 71, at ¶ 98.

¹²³ IACHR ANNUAL REPORT, *supra* note 49.

¹²⁴ CRC, *supra* note 7, at art. 28(1).

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education for these categories of people requires special protection, because these categories are often the victims of structural discrimination which requires State action to eradicate. Often, Afro-descendants, indigenous peoples, and girls “are given access to education but confined to separate, routinely inferior schools.”¹²⁵ Former U.N. Special Rapporteur on the Right to Education, Katarina Tomasevski, wrote of the way assimilation imposes uniformity and the double disadvantage girls face in schools whose curricula were designed for boys. She noted that girls “have to adjust to the ‘norm’ which favours male over female, or speakers of the dominant national language over those speaking a vernacular.”¹²⁶

Girls and women are expressly ensured the right to education under the Convention of Belém do Pará. The Convention points to an evolving standard of enhanced protection of women through education by linking their right to be free from violence to their right to be “valued and educated free of stereotyped patterns of behavior and social and cultural practices based on concepts of inferiority or subordination.”¹²⁷ In accordance with Article 8, State Parties agree progressively to undertake specific measures to realize this right, such as designing educational programs to combat gender stereotypes and prejudices.

The trend of regional human rights law is to recognize the increased need for protection of indigenous and minority rights to education and identity. This trend is reflected in the Draft Inter-American Convention Against Racism (hereinafter the “Draft Convention”), which calls on States to adopt all measures necessary to ensure that indigenous peoples and persons of African descent “will be able to enjoy their human rights as equals and without discrimination, and to guarantee that they participate in all political, economic, social and cultural sides of society,”¹²⁸ which implicitly includes their right to education. The Draft Convention further provides for the protection of ethnic, cultural, religious, and linguistic identity and obligates States to promote those identities.¹²⁹ The Draft Convention indicates the trend toward a more expansive and thorough treatment of the right to education, “geared to full development of one’s personality and human dignity and to strengthen respect for human rights, for non-discrimination, ideological pluralism, for the fundamental freedoms, and for justice and peace.”¹³⁰

Furthermore, as UNESCO recognized in 1960 in Article 5 of the Convention Against Discrimination in Education, vulnerable peoples (i.e., members of national minorities) have a right to carry on their own educational activities, including the use or teaching of their own language.¹³¹ UNESCO has set forth three essential guideline principles which represent the Organization’s approach to language and education going forward into the twenty-first century: (1) supports mother tongue instruction as a means of improving educational quality by building upon the knowledge and experience of the learners and teachers; (2) supports bilingual and/or multilingual education at all levels of education as a means of promoting both social and gender equality and as a

¹²⁵ TOMASEVSKI, *supra* note 1, at 102.

¹²⁶ *Id.* at 102–03; *see also* U.N. Commission on Human Rights, *Economic, Social and Cultural Rights: Girls’ Right to Education*, E/CN.4/2006/45 (Feb. 8, 2006) (*prepared by* V. Muñoz Villalobos).

¹²⁷ Convention Belem do Pará, *supra* note 10, at art. 6(b).

¹²⁸ OAS, Draft Inter-American Convention Against Racism and All Forms of Discrimination and Intolerance art. 6, Doc. OEA/Ser. G, CAJP/GT/RDI-57/07 corr. 1, *presented* Dec. 14, 2007 [hereinafter Draft Convention Against Racism], *available at* http://scm.oas.org/doc_public/ENGLISH/HIST_07/CP19323E04.doc (last visited July 18, 2008).

¹²⁹ *Id.*

¹³⁰ *Id.* at art. 4.

¹³¹ UNESCO Convention, *supra* note 97, at art. 5.

key element of linguistically diverse societies; (3) supports language as an essential component of inter-cultural education in order to encourage understanding between different population groups and ensure respect for fundamental rights.¹³²

The International Labour Organization (ILO) has also long recognized the rights of indigenous and tribal peoples require explicit standards for the protection of their social, economic and cultural rights without discrimination. Convention No. 169 on Indigenous and Tribal Peoples (1989),¹³³ which revised Convention No. 107 of 1957 addresses rights in education and communication in particular in Section VI. The ILO takes special note of the right of the peoples concerned to participate in the development of any programs and actions to protect their rights.¹³⁴

Article 3 of Convention No. 169 affirms that indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination and, moreover, that the Convention applies without discrimination on the basis of gender.¹³⁵ Article 26 declares that “[m]easures shall be taken to ensure that members of the peoples concerned have the opportunity to acquire education at all levels on at least an equal footing with the rest of the national community.”¹³⁶ The Convention further provides in Article 27 that education programs and services “shall be developed and implemented in co-operation with them to address their special needs, and shall incorporate their histories, their knowledge and technologies, their value systems and their further social, economic and cultural aspirations.”¹³⁷ Article 28 addresses the objective that children “be taught to read and write in their own indigenous language or in the language most commonly used by the group to which they belong. When this is not practicable, the competent authorities shall undertake consultations with these peoples with a view to the adoption of measures to achieve this objective.”¹³⁸

4. Economic, social and cultural rights are justiciable in the inter-American human rights system

The right to education without discrimination based on ethnicity was upheld in the Inter-American Court’s landmark decision, *Case of the Girls Yean and Bosico v. the Dominican Republic*.¹³⁹ This case was a response to the Dominican Republic denying two girls of Haitian descent admission to school because of their inability to produce a birth certificate. The two girls had tried to obtain the birth certificates on several occasions, but the State has a policy of regularly denying birth certificates

¹³² See UNESCO, http://portal.unesco.org/education/en/ev.php-URL_ID=13141&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited July 20, 2008).

¹³³ Convention concerning Indigenous and Tribal Peoples in Independent Countries (1989) (ILO Convention No. 169), 328 U.N.T.S. 247, Sept. 5, 1991 (*revising* Convention No. 107 of 1957) [hereinafter ILO Convention]. Ratified by Colombia, 7 Aug. 1991 and Guatemala, 5 June 1996. While the Dominican Republic has not ratified Convention No. 169, it did ratify the predecessor Convention No. 107 on Indigenous and Tribal Populations, on 23 June 1958, and has not formally denounced it (the ILO lists its status as a party to that Convention as active). See, <http://www.ilo.org/ilolex/english/newratframeE.htm>. Colombia has been a member of the ILO since 1919; Guatemala from 1919 to 1938 and since 1945; and the Dominican Republic since 1924.

¹³⁴ See ILO Convention, *supra* note 133, at arts. 2, 7, 27 among others.

¹³⁵ *Id.* at art. 3.

¹³⁶ *Id.* at art. 26.

¹³⁷ *Id.* at art. 27.

¹³⁸ *Id.* at art. 28.

¹³⁹ *The Yean and Bosico Children v. Dominican Republic*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 130 (Sept. 8, 2005), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_130_esp.pdf.

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to individuals of Haitian descent. The Court held that the Dominican Republic violated various Articles of the American Convention and upheld the right to nationality as a gateway to equal enjoyment of all rights, including the right to education without discrimination.¹⁴⁰ However, the Court neglected to address the right to education directly.

In 2003, two years before the *Yean and Bosico* decision, the Inter-American Court had its first opportunity to decide an Article 26 claim in a contentious case. In *Five Pensioners v. Peru*,¹⁴¹ the petitioners, former bank employees, claimed that a reduction in their vested pensions violated both their individual right to a pension under Article 21 of the American Convention and a broader collective right to social security under Article 26.¹⁴²

The Court declined to reach the claims made under Article 26, asserting that it did not have the competence to rule on collective rights in an individual case. Importantly, however, the Court did not rule that economic, social and cultural rights are non-justiciable. Rather, the Court deferred the “progressive realization” claims because petitioners had “failed to identify a manageable judicial standard upon which the Court could assess state responsibility under its case-based jurisdiction.”¹⁴³ However, the Court did respond generally to this type of claim in dictum, stating:

Economic, social and cultural rights have both an individual and a collective dimension. This Court considers that their progressive development ... should be measured in function of the growing coverage of economic, social and cultural rights in general, and of the right to social security and to a pension in particular, over the entire population ... and not in function of the circumstances of a very limited group of pensioners, who do not necessarily represent the prevailing situation.¹⁴⁴

According to this view, “the Court can never rule in the context of a concrete case, on the ‘growing coverage’ of any right – much less of ‘economic, social and cultural rights in general’ – ‘over the entire population.’”¹⁴⁵ “Such a collective-oriented, result-based ruling would be ultra vires as exceeding the Court’s limited case-based jurisdiction.”¹⁴⁶ Writing separately, Judge de Roux Rengifo addressed this issue stating, “. . . contrary to the Commission, the Inter-American Court cannot monitor the general situation of human rights, whether they be civil and political, or economic, social and cultural. The Court can only act when the human rights of a specific person

¹⁴⁰ *Id.* at ¶ 260.

¹⁴¹ *Five Pensioners v. Peru*, Inter-Am. Ct. H.R., (ser. C) No. 98 (Feb. 28, 2003) [hereinafter *Five Pensioners Case*].

¹⁴² *Five Pensioners Case*, *supra* note 141, at ¶ 146. The case arose after Peru reformed its national pension system, resulting in a reduction of the five petitioners’ benefits. Petitioners argued that the pension reduction breached the State’s obligation to progressively realize economic, social and cultural rights in general, and the right to a pension in particular. Thus, they placed the substance of their claim on the duty of progressive realization – a duty of a collective- and results-based nature. This argument rested largely on the prohibition of regressivity found in U.N. rights-monitoring bodies. Tara J. Melish, *Rethinking the “Less as More” Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas*, 39 N.Y.U.J. INT’L L. & POL. 171, 269-70 (2007).

¹⁴³ Melish, *supra* note 142, at 271. The Court did not rule broadly on the progressive realization of economic, social and cultural rights country wide, because such a determination is outside the scope of its limited, case-based jurisdiction.

¹⁴⁴ *Five Pensioners Case*, *supra* note 141, at ¶ 147. At least one scholar has argued that the Court’s holding and dictum prove nothing more than that the petitioners failed to show individual harm that could be imputed to the State under their Article 26 claim. Melish, *supra* note 142, at 271.

¹⁴⁵ Melish, *supra* note 142, at 272.

¹⁴⁶ *Id.*

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are violated, and the Convention does not require that there should be a specific number of such persons.”¹⁴⁷

Therefore, the Court has recognized that each of the economic, social and cultural rights within Article 26 have both a collective and an individual dimension.¹⁴⁸ It is the individual dimension of each of these rights that supports their “justiciable nature.”¹⁴⁹ The Court has declined to extend the dicta from the *Five Pensioners Case* in four other cases claiming violations of Article 26 and, in fact, noted the protection afforded by Article 26 in all four cases.¹⁵⁰ The above discussion shows that economic, social and cultural rights are justiciable in the inter-American system when pled in their individual dimension.

What is more, Article 19(6) of the Protocol of San Salvador specifically mentions the subject matter jurisdiction of the Commission and Court over claims alleging violations of two provisions of the Protocol (Articles 8 and 13).¹⁵¹ The fact that the right to education is one of these provisions underscores its importance.

The following section presents the methodology used to analyze the right to education in the case studies of Colombia, Guatemala, and the Dominican Republic. This includes a discussion of the indicators proposed by the Commission to monitor the realization of economic, social and cultural rights in the inter-American human rights system, as well as the “4-A Framework” that is used within the UN human rights system to analyze the right to education, enhanced with a fifth “A”.

¹⁴⁷ *Five Pensioners Case*, *supra* note 141, (Reasoned Opinion of Judge de Roux Rengifo) at 3.

¹⁴⁸ Melish, *supra* note 142, at 273.

¹⁴⁹ *Five Pensioners Case*, *supra* note 141 (Reasoned Opinion of Judge Sergio Garcia Ramirez) (“The Convention is a body of rules on human rights precisely, and not just on general State obligations. The existence of an individual dimension to the rights supports the so-called ‘justiciable nature’ of the latter, which has advanced at the national level and has a broad horizon at the international level.”).

¹⁵⁰ Melish, *supra* note 142, at 267; *see* “Panchito López” Case, Inter-Am. Ct. H.R. (ser. C) No. 112, at ¶ 255 (Sept. 2, 2004) (stating that Article 26 protects the right to health, education, and recreation but deciding the case only on violations of Articles 4 and 5); *Yakye Axa Indigenous Community v. Paraguay*, Inter-Am. Ct. H.R., (ser. C) No. 125, at ¶ 163 (June 17, 2005) (interpreting the right to health as protected under Article 26 to interpret Article 4); *Yean & Bosico Case*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 130, at ¶ 185 (Sept. 8, 2005) (using the right to education as protected in Article 26 to inform its interpretation of Article 19); *Acevedo Jaramillo et al. v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 144, at ¶ 285 (Feb. 7, 2006) (evaluating the effects of Article 26 violations in the reparations stage of proceedings).

¹⁵¹ Protocol of San Salvador, *supra* note 2, at art. 19(6).

**ANNEX TO THE LEGAL FRAMEWORK
REGIONAL AND INTERNATIONAL PROTECTIONS FOR THE RIGHTS TO NON-DISCRIMINATION AND EDUCATION**

REGIONAL PROTECTIONS					
	AMERICAN CONVENTION ON HUMAN RIGHTS	Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights PROTOCOL OF SAN SALVADOR	Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women CONVENTION OF BELÉM DO PARÁ	CHARTER OF THE ORGANIZATION OF AMERICAN STATES	AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN
EDUCATION	<p><i>Art. 2:</i> Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.</p> <p align="center">***</p> <p><i>Art. 19:</i> Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family,</p>	<p><i>Art. 1:</i> The States Parties to this Additional Protocol to the American Convention on Human Rights undertake to adopt the necessary measures, both domestically and through international cooperation, especially economic and technical, to the extent allowed by their available resources, and taking into account their degree of development, for the purpose of achieving progressively and pursuant to their internal legislations, the full observance of the rights recognized in this Protocol.</p> <p align="center">***</p> <p><i>Art. 2:</i> If the exercise of the rights set forth in this Protocol is not already guaranteed by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Protocol, such legislative or other measures as may be necessary for making those rights a reality.</p> <p align="center">***</p>	<p><i>Art. 5:</i> Every woman is entitled to the free and full exercise of her civil, political, economic, social and cultural rights, and may rely on the full protection of those rights as embodied in regional and international instruments on human rights. The States Parties recognize that violence against women prevents and nullifies the exercise of these rights.</p> <p align="center">***</p> <p><i>Art. 6(b):</i> The right of every woman to be free from violence includes, among others: ... (b) The right of women to be valued and</p>	<p><i>Art. 3(n):</i> The education of peoples should be directed toward justice, freedom, and peace.</p> <p align="center">***</p> <p><i>Art. 34(b):</i> The Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development. To achieve them, they likewise agree to devote their utmost efforts to accomplishing the following basic goals: ... (h) Rapid eradication of illiteracy and expansion of educational opportunities for all.</p> <p align="center">***</p> <p><i>Art. 47:</i> The Member States will give primary</p>	<p><i>Art. XII:</i> Every person has the right to an education, which should be based on the principles of liberty, morality and human solidarity. Likewise every person has the right to an education that will prepare him to attain a decent life, to raise his standard of living, and to be a useful member of society. The right to an education includes the right to equality of opportunity in every case, in accordance with natural talents, merit and the desire to utilize the</p>

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ANNEX TO THE LEGAL FRAMEWORK / REGIONAL AND INTERNATIONAL PROTECTIONS

REGIONAL PROTECTIONS					
	AMERICAN CONVENTION ON HUMAN RIGHTS	PROTOCOL OF SAN SALVADOR	CONVENTION OF BELÉM DO PARÁ	CHARTER OF THE ORGANIZATION OF AMERICAN STATES	AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN
	<p>society, and the state.</p> <p align="center">***</p> <p><i>Art. 26:</i> The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.</p>	<p><i>Art. 13(1):</i> Everyone has the right to education.</p> <p align="center">***</p> <p><i>Art. 13(2):</i> The States Parties to this Protocol agree that education should be directed towards the full development of the human personality and human dignity and should strengthen respect for human rights, ideological pluralism, fundamental freedoms, justice and peace. They further agree that education ought to enable everyone to participate effectively in a democratic and pluralistic society and achieve a decent existence and should foster understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups and promote activities for the maintenance of peace.</p> <p align="center">***</p> <p><i>Art. 13(3):</i> The States Parties to this Protocol recognize that in order to achieve the full exercise of the right to education:</p> <p>(a) Primary education should be compulsory and accessible to all without cost;</p> <p>(b) Secondary education in its different forms, including technical and vocational secondary education, should be made generally available and accessible to all by every appropriate means, and in particular, by the progressive introduction of free</p>	<p>educated free of stereotyped patterns of behavior and social and cultural practices based on concepts of inferiority or subordination.</p> <p align="center">***</p> <p><i>Art. 8(b), (e) and (f):</i> The States Parties agree to undertake progressively specific measures, including programs: ...</p> <p>(b) to modify social and cultural patterns of conduct of men and women, including the development of formal and informal educational programs appropriate to every level of the educational process, to counteract prejudices, customs and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on the stereotyped roles for men and women</p>	<p>importance within their development plans to the encouragement of education, science, technology, and culture, oriented toward the overall improvement of the individual, and as a foundation for democracy, social justice, and progress.</p> <p align="center">***</p> <p><i>Art. 48:</i> The Member States will cooperate with one another to meet their educational needs, to promote scientific research, and to encourage technological progress for their integral development. They will consider themselves individually and jointly bound to preserve and enrich the cultural heritage of the American peoples.</p> <p align="center">***</p> <p><i>Art. 49:</i> The Member States will exert the greatest efforts, in accordance with their constitutional processes, to ensure the effective exercise of the right to education, on the following bases:</p> <p>(a) Elementary education, compulsory for children of school age, shall also be offered to all others who can benefit from it. When provided by the State it shall be without charge;</p> <p>(b) Middle-level education shall be</p>	<p>resources that the state or the community is in a position to provide. Every person has the right to receive, free, at least a primary education.</p> <p align="center">***</p> <p><i>Art. XXX:</i> It is the duty of every person to aid, support, educate and protect his minor children, and it is the duty of children to honor their parents always and to aid, support and protect them when they need it.</p> <p align="center">***</p> <p><i>Art. XXXI</i> It is the duty of every person to acquire at least an elementary education.</p>

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		<p>education;</p> <p>(c) Higher education should be made equally accessible to all, on the basis of individual capacity, by every appropriate means, and in particular, by the progressive introduction of free education;</p> <p>(d) Basic education should be encouraged or intensified as far as possible for those persons who have not received or completed the whole cycle of primary instruction;</p> <p>(e) Programs of special education should be established for the handicapped, so as to provide special instruction and training to persons with physical disabilities or mental deficiencies.</p> <p align="center">***</p> <p><i>Art. 13(4):</i> In conformity with the domestic legislation of the States Parties, parents should have the right to select the type of education to be given their children, provided that it conforms to the principles set forth above.</p> <p align="center">***</p> <p><i>Art. 13(5):</i> Nothing in this Protocol shall be interpreted as a restriction of the freedom of individuals and entities to establish and direct educational institutions in accordance with the domestic legislation of the States Parties.</p> <p align="center">***</p>	<p>which legitimize or exacerbate violence against women; ...</p> <p>(e) to promote and support governmental and private sector education designed to raise the awareness of the public with respect to the problems of and remedies for violence against women;</p> <p>(f) to provide women who are subjected to violence access to effective readjustment and training programs to enable them to fully participate in public, private and social life.</p>	<p>extended progressively to as much of the population as possible, with a view to social improvement. It shall be diversified in such a way that it meets the development needs of each country without prejudice to providing a general education; and</p> <p>(c) Higher education shall be available to all, provided that, in order to maintain its high level, the corresponding regulatory or academic standards are met.</p> <p align="center">***</p> <p><i>Art. 50:</i> The Member States will give special attention to the eradication of illiteracy, will strengthen adult and vocational education systems, and will ensure that the benefits of culture will be available to the entire population. They will promote the use of all information media to fulfill these aims.</p> <p align="center">***</p> <p><i>Art. 51:</i> The Member States will develop science and technology through educational, research, and technological development activities and information and dissemination programs. They will stimulate activities in the field of technology for</p>	

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		<p><i>Art. 16:</i></p> <p>Every child, whatever his parentage, has the right to the protection that his status as a minor requires from his family, society and the State. Every child has the right to grow under the protection and responsibility of his parents; save in exceptional, judicially-recognized circumstances, a child of young age ought not to be separated from his mother. Every child has the right to free and compulsory education, at least in the elementary phase, and to continue his training at higher levels of the educational system.</p>		<p>the purpose of adapting it to the needs of their integral development. They will organize their cooperation in these fields efficiently and will substantially increase exchange of knowledge, in accordance with national objectives and laws and with treaties in force.</p>	
Non-Discrimination	<p><i>Art. 1(1):</i></p> <p>The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.</p>	<p><i>Art. 3:</i></p> <p>The States Parties to this Protocol undertake to guarantee the exercise of the rights set forth herein without discrimination of any kind for reasons related to race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition.</p>	<p><i>Art. 6(a):</i></p> <p>The right of every woman to be free from violence includes, among others:</p> <p>(a) The right of women to be free from all forms of discrimination.</p> <p style="text-align: center;">***</p> <p><i>Art. 9:</i></p> <p>With respect to the adoption of the measures in this Chapter, the States Parties shall take special account of the vulnerability of women to violence by reason of, among others,</p>	<p><i>Art. 3(l):</i></p> <p>The American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed, or sex.</p> <p style="text-align: center;">***</p> <p><i>Art. 45(a):</i></p> <p>The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms:</p> <p>(a) All human beings, without distinction as to race, sex, nationality, creed, or social condition, have a right to material</p>	

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			their race or ethnic background or their status as migrants, refugees or displaced persons. Similar consideration shall be given to women subjected to violence while pregnant or who are disabled, of minor age, elderly, socioeconomically disadvantaged, affected by armed conflict or deprived of their freedom.	well-being and to their spiritual development, under circumstances of liberty, dignity, equality of opportunity, and economic security.	
Equality	<i>Art. 24:</i> All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.		<i>Art. 4(f):</i> Every woman has the right to the recognition, enjoyment, exercise and protection of all human rights and freedoms embodied in regional and international human rights instruments. These rights include, among others: ... (f) The right to equal protection before the law and of the law.	<i>Art. 16:</i> The jurisdiction of States within the limits of their national territory is exercised equally over all the inhabitants, whether nationals or aliens.	<i>Art. II:</i> All persons are equal before the law and have rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.

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RATIFICATION OF REGIONAL DOCUMENTS								
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	<i>Date Signed</i>	<i>Date Ratified</i>	<i>Date Signed</i>	<i>Date Ratified</i>	<i>Date Signed</i>	<i>Date Ratified</i>	<i>Date Signed</i>	<i>Date Ratified</i>
COLOMBIA	11/22/69	05/28/73	--	10/22/97	04/30/48	12/07/51	N/A	N/A
GUATEMALA	11/22/69	04/27/78	11/17/88	05/30/00	04/30/48	03/18/51	N/A	N/A
DOMINICAN REPUBLIC	09/07/77	01/21/78	11/17/88	--	04/30/48	04/11/49	N/A	N/A

Sources: <http://www.cidh.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm>; <http://www.cidh.org/Basicos/English/Basic6.Prot.Sn%20Salv%20Ratif.htm>; <http://www.oas.org/juridico/english/Sigs/a-41.html>.

INTERNATIONAL PROTECTIONS				
	INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS	INTERNATIONAL CONVENTION ON THE RIGHTS OF THE CHILD	INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN	INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION
EDUCATION	<i>Art. 2(f):</i> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.	<i>Art. 4:</i> States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.	<i>Art. 5(b):</i> States Parties shall take all appropriate measures: ... (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing of their children, it being understood that the interest of the children is the primordial consideration in all cases.	<i>Art. 5(e)(i):</i> In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: ...

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	<p align="center">***</p> <p><i>Art. 13(1):</i> The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.</p> <p align="center">***</p> <p><i>Art.13(2):</i> The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right: (a) Primary education shall be compulsory and available free to all; (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free</p>	<p align="center">***</p> <p><i>Art. 19(1):</i> States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.</p> <p align="center">***</p> <p><i>Art. 19(2):</i> Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.</p> <p align="center">***</p> <p><i>Art. 28(1):</i></p>	<p align="center">***</p> <p><i>Art. 10:</i> States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women; (a) The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training; (b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality; (c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of</p>	<p>(e) Economic, social and cultural rights, in particular: ... (v) The right to education and training.</p> <p align="center">***</p> <p><i>Art. 7:</i> States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.</p>

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	<p>education;</p> <p>(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;</p> <p>(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;</p> <p>(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.</p> <p align="center">***</p> <p><i>Art. 13(3):</i></p> <p>The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.</p> <p align="center">***</p>	<p>States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:</p> <p>(a) Make primary education compulsory and available free to all;</p> <p>(b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;</p> <p>(c) Make higher education accessible to all on the basis of capacity by every appropriate means;</p> <p>(d) Make educational and vocational information and guidance available and accessible to all children;</p> <p>(e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.</p> <p align="center">***</p> <p><i>Art. 28(2):</i></p> <p>States Parties shall take all appropriate measures to ensure that school discipline is administered in a</p>	<p>textbooks and school programmes and the adaptation of teaching methods;</p> <p>(d) The same opportunities to benefit from scholarships and other study grants;</p> <p>(e) The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women;</p> <p>(f) The reduction of female student drop-out rates and the organization of programmes for girls and women who have left school prematurely;</p> <p>(g) The same opportunities to participate actively in sports and physical education;</p> <p>(h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.</p> <p align="center">***</p> <p><i>Art. 14(2)(d):</i></p> <p>States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a</p>	

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	<p><i>Art. 13(4):</i> No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.</p> <p align="center">***</p> <p><i>Art. 14:</i> Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.</p>	<p>manner consistent with the child's human dignity and in conformity with the present Convention.</p> <p align="center">***</p> <p><i>Art. 28(3):</i> States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.</p> <p align="center">***</p> <p><i>Art. 29(1):</i> States Parties agree that the education of the child shall be directed to:</p> <p>(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;</p> <p>(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;</p> <p>(c) The development of respect for the child's parents, his or her</p>	<p>basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: ...</p> <p>(d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, inter alia, the benefit of all community and extension services, in order to increase their technical proficiency.</p>	

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		<p>own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;</p> <p>(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;</p> <p>(e) The development of respect for the natural environment.</p> <p align="center">***</p> <p><i>Art. 29(2):</i></p> <p>No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.</p>		

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NON-DISCRIMINATION	<p><i>Art. 2(2):</i> The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.</p> <p align="center">***</p> <p><i>Art. 3:</i> The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.</p>	<p><i>Art. 2(1):</i> States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.</p> <p align="center">***</p> <p><i>Art. 2(2):</i> States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.</p>	<p><i>Art. 1:</i> For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.</p> <p align="center">***</p> <p><i>Art. 7:</i> States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:</p> <p>(a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;</p> <p>(b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of</p>	<p><i>Art. 1(1):</i> In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.</p> <p align="center">***</p> <p><i>Art. 1(4):</i> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and</p>

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			<p>government;</p> <p>(c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.</p>	<p>that they shall not be continued after the objectives for which they were taken have been achieved.</p> <p align="center">***</p> <p><i>Art. 2(1):</i></p> <p>States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:</p> <p>(a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;</p> <p>(b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;</p> <p>(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend,</p>

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INTERNATIONAL PROTECTIONS

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				<p>rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;</p> <p>(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;</p> <p>(e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.</p> <p align="center">***</p> <p><i>Art. 2(2):</i> States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging</p>

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INTERNATIONAL PROTECTIONS				
	INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS	INTERNATIONAL CONVENTION ON THE RIGHTS OF THE CHILD	INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN	INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION
				to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.
EQUALITY			<p><i>Art. 2:</i></p> <p>States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:</p> <p>(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;</p> <p>(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;</p> <p>(c) To establish legal protection of the rights of women on an equal</p>	<p><i>Art. 5(a):</i></p> <p>In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:</p> <p>(a) The right to equal treatment before the tribunals and all other organs administering justice.</p>

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	INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS	INTERNATIONAL CONVENTION ON THE RIGHTS OF THE CHILD	INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN	INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION
			<p>basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;</p> <p>(d) To refrain from engaging in any act or practice of discrimination against women and to ensure the public authorities and institutions shall act in conformity with this obligation;</p> <p>(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;</p> <p>(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;</p> <p>(g) to repeal all national penal provisions which constitute discrimination against women.</p> <p align="center">***</p> <p><i>Art. 3:</i> States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of</p>	

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INTERNATIONAL PROTECTIONS

	INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS	INTERNATIONAL CONVENTION ON THE RIGHTS OF THE CHILD	INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN	INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION
			<p>guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.</p> <p align="center">***</p> <p><i>Art. 15(1):</i> States Parties shall accord to women equality with men before the law.</p> <p align="center">***</p> <p><i>Art. 15(2):</i> States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.</p> <p align="center">***</p> <p><i>Art. 15(3):</i> States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.</p> <p align="center">***</p> <p><i>Art. 15(4):</i> States Parties shall accord to men</p>	

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			and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.	

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RATIFICATION OF INTERNATIONAL DOCUMENTS								
	INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS		INTERNATIONAL CONVENTION ON THE RIGHTS OF THE CHILD		INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN		INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION	
	<i>Date Signed</i>	<i>Date Ratified</i>	<i>Date Signed</i>	<i>Date Ratified</i>	<i>Date Signed</i>	<i>Date Ratified</i>	<i>Date Signed</i>	<i>Date Ratified</i>
COLOMBIA	12/21/66	10/29/69	01/26/90	01/28/91	07/17/80	01/19/82	03/23/67	09/02/81
GUATEMALA	--	05/19/88	01/26/90	06/06/90	06/08/81	08/12/82	09/08/67	01/18/83
DOMINICAN REPUBLIC	--	01/04/78	08/08/90	06/11/91	07/17/80	09/02/82	--	05/25/83

Sources: <http://www2.ohchr.org/english/bodies/ratification/3.htm>; <http://www2.ohchr.org/english/bodies/ratification/11.htm>;
<http://www2.ohchr.org/english/bodies/ratification/8.htm>; <http://www2.ohchr.org/english/bodies/ratification/2.htm>.

III. METHODOLOGY

In this Report analyzing the right to education of Afro-descendants and indigenous peoples in the Americas, we focus on two country studies—Colombia and Guatemala—and include a brief overview of the Dominican Republic. We analyze the situation in each country through the lens of the structural, process, and outcome indicators suggested by the Inter-American Commission.¹ In addition to the categories suggested by the Commission, we utilize the right to education framework proposed by the former U.N. Special Rapporteur for Education, Katarina Tomasevski, which suggests that education must be available, accessible, acceptable and adaptable.² We have added another element—accountability—to this framework.³ We herein refer to this framework as the “5-A Right to Education Framework.”

The annex attached hereto provides a chart that shows questions the indicators proposed by the Commission might raise in regard to minorities’ right to education when such indicators intersect with the “5-A Right to Education Framework.”

Because this report focuses on the state of the right to education in the Americas, we use the indicators that the Commission has suggested to monitor the progressive realization of economic, social, and cultural rights. While States must progressively realize certain aspects of the right to education, it should be emphasized that States have an obligation to immediately (rather than progressively) realize other aspects of the right to education, such as free primary education for all, as well as the right to non-discrimination and equality in education.

A. THE COMMISSION’S GUIDELINES ON MONITORING ECONOMIC, SOCIAL AND CULTURAL RIGHTS

In its Guidelines, the Commission has suggested three broad categories of monitoring and evaluation—structural, process, and outcome indicators—of economic, social and cultural rights.⁴

1. Structural Indicators

According to the Commission, structural indicators generally measure “how the State’s institutional apparatus and legal system are organized to **perform the obligations** under the Protocol of San Salvador: if it has in place—or has adopted—measures, legal standards, strategies,

¹ See INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, GUIDELINES FOR PREPARATION OF PROGRESS INDICATORS IN THE AREA OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS, OEA/Ser/L/V/II.129 (Doc. 5), at ¶¶ 30–32 (Oct. 5, 2007), available at <http://www.cidh.org/pdf%20files/Guideline%20october%202007%20eng.pdf> [hereinafter GUIDELINES].

² See Committee on Economic Social and Cultural Rights (CESCR), *General Comment 13 on the Right to Education*, ¶ 6, U.N. Doc. E/C.12/1999/10 (1999), available at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.1999.10.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.1999.10.En?OpenDocument) [hereinafter General Comment 13].

³ See PRINCETON UNIVERSITY WOODROW WILSON SCHOOL OF INTERNATIONAL AFFAIRS, FREE TO LEARN: A RIGHTS BASED APPROACH TO UNIVERSAL PRIMARY EDUCATION IN KENYA 30 (2006), available at http://www.princeton.edu/research/final_reports/f05wws591i.pdf [hereinafter WOODROW WILSON FRAMEWORK].

⁴ See GUIDELINES, *supra* note 1, at ¶¶ 30–32.

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plans, programs, or policies, or created public agencies to **implement** those rights.”⁵ Put simply, structural indicators describe whether the “law on the books” in the State incorporates the rights in question and whether there are policies and public agencies in place to implement those laws and rights.

2. Process Indicators

Process indicators “seek to **measure the quality and extent** of State efforts to implement rights by measuring the **scope, coverage, and content** of strategies, plans, programs, or policies, or other specific activities and interventions designed to accomplish the goals necessary for the realization of a given right.”⁶ Process indicators measure the extent to which the laws and policies of the State are effectively designed to implement the realization of the right. They are measured in dynamic terms with reference to a base or goal, for example considering whether there have been shifts in the coverage or quality of the State’s plan over time.

3. Outcome Indicators

Outcome indicators “seek to measure the **actual impact** of government strategies, programs, and interventions.”⁷ In other words, outcome indicators seek to measure **reality on the ground**, that is, to what extent the State is implementing the right in question.

B. “5-A RIGHT TO EDUCATION FRAMEWORK”

The former U.N. Special Rapporteur on the Right to Education, Katarina Tomasevski, suggested that education must be available, accessible, acceptable and adaptable. These measures have also been adopted by the U.N. Committee on Economic, Social and Cultural Rights. We have added another element—accountability—to this framework.⁸

1. Availability

Availability describes the government’s obligation to ensure that there are educational institutions and programs in sufficient quantity, with the necessary facilities to function appropriately in the context in which they operate (e.g., adequate structures, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, and so on; and even facilities such as libraries, computer facilities and information technology).⁹ In making education available, the government must permit the establishment of schools and provide the resources necessary to develop the physical institutions. This obligation includes the duty of the government to provide a sufficient number of schools so as to avoid excessive class size.

⁵ See *id.* at ¶ 30.

⁶ See *id.* at ¶ 31.

⁷ See *id.* at ¶ 32.

⁸ See WOODROW WILSON FRAMEWORK, *supra* note 3, at 30.

⁹ See General Comment 13, *supra* note 2, at para. 6(a).

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2. Accessibility

Accessibility refers to the need for education to be accessible to everyone, physically and economically, without discrimination.¹⁰ Accessibility mandates that schools be located in a manner that enables Afro-descendants and indigenous peoples to participate. This may mean building schools in indigenous regions, providing a means of transportation for Afro-descendant and indigenous communities or using technology as an alternative means of instruction (e.g. online instruction). To some degree, accessibility is related to availability—educational institutions that are physically or economically inaccessible effectively also fail to satisfy the availability criteria.

3. Acceptability

Acceptability addresses the form and substance of the education with regard to both quality and appropriateness.¹¹ This is a duty based on principles of basic human dignity. It requires that education be of a quality that has meaning to the individual students, the community, and society at large. Instruction should involve non-discriminatory subject matter and should incorporate content appropriate to the students' cultural, language and social backgrounds. More broadly, acceptability describes the government's duty to ensure that schools have certain minimum standards for teachers, students, building facilities, and curricula.

4. Adaptability

Adaptability addresses the need for education to be flexible and able to respond to the needs of students within their diverse social and cultural settings.¹² In demonstrating adaptability, the government should provide resources that enable schools to develop individualized education plans that meet the needs of the communities served by the schools. In addition to customizing the curricula, schools must monitor the performance of both the teacher and the students and make modifications depending on the results. An education system that is not adaptable is likely to have a high drop out rate for students.

5. Accountability

Although accountability was not included in the framework proposed by the U.N. Special Rapporteur for Education, we believe it is an important amendment to the framework. Accountability requires established mechanisms to allow claim holders to monitor the State and demand that it comply with its obligations.¹³ Accountability mechanisms can also provide policy guidance to the relevant actors, make the government more responsive, and empower people by allowing them to participate in the growth process.¹⁴ Without accountability, gains in other components of the 5-A Right to Education Framework will not be realized.¹⁵

¹⁰ *See id.* at para. 6(b).

¹¹ *See id.* at para. 6(c).

¹² *See id.* at para. 6(d).

¹³ *See* WOODROW WILSON FRAMEWORK, *supra* note 3, at 30.

¹⁴ *See id.*

¹⁵ *See id.*

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C. NOTE ON RESEARCH METHODS AND FIELD WORK

Over the past year, the RFK Memorial Center for Human Rights (hereinafter the “RFK Center”), working closely with RFK human rights laureates, have conducted visits to Colombia, Guatemala and the Dominican Republic, speaking with affected populations, their community representatives, government officials, staff members of inter-governmental organizations, and others. In May 2007, an RFK Center delegation visited six *bateyes* and three schools around *bateyes* in the Provinces of San Cristoban, Monte Plata, and Santo Domingo West in the Dominican Republic. During a visit to Guatemala in September 2007, the RFK Center staff met with a group of more than 20 indigenous community leaders from the El Quiche region. Finally, in December 2007, RFK Center staff traveled to Colombia jointly with members of the Cornell Law School International Human Rights Clinic. The delegation visited the cities of Bogotá, Cali (in the Valle del Cauca region) and Popayán (in the Cauca region). Meetings were conducted with nearly 100 people, including Afro-Colombian leaders, indigenous school teachers, education reform activists, and government representatives, including a vice-minister for education, a senator, and a magistrate justice of the Constitutional Court.

This project was undertaken by the RFK Center in partnership with its Human Rights Laureates Berenice Celeyta (NOMADESC), 1998 RFK Human Rights Laureate from Colombia, Amilcar Mendez Urizar (CERJ), 1990 RFK Human Rights Laureate from Guatemala, and Sonia Pierre (MUDHA), 2006 RFK Human Rights Laureate from Dominican Republic. RFK human rights laureates arranged and participated in most meetings and were actively involved in the on-the-ground investigations. RFK human rights laureates also identified the witnesses testifying at the hearing before the Commission.

The University of Virginia School of Law International Human Rights Clinic and Cornell Law School International Human Rights Clinic also provided assistance in the design and implementation of this project. In addition to drafting, legal analysis and technical advice, students of the clinics researched numerous primary sources (such as the laws, policies and accords of the States), secondary sources (such as human rights reports and testimonials) and tertiary sources (such as books and periodical articles).

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ANNEX TO THE METHODOLOGY

Based on the Inter-American Commission for Human Rights' *Guidelines for Preparation of Progress Indicators in the Area of Economic, Social and Cultural Rights* and the "4-A" Framework developed by former United Nations Special Rapporteur for Education, Katarina Tomasevski, as modified by the Woodrow Wilson School of Public and International Affairs. *Not intended to be comprehensive, but should be illustrative; also note that some fluidity exists between categories.*

EQUALITY & NON-DISCRIMINATION IN EDUCATION FOR AFRO-DESCENDANTS AND INDIGENOUS PEOPLES	SPECIFIC ISSUES; GENERAL INQUIRIES	STRUCTURAL INDICATORS	PROCESS INDICATORS	OUTCOME INDICATORS
INCORPORATION OF RIGHTS TO EQUALITY AND NON-DISCRIMINATION IN EDUCATIONAL CONTEXT	<p>Are these rights formally recognized in a way that is binding upon the State?</p>	<p>Does national Constitution recognize right to equality and non-discrimination in education? What is the scope of the right?</p> <p style="text-align: center;">***</p> <p>Has the State ratified regional or international treaties or other agreements that recognize the rights to education, equality and non-discrimination? What is the scope of the rights? <i>See Annex to the Legal Framework for chart of relevant agreements.</i></p> <p style="text-align: center;">***</p> <p>Are there appropriate government agencies in place to oversee the implementation of right to education (e.g., within the Ministry of Education, especially with respect to Afro-descendants and indigenous peoples)?</p>	<p>What public offices exist that are responsible for education and issues linked to Afro-descendants and indigenous peoples?</p> <p style="text-align: center;">***</p> <p>What remedial steps is State taking to address past educational discrimination (e.g., affirmative action measures)?</p> <p style="text-align: center;">***</p> <p>What offices exist for the implementation and monitoring of international and regional agreements?</p> <p style="text-align: center;">***</p> <p>How does jurisprudence support Constitutional right to equality and non-discrimination in education?</p> <p style="text-align: center;">***</p> <p>How are statistics disaggregated for Afro-descendants and indigenous peoples?</p>	<p>What percentage of primary school-aged children attends school? What percentage of Afro-descendant and indigenous primary school-aged children attends school?</p> <p style="text-align: center;">***</p> <p>What percentage of secondary school-aged children attends school? What percentage of Afro-descendant and indigenous secondary school-aged children attends school?</p>

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EQUALITY & NON-DISCRIMINATION IN EDUCATION FOR AFRO-DESCENDANTS AND INDIGENOUS PEOPLES	SPECIFIC ISSUES; GENERAL INQUIRIES	STRUCTURAL INDICATORS	PROCESS INDICATORS	OUTCOME INDICATORS
<p align="center"><i>AVAILABILITY</i></p> <p align="center">OF EDUCATION FOR AFRO-DESCENDANTS AND INDIGENOUS PEOPLES</p>	<p>Are there an adequate number of educational facilities in all regions of the State? How is the State determining measures of adequacy?</p> <p align="center">***</p> <p>Are there an adequate number of teachers for all schools in all regions of the State (particular concern with avoiding excessive class size)? How is the State determining measures of adequacy?</p>	<p>Does national Constitution provide for equal availability of education for all? What is the scope of the provision(s)?</p> <p align="center">***</p> <p>Does national legislation provide for equal availability of education for all? What is the scope of the provision(s)?</p> <p align="center">***</p> <p>Are there appropriate government agencies in place to oversee the implementation of right to education (e.g., within the Ministry of Education)? What are they and what are their mandates?</p>	<p>What proportion of State's GDP is allocated to education?</p> <p align="center">***</p> <p>Are adequate funds allocated to education to provide for adequate construction and maintenance of schools? How is adequacy measured?</p> <p align="center">***</p> <p>What policies or legislation are in place regarding recruitment, training, and pay for teachers?</p> <p align="center">***</p> <p>Do teacher salaries keep pace with inflation?</p> <p align="center">***</p> <p>How does jurisprudence support Constitutional or legislative provisions concerning equal right to education for all?</p> <p align="center">***</p> <p>Are sufficient funds being allocated to government agencies to enable them to carry out their mandates?</p>	<p>How many schools per capita are there throughout the country? How many schools per capita are located in predominantly Afro-descendant and indigenous areas?</p> <p align="center">***</p> <p>Are teachers in certain regions paid more than teachers in other regions? Are teachers in some regions more likely to be paid on time? What is the wage gap between teachers in private schools and those in public schools?</p> <p align="center">***</p> <p>How many schools are without potable water, electricity, or functioning latrines? Does this vary according to region?</p> <p align="center">***</p> <p>How many communities/schools/classrooms are without teachers? Does this vary according to region?</p>

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EQUALITY & NON-DISCRIMINATION IN EDUCATION FOR AFRO-DESCENDANTS AND INDIGENOUS PEOPLES	SPECIFIC ISSUES; GENERAL INQUIRIES	STRUCTURAL INDICATORS	PROCESS INDICATORS	OUTCOME INDICATORS
<p align="center"><i>ACCESSIBILITY</i></p> <p align="center">OF EDUCATION FOR AFRO-DESCENDANTS AND INDIGENOUS PEOPLES</p>	<p>How, if at all, does financial cost negatively impact access to education? ***</p> <p>How, if at all, do geographic factors negatively impact access to education? ***</p> <p>What economic factors have a negative impact on access to education in Afro-descendant and indigenous communities (e.g., opportunity costs associated with outside employment)?</p>	<p>Does the national Constitution provide for equal and non-discriminatory access to education? What is the scope of the right? ***</p> <p>Does national legislation provide for equal and non-discriminatory access to education? What is the scope of the right? ***</p> <p>Are there appropriate government agencies in place to oversee the implementation of the right to education (e.g., within the Ministry of Education)?</p>	<p>To what extent does the State maintain statistics on accessibility of education for Afro-descendants and indigenous persons? ***</p> <p>How does jurisprudence support any constitutional or legislative provisions on equal and non-discriminatory access to education? ***</p> <p>To what extent does the State allocate resources for alternative means of education for extremely isolated geographic localities (e.g., use of plans for satellite learning)? What plans does the State have for progressively implementing such measures?</p>	<p>Do individuals have to pay for primary education and secondary education? If so, is there a disproportionate impact on Afro-descendants or indigenous peoples at either level? ***</p> <p>How far does the average child have to travel to attend school? How far does the average Afro-descendant and indigenous child need to travel to attend school? ***</p> <p>What are the average expenditures for education of all families? What are the average expenditures for education of Afro-descendant and indigenous families? ***</p> <p>What percentage of primary school-aged Afro-descendant and indigenous children are working compared to the percentage of all primary school-aged children who are working?</p>

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EQUALITY & NON-DISCRIMINATION IN EDUCATION FOR AFRO-DESCENDANTS AND INDIGENOUS PEOPLES	SPECIFIC ISSUES; GENERAL INQUIRIES	STRUCTURAL INDICATORS	PROCESS INDICATORS	OUTCOME INDICATORS
<p align="center"><i>ACCEPTABILITY</i></p> <p align="center">OF EDUCATION FOR AFRO-DESCENDANTS AND INDIGENOUS PEOPLES</p>	<p>Is the quality of primary education acceptable to all State's inhabitants? ***</p> <p>Is the quality of secondary education acceptable to all State's inhabitants?</p>	<p>Does the national Constitution provide for (minimum standards of) acceptability for all levels of education? What is the scope of the provision(s)? ***</p> <p>Does national legislation provide for (minimum standards of) acceptability for all levels of education? What is the scope of the provision(s)? ***</p> <p>Are appropriate government agencies in place to oversee the implementation of the right to education (e.g., within the Ministry of Education)?</p>	<p>Does the State have in place methods for measuring acceptability (e.g., standardized test scores, inspection of facilities)? If so, what are they and how often are they applied and monitored? ***</p> <p>Does the State conduct regular assessments of educational needs? If so, what does this entail? ***</p> <p>How does jurisprudence support any Constitutional or legislative provisions on acceptability of education? ***</p> <p>What policies exist providing for recruitment of and training for bilingual teachers?</p>	<p>What percentage of overall children attend private schools as compared to public schools? ***</p> <p>What percentage of Afro-descendant and indigenous children attend private schools as compared to public schools? ***</p> <p>What are teachers at private schools paid in relation to those at public schools? ***</p> <p>Do schools in certain regions fall lower on acceptability measures than schools in other regions? ***</p> <p>How many bilingual teachers are in place per primary school child, and does this differ according to geographic region?</p>
<p align="center">EQUALITY & NON-DISCRIMINATION IN EDUCATION FOR AFRO-DESCENDANTS AND</p>	<p align="center">SPECIFIC ISSUES; GENERAL INQUIRIES</p>	<p align="center">STRUCTURAL INDICATORS</p>	<p align="center">PROCESS INDICATORS</p>	<p align="center">OUTCOME INDICATORS</p>

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INDIGENOUS PEOPLES				
<p align="center">ADAPTABILITY OF EDUCATION IN AFRO-DESCENDANTS AND INDIGENOUS CONTEXT</p>	<p>Does the quality of education take into account the needs of various and culturally diverse communities (should be flexible and responsive)?</p> <p align="center">***</p> <p>What percentage of primary school-aged Afro-descendant and indigenous children are working, compared to the percentage of all primary school-aged children who are working?</p>	<p>Does the national Constitution provide for adaptability of all education? What is the scope of the provision(s)?</p> <p align="center">***</p> <p>Does national legislation provide for adaptability of all education? What is the scope of the provision(s)?</p> <p align="center">***</p> <p>Are there appropriate government agencies in place to oversee the implementation of right to education (e.g., within the Ministry of Education)?</p>	<p>How does jurisprudence support any Constitutional or legislative provisions on adaptability of education?</p>	<p>What are the graduation rates for all primary and secondary school children? What are primary and secondary school graduation rates for Afro-descendant and indigenous children?</p> <p align="center">***</p> <p>Are school schedules flexible to allow for employment opportunities held by Afro-descendant and indigenous children? If so, what does this flexibility entail?</p>
<p align="center">ACCOUNTABILITY OF THE STATE FOR PROVISION OF EDUCATIONAL SERVICES TO AFRO- DESCENDANTS AND INDIGENOUS PEOPLES</p> <p align="right">↓ <i>continued</i></p>	<p>Are national and international mechanisms in place that allow claim holders (children and third parties) to hold the State accountable for educational failings?</p> <p align="center">***</p> <p>Do existing accountability mechanisms fully contemplate and appreciate the concept of progressive realization, including conception of “reasonable time”?</p>	<p>Does Constitution provide for State accountability in provision of educational services? What is the scope of the provision(s)? Are processes transparent and participatory?</p> <p align="center">***</p> <p>Does national legislation provide for State accountability in provision of educational services? What is the scope of the provision(s)? Are processes transparent and participatory?</p>	<p>Does jurisprudence effectuate State accountability?</p> <p align="center">***</p> <p>Do claim holders know and understand their rights and duty bearers’ (government institutions and education providers) obligations?</p> <p align="center">***</p> <p>If so, do they know how to exercise those rights? Does the State provide guidance for action (facilitate empowerment)?</p>	<p>Are the relationships between actors (claim holders, duty bearers, and others) becoming stronger as a result of these efforts? Why or why not?</p> <p align="center">***</p> <p>How many (successful) claims have been brought to further the right to education of indigenous and Afro-descendant groups? How long does it usually take to see a claim through to its final disposition? What is the average cost of bringing a claim to its final disposition?</p>

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EQUALITY & NON-DISCRIMINATION IN EDUCATION FOR AFRO-DESCENDANTS AND INDIGENOUS PEOPLES	SPECIFIC ISSUES; GENERAL INQUIRIES	STRUCTURAL INDICATORS	PROCESS INDICATORS	OUTCOME INDICATORS
<p align="center"><i>continued</i></p> <p align="center">ACCOUNTABILITY</p> <p align="center">OF THE STATE FOR PROVISION OF EDUCATIONAL SERVICES TO AFRO-DESCENDANTS AND INDIGENOUS PEOPLES</p>	<p>Do existing accountability mechanisms fully contemplate and appreciate the State's immediate obligation to respect, protect, and fulfill the rights to non-discrimination and equality in education?</p>	<p>Are there appropriate government agencies in place to oversee the implementation of right to education and access to information?</p> <p align="center">***</p> <p>Does the State meaningfully recognize indigenous systems of justice?</p>	<p>Does the State fund legal aid organizations that are able to assist people in bringing suits, or is there access to free legal services to further the rights to equality and non-discrimination in education? If so, what does this funding entail?</p> <p align="center">***</p> <p>How often does the State submit reports to regional and international bodies that cover education, non-discrimination and equality generally, and non-discrimination and equality <i>in</i> education specifically? What is the quality of these reports?</p> <p align="center">***</p> <p>Does the State publicize methods for securing these rights in a way that makes individuals aware of their availability? If so, what does this entail?</p> <p align="center">***</p> <p>Are mechanisms for securing and vindicating rights transparent? If so, how?</p>	<p>Have parents become increasingly and meaningfully engaged in their children's learning?</p> <p align="center">***</p> <p>Have adult literacy rates been on the rise?</p>

IV. COUNTRY PROFILE: COLOMBIA



“All children have the right to education as a universally recognized right. However, there are millions of primary school-age children who cannot attend school, and they are therefore in a situation of denial of the right to education, in turn linked to violations of civil and political rights such as illegal work, detainment in prisons, and ethnic, religious, or other forms of discrimination, worsened in cases of children in especially difficult situations such as children who are members of ethnic minorities” - Inter-American Court of Human Rights, Advisory Opinion OC-17/2002, Aug. 28, 2002, at 38.

A. INTRODUCTION

The “5-A Right to Education Framework” (defined below) and the structural, process, and outcome indicators proposed by the Inter-American Commission on Human Rights (hereinafter

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“the Commission”),¹ suggests that Colombia is in violation of inter-American and international treaties that require it to provide education to Afro-Colombians and indigenous peoples equally and without discrimination. In particular, Colombia is in violation of the following inter-American treaties: 1) Articles 13 and 16 of the Protocol to the American Convention in the Area of Economic, Social and Cultural Rights (hereinafter “the Protocol of San Salvador”) by its failure to immediately provide free primary education to all;² and 2) Articles 1, 19, and 24 of the American Convention on Human Rights (hereinafter “the American Convention”),³ Article 3 of the Protocol of San Salvador,⁴ and Articles 4 and 6 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (hereinafter “the Convention of Belém do Pará”)⁵ by failing to provide education without discrimination and equal protection. Furthermore, Colombia is obligated to progressively realize secondary and higher education rights under Articles 19 and 26 of the American Convention, Article 13 of the Protocol of San Salvador, and Article 8 of the Convention of Belém do Pará.⁶

The lack of equality in education for Afro-Colombians and indigenous peoples is illustrated by the outcome indicators. For example, 33.4 percent of indigenous peoples and 31.3 percent of Afro-Colombians in Colombia are illiterate, a rate nearly three times that of the rest of the population.⁷ Furthermore, only 18 percent of indigenous peoples and 13 percent of Afro-Colombians who are over eighteen years of age have completed primary education.⁸ Afro-Colombians and indigenous peoples together constitute a sizeable minority in Colombia—25 percent of Colombia’s population is Afro-Colombian⁹ and 2 percent is indigenous.¹⁰ Despite their sizeable populations in Colombia, at the postgraduate levels, only 0.71 percent of enrolled students are indigenous and 7.07 percent are Afro-Colombian¹¹

¹ See INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, GUIDELINES FOR PREPARATION OF PROGRESS INDICATORS IN THE AREA OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS, OEA/Ser/L/V/II.129 (Doc. 5), at ¶ 30–32 (Oct. 5, 2007), available at <http://www.cidh.org/pdf%20files/Guideline%20october%202007%20eng.pdf> [hereinafter GUIDELINES]. Section III describes the methodology for this report, including the “5-A Right to Education Framework.”

² Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), arts. 13 & 16, O.A.S. Treaty Series No. 69, Nov. 16, 1999, 28 I.L.M. 156 [hereinafter Protocol of San Salvador].

³ See American Convention on Human Rights, arts. 1, 19, & 24, O.A.S. Treaty Series No. 36, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter American Convention].

⁴ Protocol of San Salvador, *supra* note 2, at art. 3.

⁵ Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará), O.A.S. Treaty Series A 61 Jun. 9, 1994, 33 I.L.M. 1534 [hereinafter Convention of Belém do Pará].

⁶ See American Convention, *supra* note 3, at arts. 19 & 26; Protocol of San Salvador, *supra* note 2, at art. 13; Convention of Belém do Pará, *supra* note 5, at art. 8.

⁷ See ENRIQUE SÁNCHEZ & PAOLA GARCÍA, WORLD BANK, MÁS ALLÁ DE LOS PROMEDIOS: AFRODESCENDIENTES EN AMÉRICA LATINA 16, 38 (2006), available at www.acnur.org/biblioteca/pdf/4558.pdf.

⁸ See PROCURADURÍA GENERAL DE LA NACIÓN, EL DERECHO A LA EDUCACIÓN: LA EDUCACIÓN EN LA PERSPECTIVA DE LOS DERECHOS HUMANOS 159 (2006).

⁹ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, ANNUAL REPORT 2006, ¶ 42, available at <http://www.cidh.oas.org/annualrep/2006eng/Chap.4a.htm> (citing Bulletin No. 69 from the Consultancy for Human Rights and Displacement, Bogotá, Colombia, September 12, 2006.) (last visited Mar. 7, 2008).

¹⁰ *Id.* at ¶ 31.

¹¹ See VICE MINISTER OF PRESCHOOL, BASIC, AND MEDIUM EDUCATION, MINISTRY OF EDUCATION, DIRECTION OF ORDER AND EQUITY (2007), available at www.mineducacion.gov (last visited Mar. 7, 2008) [hereinafter VICE MINISTER REPORT].

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The violent internal conflict in Colombia has had a devastating impact on the education of minorities. Afro-Colombian and indigenous peoples have been disproportionately displaced and forced into extreme poverty as a result of the conflict. Displacement naturally disrupts education and, in Colombia, the poorest are among those who have the least access to education. Although ending the decades-long conflict is an important priority for the government, Colombia must recognize that guaranteeing that all children receive quality education can be an important step in this peace process. The Commission observed in its special report on Colombia in 1999 that 15 percent of members of paramilitary groups are minors and in some areas the number rises to 50 percent.¹² The Commission also noted that paramilitary groups enter low-income areas or camps of displaced persons, offering sums of money to attract children to their ranks.¹³ Thus, a viable education can offer an attractive alternative for children who may otherwise be recruited to enlist as soldiers in the internal conflict.

In this country study, we analyze the right to education in Colombia through the lens of the right to education framework proposed by the former U.N. Special Rapporteur on the Right to Education, Katarina Tomasevski, which suggests that education must be available, accessible, acceptable and adaptable.¹⁴ We have adopted an additional element—accountability—to this framework.¹⁵ We herein refer to the combined framework as the “5-A Right to Education Framework.” We further analyze each element of this framework by reference to the structural, process, and outcome indicators that the Commission has suggested.¹⁶ Section III of our submission to the Commission, *supra*, elaborates on the methodology of this Report.

The Commission has recognized that the Colombian Constitution contains strong protections for human rights, including the right to education.¹⁷ This report echos those particular findings and also commends the Colombian government for establishing a constitutional duty on the part of the State to ensure compulsory basic (as opposed to primary) education.¹⁸ The Commission should also note, however, that Colombia’s Constitution deviates from Colombia’s inter-American and international treaty obligations. The Colombian Constitution requires certain individuals—those who can afford to do so—to pay for public education.¹⁹ The failure to guarantee free primary education to children is in direct violation of Articles 13 and 16 of the Protocol of San Salvador.²⁰

¹² See INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, THIRD REPORT ON THE HUMAN RIGHTS SITUATION IN COLOMBIA, ch. 13, ¶ 62 (1999), available at <http://www.cidh.org/countryrep/Colom99en/table%20of%20contents.htm> (last visited Mar. 7, 2008).

¹³ See *Id.*

¹⁴ Committee on Economic Social and Cultural Rights (CESCR), *General Comment 13 on the Right to Education*, ¶ 6, U.N. Doc. E/C.12/1999/10 (1999), available at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.1999.10.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.1999.10.En?OpenDocument) [hereinafter General Comment 13].

¹⁵ Princeton University’s Woodrow Wilson School of International Affairs originally suggested this element. See PRINCETON UNIVERSITY WOODROW WILSON SCHOOL OF INTERNATIONAL AFFAIRS, FREE TO LEARN: A RIGHTS BASED APPROACH TO UNIVERSAL PRIMARY EDUCATION IN KENYA 30 (2006), available at http://www.princeton.edu/research/final_reports/f05wws591i.pdf [hereinafter WOODROW WILSON FRAMEWORK].

¹⁶ GUIDELINES, *supra* note 1.

¹⁷ See INTER-AMERICAN COMMISSION, *supra* note 12, at ch. 2, ¶ 41.

¹⁸ See Political Constitution of Colombia, art. 67 (1991). In this manner, the Colombian Constitution ensures free, compulsory education for children additional years beyond primary school years.

¹⁹ *Id.*

²⁰ Protocol of San Salvador, *supra* note 2, at arts. 13 & 16.

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Despite this structural failure in Colombia's domestic law, numerous constitutional provisions and Constitutional Court decisions have provided robust protections for the right to education. Constitutional Court decisions and domestic laws generally conform to the "5-A Right to Education Framework." The General Office of the Judge Advocate General also supported the view that education rights should be viewed according to availability, accessibility, adaptability, and acceptability.²¹ Moreover, the Ministry of Education recognized this conception of the right to education.²² The Constitution provides for compulsory basic education and also provides a mechanism—the *tutela* action—which is aimed at allowing people to hold the government accountable for its violations of fundamental rights.²³

There are numerous process indicators in Colombia that are intended to protect the right to education, such as agencies, plans, and programs. For instance, there is a Ministry of Education in Colombia which institutes Ten-Year Plans on education, an ombudsman who brings claims to enforce violations of the right to education, and an agency in charge of administering issues related to internally displaced people. These process protections, however, have not been adequate in scope and coverage to guarantee education to all.

The outcome indicators discussed in this country study highlight the disparities in education among minorities and non-minorities in Colombia. First, problems with availability exist as a result of dilapidated or non-existent educational structures and the lack of quality teachers, particularly in areas with large minority populations.²⁴ Second, education is both economically and physically inaccessible for many minorities. Minorities, who tend to be disproportionately poor, are often unable to afford matriculation fees and ancillary items such as uniforms and transportation.²⁵ Minorities face additional hurdles as a result of structural discrimination inherited from the legacies of colonization, slavery, and inequality. Third, with respect to the acceptability of education, the increased public funding for poor quality private education has led to a crisis of educational quality for education for minorities who are forced to attend "garage schools."²⁶ Fourth, education is not entirely adaptable to the needs and backgrounds of Afro-Colombian and indigenous peoples.²⁷ Fifth, while there are mechanisms for accountability such as *tutela* actions,²⁸ they are of limited utility in making wider policy changes.

The Commission must hold the Colombian government accountable for these violations and encourage Colombia to prioritize education as a fundamental right for all.

²¹ See PROCURADURÍA GENERAL DE LA NACIÓN, *supra* note 8, at 48.

²² NATIONAL MINISTRY OF EDUCATION OF THE REPUBLIC OF COLOMBIA, EDUCATION: THE RIGHT OF ALL, *available at* <http://www.mineducacion.gov.co/cvn/1665/article-109238.html> (last visited Mar. 7, 2008).

²³ See Political Constitution of Colombia, *supra* note 18, at arts. 67 & 86.

²⁴ See KATARINA TOMASEVSKI, THE RIGHT TO EDUCATION, ADDENDUM: MISSION TO COLOMBIA, ¶ 40 (2003), *available at* <http://www.unhchr.ch/huridocda/huridoca.nsf/2848af408d01ec0ac1256609004e770b/ebe73a2be6b6973fc1256e4a0039d6c8?OpenDocument&Highlight=2,E/CN.4/2004/45/Add.2>. (last visited Mar. 7, 2008) [hereinafter TOMASEVSKI 2003 REPORT]; Meeting with PCN, Cali, Valle del Cauca, Colombia (Dec. 8, 2007) (on file with authors) [hereinafter PCN Meeting].

²⁵ See TOMASEVSKI 2003 Report, *supra* note 24.

²⁶ As noted, *infra*, "garage schools" are private schools receiving public funding that are springing up in several underserved parts of Colombia. These schools lack quality teachers, curricula, and learning materials.

²⁷ Meeting with CRIC, Popayán, Cauca, Colombia (Dec. 10, 2007) (on file with authors) [hereinafter CRIC Meeting].

²⁸ Political Constitution of Colombia, *supra* note 18, at art. 86.

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B. THE EFFECT OF COLOMBIA'S FIFTY-YEAR INTERNAL ARMED CONFLICT ON THE RIGHT TO EDUCATION FOR AFRO-COLOMBIAN AND INDIGENOUS PEOPLES

In the Agua Blanca district of Cali, where there are over 600,000 displaced Colombians, an Afro-Colombian leader from Consejo de Comunidades Negras de la Cordillera Occidental de Nariño (COPDICONC) describes the situation of displaced people:

“We calculate that in 2007, they have killed 2,800 people and displaced some 30,000 people. Our towns are literally almost empty. It has become a situation of war that is very difficult where there is no respect for international rights. For us, the civilian population, we have had to confront the armed groups directly. And we feel knocked down and abused. We feel like we belong to a state that does not offer us protection, does not protect our rights. We never receive a straight answer from the government when we go to reclaim our rights.”²⁹

Hundreds of thousands of people have died and millions have been internally displaced as a result of the long and violent internal conflict.³⁰ Despite negotiated cease-fire agreements between groups such as the Revolutionary Armed Forces of Colombia (hereinafter “the FARC”), a leftist guerrilla movement, and the National Liberation Army (hereinafter “the ELN”), a right-wing paramilitary group that has at times colluded with the Colombian army,³¹ insurgent attacks remain a threat to civilians and guerrillas continue to control large areas of the country.³² In addition, illegal armed groups continue to use indigenous territories as zones for their military and economic operations, including arms and drug trafficking.³³ In recent years, these groups’ interests in controlling indigenous territories have increased due to their desires to exploit lands rich in natural resources.³⁴ In its most recent annual report, the Commission reported that “[m]anifestations of violence persist alongside the efforts being made to demobilize the outlawed armed groups and to administer justice, which have yet to yield results in terms of effectiveness, comprehensive redress, and elimination of factors of violence.”³⁵

²⁹ Meeting with Afro-Colombian leaders of Consejo de Comunidades Negras de la Cordillera Occidental de Nariño (COPDICONC) in Agua Blanca District, Cali, Valle del Cauca, Colombia (Dec. 9, 2007) (on file with authors) [hereinafter COPDICONC Meeting].

³⁰ JAIRO A. ARBOLEDA, PATTI L. PETESCH, & JAMES BLACKBURN, VOICES OF THE POOR IN COLOMBIA: STRENGTHENING LIVELIHOODS, FAMILIES, AND COMMUNITIES 28 (2004).

³¹ See Luis Gilberto Murillo-Urrutia, *Contemporary Challenges in Colombia: An Afro-Colombian Perspective*, 1 J. PAN AFR. STUD. 135, 136 (2007).

³² See C.I.A., THE WORLD FACTBOOK: COLOMBIA, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/co.html> (last updated Mar. 6, 2008) (last visited Mar. 7, 2008) [hereinafter WORLD FACTBOOK].

³³ See INTER-AMERICAN COMMISSION, *supra* note 9, at ¶ 32.

³⁴ See *id.*

³⁵ See *id.* at ¶ 7.

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1. Colombia's ethnic minority populations have been disproportionately displaced and forced into poverty by the violent internal armed conflict.

a. Forced Displacement

There are currently between 2 and 3.5 million internally displaced persons (hereinafter "IDPs") in Colombia, a country with a total population of 44 million.³⁶ This is the second highest number of IDPs in the world and the highest in the Western Hemisphere.³⁷ Indigenous peoples and Afro-Colombians are disproportionately represented among the internally displaced. While Afro-Colombians comprise about 27 percent of the population, they disproportionately represent 30 percent of Colombia's internally displaced.³⁸ The Commission has also observed that "[l]arge numbers of Afro-Colombians reside in some of the most conflictive areas of the national territory."³⁹ Additionally, according to the Office of Human Rights and Displacement (*Consultoría para los Derechos Humanos y el Desplazamiento*), although they constitute only 2 percent of the population, 16 percent of those displaced in 2006 were indigenous people.⁴⁰

Displaced Colombians suffer in practically every measurable social indicator, such as health, living standards, education, or employment.⁴¹ The government's Social Solidarity Network found that housing quality, sanitation access, education levels, and employment levels are almost always lower for IDPs than for individuals living in poverty who have not been displaced.⁴² For instance, displaced families live, on average, in more crowded homes than do their non-displaced counterparts.⁴³ In addition, more than half of displaced persons live in homes made of cloth, cardboard or wood scraps, while only 16 percent of non-displaced individuals lives in similar

³⁶ See WORLD FACTBOOK, *supra* note 32.

³⁷ See Murillo-Urrutia, *supra* note 31, at 136 (noting that the United Nations Refugee Agency has estimated that between 2 and 3 million people are displaced, while the Catholic Church Social Ministry and Consultancy on Displacement and Human Rights have both estimated the number to be closer to 3.5 million). The Economic and Social Commission of the U.N. Commission on Human Rights noted discrepancies in the reporting of internally displaced peoples:

In a situation, such as in Colombia, of long-standing internal displacement stretching over decades, there also arises the question of when to stop counting persons as displaced. This is indeed a complex question. In the absence of clear guidelines as to when displacement ends, there is a need for a case-by-case approach taking into account situational factors determining the possibilities for return home or resettlement as a durable solution.

See U.N. Economic and Social Council, Commission on Human Rights, 55th sess., provisional agenda item 14(c), Specific Groups and Individuals: Mass Exoduses and Displaced Persons, *Report of the Representative of the Secretary General on Internally Displaced Persons Submitted in Accordance with Commission Resolution 1999/47, Addendum: Profiles in Displacement: Follow-Up Mission to Colombia*, ¶14, U.N. Doc. E/CN.4/2000/83/Add.1 (2000) [hereinafter U.N. Follow-Up Mission].

³⁸ *Id.* at ¶ 42.

³⁹ See INTER-AMERICAN COMMISSION, *supra* note 12, at ch. 11, ¶ 26.

⁴⁰ INTER-AMERICAN COMMISSION, *supra* note 9, at ¶ 35.

⁴¹ See CONSULTORÍA PARA LOS DERECHOS HUMANOS Y EL DESPLAZAMIENTO (CODHES), *DROP BY DROP: FORCED DISPLACEMENT IN BOGOTÁ AND SOACHA* 27–35 (2007).

⁴² See Luis Eduardo Pérez Murcia, *Población desplazada: entre la vulnerabilidad, la violencia y la exclusión* 28–43 (Santafé de Bogotá: Red de Solidaridad Social, 2002); HUMAN RIGHTS WATCH, *COLOMBIA: DISPLACED AND DISCARDED: THE PLIGHT OF INTERNALLY DISPLACED PERSONS IN BOGOTÁ AND CARTAGENA* 4 (2005).

⁴³ See HUMAN RIGHTS WATCH, *supra* note 42, at 20–21 (summarizing the findings from the Social Solidarity Network that the average displaced household has 4.6 members as compared to the average non-displaced household with only 3.6 members. Additionally, more than half of displaced households do not have one room used exclusively as a bedroom whereas more than half of non-displaced households have at least one bedroom in their homes.).

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housing situations.⁴⁴ Many of these displaced communities lack infrastructure and have little to no access to essential services, such as clean, potable water, sanitation and education services.⁴⁵

Ironically, a law that was designed to benefit Afro-Colombians appears to be one of the reasons behind the displacement. The Black Community Law (Law 70 of 1993)⁴⁶ was intended to give Afro-Colombian communities increased autonomy and control over 15 million acres of land (approximately 5 percent of Colombia's territory).⁴⁷ Afro-Colombian land is often of strategic interest to Colombia's paramilitary groups for its wealth in natural resources.⁴⁸ Thus, the U.N. Commission on Human Rights has noted that forced displacement has become a "tool for acquiring land for the benefit of large landowners, narco-traffickers, as well as private enterprises planning large-scale projects for the exploitation of natural resources."⁴⁹

b. Extreme Poverty

Extreme income disparities persist in Colombia. As the Commission recognized, "the poorest 10% of the population accounts for only 1% of consumption, [whereas] the wealthiest 10% is responsible for 46.9% of all consumer spending."⁵⁰ The Commission has further observed that Afro-Colombians and indigenous peoples have the lowest per capita income of all groups⁵¹ and that the "terror and violence as practiced by all of the contending forces in Colombia have taken their greatest toll on the Colombians living in extreme poverty—a disproportionate number of whom are black citizens."⁵²

The United Nations High Commissioner for Human Rights also estimates that Afro-Colombians are disproportionately represented among the nation's poor: more than 80 percent of Afro-Colombians live in extreme poverty while under 59 percent of the total population lives below the poverty line.⁵³ Seventy-two percent of the Afro-descendant population occupies the two lowest socio-economic strata in Colombia and 85 percent lives in the department of Chocó, a region with the lowest levels of accessible drinking water, low literacy rates, and high levels of childbirth-related deaths.⁵⁴ On average, Afro-Colombians earn the equivalent of \$500 USD per person per year, while the average non-Afro-Colombian earns the equivalent of \$1,900 USD per year.⁵⁵ Moreover, these communities have limited or no access to education, employment, economic opportunity, government participation, or decision-making.⁵⁶ The Commission recognized that these factors, coupled with a history of racism and discrimination, "prevent this segment of the population from

⁴⁴ See *id.* at 21.

⁴⁵ Doctors Without Borders, *Displaced Colombians Struggle to Survive in Urban Slums*, June 27, 2005, available at www.doctorswithoutborders.org/news/2005/06-27-2005.cfm (last visited Mar. 7, 2008).

⁴⁶ Law 70 of 1993: In Recognition of the Right of Black Colombians to Collectively Own and Occupy their Ancestral Lands [hereinafter Black Community Law].

⁴⁷ See Murillo-Urrutia, *supra* note 31, at 141.

⁴⁸ See Defensoría del Pueblo Colombia, *XI Informe del Defensor del Pueblo Al Congreso de Colombia* (2003), cited in HUMAN RIGHTS WATCH, *supra* note 42, at 11.

⁴⁹ See U.N. Follow-Up Mission, *supra* note 37, at ¶ 23.

⁵⁰ See INTER-AMERICAN COMMISSION, *supra* note 9, at ch. 3, ¶ 13.

⁵¹ See *id.* at ch. 11, ¶ 21.

⁵² See *id.* at ch. 11, ¶ 26.

⁵³ See U.S. OFFICE ON COLOMBIA, *THE IMPACT OF WAR ON AFRO-COLOMBIANS: A COMMUNITY UNDER SEIGE* (2004).

⁵⁴ INTER-AMERICAN COMMISSION, *supra* note 9, at ¶ 41.

⁵⁵ See Murillo-Urrutia, *supra* note 31, at 139.

⁵⁶ INTER-AMERICAN COMMISSION, *supra* note 9, at ¶ 41.

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enjoying their particular world view, traditions and culture, and they have also made them largely invisible within the country's policies."⁵⁷

In Colombia, 90 indigenous communities number more than 1 million people and live throughout the country's 32 departments, though this precise number is subject to some debate.⁵⁸ While three indigenous groups, the Wayuu, the Paez, and the Embera, each thrive with populations of more than 50,000 people, more than 30 other groups have fewer than 500 members.⁵⁹ Indigenous peoples speak more than 64 different languages and have distinct worldviews, histories and cultures.⁶⁰ Ninety-five percent of indigenous Colombians live in rural areas where there is generally less access to basic services.⁶¹ Despite increasing recognition of indigenous peoples' autonomy and self-development, these groups suffer as targets of armed groups, who negatively impact their lives and threaten their physical and cultural survival.⁶² Indeed, Colombia's Ombudsman's Office (*Defensoría del Pueblo*) has noted that, along with the Afro-Colombians, the indigenous population runs the risk of becoming "invisible" in the midst of the larger crisis among displaced people.⁶³

2. The violent conflict as well as the resulting forced displacement and extreme poverty negatively impact the right to education of ethnic minorities in Colombia.

Children's schooling is disrupted or permanently abandoned by the forced displacement of families from their homes and native communities.⁶⁴ Internally displaced persons face numerous difficulties accessing and securing education in the shantytowns to which they typically flee. In fact, extreme poverty forces many parents to choose between schooling and food.⁶⁵ Also, parents describe schools without enough space, desks, books, and teachers to accommodate their children's educational needs.⁶⁶ Moreover, matriculation fees and additional costs for transportation, school uniforms, and books are prohibitive for most displaced families.⁶⁷ Between 2003 and 2004, more than 520,000 Colombian children left school for various reasons, but economic reasons ranked high

⁵⁷ *Id.*

⁵⁸ *Id.* at ¶ 31; Rodolfo Stavenhagen, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, ¶ 3, E/CN.4/2005/88/Add.2, available at http://www.afsc.org/colombia/learn-about/documents/UN_Report_on_Indigenous.pdf. Some indigenous groups have argued that the national census has underrepresented the number of indigenous Colombians. See CRIC Meeting, *supra* note 27. For example, members of the indigenous organization CRIC claimed that those administering the national censuses outside of indigenous reservations never asked whether a person considered him or herself indigenous. See CRIC Meeting, *supra* note 27. They cite the city of Popayán as an example where approximately 3,000 indigenous Colombians live, and yet none have been counted toward a national average. See CRIC Meeting, *supra* note 27. Hence, they claim that, given this larger trend, the number of indigenous may have been artificially deflated in one or both of the national censuses and is in actuality closer to 1,750,000. See CRIC Meeting, *supra* note 27.

⁵⁹ Stavenhagen, *supra* note 58.

⁶⁰ INTER-AMERICAN COMMISSION, *supra* note 9, at ¶ 31.

⁶¹ See DEFENSORÍA DEL PUEBLO, *EL DESPLAZAMIENTO FORZADO EN COLOMBIA* 114 n.34 (2003).

⁶² Stavenhagen, *supra* note 58.

⁶³ See DEFENSORÍA DEL PUEBLO, *supra* note 61, at 117.

⁶⁴ See WOMEN'S COMMISSION FOR REFUGEE WOMEN AND CHILDREN, *UNSEEN MILLIONS: THE CATASTROPHE OF INTERNAL DISPLACEMENT IN COLOMBIA* 22 (2002), available at www.womenscommission.org/pdf/co2.pdf.

⁶⁵ PCN Meeting, *supra* note 24; Meeting with Diego Escobar, Cali, Valle del Cauca, Colombia (Dec. 9, 2007) (on file with authors) [hereinafter Diego Escobar Meeting].

⁶⁶ PCN Meeting, *supra* note 24; Meeting with indigenous leaders, Cali, Valle del Cauca, Colombia (Dec. 8, 2007) (on file with authors) [hereinafter Indigenous Leaders Meeting].

⁶⁷ PCN Meeting, *supra* note 24; Indigenous Leaders Meeting, *supra* note 66.

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on the list.⁶⁸ Finally, children are recruited as soldiers into the war and, therefore, drop out of school.⁶⁹

C. THE RIGHT TO EDUCATION FOR AFRO-COLOMBIANS AND INDIGENOUS PEOPLES THROUGH THE LENS OF THE “5-A RIGHT TO EDUCATION FRAMEWORK” AND THE COMMISSION’S STRUCTURAL, PROCESS AND OUTCOME INDICATORS

The Colombian government has failed to provide available, accessible, adaptable, and acceptable education to Afro-Colombian and indigenous peoples and has not been held accountable for this failure. Although Colombia’s structural and, to some extent, process indicators generally suggest that Colombia provides strong protections for the right to education, the outcome indicators indicate that minorities are systematically being denied the right to education. This country study analyzes the status of the right to education of Afro-Colombian and indigenous peoples through the intersecting lens of the structural, process, and outcome indicators proposed by the Commission and the “5-A Right to Education Framework.”

1. Availability

a. Structural Indicators: The Colombian Constitution and Constitutional Court decisions incorporate Colombia’s regional and international treaty obligations that require it to provide an adequate supply of educational services to minorities.

“Availability” is a government’s obligation to provide an adequate number of educational institutions and programs, as well as the facilities necessary to function appropriately in their contexts.⁷⁰ The concept of availability is protected by Article 13 of the Protocol of San Salvador⁷¹ and Articles 13 and 14 of the International Covenant on Economic, Social, and Cultural Rights (hereinafter “the ICESCR”).⁷² The notion of available education is also embedded in the Colombian Constitution.⁷³ The fifth paragraph of Article 67 of the Colombian Constitution imposes government obligations to guarantee an “adequate supply” of educational services,⁷⁴ declaring that

⁶⁸ COMISIÓN NACIONAL DE SEGUIMIENTO A LAS RECOMENDACIONES DE LA RELATORA ESPECIAL DE NACIONES UNIDAS PARA EL DERECHO A LA EDUCACIÓN, ESTADO DEL DERECHO A LA EDUCACIÓN EN COLOMBIA 13 (2005), available at www.lpp-uerj.net/olped/documentos/0986.pdf.

⁶⁹ PCN Meeting, *supra* note 24; Katarina Tomasevski, *The Right to Education: Report Submitted by the Special Rapporteur*, ¶ 49, E/CN.4/2004/45/Add.2/Corr. 1 (Mar. 30, 2004) (“Schools have also been a recruiting ground. As one teacher put it to the Special Rapporteur, what can she say, on her salary of 300,000 pesos, to a 16-year-old student earning 800,000 pesos as a combatant? In the words of children, ‘if young people had attractive educational and lifestyle options and opportunities, the recruitment of child soldiers could be avoided.’”), available at <http://www.right-to-education.org/> (last visited Mar. 7, 2008) [hereinafter Tomasevski 2004 Report].

⁷⁰ See KATARINA TOMASEVSKI, HUMAN RIGHTS OBLIGATIONS: MAKING EDUCATION AVAILABLE, ACCESSIBLE, ACCEPTABLE AND ADAPTABLE 17 (2001) [hereinafter TOMASEVSKI 2001 REPORT].

⁷¹ Protocol of San Salvador, *supra* note 2, at art. 13.

⁷² International Covenant on Economic, Social and Cultural Rights (ICESCR) arts. 13 & 14, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, [hereinafter ICESCR].

⁷³ Political Constitution of Colombia, *supra* note 18, at art. 67.

⁷⁴ DEFENSORÍA DEL PUEBLO COLOMBIA, EL DERECHO A LA EDUCACIÓN: EN LA CONSTITUCIÓN, LA JURISPRUDENCIA Y LOS INSTRUMENTOS INTERNACIONALES 58–59 (2003) [hereinafter DEFENSORÍA 2003 REPORT].

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“it is the responsibility of the State . . . to guarantee an adequate supply of [education]”⁷⁵ In addition, the Human Rights Ombudsman (*Defensoría del Pueblo de Colombia*) asserted that denying the right to school placement is contrary to Article 67 of the Constitution because it effectively impedes the exercise of the rights of children to access the educational system,⁷⁶ a right that is protected by Article 44 of the Constitution.⁷⁷

The Constitutional Court articulated a number of ways in which the Colombian government is required to make education available. First, the Constitutional Court found that the right to education must include the right to school placement and adequate schoolroom capacity.⁷⁸ Second, the Constitutional Court has found that the government does not satisfy the availability component of the right to education when it fails to provide adequate, uninterrupted funding,⁷⁹ when it fails to hire substitute teachers,⁸⁰ or when it refuses to pay teachers.⁸¹

Finally, the Court declared that the right to education as well as the right to equal opportunity obligates the government to ensure the availability of educational services for children living in rural areas.⁸² In particular, the Court stated that “students from a small rural school have the same right to receive [educational services] . . . without finding themselves in inferior conditions when compared to students from other learning institutions.”⁸³ Thus, in order to fulfill the right to education, the government must provide adequate school placement, adequate schoolroom capacity, adequate funding for schools, and an adequate supply of teachers. Finally, education must also be made equally available in rural areas.

b. Process Indicators: Colombia’s Ten-Year Educational Development Plan has not prioritized increasing education availability for minorities.

The General Education Law of 1994—Law 115⁸⁴—defines its objectives⁸⁵ in accordance with Article 67 of the Constitution, outlines the structure of educational services, provides guidelines

⁷⁵ Political Constitution of Colombia, *supra* note 18, at art. 67 (emphasis added); Corte Constitucional. Sentencia T-329-93.

⁷⁶ DEFENSORÍA DEL PUEBLO COLOMBIA, SISTEMA DE SEGUIMIENTO Y EVALUACIÓN DE LA POLÍTICA PÚBLICA EDUCATIVA A LA LUZ DEL DERECHO A LA EDUCACIÓN 26 (2004) [hereinafter DEFENSORÍA 2004 REPORT].

⁷⁷ Political Constitution of Colombia, *supra* note 18, at art. 44 (1991). In addition, the Constitutional Court has found that “access and continuity with respect to education, is limited to the regulations that ensure moral, intellectual and physical growth of students . . . [and] it is evident that it is not possible to mandate school attendance while lacking schools, trained staff members, funding, structure, or school placement.” Corte Constitucional. Sentencia T-388-95.

⁷⁸ DEFENSORÍA 2004 REPORT, *supra* note 76, at 26.

⁷⁹ Corte Constitucional. Sentencia T-571 of 1999. Suspension of education services must have an “exceptional character” and be justified. *See* Corte Constitucional. Sentencia T-467 of 1994; DEFENSORÍA 2003 REPORT, *supra* note 74, at 77.

⁸⁰ Corte Constitucional. Sentencias T-935 of 1999; T-467 of 1994; T-450 of 1997; T-571 of 1999; T-1102 of 2000. DEFENSORÍA 2003 REPORT, *supra* note 74, at 62.

⁸¹ Corte Constitucional. Sentencia T-1102 of 2000; DEFENSORÍA 2003 REPORT, *supra* note 74, at 63. *See also* Corte Constitucional. Sentencia T-423 of 1996 (finding that the suspension of activities violates children’s fundamental right to education, a right that prevails over the rights of others).

⁸² DEFENSORÍA 2003 REPORT, *supra* note 74, at 70.

⁸³ Corte Constitucional. Sentencia T-467 of 1994 (translated by authors).

⁸⁴ General Education Law of 1994, Law 115 (1994) [hereinafter General Education Law].

⁸⁵ Article 5 sets out the 13 specific objectives of education on Colombia in accordance with Article 67 of the Colombian Constitution. *Id.* at art. 5.

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for educational programs, and establishes the various organizational entities to implement educational services throughout the country.⁸⁶ In particular, Law 115 obligates the State to develop a National Educational Development Plan, which establishes the Ministry of Education's duties to provide public educational services and educational funding in accordance with Law 60 of 1993.⁸⁷ Article 72 of Law 115, empowers the Ministry of Education to "prepare at least every ten (10) years the Ten-Year Educational Development Plan that will include actions in order to complete the constitutional and legal mandates to implement educational services."⁸⁸ The first Plan from 1996 to 2005 had five main objectives: 1) to make education reform an important national issue; 2) to succeed in recognizing that education is the axis of human, social, political, economic, and cultural development; 3) to develop knowledge, science, skills, and technology; 4) to integrate organically the institutional education system with other educational activities of state entities and civil society; and 5) to guarantee effectively the right to education.⁸⁹

The second Ten-Year National Educational Development Plan (2006–2015) also proposes objectives and goals for the government to effectively guarantee the right to education in Colombia.⁹⁰ Organized into eleven themes, the newest Plan similarly aspires to reform the national educational system in several key areas.⁹¹ The eleven themes are: 1) guaranteeing the right to education in conditions of equality for the entire population at all levels of education; 2) recognizing students as human beings and active individuals with rights in order to realize peace, overcome poverty and exclusion, reconstruct the social thread, and developing democratic values; 3) strengthening public education at all levels to ensure availability, access, permanence, and quality in terms of equality, equity, and inclusion; 4) guaranteeing adequate investment of resources through public policies; 5) implementing educational programs to promote opportunity in all aspects, including culture, science, technology, research, innovation, and knowledge; 6) realizing the basic functions of education, such as research, innovation, and establishing knowledge; 7) recognizing the importance of teachers in the education system as essential players in the quality of education, guaranteeing dignified lives for teachers; 8) recognizing ethnic and cultural diversity and building a system of their own education (*educación propia*); 9) designing pedagogical proposals and creating material, psychosocial, and security conditions that respond to the educational needs of all of the victims in displacement from the armed conflict; 10) guaranteeing conditions of special attention to the populations in need with respect to diversity, including ethnic, gender, sexuality, disability, ability, age, creed, and displacement; and 11) implementing educational policies with the goals of ensuring it remains public, free, inclusive, and of quality.⁹² These various objectives demonstrate the government's clear understanding of the basic obligations that it must fulfill in order to effectively guarantee the right to education in Colombia.

While the most current Ten-Year Educational Development Plan recognizes the need for equality and non-discrimination in education, it does not provide for ways to eradicate the disparities

⁸⁶ CARLOS ALBERTO LERMA CARREÑO, FLAPE, *EL DERECHO A LA EDUCACIÓN EN COLOMBIA* 17–18 (2007).

⁸⁷ *Id.* at 18.

⁸⁸ General Education Law, *supra* note 84, at art. 72 (Plan Nacional de Desarrollo Educativo).

⁸⁹ Ministry of Education, Plan Decenal de Desarrollo Educativo, at 7–8 (1995), *available at* http://www.mineducacion.gov.co/1621/articles-85242_archivo_pdf.pdf.

⁹⁰ Alcance, Visión, Propósitos, Mecanismos de seguimiento y Objetivos del Plan Nacional Decenal de Educación 2006–2015 (Aug. 7, 2007).

⁹¹ *Id.*

⁹² PACTO SOCIAL POR LA EDUCACIÓN, PLAN DECENAL DE EDUCACIÓN 2006–2015 5 (2007), *available at* http://www.plandecenal.edu.co/html/1726/articles-140247_archivo_1.pdf.

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in education between minorities and the rest of the population nor does it allocate sufficient resources to ensure that such disparities are eradicated. On the contrary, public spending on education has decreased as a total of the overall government budget: while in 1991, education spending constituted 14.3 percent of total public spending, in 2002–2005 it was only 11.1 percent of the budget.⁹³ Consequently, the Ten-Year Educational Plan's proposals have not been implemented to ensure that there are more educational facilities or teachers in areas with large minority populations.

c. Outcome Indicators: The Colombian government has not satisfied its obligations to make education equally available to Afro-Colombian and indigenous peoples.

As part of the research for this country study, the RFK Memorial Center staff visited Colombia jointly with the Cornell Law School International Human Rights Clinic in December 2007. During this visit, we witnessed first-hand the inadequate infrastructure in Colombia's educational institutions. Escuela Benjamin Herrera, a primary school in Cali, typifies the unacceptable quality of Colombian public schools. The school is approximately 70-75 years old and the building suffers from severe dilapidation. The supporting columns of the building are starting to fall down and the building as a whole is infested with termites. At least one classroom building is abandoned due to rain damage on the ceiling and even classrooms that were in use had missing ceiling parts. Though the government provided computers to the school, the computer room is now abandoned because the computers are all infected with viruses and the electrical wiring of the school could not support the voltage needed to turn on the computers. Parts of the roof of the computer room also collapsed.⁹⁴

The school director reported that government support for her school decreased in 2004 and, since that time, the quality of the infrastructure and resulting education decreased as well.⁹⁵ Indeed, public expenditure on education has decreased over the last decade. For example, the average allocation per student in 2004 was \$962,468, much higher than what was assigned in 1995 and slightly higher than in the years 2000 and 2003, but less than what was assigned in the other years since 1996.⁹⁶ The Committee on the Rights of the Child recognized that these spending cuts adversely affect the economically disadvantaged groups in Colombia, including the Afro-Colombian and indigenous peoples, in violation of Article 4 of the Convention on the Rights of the Child (hereinafter "the CRC").⁹⁷

In some indigenous areas, the lack of any physical infrastructure forces students to be educated in homes or not at all.⁹⁸ In the region of Chocó, for instance, a lack of available facilities

⁹³ UNITED NATIONS DEVELOPMENT PROGRAMME (UNDP). HUMAN DEVELOPMENT REPORT 2007/2008, available at http://hdrstats.undp.org/countries/data_sheets/cty_ds_COL.html (last visited Mar. 8, 2008).

⁹⁴ Visit to Escuela Benjamin Herrera, Cali, Valle de Cauca, Colombia (Dec. 10, 2007) (on file with authors) [hereinafter Benjamin Herrera Visit].

⁹⁵ *Id.*

⁹⁶ See PROCURADURÍA GENERAL DE LA NACIÓN, *supra* note 8, at 113.

⁹⁷ See Concluding Observations of the Committee on the Rights of the Child: Colombia, CRC/C/COL/3, (08/06/2006), ¶ 21 [hereinafter CRC Concluding Observations].

⁹⁸ CRIC Meeting, *supra* note 27.

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forced students to attend school in improvised constructions made of palm leaves, with no roof.⁹⁹ Urban schools are not large enough, nor are there enough schools to accommodate IDP children,¹⁰⁰ a population that is disproportionately Afro-Colombian and indigenous. In these areas, there are schools without roofs, three students to one desk, students without desks sitting on the ground, and no working bathrooms.¹⁰¹ For example, one teacher noted that there are 50 students in his classroom and he cannot control 50 children let alone teach them all of the required subjects.¹⁰² Another Afro-Colombian leader from the organization Process of Black Communities of Colombia (*Proceso de Comunidades Negras de Colombia*, hereinafter “PCN”) underscored the point, “[o]ur students study in inhumane conditions. They study in small classrooms with forty students, all sharing desks and chairs. This is a violation of human rights.”¹⁰³ Many schools do lack any sort of recreational space¹⁰⁴ or places for students to have their mid-morning snack.¹⁰⁵ Others lack the basic materials or equipment necessary to run a school because, in some cases, schools received foreign funds and those funds were only adequate for the actual construction of the school infrastructure itself.¹⁰⁶

The lack of adequate infrastructure leaves many minority children unenrolled in school. One activist estimated 70-80 percent of the children in the community of Eduardo Honduras are enrolled in primary education while 40-50 percent attend secondary school.¹⁰⁷ Similarly, poor families in rural areas, many of whom are indigenous, do not enroll their school-age children in school.¹⁰⁸ In 2001, although 88 percent of primary-age children were enrolled in school overall, only 70 percent were enrolled in rural areas.¹⁰⁹ At the secondary and tertiary levels, this gap widens: 54 percent of school-age children attend school overall while only 15 percent attend in rural areas.¹¹⁰ Ultimately, a majority of Colombian children do not complete secondary school, with an average dropout age of thirteen and some leaving school as early as eight or nine.¹¹¹

A shortage of teachers further contributes to the unavailability of education. Teachers get to know the problems of peasant farmers’ families and, as a result, they often become social leaders who put forward petitions and requests to multinationals.¹¹² Paramilitary groups have targeted them for such actions.¹¹³ In October 2003, Tomasevski reported that 691 teachers had been murdered in

⁹⁹ PLATAFORMA COLOMBIANA, INFORME SOBRE EL DISFRUTE DEL DERECHO A LA EDUCACIÓN EN COLOMBIA 18 (2003), available at www.plataforma-colombiana.org/biblioteca_pag/045.pdf.

¹⁰⁰ See WOMEN’S COMMISSION FOR REFUGEE WOMEN AND CHILDREN, *supra* note 64, at 23.

¹⁰¹ PCN Meeting, *supra* note 24.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ See JAIRO A. ARBOLEDA, PATTI L. PETESCH, & JAMES BLACKBURN, VOICES OF THE POOR IN COLOMBIA: STRENGTHENING LIVELIHOODS, FAMILIES, AND COMMUNITIES 56–57 (2004).

¹⁰⁵ Benjamin Herrera Visit, *supra* note 94.

¹⁰⁶ See WOMEN’S COMMISSION FOR REFUGEE WOMEN AND CHILDREN, *supra* note 64, at 25.

¹⁰⁷ Indigenous Leaders Meeting, *supra* note 66.

¹⁰⁸ See ARBOLEDA ET AL., *supra* note 104, at 56.

¹⁰⁹ *See id.*

¹¹⁰ *See id.*

¹¹¹ *See id.* at 60.

¹¹² UNESCO DIVISION FOR THE COORDINATION OF UNITED NATIONS PRIORITIES IN EDUCATION, EDUCATION UNDER ATTACK: A GLOBAL STUDY ON TARGETED POLITICAL AND MILITARY VIOLENCE AGAINST EDUCATION STAFF, STUDENTS, TEACHERS, UNION AND GOVERNMENT OFFICIALS, AND INSTITUTIONS 26 (2007), available at http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/28/09/48.pdf [hereinafter UNESCO REPORT].

¹¹³ *Id.*

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one decade.¹¹⁴ The Committee on the Rights of the Child noted in 2006 that three teachers are killed each month.¹¹⁵ Tomasevski further noted that these threats against teachers cause them to abandon their occupations in fear.¹¹⁶ Indeed, displaced teachers often do not return to the communities in which they worked even when students and families begin to return home.¹¹⁷

2. Accessibility

a. Structural Indicators: Colombia's Constitution fails to conform to its Inter-American and international obligations to provide free primary education to all.

“Accessibility” refers to the ability of all individuals to physically and economically access education without discrimination.¹¹⁸ Numerous Inter-American and U.N. treaties recognize the importance of accessible education without discrimination, including Articles 3 and 13 of the Protocol of San Salvador,¹¹⁹ Article 1 of the American Convention,¹²⁰ Article II of the American Declaration,¹²¹ Article 2(1) of the International Covenant on Civil and Political Rights (hereinafter “the ICCPR”),¹²² Articles 2(2) and 13 of the ICESCR,¹²³ Articles 1 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter “ICERD”),¹²⁴ Articles 2 and 28 of the CRC¹²⁵ and Articles 1 and 10 of the Convention on the Elimination of All Forms of Discrimination against Women (hereinafter “CEDAW”).¹²⁶

In particular, Article 13 of the Protocol of San Salvador as well as Articles 13 and 14 of the ICESCR require that Colombia provide free primary education to all.¹²⁷ Despite these enumerated regional and international obligations, Article 67 of the Constitution expressly permits the government to levy fees for educational services.¹²⁸ Specifically, Article 67 states that “[e]ducation will be free of charge in the State institutions, *without prejudice to those who can afford to defray the costs.*” In other words, those who can afford to pay must pay for education. Consequently, Tomasevski

¹¹⁴ See TOMASEVSKI 2003 REPORT, *supra* note 24, at ¶ 40.

¹¹⁵ See CRC Concluding Observations, *supra* note 97, at ¶ 76(h).

¹¹⁶ See TOMASEVSKI 2003 REPORT, *supra* note 24, at ¶ 42.

¹¹⁷ PCN Meeting, *supra* note 24.

¹¹⁸ TOMASEVSKI 2001 REPORT, *supra* note 70, at 27.

¹¹⁹ Protocol of San Salvador, *supra* note 2, at arts. 3 & 13 (right to non-discrimination and right to education).

¹²⁰ American Convention, *supra* note 3, at art. 1 (right to non-discrimination)

¹²¹ American Declaration of the Rights and Duties of Man (American Declaration) art. II (right to equality and non-discrimination), O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992) [hereinafter American Declaration].

¹²² International Covenant on Civil and Political Rights (ICCPR) art. 2(1) (right to non-discrimination), Dec. 16, 1966, 999 U.N.T.S. 171, (1967) [hereinafter ICCPR].

¹²³ ICESCR, *supra* note 72, at art. 2(2) (right to non-discrimination).

¹²⁴ International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) arts. 1(1), 1(4), & 5(e)(v) (rights to non-discrimination, special protections and education), 660 U.N.T.S. 195, entered into force January 4, 1969 [hereinafter ICERD].

¹²⁵ Convention on the Rights of the Child (CRC) arts. 2(1) & 28 (rights to non-discrimination and education), G.A. Res. 44/25, Annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force September 2, 1990 [hereinafter CRC].

¹²⁶ Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), arts. 1 & 10 (rights to non-discrimination and education), Dec. 18, 1979, 1249 U.N.T.S. 513 [hereinafter CEDAW].

¹²⁷ Protocol of San Salvador, *supra* note 2, at art. 13; ICESCR, *supra* note 72, at arts. 13 & 14.

¹²⁸ Political Constitution of Colombia, *supra* note 18, at art. 67.

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noted that “Colombia remains an exception in the region because the government is not committed to free and compulsory education for all.”¹²⁹ The Committee on Economic, Social and Cultural Rights (hereinafter “the ICESCR Committee”) observed that Colombia violates Articles 13 and 14 of the ICESCR by imposing fees in order to access public education on individuals who can afford to pay them.¹³⁰ As a result of the Constitution’s structural failure, outcome indicators in Section III.B.3 *infra* suggest that education is not economically accessible to all Colombians.

Although the Constitution fails to ensure that education is economically accessible to all, the Constitutional Court recognized the importance of physical accessibility of education. The Court stated that the government’s obligation to ensure the right to education “implies the precondition of accessible educational institutions.”¹³¹ In addition, the Constitutional Court also condemned discriminatory selection criteria in schools that have the effect of limiting physical access to education for minorities.¹³² The Court ruled that selection criteria in schools must be academic and not based on race, nationality, family, language, religion, political opinion, or economic condition.¹³³ Affirmative action in favor of marginalized social groups, however, would not violate the right to equal access to education.¹³⁴

Furthermore, Law 70 of 1993, which recognizes the right of Afro-Colombians to collectively own and occupy their ancestral lands, also emphasizes the right to accessible education without discrimination.¹³⁵ For example, under Article 32 of Law 70, the government is required to recognize and guarantee the right to education in accordance with their needs and ethnocultural aspirations.¹³⁶ Additionally, under Article 33, the government aims to prevent and sanction all forms of intimidation, segregation, discrimination and racism against Afro-Colombian communities in the education system.¹³⁷ Finally, Article 40 requires the government to allocate funds for the specific purpose of creating more opportunities for Afro-Colombians in institutions of higher education.¹³⁸

b. Process Indicators:

i. Affirmative action programs assist in increasing enrollment, but fail to ensure that minorities graduate from schools.

Only 14 percent of Afro-Colombians enroll in tertiary education, which is almost half the rate of enrollment of the rest the population.¹³⁹ Certain universities such as the Valle University in Cali instituted affirmative action policies to address this problem. The University accepts all Afro-

¹²⁹ KATARINA TOMASEVSKI, *FREE OR FEE: 2006 GLOBAL REPORT 201* (2006) [hereinafter TOMASEVSKI 2006 REPORT].

¹³⁰ Concluding Observations of the Committee on Economic, Social and Cultural Rights: Colombia. 30/11/2001. E/C.12/1/Add.74., ¶ 27 [hereinafter ICESCR Concluding Observations].

¹³¹ Corte Constitucional. Sentencia T-402-92. (translated by authors).

¹³² Corte Constitucional. Sentencia T-064 of 1993.

¹³³ *Id.*

¹³⁴ Corte Constitucional. Sentencia T-441 of 1997.

¹³⁵ *See, e.g.*, Black Community Law, *supra* note 46, at art. 32 (“The Colombian State recognizes and guarantees to the black communities the right to a educational process in accordance with their ethnocultural necessities and aspirations. The competent authority will adopt the necessary measures so that at every educational level, the curriculums will adapt themselves to this disposition.”)

¹³⁶ *Id.* at art. 32.

¹³⁷ *Id.* at art. 33.

¹³⁸ *Id.* at art. 40.

¹³⁹ Diego Escobar Meeting, *supra* note 65.

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Colombian and indigenous high school students who have scored at the top 4 percent in the standardized university entrance exam.¹⁴⁰ According to a Valle University professor, without the existence of affirmative action programs such as these, no more than two to four university students would be ethnic minority members.¹⁴¹

Although minority students enroll in the Valle University, many Afro-Colombian and indigenous students drop out of school before the end of their first years.¹⁴² After intensively studying the causes of this failure of retention, the university discovered a number of reasons for its inability to retain minorities. Many minority students have to work to pay for their studies, travel long distances to attend classes, make up for previous poor educational preparation, and adjust to new cultures and lifestyles.¹⁴³ As a result of these barriers, affirmative action programs that do not provide additional orientation, academic and social support services may not serve as adequate process mechanisms for ensuring the realization of the right to education for ethnic minorities in Colombia.

ii. **The restrictive registration policies of government agencies systematically deny educational access to many displaced peoples.**

Although the laws and agencies provide for many benefits to IDPs, flawed implementation and restrictive agency policies prevent many of Colombia's internally displaced from accessing needed services, including educational services. Law 387 guarantees rights and defines priority state obligations to internally displaced peoples.¹⁴⁴ Individuals displaced in Colombia report their status

¹⁴⁰ ICFES stands for "Instituto Colombiano de Fomento de Educación Secundaria." PCN Meeting, *supra* note 24; Meeting with Carlos Gonzalez (UNOCAL), Cali, Valle del Cauca, Colombia, Dec. 8, 2007 [hereinafter Carlos Gonzalez Meeting].

¹⁴¹ Meeting with Maria Cristina Tenorio, Professor of Social Psychology, Universidad de Valle del Cauca, Cali, Valle del Cauca, Colombia (Dec. 10, 2007) [hereinafter Maria Cristina Tenorio Meeting].

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Law 387 of 1997, arts. 2 & 3 (1997) ("Article 2. Principles. The interpretation and application of the present law is oriented toward the following principles:

1st. Forced displaced people have the right to request and to receive international help and this generates a correlative right of the international community to offer humanitarian aid.

2nd. Forced displaced people will enjoy the fundamental civil law recognized internationally.

3rd. The displaced person and/or forced displaced persons have the right to not be discriminated against due to their social condition of being displaced persons, motive of race, religion, public opinion, place of origin, or physical incapacity.

4th. The family of forced displaced people should be benefited by the fundamental right of family reunification.

5th. Forced displaced people have the right to agree to final solutions regarding their situation.

6th. Forced displaced people have the right to return to their place of origin.

7th. Colombians have the right to not be displaced persons by force.

8th. The displaced person and/or forced displaced persons have the right that their liberty of movement not be

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and declare reasons for their displacement to the Public Ministry, which then sends the declaration to the Presidential Agency for Social Action and International Cooperation (*Acción Social*).¹⁴⁵ Individuals accepted as IDPs receive identification cards that allow them to obtain services, including waived matriculation fees for IDP children in schools, from the Social Solidarity Network (*Red de Solidaridad Social*), the agency that administers humanitarian assistance to IDPs.¹⁴⁶

However, Law 387 defines refugees more narrowly than internationally-accepted norms, and, as a result, certain people who would qualify under international standards are not allowed to register as IDPs in the official government registry.¹⁴⁷ According to the U.N. Guiding Principles on Internal Displacement, “displaced persons” are those who “have been forced or obligated to flee or to leave their homes or places of habitual residence, in particular as the result of or in order to avoid the effects of an armed conflict, situations of generalized violence, violations of human rights or natural or man-made disasters, and who have not crossed an internationally recognized State border.”¹⁴⁸ Colombia’s Law 387, however, does not recognize natural or man-made disasters as grounds for displacement.¹⁴⁹ As a result, Social Action does not recognize people who have been displaced due to the widespread anti-narcotics fumigations and subsequent military operations of Plan Colombia. People who have been displaced due to army operations that do not include other armed groups are also barred from qualifying as IDPs. Finally, those who fail to file within one year of displacement are also barred.¹⁵⁰ Therefore, many victims of forced displacement are excluded from the official registry and, as a result, from subsequent benefit programs in all areas of assistance, including education.¹⁵¹ As one Afro-Colombian leader from PCN pointed out, “there are a lot of students who are not receiving an education because they are displaced and either there is no space

subjected to more restrictions than foreseen by the law.

9th. It is the duty of the State to favor conditions that facilitate Colombians’ living together with equity and social justice.

Article 3. The responsibility of the State. It is the responsibility of the Colombian State to formulate policies and to adopt measures for the prevention of forced displacement; the attention, protection, consolidation, and socioeconomic stabilization of persons internally displaced by violence. In order to give effect to the previous clause, they will take into account the principles of subsidiarity, complementarity, decentralization, and assembly upon which the organization of the Colombian State has been written.”)

¹⁴⁵ See HUMAN RIGHTS WATCH, *supra* note 42, at 37.

¹⁴⁶ See Red de Solidaridad Social, *available at* <http://www.red.gov.co/> (last visited Mar. 7, 2008).

¹⁴⁷ See Law 387, *supra* note 143 (“A ‘displaced’ [person] is every person that has been seen forced to emigrate inside the national territory abandoning their locality of residence or habitual economic activities, because his or her life, his or her physical integrity, his or her security or personal liberty have been wounded or they are found directly threatened, on occasion of any of the following situations: internal armed conflict, disturbances and interior tensions, generalized violence, massive violations of Human Rights, infractions to international humanitarian law or other circumstances emanating from the previous situations that can alter or alter drastically law and order.”). For a brief description of earlier administrative measures to protect displaced persons, see DEFENSORÍA DEL PUEBLO, *supra* note 60, at 62–63.

¹⁴⁸ See Office of the High Commissioner on Human Rights, Guiding Principles on Internal Displacement, E/CN.4/1998/53/Add.2 (Feb. 11, 1998), *available at* <http://www.unhcr.ch/html/menu2/7/b/principles.htm>. (last visited Mar. 8, 2008).

¹⁴⁹ See HUMAN RIGHTS WATCH, *supra* note 42, at 27; Law 387, *supra* note 144, at art. 1 (failing to include natural or man-made disasters as causes for displacement).

¹⁵⁰ See Law 387, *supra* note 144; Refugees International, *Bulletin: Colombia: Flaws in Registering Displaced People Leads to Denial of Services* (2007), *available at* <http://www.refugeesinternational.org/content/article/detail/9976/> (last visited Mar. 8, 2008).

¹⁵¹ See PCN Meeting, *supra* note 24; Refugees International, *supra* note 150.

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or the government is not recognizing them as displaced We have pursued *tutela* actions, but the government says ‘it’s a shame, but these people are not displaced.’”¹⁵²

c. Outcome Indicators:

i. The matriculation fees and the costs of associated goods often make education economically inaccessible to ethnic minorities in Colombia.

“We were talking about the reasons why children in our communities do not go to school. There are many single mothers in our communities, mothers who run the home. I myself am a single mother and it is very difficult for me to send my children to school. We can send them to primary school but not to secondary school because we do not feel we have the economic resources to allow them to continue to study in other towns. We also worry about our children being so far away. In my case I have a son studying and this costs me 500,000 pesos [\$270 USD] per year. This does not even give them everything he needs to study and live I earn 8000 pesos [\$4.35 USD] per day. This is barely enough to get by let alone give my son an education.”¹⁵³

As discussed in Section III.B.1 *supra*, Article 67 of the Colombian Constitution permits the government to charge parents for education, even for primary education. Even though this constitutional provision suggests that those who cannot afford to pay should not be charged, in reality the ability of the government to charge for education has created severe economic obstacles for poor parents,¹⁵⁴ many of whom are minorities.¹⁵⁵ Under the Colombian system, parents are classified into six different categories based on their income.¹⁵⁶ Parents from the lowest income categories (categories 1 and 2) are supposed to be exempt from payment of matriculation fees.¹⁵⁷ In addition to enrollment fees, all parents (even those from the lower income categories) must pay for costs associated with education, such as uniforms, books, and transportation. Although this system is aimed at ensuring that education is economically accessible to all, the outcome indicators suggest otherwise. According to the Colombian Commission of Jurists, the average cost per student is 1,080,000 pesos [\$587 USD] for one year of education,¹⁵⁸ three times the minimum monthly wage and therefore beyond the means of the poorest strata of society.¹⁵⁹ Indeed, the poorest classes of society are not receiving education at the same levels as the richest classes of society. Young people from the lowest categories (one and two) have an average 5.7 years of schooling, whereas young people from the highest category (six) have completed over 11 years of school.¹⁶⁰

The Commission observed that “[o]ne of the principle reasons why children leave school is the cost of education.”¹⁶¹ The former U.N. Special Rapporteur on the Right to Education agreed

¹⁵² PCN Meeting, *supra* note 24.

¹⁵³ Indigenous leader, Cali, Valle del Cauca, Colombia (Dec. 8, 2007).

¹⁵⁴ See TOMASEVSKI 2003 REPORT, *supra* note 24, at ¶ 24.

¹⁵⁵ See INTER-AMERICAN COMMISSION, *supra* note 12, at ch. 11, ¶ 21.

¹⁵⁶ See TOMASEVSKI 2003 REPORT, *supra* note 24, at ¶ 16.

¹⁵⁷ See *id.*

¹⁵⁸ See *id.* at ¶ 24 (2003). This amounts to “materials and tuition cost around 30,000 to 40,000 pesos in elementary school and in high school 60,000, 70,000, and even 80,000 pesos.” See ARBOLEDA ET AL., *supra* note 104, at 57.

¹⁵⁹ See TOMASEVSKI 2003 REPORT, *supra* note 24, at ¶ 24.

¹⁶⁰ See *id.* at ¶ 16.

¹⁶¹ See INTER-AMERICAN COMMISSION, *supra* note 12, at ch. 3, ¶ 14.

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that “[a]ll available information indicates that inability to pay is the principal reason why children fail to enroll or abandon school.”¹⁶² The ICESCR Committee noted “with concern that the imposition of fees prevented a number of children from having access to free primary education.”¹⁶³ The Committee on the Rights of the Child also noted that the prohibitive hidden costs of education—for uniforms, administration, materials and transportation—are leading to increasing dropout rates, especially for rural children.¹⁶⁴

An Afro-Colombian leader emphasized the point that education is not free for poor Colombians:

The Constitution says that education is free, but in reality it is not free. Students are charged 25,000 pesos [\$18 USD] for the year. This is not too much. However, for many families this is a lot because they still have to pay for uniforms, transportation, books, etc. and this can become very expensive On the other hand, it costs more to continue on to high school. This is in the public schools. For the private schools, where most students attend, the schools charge. Take Agua Blanca, for example. Children arrive to the school and they have to pay There is a system of ‘seats.’ There are some spaces that are paid for, but this does not cover everyone.¹⁶⁵

Further, this disparity is only exacerbated at the tertiary levels, where 95 percent of Afro-Colombians cannot afford to send their children to university because of a lack of income.¹⁶⁶

The Commission pointed out that the failure of the government to make education economically accessible perpetuates the cycle of poverty:

Because the level of schooling has a direct effect on wages earned, education is an important aspect of a cycle of poverty. Children from poor families receive fewer years of education than their wealthier counterparts and, as a result, obtain lower wages at adulthood. Their families thus tend to remain poor, making it likely that their children, in turn, will benefit from fewer years of education.¹⁶⁷

ii. In many Afro-Colombian and indigenous communities, schools are physically inaccessible, particularly secondary schools.

Many minority communities do not have any secondary schools and the nearest secondary schools are physically inaccessible.¹⁶⁸ One of the reasons for the lack of secondary schools is the requirement that in order to support a public school, there must be a minimum number of

¹⁶² See TOMASEVSKI 2003 REPORT, *supra* note 24, at ¶ 16.

¹⁶³ ICESCR Concluding Observations, *supra* note 130, at ¶ 27.

¹⁶⁴ CRC Concluding Observations, *supra* note 97, at ¶ 76(d).

¹⁶⁵ PCN Meeting, *supra* note 24.

¹⁶⁶ Leonardo Reales Jiménez, *Afro-Colombian National Movement CIMARRON Report on the Human Rights Situation of Afro-Colombians (1994–2004)*, in MOVIMIENTO NACIONAL CIMARRON (2004).

¹⁶⁷ See INTER-AMERICAN COMMISSION, *supra* note 12, at ch. 3, ¶ 14.

¹⁶⁸ See ARBOLEDA ET AL., *supra* note 104, at 56.

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students.¹⁶⁹ In rural regions, however, this requirement is difficult to satisfy. As a result, many rural communities, which tend to consist disproportionately of Afro-Colombian and indigenous peoples, lack schools, particularly secondary schools.

An indigenous teacher from the town of Poblazón in the Cauca region confirmed the resulting problem of physical accessibility. Students wishing to gain secondary schooling “have to leave [their] famil[ies], . . . wake up at five in the morning. There are safety risks, the food is the same, and they don’t eat well It is preferable that they don’t go to study.”¹⁷⁰ An Afro-Colombian leader suggested that similar problems exist in Afro-Colombian communities, “students cannot arrive to their schools and this is especially a problem for rural children. There are no roads. There are bodies of water to cross and this causes great difficulty. Other kids have to leave at three or four in the morning to arrive to school and they are gone until the middle of the day.”¹⁷¹

Consequently, even though they comprise 27 percent of the population, Afro-Colombians constitute just 10.96 percent of students enrolled in secondary schools.¹⁷² The Committee on the Elimination of Discrimination against Women (hereinafter “the CEDAW Committee”) has also recently noted that rural and displaced women and children tend to have lower school enrollment and completion rates.¹⁷³

iii. Displaced ethnic minority children suffer additional hurdles to accessing education.

“In Buenaventura 40 to 50 percent of children are not attending school and do not have access to education. We emphasize the situation in Buenaventura because it is the most violent city in all of Latin America. Its commercial port is the most important in Colombia and in all of South America. Also, it is the most impoverished city. . . . No one is interested in stopping the violence there . . . the FARC controls the port Regarding education . . . mothers do not send their children to school when they are starving. They have nothing to eat. Why send a child to school starving when they could go and work or fish to help with getting food to eat?”¹⁷⁴

Displaced Afro-Colombian children experience additional difficulties in accessing education.¹⁷⁵ First, overt discrimination hinders access to education. For example, an Afro-Colombian leader in Bogotá related the story of his son, who said to him, “Dad, I won’t want to go to high school because there they call me *chocolatín*, *negrito*, and they call me other things. So, I tell them that my name is Gustavo, and that they shouldn’t call me *chocolatín*, or *negrito*, or none of these things, that my name is Gustavo. But my classmates don’t pay attention to me.”¹⁷⁶ Another Afro-

¹⁶⁹ Meeting with indigenous teachers in Poblazón, Cauca, Colombia (Dec. 10, 2007) (on file with authors) [hereinafter Poblazón Meeting].

¹⁷⁰ *Id.*

¹⁷¹ PCN Meeting, *supra* note 24.

¹⁷² See VICE MINISTER REPORT, *supra* note 11.

¹⁷³ See Concluding Comments of the Committee on the Elimination of Discrimination against Women: Colombia, ¶¶ 12, 13 & 30, U.N. Doc. CEDAW/C/COL/CO/6 (2007).

¹⁷⁴ Senator Alexander Lopez Maya, Cali, Valle del Cauca, Colombia (December 8, 2007).

¹⁷⁵ See WOMEN’S COMMISSION, *supra* note 64, at 23.

¹⁷⁶ See *id.* at 22. Both the words *chocolatín* (“little chocolate”) and *negrito* (“little black boy”) can be used as racial slurs in Spanish.

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Colombian leader in Bogotá stated that one teacher said to a student, ““God killed you four times: for being poor, for being black, for being displaced, and for being a woman.””¹⁷⁷

Second, although children of IDPs are supposed to receive priority admission for schools, this policy is often not properly implemented.¹⁷⁸ Only 23 percent of women certified as IDPs know that they can receive help with regard to their children’s education.¹⁷⁹ In addition, government policies waive displaced children’s matriculation fees for only one year and only if their families hold an official displacement identification card.¹⁸⁰ Despite being admitted to schools, IDP children are required to pay for uniforms and school materials.¹⁸¹

As a result of all of these factors, 77 percent of children abandon their schooling after being displaced¹⁸² and between 1.5 and 3.3 million students have been excluded from schools.¹⁸³

3. Acceptability

a. **Structural Indicators: In compliance with its inter-American and international treaty obligations, Colombia’s Constitution and Constitutional Court require quality education for all Colombians.**

Under the “acceptability” requirement, governments are obligated to provide an acceptable high-quality education to students.¹⁸⁴ Article 13 of the Protocol of San Salvador¹⁸⁵ and Articles 13 and 14 of the ICESCR¹⁸⁶ obligate Colombia to provide its people an acceptable quality of education. In accordance with its treaty obligations, Article 67 of the Colombian Constitution addresses acceptability of education by declaring that the state must “perform the final inspection and supervision of education in order to control its quality, to ensure it fulfills its purposes, and for the improved moral, intellectual, and physical training of those being educated”¹⁸⁷

The Constitutional Court also suggested that the government must provide an acceptable high-quality education to all. First, the Constitutional Court found that the government violates the right to education when the public educational system does not adequately prepare students or teach them the knowledge and values that the educational system is designed to teach them.¹⁸⁸ Second, the Court declared that the government violates the right to an acceptable quality of education when public authorities fail to advance or to execute important administrative procedures to provide the most efficient and highest quality educational services available.¹⁸⁹ Finally, the right to acceptable educational standards triggers the government obligation to monitor and evaluate the educational

¹⁷⁷ Meeting with CODHES, AFRODES, & CIMARRON, Bogotá, Colombia (Dec. 12, 2007) (on file with authors).

¹⁷⁸ See WOMEN’S COMMISSION, *supra* note 64, at 23.

¹⁷⁹ See *id.*

¹⁸⁰ See PCN Meeting, *supra* note 24.

¹⁸¹ See WOMEN’S COMMISSION, *supra* note 64, at 23.

¹⁸² SENIOR INTER-AGENCY NETWORK ON INTERNAL DISPLACEMENT MISSION TO COLOMBIA, FINDINGS AND RECOMMENDATIONS 6 (2001), available at www.reliefweb.int/idp/docs/reports/Colombiaiarepaug2001.pdf.

¹⁸³ See TOMASEVSKI 2003 REPORT, *supra* note 24, at ¶ 29.

¹⁸⁴ DEFENSORÍA 2003 REPORT, *supra* note 74, at 205; TOMASEVSKI 2001 REPORT, *supra* note 69, at 29.

¹⁸⁵ Protocol of San Salvador, *supra* note 2, at art. 13.

¹⁸⁶ ICESCR, *supra* note 72, at arts. 13 & 14.

¹⁸⁷ Political Constitution of Colombia, *supra* note 18, at art. 67 (emphasis added).

¹⁸⁸ DEFENSORÍA 2004 REPORT, *supra* note 76, at 28; Corte Constitucional. Sentencia T-337-95.

¹⁸⁹ See Corte Constitucional. Sentencias T-337-95 & T-571-99.

system.¹⁹⁰

b. Process Indicators: The Ministry of Education continues to fund poor quality private schools, commonly referred to as “garage schools.”

Under Law 715 enacted in 2001, which governs the public education system, the government is permitted to contract with private entities for the provision of educational services when the public education system is insufficient or inadequate.¹⁹¹ Under Decree 4313, the Ministry of National Education established evaluation criteria and certain qualification levels that schools must meet in order to participate in the pool of schools that could receive public funding, known as the “Supply Bank” (*Banco de Oferentes*).¹⁹² Despite these minimum standards, the Decree contains a fundamental “escape” clause that allows for the funding of below-quality schools.¹⁹³ Specifically, the clause states that “[w]hen it is shown that the average score of the educational services in the area should be lower than this established minimum, the certified territorial entity shall, with justification, establish a lower minimum technical score”¹⁹⁴ In other words, where there are no educational providers in a particular area that satisfy the minimum certification criteria, the central government is permitted to fund below-quality providers. Consequently, under its own regulations, the Ministry of Education is permitted to provide public funding to private and low quality educational institutions.

c. Outcome Indicators: Public funding for private schools referred to as “garage schools” and the shortage of trained teachers in public schools is creating a crisis of quality of the education provided to Afro-Colombian and Indigenous peoples.

As a result of Decree 4313,¹⁹⁵ public funding is being provided to privately-run schools of low quality known as “garage schools” (*escuelas de garaje*). These schools usually lack quality teachers, curricula, and learning materials. An Afro-Colombian leader pointed out the prevalence of garage schools in Cali, where there is a large Afro-Colombian population. He stated that even though there are 162 educational primary and secondary schools in Cali, only six are public institutions.¹⁹⁶ The rest are “garage schools,” which not only provide low quality education, but also charge students enrollment fees.¹⁹⁷ He further noted that “[t]here is no control or monitoring of these schools. . . . They do not care whether the students learn at school as long as they are receiving the money for having a school.”¹⁹⁸

Poorly-trained teachers also negatively impact the acceptability of education. The Commission recognized this problem and observed that “[m]ore than half (52.5%) of teachers have

¹⁹⁰ See DEFENSORÍA 2003 REPORT, *supra* note 74, at 142.; Sentencia T-562 of 1993.

¹⁹¹ Law 715 of 2001 (2001).

¹⁹² Colombia Decree 4313, Chapter II, Sec. 1.6.3, at 4 (2004) (“The Ministry of National Education shall establish the evaluation and qualification criteria, which shall include technical aspects . . . and shall take economic aspects into consideration”).

¹⁹³ NATIONAL MINISTRY OF EDUCATION OF THE REPUBLIC OF COLOMBIA, GUÍA PARA LA CONFORMACIÓN DEL BANCO DE OFERENTES 8 n.3 (2008).

¹⁹⁴ *Id.*

¹⁹⁵ Colombia Decree 4313, *supra* note 189.

¹⁹⁶ PCN Meeting, *supra* note 24.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

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only a secondary education, while some teachers (0.5%) have only a primary education.”¹⁹⁹ The Commission also noted that another reason for the low quality of education is the inadequate pay received by teachers. The Commission stated that “[a]ccording to the Colombian Federation of Educators, the average monthly salary of teachers is \$292,000 pesos (approximately \$185 dollars) and 55% of teachers earn only \$250,000 pesos (approximately \$158 dollars).”²⁰⁰ The Committee on Economic, Social and Cultural Rights also found poor quality education in Colombia at all levels of the educational system.²⁰¹

Outcome indicators demonstrate the unacceptability of the education for minorities. Approximately 50 percent of public schools report “low achievement” on assessment tests.²⁰²

4. Adaptability

- a. **Structural Indicators: In compliance with its regional and international treaties, Colombia’s Constitution, Constitutional Court, and legislation require that the Colombian government provide adequate education for students of diverse educational backgrounds.**

Adaptability refers to an education system’s ability to accommodate students who may require specific arrangements based on their individual needs or on their social or cultural backgrounds.²⁰³ Colombia is required to provide special education under Article 13(3)(e) of the Protocol of San Salvador and to protect the right of indigenous peoples to receive an education in their own culture and language under Article 15 of the United Nations Declaration on the Rights of Indigenous Peoples.²⁰⁴ An adaptable education is one that accommodates students so that they will stay in school.

The right to retention in the educational system and the obligation of adaptability of the system are found in Article 67 of the Constitution, which requires the State to provide “the minimum conditions necessary for [children’s] . . . retention in the educational system.”²⁰⁵ In this respect, the Constitutional Court found that the “effectiveness of the fundamental right to education is having access to a place which provides for educational services and guarantees retention of the student in the educational system.”²⁰⁶ According to the Court, any minor with access to an educational institution who is performing satisfactorily and conforming to school rules has the fundamental right to continued placement in the institution.²⁰⁷

Additionally, the Constitutional Court indicated that the right to retention is connected to other fundamental human rights, such as the rights to equality, due process and personal development.²⁰⁸ It also explicitly prohibited educational institutions from expelling or sanctioning

¹⁹⁹ See INTER-AMERICAN COMMISSION, *supra* note 12, at ch. 3, ¶ 15.

²⁰⁰ See *id.*

²⁰¹ See, e.g., ICESCR Concluding Observations, *supra* note 130, at ¶ 28.

²⁰² See ARBOLEDA ET AL., *supra* note 104, at 50.

²⁰³ TOMASEVSKI 2001 REPORT, *supra* note 70, at 31.

²⁰⁴ United Nations Declaration on the Rights of Indigenous Peoples, art. 15, A/RES/61/295 (Oct. 2, 2007).

²⁰⁵ Political Constitution of Colombia, *supra* note 18, at art. 67; DEFENSORÍA 2004 REPORT, *supra* note 76, at 26.

²⁰⁶ Corte Constitucional. Sentencia T-290-96 (translated by authors).

²⁰⁷ Corte Constitucional. Sentencia T-402 of 1992.

²⁰⁸ DEFENSORÍA 2004 REPORT, *supra* note 76, at 27; Corte Constitucional. Sentencia T-1635 of 2000; DEFENSORÍA 2003 REPORT, *supra* note 74, at 142.

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students on account of “pregnancy, hair color, sexual identity, or marital status . . .”²⁰⁹ so as not to allow the government to violate students’ rights to remain in school. The government has a special duty to adapt educational services to fit the special needs of children with disabilities or special abilities.²¹⁰ Although children fourteen years of age or older may choose to work, the government must provide evening classes, including adult education.²¹¹

Finally, the General Educational Law, Law 115, defines and clarifies State duties in adapting educational services by providing for “ethno-education”²¹² and education for rural populations.²¹³ Article 55 defines ethno-education as education for ethnic groups or communities that have their own indigenous cultures, languages, and traditions.²¹⁴ The basic principles and objectives of ethno-education are to link education to the respect and protection of the environment, to linguistic diversity and to community practices and beliefs.²¹⁵ Similarly, Article 64 promotes rural education and focuses on teaching technical skills in areas such as agriculture, fishing and forestry, which respects the needs and will contribute to the improvement of work and quality of life of rural communities.²¹⁶ The Court’s jurisprudence recognizes the value of education that aims to preserve culture in line with Article 68 of the Constitution, which requires that the State respect ethnic and cultural identity and development through the educational system.²¹⁷ Thus, in order to be acceptable, education must meet the needs of minority and rural communities.

b. Process Indicators: The Ministry of Education is the agency charged with implementing education policies and focuses on minority issues.

The Ministry of Education has spearheaded many initiatives aimed at improving its education system; such reforms include improving the education system’s adaptability. The Ministry of National Education’s mandate from Decree 4675 of 2006²¹⁸ enumerates several major functions, including formulating national educational policies, regulations and evaluation criteria to improve access, quality, and equity in the Colombian education system.²¹⁹ This government agency is charged with regulating all levels of education: preschool, primary, secondary, tertiary, and technical training.²²⁰ Additionally, through Law 30,²²¹ Law 21,²²² and the “Expansion of Coverage” Law

²⁰⁹ Corte Constitucional. Sentencia T-1032-00.

²¹⁰ DEFENSORÍA 2003 REPORT, *supra* note 74, at 169–77.

²¹¹ *See* Sentencia T-1017 of 2000; *id.* at 179–80. Notably, Article 44 of the Constitution protects children from employment that impede a child’s access to education. DEFENSORÍA 2003 REPORT, *supra* note 74, at 181.

²¹² General Education Law, *supra* note 84, at Chapter III, Education for Ethnic Groups, arts. 55–63.

²¹³ *Id.* at Chapter IV, Rural Education, arts. 64–67.

²¹⁴ *Id.* at art. 55, Definición de Etnoeducación.

²¹⁵ *Id.* at art. 56, Principios y Fines. Law 60 of 1993 was repealed by Law 715 of 2001.

²¹⁶ *Id.* at art. 64, Fomento de la Educación Campesina.

²¹⁷ Political Constitution of Colombia, *supra* note 18, at art. 68; DEFENSORÍA 2003 REPORT, *supra* note 74, at 142.

²¹⁸ Colombia Decreto 4675, art. 2 (2006), *available at* <http://www.avancejuridico.com/actualidad/documentosoficiales/2006/46496/d4675006.html> (last visited Mar. 8, 2008).

²¹⁹ *Id.*

²²⁰ Ministerio de Educación Nacional, Servicios, *available at* <http://www.mineducacion.gov.co/1621/article-85259.html> (last visited Mar. 8, 2008).

²²¹ Law 30, *available at* http://www.secretariassenado.gov.co/leyes/L0030_92.HTM (last visited Mar. 8, 2008).

²²² Law 21 of 1991 (1991), *available at* <http://www.acnur.org/biblioteca/pdf/4407.pdf>.

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(*Ampliación de Cobertura*),²²³ the Ministry is to monitor and distribute the financial resources in order to implement its various national educational strategies and programs.²²⁴

Moreover, the Ministry of Education oversees the development, implementation and management of the National Development Plan projects directed by territorial entities, education secretaries, and public universities to guarantee increased education coverage, improved education quality, and increased efficiency of the education sector.²²⁵ Its offices also provide technical assistance and handles quality assurance procedures in higher education systems.²²⁶ Finally, the Ministry supplies and disseminates information to monitor and evaluate the education system throughout the country.²²⁷ Although the Ministry has personnel who study ethno-education, the number of personnel varies with each presidential administration, and we are not aware of specific programs that address the immense disparities between the educational access of Afro-Colombian and indigenous people and the rest of the population.

c. Outcome Indicators: Colombian education is not adaptable because it does not accommodate ethnic minorities' demands for public funding of programs to support ethno-education.

“The educational texts show the presence of blacks as slaves who came from Africa, who worked in the mines, who worked in the haciendas, and in some cases talk about the movements of immigration as in the case of the *Cimarrones* [Africans who escaped from European colonial slavery]. Nothing more.”²²⁸

A central challenge to Colombia's public schools is the failure of the government to provide meaningful alternative curricula to indigenous and Afro-Colombian students. Though Colombia's Constitution changed the national self-conception from Eurocentric to heterogeneous, the public education system has not empowered ethnic groups to educate students about their own cultures.²²⁹

Afro-Colombian and indigenous leaders offer many reasons why the Colombian government has failed to provide true ethno-education to minority communities. Some note a lack of diversity among teachers themselves, and therefore students are not learning from teachers who understand their students' diverse backgrounds.²³⁰ Others argue that, though minority teachers are in fact teaching in schools, they do not have the training or the flexibility to teach an alternative curriculum of their own choosing.²³¹ Finally, still others note that, even if teachers had such a curriculum

²²³ Law 60 of 1993 (1993), available at http://www.secretariassenado.gov.co/leyes/L0060_93.HTM (last visited Mar. 8, 2008).

²²⁴ Ministerio de Educación Nacional, *supra* note 220; interview with Juana Diaz, Vice Minister of Education, Colombia (Dec. 14, 2007) [hereinafter Juana Diaz Interview].

²²⁵ Ministerio de Educación Nacional, *supra* note 220; Juana Diaz Interview, *supra* note 224.

²²⁶ Ministerio de Educación Nacional, *supra* note 220; Juana Diaz Interview, *supra* note 224.

²²⁷ Ministerio de Educación Nacional, *supra* note 220; Juana Diaz Interview, *supra* note 224.

²²⁸ Meeting with PCN, Cali, Valle del Cauca, Colombia (December 8, 2007).

²²⁹ Meeting with Afro-Colombian leaders at CODHES, Bogotá, Colombia, Dec. 12, 2007.

²³⁰ CRIC Meeting, *supra* note 27.

²³¹ PCN Meeting, *supra* note 24.

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available to them, they would not functionally be free to teach such a curriculum because they are preparing students for the standardized university entrance exam (*ICFES*).²³²

As the Ministry of Education²³³ noted, one of the most ambitious ethno-education plans has been an indigenous proposal to create a distinct, publicly funded “Indigenous University.” The Regional Indigenous Committee of Cauca (*Comité Regional Indígenas del Cauca*, hereinafter “CRIC”) conceived of this plan and is currently in dialogue with the Ministry of Education regarding its creation. According to CRIC leaders, there is no autonomous education in Colombia and the issue of ethno-education is “much more complex than just managing texts.”²³⁴ For them, the problem stems from having a “standardized” system that, because of its uniformity, does not “meet the needs” of the indigenous.²³⁵ CRIC therefore advocates for a university that would be publicly funded and managed with political, pedagogic, and administrative components designed for indigenous students.²³⁶ However, the Ministry of Education expressed that an indigenous university would need to meet basic Colombian curricular requirements in order to receive public funding; the curriculum could not be based solely on indigenous matters or be restricted to education solely in indigenous languages.²³⁷

The United Nations High Commissioner for Refugees (hereinafter “the UNHCR”) recognized that indigenous students abandon schools with their “Western structure” and “homogeneous culture.”²³⁸ Consequently, the UNHCR is funding the creation of textbooks in indigenous languages that pertain to indigenous cultures.²³⁹ The Committee on the Rights of the Child recently noted that Colombia must pay greater attention to ensuring that education is adaptable.²⁴⁰ It recommended that Colombia “improve the quality of education, respecting geographical and cultural diversity” as well as “improve the relevance of bilingual education programmes for children belonging to indigenous and Afro-Colombian groups” in compliance with Articles 28 and 29 of the CRC.²⁴¹

²³² Meeting with the Afro-Colombian Conference leaders, Bogotá, Colombia, Dec. 13, 2007.

²³³ Meeting with Ministry of Education, Bogotá, Colombia, Dec. 13, 2007 [hereinafter Ministry of Education Meeting].

²³⁴ CRIC Meeting, *supra* note 27. There is an “Afrocolombian National School” that has received funding from USAID. Leonardo Reales, *Racial Discrimination and Lack of Empowerment: The Afrocolombian Case*, in NATIONAL CIMMARON MOVEMENT (2004). In contrast to the Indigenous University, whose goal is to train indigenous students, the purpose of the school is to educate community leaders and Afrocolombian teachers about political, constitutional, and women’s rights. See Reales, *supra*.

²³⁵ CRIC Meeting, *supra* note 27.

²³⁶ *Id.*

²³⁷ Ministry of Education Meeting, *supra* note 233.

²³⁸ Meeting with Office of the U.N. High Commissioner for Refugees, Bogotá, Colombia, Dec. 13, 2007 [hereinafter UNHCR Meeting].

²³⁹ *Id.*

²⁴⁰ CRC Committee, Concluding Observations of the Committee on the Rights of the Child: Colombia, ¶¶ 53, 60, CRC/C/15/Add.137 (2000).

²⁴¹ *Id.*

5. Accountability

a. Structural Indicators: Colombia's Constitution and Constitutional Court affirm the *tutela* as the principal mechanism for accountability.

Accountability “demands that mechanisms be established to allow claim holders . . . to monitor and discipline duty bearers . . . so as to improve the educational outcomes.”²⁴² Accountability requires mechanisms to demand state compliance with its duty to guarantee the free and full exercise of fundamental constitutional rights.²⁴³ Without available mechanisms for state accountability, individuals could never exercise other rights that are necessary to effectively exercise the right to education.²⁴⁴ Thus, ensuring accountability is also an integral step the government must take toward securing the right to education in Colombia.

The Constitution establishes the *tutela*, a direct and immediate mechanism for accountability through the Colombian judicial system.²⁴⁵ This allows individuals to bring an action to demand immediate protection of rights that are identified as “fundamental rights” under the Constitution and to declare laws unconstitutional.²⁴⁶ A person can bring a *tutela* action before a judge at any time and in any place.²⁴⁷ The judge must rule on the action within ten days.²⁴⁸ Under Decree 2591 of 1991, the government must comply with orders granting *tutelas* within 48 hours of the initial order granting protection of fundamental rights.²⁴⁹

Although the key constitutional provisions relating to the right to education are not considered “fundamental rights,” the Constitutional Court nevertheless allowed individuals to bring *tutela* actions to enforce aspects of the right to education that are related to other fundamental rights.²⁵⁰ The Constitutional Court viewed education to be a fundamental right to the extent it relates to the fundamental rights of children. Article 44 of the Constitution declares that the “fundamental rights of children [are] life, physical integrity, health and social security . . . education and culture, recreation, and the free expression of their opinions.”²⁵¹ The Court interpreted this provision to mean that the right to education is a fundamental right for all children until the age of 18.²⁵²

²⁴² See WOODROW WILSON FRAMEWORK, *supra* note 15, at 30; HERNÁN ALEJANDRO OLANO GARCÍA, INTERPRETACIÓN Y DOGMÁTICA CONSTITUCIONAL 180–83 (2005).

²⁴³ See WOODROW WILSON FRAMEWORK, *supra* note 15, at 30.

²⁴⁴ See *id.*

²⁴⁵ See Mercedes Londoño, *El Rol de la Acción de Tutela en la Protección del Derecho a la Educación*, in EL DERECHO A LA EDUCACIÓN DE NIÑOS Y NIÑAS EN SITUACIÓN DE DESPLAZAMIENTO Y DE EXTREMA POBREZA EN COLOMBIA (Katya Salazar, ed.) 247 (2005).

²⁴⁶ CEDAW Committee, Concluding Observations: Colombia, ¶ 340, CEDAW/C/COL/4 (Feb. 3, 1999), available at <http://www1.umn.edu/humanrts/cedaw/colombia1999.html> (last visited Mar. 8, 2008) [hereinafter CEDAW Committee Concluding Observations].

²⁴⁷ Political Constitution of Colombia, *supra* note 18, at art. 86.

²⁴⁸ Martha Morgan, *Taking Machismo to Court: The Gender Jurisprudence of the Colombian Constitutional Court*, 30 U. MIAMI INTER-AM. L. REV. 253, 276 (1999).

²⁴⁹ *Id.*

²⁵⁰ Political Constitution of Colombia, *supra* note 18, at art. 85. This list of fundamental rights consists of rights that are of “immediate application.” *Id.*

²⁵¹ *Id.* at art. 44 (emphasis added). See ROGELIO ENRIQUE PEÑA PEÑA, CONSTITUCIÓN POLÍTICA DE COLOMBIA: CONCORDANCIAS, JURISPRUDENCIA, DOCTRINA, COMENTARIOS 51–52 (2007).

²⁵² DEFENSORÍA 2003 REPORT, *supra* note 74, at 89.

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Additionally, the Court found that the right to education is a fundamental right to the extent it relates to equality and non-discrimination in education. The Constitution recognizes the right to non-discrimination²⁵³ and the right to equality. In particular, Article 13 declares that “all individuals are born free and equal before the law and are entitled to equal protection . . . to enjoy the same rights, freedoms, and opportunities without discrimination . . .” of any kind.²⁵⁴ Article 13 also obligates Colombia to adopt affirmative action programs to “promote the conditions necessary in order that equality may be real and effective and will adopt measures in favor of groups which are discriminated against or marginalized.”²⁵⁵ Thus, the Constitutional Court found that the right to education is a fundamental right to the extent that a violation of the right to education is also violative of the non-discrimination and equality protections of the Constitution.²⁵⁶

The Constitutional Court interpreted the function of *tutela* actions broadly.²⁵⁷ Thus, a large body of human rights jurisprudence developed because of the development of the *tutela* action.²⁵⁸ Currently, however, proposed constitutional amendments seek to drastically limit the permissible uses of the *tutela* action.²⁵⁹ As a result, the long-term, future scope of the *tutela* action is uncertain.

b. Process Indicators: The Colombian Ombudsman’s Office addresses grievances with regard to the right to education.

The Ombudsman’s Office (*Defensoría del Pueblo*) provides public defender services—technical assistance and judicial representation—to socio-economically disadvantaged Colombians.²⁶⁰ The Ombudsman’s office receives and initiates numerous petitions for *tutela* actions to hold the government accountable for human rights violations, including the right to education. In the Cali regional office, for example, *tutela* actions to enforce the right to education were the fifth highest number of *tutela* actions.²⁶¹ The Ombudsman for the region of Cali himself estimates that 90 percent of Colombians who come to his office wishing for some sort of legal assertion of rights, whether it be *tutela*, collective rights, or some other action, are able to achieve some legal recourse.²⁶² However, it is not clear whether the office has implemented any extensive outreach programs or brochures in indigenous languages that would explain to people their rights and the services that the Ombudsman offers in furtherance of those rights.

²⁵³ Political Constitution of Colombia, *supra* note 18, at art. 5. See PEÑA PEÑA, *supra* note 251, at 11–12 (stating that this right is a fundamental constitutional right and declaring that the state must recognize and protect this and other fundamental rights).

²⁵⁴ Political Constitution of Colombia, *supra* note 18, at art. 13.

²⁵⁵ *Id.*

²⁵⁶ DEFENSORÍA 2003 REPORT, *supra* note 74, at 32; see Corte Constitucional. Sentencia T-402-92.

²⁵⁷ WORLD ORG. AGAINST TORTURE, VIOLENCE AGAINST WOMEN: A REPORT TO THE COMMITTEE AGAINST TORTURE 155, 172 (2003), *available at* http://www.omct.org/pdf/VAW/Publications/2003/Eng_2003_04_Colombia.pdf.

²⁵⁸ CEDAW Committee Concluding Observations, *supra* note 246, at ¶ 340.

²⁵⁹ WORLD ORG. AGAINST TORTURE, *supra* note 257, at 155, 172 (citing Observatory for the Protection of Human Rights Defenders, OMCT and FIDH, *Rapport d’une Mission d’Enquête Internationale, Colombie: Administration de la Justice ou de l’Impunité?* (2003)).

²⁶⁰ Defensoría del Pueblo, *available at* http://www.defensoria.org.co/red/?_item=0001&_secc=00&ts=1 (last visited Mar. 8, 2008).

²⁶¹ Meeting with the Defensoría del Pueblo, Cali, Valle del Cauca, Colombia, Dec. 12, 2007.

²⁶² *Id.*

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- c. **Outcome Indicators: Existing mechanisms have been unsuccessful in holding the government accountable for its failures in the right to education for minorities.**

Although the *tutela* action is a powerful tool for government accountability, the Colombian government has not been held fully accountable for systematic failures in meeting its obligations to ensure the right to education. Many marginalized individuals are not in a position to initiate a court case to receive relief from fundamental human rights violations.²⁶³ For example, one IDP told Human Rights Watch: “I can’t wait for a *tutela*. While I wait for a *tutela*, my daughter will have gone three or four months without food.”²⁶⁴ Furthermore, a *tutela* action cannot offer compensation or payment of benefits to victims of fundamental human rights violations.²⁶⁵ Finally, the decisions of *tutela* cases are limited to the persons involved in the disputes and do not have general applicability.²⁶⁶ Thus, the government can address the specific issues raised by the litigants in the *tutela* action, but it can avoid rectifying those same inequalities or problems for the rest of the population.

D. RECOMMENDATIONS TO THE COLOMBIAN GOVERNMENT

Structural, process and outcome indicators and the “5-A Right to Education Framework” suggest that Colombia has not satisfied its obligations to Afro-Colombian and indigenous peoples with respect to education under Article 13 of the Protocol of San Salvador as well as numerous other Inter-American and international treaties to which it is a State Party.

Consequently, we recommend that the Colombian government:

1. Increase availability by allocating more funds for the creation and maintenance of both primary and secondary public schools in areas with large minority populations, including rural areas.
2. Improve accessibility to minorities, who are disproportionately represented among the poor, by amending the Constitution to delete the language that requires people can afford to pay to pay for education. Specifically, delete from Article 67 of the Constitution, the phrase “sin perjuicio del cobro de derechos academicos a quienes pierdan sufragarlos” (without prejudice to those who can afford to defray the costs).
3. Address acceptability by refusing to provide public funding to low quality schools that currently exist in minority communities, especially “garage schools.”
4. Make schools more adaptable by focusing on the needs of Afro-Colombian and indigenous peoples, especially by incorporating ethno-education into school curricula.

²⁶³ HUMAN RIGHTS WATCH, *supra* note 42, at 36.

²⁶⁴ *Id.*

²⁶⁵ CENTER FOR REPRODUCTIVE RIGHTS, BODIES ON TRIAL: REPRODUCTIVE RIGHTS IN LATIN AMERICAN COURTS 55 (2003), available at http://www.reproductiverights.org/pdf/pdf_BOT_colombia.pdf.

²⁶⁶ *Id.*

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5. Increase accountability for its actions by maintaining and broadening the scope of tutela actions.

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V. COUNTRY PROFILE: GUATEMALA



A. OVERVIEW: GUATEMALA HAS FAILED TO MEET ITS LEGAL OBLIGATIONS TO FULFILL THE RIGHT TO EDUCATION, IN PARTICULAR OF AFRO-DESCENDANTS AND INDIGENOUS PEOPLES.

This Country Study analyzes the realization of the right to education in Guatemala through structural, process, and outcome indicators in accordance with the Inter-American Commission on Human Rights' (hereinafter the "Inter-American Commission" or "Commission") proposed Guidelines for Preparation of Progress Indicators in the Area of Economic, Social and Cultural Rights (hereinafter "Guidelines").¹ The State has structural indicators in place in the form of regional, international, and domestic legal obligations that require immediate and progressive realization of the right to education on an equal basis without discrimination. However, its poor process and outcome indicators demonstrate that Guatemala has failed to effectively implement this

¹ See INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, GUIDELINES FOR PREPARATION OF PROGRESS INDICATORS IN THE AREA OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS, OEA/Ser/L/V/II.129 (Doc. 5), at ¶ 30–32 (Oct. 5, 2007), available at <http://www.cidh.org/pdf%20files/Guideline%20october%202007%20eng.pdf> [hereinafter GUIDELINES].

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right. This is especially the case with respect to its Afro-descendants and indigenous peoples, who comprise 40 percent of the population but lag behind the rest of the country in educational attainment, literacy rates, and earning potential.² The realization of the right to education for these marginalized populations is essential in breaking the cycles of poverty and discrimination.³ The Inter-American Commission must hold the Government of Guatemala accountable for the failure to fulfill its legal obligations with respect to education.

Under regional law, Guatemala is obligated to immediately provide education at all levels without discrimination; compulsory and free primary education; and equal protection under the law for vulnerable populations such as Afro-descendants and indigenous peoples and women. The State's failure to do so suggests that it has violated its obligations under Article 26 of the American Convention on Human Rights (hereinafter "the American Convention"),⁴ Articles 13 and 16 of the Protocol of San Salvador (hereinafter "the Protocol of San Salvador"),⁵ Article 5 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (hereinafter "the Convention of Belém do Pará"),⁶ and Articles II and IX of the American Declaration on the Rights and Duties of Man (hereinafter "the American Declaration").⁷ In addition, Guatemala's regional obligations require that it take steps to progressively realize the right to secondary and higher education. The State must advance progressively toward this goal using maximum available resources in order to comply with Article 26 of the American Convention, Article 13 of the Protocol of San Salvador, and Article 8 of the Convention of Belém do Pará.

Additionally, Guatemala's failure to provide quality education is a violation of its domestic legal obligations. The Constitution of Guatemala guarantees the right to education for all without discrimination and free and compulsory primary education under Articles 71 and 74.⁸ The Guatemalan Peace Accords of 1996 establish binding goals to improve education through literacy, scholarship, and indigenous-focused programs and increased government spending,⁹ and a number of domestic laws mandate quality education for both the general population and indigenous peoples specifically.¹⁰

Nonetheless, Guatemala has systematically failed to implement the educational rights established in its national legal framework and to which it has committed itself under regional and

² Luisa Maria Mazariegos, Sandra Sáenz de Tejada & Lucia Jiménez, *Educación e Idioma: Acceso y Diversidad Étnico-Cultural 1994-2004*, Estudio 1360, in REPORT ON HUMAN DEVELOPMENT (2005); INTER-AMERICAN DEVELOPMENT PROJECT, INDIGENOUS PEOPLES AND POVERTY REDUCTION: A CASE STUDY IN GUATEMALA, (1998), available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=363023>.

³ See Guatemalan Peace Accords of 1996, Agreement on Identity and Rights of Indigenous Peoples, Title III, available at http://www.usip.org/library/pa/guatemala/guat_950331.html [hereinafter Peace Accords].

⁴ Organization of American States, American Convention on Human Rights (American Convention) art. 26, Nov. 22, 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention].

⁵ Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) arts. 13 & 16, Nov. 17, 1988, O.A.S. Treaty Series No. 69 [hereinafter Protocol of San Salvador].

⁶ Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, (Convention of Belém do Pará) art. 5, Jun. 9, 1994, 33 I.L.M. 1534 (1994) [hereinafter Convention of Belém do Pará].

⁷ American Declaration on the Rights and Duties of Man (American Declaration) arts. II & IX, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992) [hereinafter American Declaration].

⁸ Constitución Política Reformada por Acuerdo Legislativo No. 18-93 del 17 de Noviembre de 1993 [hereinafter Guat. Const.].

⁹ Peace Accords, *supra* note 3.

¹⁰ See Part V.B.4, *infra* (discussing range of domestic legislation).

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international law. Due in part to the country's turbulent history of war, its diverse ethnic composition, structural discrimination, and its rural demography, Guatemala's Afro-descendants and indigenous peoples have not benefited from the State's legal protections.¹¹

An analysis of outcome indicators demonstrates that Guatemala has failed to effectively provide education to its population. This Country Study uses the "5-A Right to Education Framework," to evaluate the State's compliance with the educational requirements of the American Convention, by examining the availability, accessibility, acceptability, adaptability,¹² and accountability of Guatemala's education system.¹³ The Country Study draws from educational data from the past five years, to the extent it is available, and finds that low education spending, poor facilities, and inadequate teacher training detract from the availability of education, especially for Afro-descendants and indigenous peoples. Furthermore, the accessibility of education is also compromised, especially for rural families, due to remote school locations and the need for children to earn money rather than attend school. The failure of the State to account for the language barrier faced by many indigenous students negatively affects the acceptability of education. Additionally, the failure to adapt educational programs to meet the needs of the rural agriculturally-based population also disparately affects Afro-descendants and indigenous peoples of Guatemala. The State should also strengthen the relationships between duty bearers and rights holders in order to improve its accountability to citizens. These State failures violate Guatemala's regional, international, and domestic obligations, and result in a disparate impact on the educational attainment of Afro-descendants and indigenous peoples,¹⁴ which must be rectified.

B. GUATEMALA HAS THE LEGAL OBLIGATION, UNDER BOTH DOMESTIC AND REGIONAL LAW, TO FULFILL THE RIGHT TO EDUCATION WITHOUT DISCRIMINATION.

In evaluating the right to education, the Commission's ESCR Guidelines call for an analysis of structural indicators, i.e., the components of the State's institutional framework for providing education.¹⁵ Within the existing legal framework, indigenous Guatemalans are entitled to an education free from discrimination. Under domestic law, including the 1996 Peace Accords, the Guatemalan Constitution, and a range of education-related legislation, as well as regional and international law, the State is obligated to provide quality education to all its citizens.¹⁶ However, Guatemala historically has had difficulty meeting these obligations.

¹¹ See Mazariegos et al, *supra* note 2.

¹² See Committee on Economic Social and Cultural Rights (CESCR), *General Comment 13 on the Right to Education*, ¶¶ 1, 6 & 31, U.N. Doc. E/C.12/1999/10 (1999), available at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.1999.10.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.1999.10.En?OpenDocument) [hereinafter General Comment 13].

¹³ See PRINCETON UNIVERSITY WOODROW WILSON SCHOOL OF PUBLIC AND INTERNATIONAL AFFAIRS, FREE TO LEARN: A RIGHTS BASED APPROACH TO UNIVERSAL PRIMARY EDUCATION IN KENYA 30 (2006), available at www.ungei.org/SFAIdocs/resources/UPE_KenyaReport.pdf [hereinafter WOODROW WILSON FRAMEWORK].

¹⁴ World Bank Project Appraisal Document on a Proposed Loan in the Amount of \$80.0 Million to the Republic of Guatemala for an Education Quality and Secondary Education Project, Report No. 36712-GT (January 30, 2007), available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/02/09/000310607_20070209102837/Rend ered/PDF/36712core0GT0R20071002311.pdf, at 141 [hereinafter World Bank Report].

¹⁵ GUIDELINES, *supra* note 1.

¹⁶ Peace Accords, *supra* note 3, Title III, Cultural Rights, Part G, Educational Reform; Guatemala Constitution; *see also infra*, Parts V.B.4–5 (discussing range of domestic legislation and regional obligations).

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1. Guatemala's political and economic history and its geographical and ethnic realities have contributed to weak education outcomes and a disparate impact on Afro-descendants and indigenous peoples in educational attainment.

Guatemala's political and economic troubles, combined with its largely rural demography and ethnically diverse population, have left the country with one of the lowest literacy rates in Latin America. Guatemala has been scarred by revolution, social struggle, violence, impunity, governmental corruption, and military leadership, subject to repeated military coups in 1963, 1982, 1983, and 1993. During Guatemala's 36-year civil war (1960-1996), it is estimated that some 200,000 people, primarily unarmed indigenous civilians, were murdered.¹⁷ In addition to arbitrary executions, indigenous people were subject to kidnapping, torture, rape, and massive forced displacement of their communities.¹⁸ The Commission for Historical Clarification (CEH) concluded that the "massive and indiscriminate aggression" against Guatemala's indigenous populations was partly fueled by the institutionalized racism of the State and damaged the "cultural values that ensured cohesion and collective action in Mayan communities."¹⁹

The political tradition in Guatemala tends toward "anti-democratic," according to the CEH.²⁰ There exists a "system of multiple exclusions, including elements of racism, which is, in turn, the most profound manifestation of a violent and dehumanizing social system. The State gradually evolved as an instrument for the protection of this structure, guaranteeing the continuation of exclusion and injustice."²¹ An added problem is Guatemala's history of and continuing political corruption. In the 2007 Corruption Perception Index, published by Transparency International, Guatemala ranks 111th out of 179 countries.²² A USAID survey in 2004 revealed that 49 percent of Guatemala's population viewed government corruption as "rampant" and estimated that reducing corruption even by one percent would save the State up to 16 million US dollars per year.²³

¹⁷ Conciliation Resources, *Historical Background*, Patrick Costello, 1997, at <http://www.c-r.org/our-work/accord/guatemala/historical-background.php>; Global Security, *Guatemala Civil War 1960-1996*, at <http://www.globalsecurity.org/military/world/war/guatemala.htm>; REPORT OF THE COMMISSION FOR HISTORICAL CLARIFICATION: CONCLUSIONS AND RECOMMENDATIONS, MEMORY OF SILENCE (1999), available at <http://shr.aas.org/guatemala/ceh/report/english/toc.html> [hereinafter MEMORY OF SILENCE].

¹⁸ Testimonies from victims of "La Violencia" provide insight into the savagery of the attacks and the long-lasting effects on surviving indigenous populations. VICTORIA SANFORD, BURIED SECRETS: TRUTH AND HUMAN RIGHTS IN GUATEMALA 191-94 (2003) (quoting Alejandro, an Ixil survivor of the Salquil massacre:

Before 1979, our people had livestock. We had the means to produce food and eat . . . But after the cooperatives began to produce, that is when the repression began . . . [The army] began to steal and burn our harvest. They robbed everything they could carry . . . After they had burned everything and we were up in the mountains, they pursued us there. They attacked us with helicopters and planes . . . They burned temporary shelters we built in the mountains—sometimes with children inside them . . . Our people have suffered. I witnessed the death of many brothers . . . We still aren't free because we don't have the means to live or give our children a life. There have been no solutions for our needs.)

¹⁹ MEMORY OF SILENCE, *supra* note 17, at paras. 1-2, 28-33.

²⁰ *Id.* at para. 4.

²¹ *Id.*

²² TRANSPARENCY INTERNATIONAL, CORRUPTION PERCEPTIONS INDEX 2007, available at http://www.transparency.org/policy_research/surveys_indices/cpi/2007. The ranking is based on surveys, expert assessments, and the perception of corruption as seen by country analysts and business people.

²³ "Guatemalan Government Gets Help to Stamp out Corruption," USAID, Feb. 2006, at http://www.usaid.gov/locations/latin_america_caribbean/country/guatemala/corruption.html (last visited Mar. 8, 2008).

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The combination of civil war, political disruption, corruption, and economic hardship²⁴ affects the availability of social services, particularly education. Currently, 65 percent of the population is rural and 86 percent lives below the poverty line.²⁵ The distribution of wealth in Guatemala is aggressively skewed, with 10 percent of the population controlling half of the country's resources and the top 20 percent controlling fully two-thirds of the country's wealth.²⁶

Additionally, the composition of the Guatemalan population is extremely diverse, representing a wide range of languages and traditions. The Mayan population is estimated to be 3.5 million, with at least 21 sub-ethnic groups among them.²⁷ Afro-descendants and indigenous peoples comprise approximately 40 percent of the Guatemalan population.²⁸ Twenty-seven percent of indigenous Guatemalans do not speak Spanish;²⁹ there are 23 distinct Amer-indian languages officially recognized by the State.³⁰ Cultural and linguistic barriers caused by the dozens of distinct indigenous voices, in addition to the high poverty rate and history of structural discrimination, complicate the provision of quality and comprehensive education.

The literacy rates in Guatemala remain staggeringly low. The Government attempted to reach a goal of 70 percent literacy by the year 2000, as set out in the 1996 Guatemalan Peace Accords.³¹ However, a 2002 report demonstrated that the targeted literacy level was not reached equally for all population groups. Men achieved literacy at higher rates than women, and non-indigenous Guatemalans achieved literacy at higher rates than indigenous Guatemalans.³²

²⁴ The State suffered from poor economic development during the Civil War due to the number of deaths and the destruction of property and infrastructure. *See* MEMORY OF SILENCE, *supra* note 17, at paras. 72–76. After the war, Guatemala's economy developed slowly and was further stunted by a financial crisis in 1998, which impacted foreign investments and local incomes. U.S. State Department Bureau of Western Hemisphere Affairs, Country Profile (Guatemala): Background Note, Feb, 2008, *available at* <http://www.state.gov/r/pa/ei/bgn/2045.htm> [hereinafter U.S. State Dept. Country Profile].

The subsequent collapse of coffee prices left what was once the country's leading export sector in depression and had a severe impact on rural incomes. Foreign investment inflows have been weak, with the exception of the privatization of utilities. Potential investors, both foreign and domestic, cite corruption, lack of physical security, a climate of confrontation between the government and private sector, and unreliable mechanisms for contract enforcement as the principal barriers to new business.

Id.

²⁵ LUIS MENENDEZ, LA EDUCACION EN GUATEMALA: 1954–2004 at 17 (Editorial Universitaria, Universidad de San Carlos de Guatemala 2006).

²⁶ U.S. State Dept. Country Profile, *supra* note 24.

²⁷ MENENDEZ, *supra* note 25, at 17. In 2002, the ethnic breakdown in Guatemala was as follows: Ladino 60%; K'iche 11.31%; Q'eqchi 7.58%; Kaqchikel 7.41%; Mam 5.49%; Q'anjob'al 1.42%; Pocomchi 1.02%; Achi 0.94%; Ixil 0.85%; Tz'utujil 0.70%; Cluj 0.57%; Jakalteco 0.42%; Ch'orti' 0.42%; Poqomam 0.37%; Akateco 0.35%; Xinka 0.14%; Awacateco 0.10%; Sipakapense 0.09%; Sakapulteko 0.09%; Uspanteko 0.07%; Garifuna 0.04%; Mopan 0.03%; Tektiteko 0.02%; Itza 0.02%; Otro [Other] 0.48%. National Institute of Statistics (INE) XI National Census 2002, Reported in World Bank Project Appraisal Report No. 36712-GT, *supra* note 14, at 138.

²⁸ C.I.A., THE WORLD FACTBOOK: GUATEMALA, *available at* <https://www.cia.gov/library/publications/the-world-factbook/geos/gt.html> (last visited Mar. 8, 2008) [hereinafter WORLD FACTBOOK].

²⁹ Mazariegos et al., *supra* note 2, at 8, t. 44.

³⁰ WORLD FACTBOOK, *supra* note 28.

³¹ MENENDEZ, *supra* note 25, at 48; Agreement on Social and Economic Aspects and Agrarian Situation, Guat. – Unidad Revolucionaria Nacional Guatemalteca, art. II.A.22.c.i, May 6, 1996, *available at* http://www.usip.org/library/pa/guatemala/guat_960506.html (last visited Mar. 8, 2008).

³² Seventy-five percent of indigenous urban men were literate, compared to 91 percent of non-indigenous urban men; 55 percent of indigenous urban women were literate, versus 86 percent of non-indigenous women; 58 percent of indigenous rural men were literate, compared to 70 percent of non-indigenous rural men; 35 percent of indigenous rural women were literate, compared to 62 percent of non-indigenous rural women. Mazariegos et al, *supra* note 2.

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Professor Luis Menendez, a specialist in education in Latin America and author of *La Educacion en Guatemala: 1954-2004*, suggests the following causes for high levels of illiteracy in Guatemala: (1) the unfair distribution of land and resulting state of poverty and servitude among the rural masses; (2) lack of rural schools; (3) wide distribution of the population due to their agricultural pursuits; (4) large numbers of indigenous people who are non-Spanish speaking; (5) attitude among rural people that education does not necessarily benefit their children; and (6) lack of literacy campaigns before 1945.³³

Indigenous children tend to have economic, cultural, and linguistic reasons, distinct from the rest of the population, for failing to attend school.³⁴ In the year 2000, the most common were employment elsewhere or obligations in the household business (approximately 28 percent and 23 percent, respectively). A later survey in 2002 cited both a lack of interest and a lack of money as the primary reasons for not enrolling in school. These groups constituted well over half of the respondents (approximately 30 percent each).³⁵

Despite the country conditions that detract from the quality of education and the current low education rates, Guatemala does have the legal framework in place to implement better quality education. The following legal obligations, if fulfilled, would help remedy the State's current failure to provide quality education without discrimination.

2. The Guatemalan Peace Accords of 1996 established goals of improving the quality of education, especially for rural and indigenous peoples.

The Peace Accords of 1996 signified not only the end of the Civil War, but also the promise of a democratic, pluralist, and inclusive society. The Peace Accords set out to:³⁶

- Respect and nurture cultural and linguistic diversity;
- Decentralize the national educational system in order to better meet local indigenous needs;
- Acknowledge and teach indigenous knowledge: science, philosophy, arts, history, politics, and language;
- Improve bilingual education by increasing the quality of bilingual instructors;
- Introduce technology to assist in the socioeconomic development of communities;
- Increase the budget for education;
- Promote the creation of a Mayan University;
- Increase scholarships and stipends for indigenous students;
- Create a commission with governmental and indigenous representatives in order to meet these educational goals.

The Accords, significantly, recognized that education is fundamental for the economic, social, cultural, and political development of the country, as well as for international competitiveness and modernization. Accordingly, their educational provisions aspired to teach moral and cultural

³³ MENENDEZ, *supra* note 25, at 279.

³⁴ Joseph Shapiro, *Guatemala, in* INDIGENOUS PEOPLES, POVERTY AND HUMAN DEVELOPMENT IN LATIN AMERICA 131 (G. Hall and H.A. Patrinos, eds. 2006) (citing the 2000 ENCOVI Survey).

³⁵ Mazariegos et al., *supra* note 2, at 23.

³⁶ Peace Accords, *supra* note 3, at Title III: Cultural Rights, Part G: Educational Reform.

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values, as well as basic concepts about democracy and human rights, cultural diversity in Guatemala, the achievements of its people, and regular participation in social and political life.³⁷ In addition, they envisioned developing education as a means to end the cycles of poverty and discrimination, and to incorporate Guatemala into the world economy through technical and scientific advances.³⁸ The Accords aimed to meet these goals through efforts to expand “primary school coverage, intercultural and bilingual education, and the modernization and decentralization of school management.”³⁹

In order to achieve these goals, the Accords first required that the government significantly increase the budget for education. At a minimum, they called for education spending to increase 50 percent between 1995 and 2000, within the possibilities and constraints of progressive realization.⁴⁰ The Accords also created an obligation for the State to rapidly increase coverage of bilingual educational services, particularly in rural areas, including literacy programs in all languages, for adults as well as children, with the aim of reaching 70 percent literacy by 2000.⁴¹ Additionally, they called for programs designed to help the rural population become trained in skilled work and for the training of social organizations at the national and regional levels to work toward socio-economic development.⁴² Some such programs have developed under the Municipal Centers for Training and Human Growth (*Centros Municipales de Capacitación y Formación Humana—CEMUCAF*) initiative of the Ministry of Education, which established a total of 182 training centers for technical skills. However, the results of such training have not been quantified.⁴³

To improve retention and adaptation of education services to each community, the Accords obligated the State to invite the community and parents to participate in discussions on such matters as curriculum, teachers, and school calendars.⁴⁴ The Accords addressed poverty concerns by establishing scholarships, stipends, and economic support programs, and other incentives for needy students.⁴⁵ They also created training programs for teachers and administrators, addressing the problem of teacher shortages.⁴⁶

In addition, the Accords called for a general acknowledgement of and respect for indigenous forms of and attitudes toward education.⁴⁷ Specifically, they required the State to create an advisory commission to the Ministry of Education to represent the identity and rights of indigenous Guatemalans.⁴⁸ Also, recognizing that higher rates of university attendance are fundamental for economic growth, the Accords envisioned state-supported university initiatives, particularly related to regional development and professional programs; these initiatives, over time, include a plan for a

³⁷ Peace Accords, *supra* note 3, Title III; MENENDEZ, *supra* note 25, at 44.

³⁸ Peace Accords, *supra* note 3, Title III; MENENDEZ, *supra* note 25, at 45.

³⁹ World Bank Report, *supra* note 14, at 7.

⁴⁰ Peace Accords, *supra* note 3, at III(G)(2); MENENDEZ, *supra* note 25, at 25.

⁴¹ MENENDEZ, *supra* note 25, at 45 & 48.

⁴² *Id.* at 45–46.

⁴³ Ministerio De Educación, CEMUCAF, *available at* <http://www.mineduc.gob.gt/default.asp?seccion=46> (last visited Mar. 8, 2008).

⁴⁴ Peace Accords, *supra* note 3, Title III(G)(2); MENENDEZ, *supra* note 25, at 46.

⁴⁵ Peace Accords, *supra* note 3, Title III(G)(4); MENENDEZ, *supra* note 25, at 46.

⁴⁶ *Id.*

⁴⁷ Peace Accords, *supra* note 3, Title III.(1)-(3), III(G).

⁴⁸ MENENDEZ, *supra* note 25, at 46.

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Mayan University.⁴⁹ To date, the Ministry of Education has not developed extensive programs focusing on the development of university level education.⁵⁰

Improvements in literacy have advanced more quickly since the Peace Accords than they did before 1996,⁵¹ indicating the potential of the law if fully implemented. However, despite the textual foundation established by the peace agreement, its goals of significantly improving indigenous education have yet to be realized, as discussed *infra*, Section V.D.

3. The Guatemalan Constitution guarantees the right to education without discrimination, as well as free and compulsory primary education.

The Constitution of Guatemala contains a comprehensive set of provisions that affirm the right to education, acknowledge the shortcomings in current education outcomes, and address the need for State action in fulfilling the right to education, especially for members of marginalized populations.⁵²

The right to education is thus definitively established in the Constitution. Article 71 obligates the State to provide education without discrimination. Article 74 of the Constitution declares that primary education is a right and an obligation for all children and shall be provided at no cost. Additionally, Article 73 recognizes the right of parents to choose the school to which they will send their children and the right to non-discrimination in religious education. The Constitution declares that education is essential to the development of the human being and is a key national interest.⁵³

Many provisions recognize the failings of the current education system and the ways in which the State has an obligation to address them. Literacy is declared a national emergency under Article 75, which also asserts the government's obligation to promote literacy by providing resources and support. The Constitution calls for the State to provide scholarships and educational credits toward this goal. Article 76 establishes the need for a bilingual educational system that is decentralized and regional; Article 78 provides that "teaching at schools that have a predominant indigenous population shall be administrated bilingually." The Constitution also addresses the problem of conflicts between employment and education, by establishing obligations for industry owners and large employers to provide and maintain childcare, education, and cultural centers for their workers and their communities.⁵⁴

Additionally, the Constitution provides a mechanism for citizens to seek redress for violations of their rights, including education, in the form of the *amparo*.⁵⁵ Any citizen may institute an *amparo* proceeding in the Constitutional Court to challenge and seek redress for a denial of his or

⁴⁹ Peace Accords, *supra* note 3, Title III(G)(3).

⁵⁰ See Ministerio De Educación (including no mention of university initiatives in its list of education programs), *available at* <http://www.mineduc.gob.gt/>.

⁵¹ WORLD BANK, POVERTY IN GUATEMALA78 (2003) [hereinafter POVERTY REPORT].

⁵² Guat. Const., *supra* note 8, Chapter II, Section IV, arts. 74–81.

⁵³ *Id.* at art. 72.

⁵⁴ *Id.* at art. 77.

⁵⁵ *Id.* at art. 265.

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her constitutional rights. *Amparo* recourse is available against State action, domestic law, and judicial decisions.⁵⁶

4. The domestic laws of Guatemala mandate improved quality of education both at the general level and for Afro-descendants and indigenous peoples in particular.

Domestic legislation in Guatemala aims to fulfill the right to education as articulated in the Constitution both through improvements to general education and through education targeted at Afro-descendants and indigenous peoples specifically. At the general level, National Education Law 12-91 (hereinafter “the National Education Law”), passed in 1991, establishes key goals for providing quality education.⁵⁷ It requires that education be participatory, regional, and decentralized.⁵⁸ Article 5 states the educational structure should fully incorporate all components of the system, including the Minister of Education, the educational community, and educational centers.⁵⁹ Article 29 establishes that there should be pre-school, primary, and middle-school education, though there is no mention of advanced technical school, secondary school, or college-level education.

The Social Development Law of 2001, Law 42-2001 (hereinafter “the Social Development Law”), devotes several provisions to the essential role of education in social development.⁶⁰ Article 27 declares that all people have the right to education and to take advantage of the State’s provision of education, particularly children and young people. Education is recognized as an integral part of human development that touches the individual’s environment, social life, politics, and economics. The Social Development Law calls for addressing the human rights issues of equality and participation of women in education, as well as intercultural education. Article 28 states that education is an essential aspect of individual development and, as such, must be provided by the State so that schools will be permanent and not subject to economic factors.

The Social Development Law also establishes a long list of issues to be addressed in school: development, population, health, family, quality of life, environment, gender, human sexuality, human rights, multiculturalism and interculturalism, responsible parenting, and reproductive health. It calls for special programs to inform how to avoid unwanted pregnancy and sexually transmitted diseases and goes so far as to prohibit the expulsion of pregnant students.⁶¹ Article 30 affirms the object of public education is improving quality of life and human dignity while instilling values of responsible parenting. It further requires the state to support and develop vocational schools. Finally, Article 31 calls for the establishment of a monitoring system to study the importance and impact of demographic variables on economic and social development in the country. Educational content and methods will be defined by an Intersectoral Commission on Population Education

⁵⁶*Id.* at arts. 265 & 272. See also Allan R. Brewer-Carais, *Some Aspects of the “Amparo” Proceeding in Latin America as a Constitutional Judicial Mean Specifically Established for the Protection of Human Rights*, Oct. 2007, at http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1001&context=iclc_papers.

⁵⁷ MENENDEZ, *supra* note 25, at 62–63.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ El Congreso de la Republica de Guatemala, Decreto Numero 42-2001, *available at* http://www.mspas.gob.gt/menu/marco_legal/decreto_42-2001.pdf [hereinafter Decree 42-2001].

⁶¹ *Id.* at art. 25 & 26.

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(hereinafter “the Commission on Education”), in keeping with the scientific and humanistic character of the Constitution.⁶²

Beyond recognizing the importance of the right to education in general, many domestic law provisions specifically target the problems faced by indigenous peoples, most significantly the language barrier. Literacy Law 43-86, passed in 1986, promotes literacy by prioritizing target groups by age and specifically recognizes the rights of indigenous non-Spanish speakers to literacy in their native languages. It calls particular attention to the importance of literacy for seasonal migrant workers.⁶³ The National Education Law, in addition to its general education provisions, supports bilingual and bicultural education;⁶⁴ Article 56 states that bilingual education responds to the characteristics, needs, and interests of Guatemala, with its diverse ethnic and linguistic groups, and thus should run parallel to all other educational programs. The National Education Law also recognizes that bilingual education strengthens identity and cultural values of indigenous communities.⁶⁵

In 1995, Law 726-95 created the General Directorate of Bilingual Intercultural Education.⁶⁶ This office is charged with developing bilingual education based on the needs of the country’s student population, at all educational levels and geographic areas; to strengthen the identity of different ethnic groups; to promote self-realization; and to preserve bilingualism within the Mayan-speaking population.⁶⁷

The Social Development Law also has a provision specifically targeting indigenous peoples; Article 16 classifies indigenous populations as a group deserving of special attention, in order to promote the participation of indigenous citizens in the national arena, while respecting their unique identity and culture. It created a legal obligation for the State to promote, implement, and continually evaluate programs for social, familial, and special-groups-targeted human development.⁶⁸

The National Languages Law 19-2003 declares that the national education system, both public and private, should apply at all levels of the promotion, development, and utilization of Mayan languages.⁶⁹ Finally, the Broadening Bilingual, Multicultural, and Intercultural Education in the National Education System, Accord 22-2004, aims to open up the national education system to better reflect its diverse pupils. Under this law, the government is obligated to direct more funds toward programming that improves bilingual and multicultural education directly to teachers and schools.⁷⁰

⁶² *Id.*

⁶³ MENENDEZ, *supra* note 25, at 280.

⁶⁴ *Id.* at 304.

⁶⁵ *Id.*

⁶⁶ RAY CHESTERFIELD, FERNANDO E. RUBIO F., & RIGOBERTO VASQUEZ, STUDY OF BILINGUAL EDUCATION GRADUATES IN GUATEMALA, 4 (2003), available at http://www.ieq.org/pdf/Study_Bilingual_grad_Guatemala.pdf [hereinafter Bilingual Education Study].

⁶⁷ *Id.*

⁶⁸ Decree 42-2001, art. 16.

⁶⁹ Mazariegos et al., *supra* note 2, at 12, t. 46.

⁷⁰ Directorio Electronico de Guatemala, *Ministerio de Educacion crea Bono Especifico por Bilinguismo*, 14 Aug. 2007, available at http://www.deguate.com/educacion/article_10986.shtml (last visited Mar. 8, 2008).

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Thus, domestic legislation has established lofty goals for providing quality education at both the general and indigenous-specific levels; however, the poor educational outcomes, particularly in the case of indigenous populations, indicate that the implementation of this domestic framework has failed. See *infra*, Section V.D.

5. Under inter-American and international law, Guatemala has immediate and progressive obligations to fulfill the right to education without discrimination.

Beyond its domestic obligations to provide education, Guatemala is party to regional and international instruments that require immediate and progressive realization of the right to education.⁷¹

Guatemala's immediate obligations under regional instruments are to provide compulsory primary education that is free to all, without discrimination on any basis, and to ensure all persons within their jurisdiction receive equal protection under the law. Under Article 26 of the American Convention, Guatemala must meet "the full realization" of the right to education, and do so without discrimination.⁷² Additionally, under the Protocol of San Salvador, Guatemala is obligated to provide "free and compulsory education" at the primary level.⁷³ The Convention of Belém do Pará obligates Guatemala to educate women in particular without discrimination.⁷⁴ As a member of the Organization of American States (hereinafter "the OAS"), Guatemala is also bound by the OAS Charter, which requires Member States to protect the right to educational opportunities. The Charter establishes the requirement of providing free and compulsory primary education.⁷⁵ The American Declaration reinforces the principle that Guatemala must provide free primary education and equality of opportunity as well.⁷⁶

Guatemala's regional commitments also establish the progressive obligation to provide secondary and higher education subject to the maximum use of available resources. Article 26 of the American Convention imposes a requirement for States to work toward the fulfillment of all human rights, using maximum available resources.⁷⁷ Guatemala must take steps to progressively realize the right to secondary and higher education. The Protocol of San Salvador calls for States to progressively introduce free education at the secondary and university levels.⁷⁸ Additionally, as a State Party to the Convention of Belém do Pará, Guatemala commits to working progressively toward the development of educational programs to counteract discrimination against women.⁷⁹

⁷¹ See also Part V.B.II, *supra*.

⁷² American Convention, *supra* note 4, at art. 26.

⁷³ Protocol of San Salvador, *supra* note 5, at arts. 13 & 16.

⁷⁴ Convention of Belém do Pará, *supra* note 6, at art. 5.

⁷⁵ Charter of the Organization of American States arts. 34 & 49, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 48 [hereinafter OAS Charter].

⁷⁶ American Declaration, *supra* note 7, at arts. II & IX.

⁷⁷ American Convention, *supra* note 4, at art. 26.

⁷⁸ Protocol of San Salvador, *supra* note 5, at art. 13.

⁷⁹ Convention of Belém do Pará, *supra* note 6, at art. 50.

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C. GUATEMALA SHOULD MAKE THE MOST OF CURRENT POLITICAL MOMENTUM TO FOLLOW THROUGH WITH ITS LEGAL OBLIGATIONS TO PROVIDE THE ESSENTIAL RIGHT TO EDUCATION WITHOUT DISCRIMINATION.

Recent economic and political developments, as well as the demonstrable will of the Guatemalan polity to improve the educational environment, have set the stage now for a serious push to fulfill Guatemala's educational obligations. The struggle for the recognition of indigenous rights gained momentum in general in the past decade and a half. In 1992, Rigoberta Menchu Tum, a Quiche Mayan, received the Nobel peace prize for her work with the indigenous populations of Guatemala, Latin America, and the world.⁸⁰ In November 2007, Guatemalans elected a new president, Alvaro Colom, who pledged "to convert Guatemala into a social democratic country with a Mayan face."⁸¹ President Colom secured the election by winning rural Guatemala and he promised to fight for social justice and to reduce poverty.⁸²

There are many independent organizations, including both Guatemalan and international NGOs, working to improve education in Guatemala with which the State can ally to fulfill its own obligations for providing education. The civil movement indicates a strong local push toward improved education and the desire and need for increased State action.⁸³

In a country suffering from extreme poverty, especially among its marginalized ethnic populations, the right to education is an essential interest. Education offers the clearest path out of poverty, as a 2003 World Bank study demonstrated for Guatemala in particular.⁸⁴ On average, hourly wages increased 15 percent with a primary education, 51 percent with a secondary education, and 74 percent with a university education, as compared to expected wages earned by those without education. The improvement in women's wages was especially pronounced.⁸⁵

Given the importance of education for the people of Guatemala, it is time for the State to meet its legal obligations to fulfill the right to education. The following framework analyzes the disparity between Guatemala's legal and aspirational commitments to providing education and the dire state of education process and outcomes in reality.

⁸⁰ The Nobel Peace Prize 1992, Rigoberta Menchu Tum, *available at* http://nobelprize.org/nobel_prizes/peace/laureates/1992/tum-bio.html (last visited Mar. 8, 2008).

⁸¹ Marc Lacey, *Healing Hearts and, Possibly, Divisions in Guatemala*, N.Y. TIMES, Nov. 6, 2007, *available at* <http://www.nytimes.com/2007/11/06/world/americas/06guatemala.html> (last visited Mar. 8, 2008).

⁸² Prensa Libre de Guatemala, Nov. 6, 2007, *available at* <http://www.medioslatinos.com/modules/news/article.php?storyid=577> (last visited Mar. 8, 2008).

⁸³ Guatemalan NGOs dedicated to improving education include: The Center for Mayan Cultural Studies, the Radio Nahuala, Solola, and the Pro-Development and Education Association. International NGOs include: the Deep Roots Scholarship Fund (dispensing scholarships and holds workshops addressing self-esteem, leadership skills, and sexual health), the Global Education Partnership (raising money to send rural students to schools and provide computer training), the Guatemalan Maya Spanish Association, the CasaSito Association, Safe Passage, La Cambalacha, Education and Hope, and the Calacirya Foundation.

⁸⁴ POVERTY REPORT, *supra* note 51, at 74.

⁸⁵ *Id.*

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D. THE RIGHT TO EDUCATION OF AFRO-DESCENDANTS AND INDIGENOUS PEOPLES THROUGH THE LENS OF THE “5-A RIGHT TO EDUCATION FRAMEWORK” AND THE COMMISSION’S PROCESS AND OUTCOME INDICATORS.

As discussed above, Guatemala is obligated to provide education that is free, non-discriminatory, and administered bilingually.⁸⁶ Guatemala’s process indicators, involving policies and programs of the Ministry of Education, suggest that Guatemala is protecting that right. Outcome indicators, however, demonstrate that the nation’s education system still suffers from insufficient coverage, poor quality, and disparities in access for Afro-descendants, rural, and indigenous peoples.⁸⁷ These failures have left the country with “some of the worst education statistics in the region.”⁸⁸ Adult literacy rates, a standard measure of a country’s education level, are approximately 85 percent in Latin America, but only 70 percent in Guatemala.⁸⁹ Significantly, the literacy rate for indigenous peoples, at 53 percent, is half that of the non-indigenous population.⁹⁰

Guatemala’s greatest failures stem from its inability to keep students in school once they have enrolled.⁹¹ Though access to primary education nationwide has increased, primary school completion and literacy rates remain among the lowest in Latin America.⁹² In 2005, only 33 percent of students aged 13 to 15 were enrolled in lower secondary school (grades seven through nine).⁹³ This lack of enrollment has been attributed to low quality schools, an insufficient supply of secondary schools, and the prevalent failure to complete primary school, with only a net 22 percent of children completing primary education on time.⁹⁴ For students who proceed beyond primary education, a mere 10.1 percent complete secondary education.⁹⁵ These systematic failures of the

⁸⁶ See Part V.B, *supra* (discussing international, regional, and domestic legal obligations of Guatemala).

⁸⁷ There is less data available on the specific situation of Afro-descendants in Guatemala. This section extrapolates the data on indigenous populations because the situation of the Afro-descendant population in Guatemala appears to be similar or worse than that of the indigenous population.

⁸⁸ USAID Latin American and Caribbean Education Profiles, *Guatemala: Increasing Education, Access, Quality, and Equity in Guatemala*, 1 (1999-2004), available at: <http://www.beps.net/publications/LAC%20Profiles/LACGuatemalaTAG.pdf> [hereinafter USAID Education Profile].

⁸⁹ *Id.* at 3. Guatemala is located in Latin America and studies compare statistics among countries in Latin America, Central America, and the Caribbean.

⁹⁰ L.E. Lopez, *Cultural Diversity, Multilingualism and Indigenous Education in Latin America*, in *IMAGINING MULTILINGUAL SCHOOLS: LANGUAGES IN EDUCATION AND GLOCALIZATION* 241 (O. Garcia, T. Skutnabb-Kangas, M.E. Torres-Guzman eds., 2006).

⁹¹ DR. SERGIO FERNANDO MORALES ALVARADO, INFORME ANUAL CIRCUNSTANCIADO: TOMO I, SITUACION DE LOS DERECHOS HUMANOS EN GUATEMALA (2007), available at: http://www.pdh.org.gt/images/files/Informes_anuales/INFORME07_TOMO_I.pdf, at 78 [hereinafter Ombudsman’s Report].

⁹² Kelly Hallman et. al., *Multiple Disadvantages of Mayan Females: The Effects of Gender, Ethnicity, Poverty, and Residence on Education in Guatemala*, Population Council Working Papers no. 211, June 2006, available at: http://www.usaid.gov/gt/docs/disadvantages_mayan_females.pdf, at 3 [hereinafter Mayan Females]. Along with the occurrence and timing of initial school enrollment, continuation in school (retention) and grade repetition are the basic factors determining educational attainment. *Id.* at 8.

⁹³ World Bank Project Appraisal Document No. AB2244 (June 12, 2006), at 2 [hereinafter World Bank Appraisal].

⁹⁴ *Id.* at 3–4. In 2005, a standardized test given to 9th graders showed an overall deficient level of learning, especially in rural secondary education models. Moreover, the net completion rate for 6th grade was only 22 percent, caused in part by a failure to even reach 6th grade. In 2005, 25 percent of enrolled students repeated first grade. Drop-out rates increase each year in primary school and over 45 percent of children enrolled in Grade 5 in 2005 were no longer enrolled in 2006. The gross enrollment rate for lower secondary school was only 26 percent for indigenous youths, a gap which reflects the low supply of lower secondary education in rural areas.

⁹⁵ USAID Education Profile, *supra* at note 88, introductory page entitled “Guatemala at a Glance.”

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education system disproportionately impact Afro-descendants and indigenous peoples. While approximately one-third of non-indigenous students fail to complete primary school, that figure stands at more than half for Guatemala's indigenous students.⁹⁶

To fulfill its obligation to ensure the right to education, Guatemala must make education available, accessible, acceptable, and adaptable, with appropriate mechanisms in place for holding the government accountable.⁹⁷ The following sections integrate the process and outcome indicator components of the Commission's ESCR Guidelines⁹⁸ with the "5-A Right to Education Framework" to evaluate Guatemala's mechanisms to fulfill the right to education without discrimination and the statistical results of these efforts.

1. Availability: Guatemala has failed to make education available to all school age citizens in sufficient quantity and with necessary facilities.

The government's obligation to make education "available" requires it to ensure that there are proper educational facilities, adequately equipped, with sufficient staff and educational materials.⁹⁹ Though Guatemala's educational policies recognize the need for improvement in educational coverage and teacher training, current conditions reflect a serious lack of adequate infrastructure and trained teachers, as analyzed below.

a. Process Indicators: Guatemala's Educational Policies identify availability issues, but provide insufficient mechanisms for resolving them.

The Ministry of Education recently released its "Educational Policies 2008-2012." The first policy listed, to improve the quality of education, involves objectives related to availability, such as strengthening the professionalism and development of teachers.¹⁰⁰ Specifically, the plan calls for advanced education and continuing training.¹⁰¹ The government also pledges to ensure completion of primary education in all regions of the country, particularly where bilingual education is needed, focusing on poor, rural, and predominantly indigenous areas where as few as 39 percent of children complete the primary level.¹⁰² Specific objectives include guaranteeing quality textbooks for students and educational material for teachers, determining the physical location of schools, and making school infrastructure a priority.¹⁰³ Guatemala's Education Policy calls for greater investment in

⁹⁶ Emiliana Vegas & Jenny Petrow, *Raising Student Learning in Latin American Countries*, World Bank 2008, available at: http://siteresources.worldbank.org/INTLAC/Resources/Raising_Student_Learning_in_LAC_Document.pdf, at 28 [hereinafter *Raising Student Learning*]. USAID reports that 76 percent of rural children who enter first grade drop out before completing primary education. USAID Education Profile, *supra* note 88, at 1.

⁹⁷ General Comment 13, *supra* note 12. As discussed in Part III, *supra*, this report utilizes the right to education framework proposed by the former U.N. Special Rapporteur for Education, Katarina Tomasevski, as modified by the Woodrow Wilson School of Public and International Affairs in combination with the structural, process, and outcome indicators suggested by the Inter-American Commission on Human Rights.

⁹⁸ GUIDELINES, *supra* note 1.

⁹⁹ General Comment 13, *supra* note 12.

¹⁰⁰ Ministerio De Educación, "Políticas Educativas 2008-2012," available at: http://www.mineduc.gob.gt/uploads/pdf/MATRIZ_POLITICAS_EDUCATIVAS_2008.pdf [hereinafter *Educational Policies*, 1–5].

¹⁰¹ *Id.*

¹⁰² *Id.* Educational Policy 2, *supra* note 100, at 9.

¹⁰³ *Id.* at 6.

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education, progressively expanding the budget for education, and prioritizing resources for the poorest, most remote, and most vulnerable segments.¹⁰⁴

These new policies reflect areas where past educational plans have fallen short. The prior Education Plan (2004-2007) also included strategic objectives of creating and developing a training program for teachers.¹⁰⁵ However, Guatemala currently lacks any selection or vocational testing mechanism to recruit and train the best candidates for the teaching profession.¹⁰⁶ Though an increase in the supply of teachers will be essential for Guatemala to strengthen availability of education,¹⁰⁷ the country has not yet found effective means for achieving that goal.

In addition to educational objectives, the Ministry of Education provides annual reports of statistics that track important availability measures. The 2006 Report included GDP expenditures on education, student/teacher ratios for public and private schools, teacher wage information, the percentage of schools with inadequate infrastructure, school meals provided, and per student expenditure.¹⁰⁸ The budget information on the Ministry of Education's website is outdated, with budget detail only through 2000.¹⁰⁹

b. Outcome Indicators: Despite its political commitments, Guatemala has inadequate school infrastructure and an unacceptably low supply of trained teachers, particularly in public schools and in indigenous regions.

The Guatemalan government devotes far too few resources to education than are required to achieve its goals of higher literacy rates and universal primary coverage for all segments of the population. Though Guatemala's education budget increased from \$362 million in 2000 to \$611 million in 2005,¹¹⁰ the government spent just 1.8 percent of its GDP on education in 2007. This is well below the Latin American average of 4.7 percent¹¹¹ and even further below the six percent GDP allocation UNESCO recommends.¹¹² Moreover, a significant portion of the scarce resources committed to education have been wasted through inefficiency, a consequence of grade repetition or

¹⁰⁴ *Id.* at 7.

¹⁰⁵ Plan de Educación 2004-2007, *available at*: http://www.mineduc.gob.gt/uploads/Plan_de_educacion.pdf.

¹⁰⁶ WORLD BANK REPORT, *supra* note 14, at 7.

¹⁰⁷ "An Analysis of Selected Recent and Current Education Plans," UNESCO Background Paper prepared for the Education for All Monitoring Report 2006, *available at*: <http://unesdoc.unesco.org/images/0014/001459/145953e.pdf>, at 28.

¹⁰⁸ Guatemala Sistema Nacional de Indicadores 2006, *available at*: <http://www.mineduc.gob.gt/uploads/Estadisticas/estadisticas/2006/home.htm> (last visited Mar. 8, 2008) [hereinafter MINEDUC 2006 Statistics].

¹⁰⁹ *See* Ministerio de Educación, Presupuesto Programado por Departamento 1997-2000, *available at*: <http://www.mineduc.gob.gt/uploads/Administraci%F3n/Presupuesto/presupuesto.htm>. The need for the disaggregation of data will be addressed in the "Accountability" section (*infra*, 5).

¹¹⁰ Emilio Porta & Jose Laguna, *Education for All by 2015: Will We Make It? Guatemala Country Case Study*, Paper commissioned for the EFA Global Monitoring Report 2 (2008), UNESCO 2007, *available at*: <http://unesdoc.unesco.org/images/0015/001555/155575e.pdf> [hereinafter UNESCO Guatemala Case Study].

¹¹¹ OMBUDSMAN'S REPORT, *supra* note 91, at 76. The Ombudsman's report notes that the 1.8 percent GDP spent on education in 2007 was a decrease from the Guatemalan high of 2.6 percent in 2001. *Id.*

¹¹² UNESCO advises countries to " earmark at least 6 percent of GDP for education." UNESCO Guatemala Case Study, *supra* note 110, at 2.

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failure to graduate.¹¹³ Reports estimate that Guatemala needs to devote more than double the current levels of public financing to address its education problems.¹¹⁴ This lack of funding has left Guatemala with some of the lowest primary education completion rates in Latin America, particularly for indigenous peoples, despite an increase in enrollment figures in recent years.¹¹⁵ Moreover, it has led to the perception that the government “does not recognize that the education situation in Guatemala is terrible” and is not “assum[ing] its responsibilities.”¹¹⁶

Furthermore, Guatemala has one of the lowest levels of investment per primary pupil in the region and this lack of expenditure is evident in school infrastructure.¹¹⁷ A mere 15 percent of public schools have such essential facilities as electricity, drinking water, classrooms in good condition, an adequate number of toilets, and enough space.¹¹⁸ More than 85 percent of public schools require improvement to classrooms to meet the minimum conditions for classes to be held.¹¹⁹ The Ministry of Education itself noted a positive correlation between school infrastructure, particularly the presence of running water and electricity supply, and test results.¹²⁰ The reality in Guatemala is a woefully inadequate infrastructure that hampers student development.

The numbers of students affected by the poor availability of schooling is significant. Guatemala had 2,116,385 primary level students in 2006,¹²¹ 112,414 teachers,¹²² and 14,207 total primary schools.¹²³ This led to a situation in which some schools “hardly have a teacher.”¹²⁴ With 31 students per teacher, one of the highest student/teacher ratios in Latin American and the Caribbean, classes are overcrowded and students receive insufficient individualized attention.¹²⁵ Low pupil/teacher ratios allow teachers to provide more personalized attention, which leads to “better results in education quality indicators.”¹²⁶ These problems are exacerbated in public schools: while private schools average 21 students per teacher, public schools average 33.¹²⁷ Studies demonstrate that indigenous students in particular score lower on tests when faced with higher student teacher ratios.¹²⁸

¹¹³ *Id.* (stating that “Moreover, a large portion of existing scarce resources was wasted in 2002, with 21.2 percent of the Ministry of Education budget spent on first grade inefficiency and 42.4 percent on overall inefficiency at the primary level.”).

¹¹⁴ USAID Education Profile, *supra* note 88, at 2.

¹¹⁵ Mayan Females, *supra* note 92, at 13; WORLD BANK REPORT, *supra* note 14, at 32, 133.

¹¹⁶ Interview by Angelica Macario Quino with adult woman with sixth grade education from Santa Lucia Cotzumalguapa in the Escuintla department (Dec. 2007) [hereinafter Interview with woman from the Escuintla department].

¹¹⁷ UNESCO Guatemala Case Study, *supra* note 110, at 21.

¹¹⁸ *Id.* The reports defines “enough” toilets as “less than 35 students per toilet” and “enough” space as “at least 2.5 square meters per student.” *Id.*

¹¹⁹ MINEDUC 2006 Statistics, *supra* note 108, at 29.

¹²⁰ UNESCO Guatemala Case Study, *supra* note 110, at 22.

¹²¹ MINEDUC 2006 Statistics, *supra* note 108, at 18.

¹²² UNESCO Guatemala Case Study, *supra* note 110, at 25 (2005).

¹²³ WORLD BANK REPORT, *supra* note 14, at 142.

¹²⁴ Interview by Angelica Macario Quino with a 23-year-old Mayan woman from Quiché (Dec. 2007) [hereinafter Interview with Mayan woman from Quiché].

¹²⁵ UNESCO, GLOBAL EDUCATION DIGEST 2006: COMPARING EDUCATION STATISTICS AROUND THE WORLD 81 (2006).

¹²⁶ UNESCO Guatemala Case Study, *supra* note 110, at 25.

¹²⁷ *Id.* at 25.

¹²⁸ Martha Hernandez-Zavala et. al., *Quality of Schooling and Quality of Schools for Indigenous Students in Guatemala, Mexico, and Peru*, August 1, 2006, World Bank Policy Research Working Paper No. 3982, available at SSRN: <http://ssrn.com/abstract=923289>, at 18 [hereinafter School Quality Study].

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Teacher training throughout Guatemala is seriously deficient. Despite inclusion in the Ministry's 2004-2007 Education Plan, teachers throughout the country are not trained beyond the secondary education level (grades 10 through 12) and this program has not been updated in 22 years.¹²⁹ Teachers of indigenous children have even less experience and education than their counterparts in primarily non-indigenous areas, putting their students at a greater disadvantage.¹³⁰

In addition to inadequate teacher recruitment and training, teacher pay has long been a major issue in Guatemala. Teacher salaries increased by 22 percent from 2000-2005, but the pay increases are based solely on the number of years spent as a teacher, without reward for performance or quality.¹³¹ Such a system creates a "perverse incentive" to retire early for teachers with the most experience; once they reach the highest pay grade with no prospect of a further pay raise, it is in their interest to retire and work as independent contractors or in the private sector.¹³² Teachers went on strike in 2003, demanding, among other things, a 100 percent increase in salary.¹³³ In 2007, they organized another strike to demand a further 12 percent wage increase.¹³⁴ The importance of attracting an adequate supply of trained teachers cannot be overstated. Studies indicate that teachers have a significant impact on student learning and effective teachers need experience, credentials, and teacher test scores.¹³⁵

Indigenous students are hit particularly hard by deficiencies in expenditures, infrastructure, and teacher supply and quality. A recent study on school quality for indigenous children in Guatemala, Mexico, and Peru showed that indigenous children generally enter school with more disadvantaged backgrounds, study in schools with fewer resources, and perform worse on exams.¹³⁶ They have fewer schools (only 7,832 of the country's schools are located in "bilingual departments,"¹³⁷ and only 1,693 are intercultural bilingual education schools¹³⁸), fewer instructional materials, lower-quality infrastructure, and less qualified teachers" than non-indigenous students.¹³⁹ These issues are directly related to achievement, as studies have linked student test scores to school size and location, the presence of textbooks, teacher salary and quality, and quality of school infrastructure.¹⁴⁰

Guatemala's failure to provide for each of these fundamental educational components has hindered the State's ability to make education available to its population. Rather, the Guatemalan

¹²⁹ WORLD BANK REPORT, *supra* note 14, at 11.

¹³⁰ School Quality Study, *supra* note 128, at 15.

¹³¹ UNESCO Guatemala Case Study, *supra* note 110, at 26.

¹³² *Id.*

¹³³ Juan Hernandez Pico, *Protesting for Life: A Bold, Persistent Teacher's Strike*, ENVIO DIGITAL, April, 2003, *available at*: <http://www.envio.org.ni/articulo/2087>.

¹³⁴ Renata Avila, *Guatemala: Town's Oldest School to be Demolished... and Teachers on Strike*, Global Voices Online, May 8, 2007, *available at*: <http://www.globalvoicesonline.org/2007/05/08/towns-oldest-school-to-be-demolishedand-teachers-on-strike/> (last visited Mar. 8, 2008).

¹³⁵ Raising Student Learning, *supra* note 96, at 126.

¹³⁶ School Quality Study, *supra* note 128, at 14.

¹³⁷ PRONACOM National Competitiveness Agenda: Guatemala, 2005-2015 (Sept. 2005), at 20 [hereinafter PRONACOM Agenda]. Guatemala is subdivided into 22 departments, which are administered by governors appointed by the President. U.S. State Department Background Note on Guatemala, Feb 2008, *available at*: <http://www.state.gov/r/pa/ei/bgn/2045.htm> (last visited Mar. 8, 2008).

¹³⁸ WORLD BANK REPORT, *supra* note 14, at 140.

¹³⁹ Patrick McEwan & Marisol Trowbridge, *The Achievement of Indigenous Students in Guatemalan Primary Schools*, 27(1) INT'L J. ED. DEV. 61, 61 (2007)[hereinafter Indigenous Students Study].

¹⁴⁰ School Quality Study, *supra* note 128, at 5.

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education system perpetuates a pattern of inequality throughout the country, not only providing inadequate investment in education, but sometimes overtly directing the greatest benefits to those least in need.¹⁴¹ This is particularly frustrating since many Guatemalans recognize that they “need . . . a better education in order to obtain a good job and earn [a] just wage.”¹⁴² The “reality,” however, is that the government “has left many children abandoned.”¹⁴³

2. Accessibility: Guatemala’s failure to eliminate geographic and economic obstacles to education prevents its attainment by all citizens, and disproportionately impacts Afro-descendants and indigenous peoples.

Under the OAS Charter,¹⁴⁴ the America Declaration,¹⁴⁵ the Protocol of San Salvador,¹⁴⁶ its national Constitution,¹⁴⁷ and the Peace Accords,¹⁴⁸ Guatemala’s government is obligated to eliminate barriers to education. Accessibility issues involve the distance children travel to get to school, how they get there, and the fees associated with school. Though the Guatemalan government has made efforts to improve the accessibility of education, problems of transportation, location, and fees remain. Recent statistics show that Guatemala has made significant progress toward its goal of universal primary education, raising net enrollment for children ages 7 to 12 from 84.3 percent in 2000 to 93.5 percent in 2005.¹⁴⁹ Inhabitants of rural areas and those in the most disadvantaged socio-economic groups, however, have significantly less access to primary education than other groups.¹⁵⁰ These access failures increase at higher education levels, as Guatemala suffers from serious problems of school retention and progression.¹⁵¹

a. Process Indicators: Guatemala has failed to establish the necessary mechanisms to ensure that indigenous and Afro-descendant citizens have access to education.

Guatemala’s prior Education Plan 2004-2007 focused on improving the number of children who receive formal schooling.¹⁵² In 2005, the Ministry published Education Goals, naming universal

¹⁴¹ UNESCO Guatemala Case Study, *supra* note 110, at 16.

¹⁴² Interview with a woman from the Escuintla department, *supra* note 116.

¹⁴³ Interview by Angelica Macario Quino with Anonymous from the San Marcos department [hereinafter Interview with Anonymous from the San Marco department].

¹⁴⁴ OAS Charter, *supra* note 75, at arts. 34 & 49. The Charter requires Member States to protect the right to educational opportunities and to provide free and compulsory primary education. *Id.*

¹⁴⁵ American Declaration, *supra* note 7, at arts. II & IX. The American Declaration binds Guatemala to provide free primary education and equality of opportunity. *Id.*

¹⁴⁶ Protocol of San Salvador, *supra* note 5, at arts. 13 & 16. Under the Protocol of San Salvador, Guatemala is obligated to provide “free and compulsory education” at the primary level. *Id.*

¹⁴⁷ Guat. Const., *supra* note 8, art. 75. Article 75 states that Guatemala is obliged to provide resources, including scholarships and educational credits, to promote literacy. *Id.*

¹⁴⁸ Peace Accords, *supra* note 3, at Title III(G)(4). The Peace Accords establish scholarship, stipend, and economic support programs and other incentives for needy students. *Id.*

¹⁴⁹ UNESCO Guatemala Case Study, *supra* note 110, at 6, citing MINEDUC statistics; World Bank Appraisal, *supra* note 93, at 1 (footnote 2 defines Net enrollment as “Number of pupils age 7-12 enrolled in 1-6th grade by January of [the year of the statistic] / Number of children age 7-12 (as estimated by INE) for [the year of the statistic]”).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² PRONACOM Agenda, *supra* note 137, at 22.

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primary education as its first goal.¹⁵³ The Educational Policies 2008-2012 reiterate the objective of expanding coverage, specifically focusing on children from extreme poverty and vulnerable segments of the population.¹⁵⁴ The content of that policy is consistent with the State's obligation to provide free public education, compulsory at the primary level, and sets a strategy for expanding equitable coverage at all education levels.¹⁵⁵ However, the policy plans and operational objectives speak in broad terms, without specific mechanisms for implementation, or to track and ameliorate, for example, distance to schools or the fees and other hidden costs that often keep children from attending school. The Education Policies 2008-2012 set as a goal social justice through educational equity and school retention, which is meant to provide access for marginalized groups, such as women, rural inhabitants, and members of indigenous and Afro-descendant groups.¹⁵⁶ The operative objectives of that goal include the implementation of measures such as providing conditional cash transfers, scholarships, and bonds,¹⁵⁷ but the scope and details of the plan are unclear, as are mechanisms for implementation.

The Ministry of Education provided a means of tracking statistics on the country's coverage goal and measures the percentage of Guatemalan children ages 4-17 not attending school.¹⁵⁸ These statistics also provide data on primary age children (ages 7-12) in heavily rural departments. They do not, however, disaggregate the data for indigenous or Afro-descendant groups.

b. Outcome Indicators: As a result, indigenous and Afro-descendant Guatemalans, who face both geographic and economic obstacles to education, have lower enrollment rates.

Geography is a significant factor in a child's likelihood of attaining formal education, and in some departments, such as San Marcos, "kids... [who] strive to finish with their studies... have to walk up to three hours in order to reach the school."¹⁵⁹ Often, children do not go to school because they would have to travel alone and it is too dangerous.¹⁶⁰ Statistical rates of enrollment and grade completion demonstrate that rural children fare far worse than their urban counterparts.¹⁶¹ The highest concentration (64 percent) of children ages 7-12 not in school live in the rural regions of Alta Verapaz, Huehuetenango, and Quiche.¹⁶² "Though 60 percent of urban students will complete third grade, only 30 percent of rural students will do so ... this legacy persists throughout life, since primary education is insufficient preparation for modern jobs in the globalized economy, and the average rural worker has been schooled for only 2.1 years."¹⁶³ Thus, Guatemala's rural and socio-economically disadvantaged inhabitants have significantly less access to primary education than other groups.¹⁶⁴

¹⁵³ *Id.* at 24.

¹⁵⁴ Educational Policy, *supra* note 100, at 7.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*, Educational Policy 3, at 8-9.

¹⁵⁷ *Id.*

¹⁵⁸ MINEDUC 2006 Statistics, *supra* note 108, at 17.

¹⁵⁹ Interview with Anonymous from the San Marcos department (describing the situation of children who seek education beyond the basic and diversified level), *supra* note 143.

¹⁶⁰ Comments of Angelica Macario Quino, meeting with RFK staff, June 5, 2007.

¹⁶¹ Mayan Females, *supra* note 92, at 2.

¹⁶² MINEDUC 2006 Statistics, *supra* note 108, at 17.

¹⁶³ USAID Education Profile, *supra* note 88, at 2.

¹⁶⁴ UNESCO Guatemala Case Study, *supra* note 110, at 6.

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Additionally, economic factors play a major role in whether children attend school. Though Guatemala's Constitution protects the right to free primary education, schooling currently has associated costs that pose a bar for significant portions of the population. Students must pay enrollment costs, school fees, uniform fees, exercise book fees, textbook fees, and transportation fees.¹⁶⁵ Children are not permitted to wear their traditional garments to school and, in part, because of gang-related problems, public schools have adopted a policy of obligatory uniforms. Besides the issue of the right not to be subjected to any form of forced assimilation or integration,¹⁶⁶ this is a financial burden.¹⁶⁷ In addition to these significant costs, families bear the indirect opportunity cost of sending children to school, rather than to work.¹⁶⁸ A Mayan woman from Quiche described how family circumstances forced her to work instead of attending school until she was 13. Even then, she had no money for school materials and endured "many difficult moments" holding down a job while attending classes.¹⁶⁹ These high costs led over half of primary school-age children surveyed by the U.N. Educational, Scientific and Cultural Organization (UNESCO) to identify a "lack of financial resources" as the reason they were not in school.¹⁷⁰

Both geographic and economic factors disproportionately impact indigenous students. Rural departments with an indigenous majority have the highest rates of illiteracy.¹⁷¹ Furthermore, being indigenous in Guatemala is linked to a 10 percent greater likelihood of being poor.¹⁷² While disparities in education between indigenous and non-indigenous persons exist throughout Latin America, in Guatemala indigenous adults have less than half the level of schooling of non-indigenous adults.¹⁷³ Indigenous children are less likely to be enrolled in school, more likely to be over-age when they are enrolled, more likely to repeat grades, and more likely to drop out of primary school without achieving literacy.¹⁷⁴

Guatemala concentrated its efforts relating to accessibility on achieving universal coverage of primary education, which it measures using enrollment figures. A basic condition of the right to education, however, is completion of studies.¹⁷⁵ According to this measure, with only 40 percent of

¹⁶⁵ *Id.* at 16.

¹⁶⁶ U.N. Declaration on the Rights of Indigenous Peoples, U.N. Doc. A/61/L.67, Sept. 7 2007, Art. 8:

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. States shall provide effective mechanisms for prevention of, and redress for:
 - (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; ...
 - (d) Any form of forced assimilation or integration;

¹⁶⁷ Comments of Angelica Macario Quino, *supra* note 160.

¹⁶⁸ UNESCO Guatemala Case Study, *supra* note 110, at 16.

¹⁶⁹ Interview with Mayan woman from Quiche, *supra* note 124.

¹⁷⁰ UNESCO Guatemala Case Study, *supra* note 110, at 16.

¹⁷¹ Report of the United Nations Verification Mission in Guatemala (MINUGUA) for the Consultative Group Meeting for Guatemala, Jan. 18, 2002, *available at*: http://www.iadb.org/regions/re2/consultative_group/gu/minugua_eng.pdf, at 6.

¹⁷² Mayan Females, *supra* note 92, at 3, citing Hall and Patrinos, 2005.

¹⁷³ *Id.* at 2, citing Hall & Patrinos, 2005 (2.5 versus 5.7 years).

¹⁷⁴ Mayan Females, *supra* note 92, at 2 ("While age 12 would be a time of transition from primary to secondary school for children who entered school on time and made regular progress, most non-enrolled children aged 12 and older, especially those who are Mayan, have very low grade attainment and few have completed primary school.")

¹⁷⁵ The State of Education in Latin America and the Caribbean: Guaranteeing Quality Education for All, UNESCO Regional Report, 2007, *available at*: <http://unesdoc.unesco.org/images/0015/001528/152895e.pdf>, at 76 [hereinafter State of Education Report].

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15-19 year olds who have completed primary education,¹⁷⁶ Guatemala lands at the bottom of Latin American and Caribbean countries.¹⁷⁷ This inability to graduate is felt keenly by Guatemala's indigenous population, more than half of whom do not complete primary school.¹⁷⁸ In addition to a failure to graduate students, the Guatemalan system experiences severe inefficiencies caused by students repeating grades, failing classes, or leaving. Even among children who entered first grade on time, more than half were delayed or expelled within that year.¹⁷⁹ Only 21.8 percent of students finished the final grade of primary school on time.¹⁸⁰ Such school inefficiency caused by grade repetition exacerbates economic access issues, as it leads to higher monetary expenses and opportunity costs for families.¹⁸¹ Moreover, primary level inefficiency uses a significant portion of the State's meager education expenditures, consuming 42.4 percent of the Ministry of Education budget in 2004.¹⁸²

As noted above,¹⁸³ Guatemala pledged to address the prohibitively high cost of education through creation of scholarships and educational grants for certain disadvantaged communities.¹⁸⁴ Problems of inadequate budget and low levels of enforcement, however, have frustrated the purpose of the government's scholarship efforts and resulted in programs that still do not cover needy children.¹⁸⁵ Guatemala's current scholarship program, Programa Nacional de Becas para la Educación (EDUBECAS), recognized that past efforts failed to reach vulnerable populations and were wracked by corruption and inefficiency.¹⁸⁶ EDUBECAS attempts to improve on this by creating a Scholarship Unit to administer its programs, including a primary education program to benefit approximately 92,000 children in over 2,800 schools in 20 departments.¹⁸⁷ Secondary education initiatives drop off significantly, with plans to award scholarships to only 250 high-achieving youths in 2005.¹⁸⁸ The Plan notes that its effectiveness is limited by insufficient funds.¹⁸⁹

¹⁷⁶ *Id.* at 88.

¹⁷⁷ *Id.* at 89.

¹⁷⁸ Raising Student Learning, *supra* note 96, at 28.

¹⁷⁹ State of Education Report, *supra* note 175, at 113.

¹⁸⁰ *Id.* at 114. Primary education extends through 6th grade, and is directed at children ages 7-12. Maria Elena Anderson, Guatemala Poverty Assessment Program (GUAPA), Technical Paper No. 2: The Education Sector, Oct. 2001, *available at*: [http://wbln0018.worldbank.org/LAC/LACInfoClient.nsf/e9dd232c66d43b6b852567d2005ca3c5/d5bfd49e5dd62fad85256df000585334/\\$FILE/GUAPA%20Educationsector-Paper2.pdf](http://wbln0018.worldbank.org/LAC/LACInfoClient.nsf/e9dd232c66d43b6b852567d2005ca3c5/d5bfd49e5dd62fad85256df000585334/$FILE/GUAPA%20Educationsector-Paper2.pdf), at 6.

¹⁸¹ *Id.* at 116.

¹⁸² USAID Education Profile, *supra* note 88, at 2.

¹⁸³ See Part V.D.2.a, *supra* (discussing the Education Policy 2008-2012 goal of providing cash transfers, scholarships, and bonds to increase access to education for marginalized populations).

¹⁸⁴ UNESCO Guatemala Case Study, *supra* note 96, at 18-19. See also, Educational Policies 2008-2012, at 8-9.

¹⁸⁵ OMBUDSMAN'S REPORT, *supra* note 91, at 78.

¹⁸⁶ Programa Nacional de Becas para la Educación (EDUBECAS), *available at*: <http://www.mineduc.gob.gt/default.asp?seccion=576> (link to: Programa Nacional de Becas), at 3.

¹⁸⁷ *Id.* at 7. The program is funded by the Ministry of Education with \$20.1 million *quetzales* (approximately \$2.7 million USD). *Id.*

¹⁸⁸ *Id.* at 8.

¹⁸⁹ *Id.* at 10. The Program states that approximately 25,000 children have been identified as vulnerable (meaning that they are likely to drop out of school) and require customized scholarships. Such a program, however, would exceed EDUBECA's 2006 budget by \$10 million *quetzales*. *Id.*

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3. **Acceptability: Guatemala has failed to provide a quality education program that adequately accounts for the diverse cultural background of students.**

An “acceptable” education program is one that is appropriate for the students, based on principles of human dignity. It must not only meet minimum quality standards, but also be meaningful for the students and community, and supportive of their diverse and unique cultural backgrounds. Because many indigenous students are not taught in their native language, they repeat grades numerous times. After having to repeat the same grade once or twice, they often choose to drop out. Thus, while issues of cost are a concern for indigenous families, issues of culture play a significant role as well. Increasing access to intercultural bilingual studies would likely decrease the repetition and drop-out rates, ultimately reducing the number of children who fail to enroll in school. Though Guatemala has a stated commitment to providing a strong, culturally and linguistically relevant education, more than half of indigenous students fail or drop out of school.¹⁹⁰

a. **Process Indicators: Guatemala’s policies call for quality education that takes into account the bilingual and intercultural backgrounds of the students.**

Both the previous and the current Ministry of Education plans recognize that the right to education encompasses more than just attending school. The Government appreciates that access to quality education means reducing grade repetition and drop-out rates, and making schooling relevant to the students’ communities and cultures.¹⁹¹ The 2008-2012 Policies envision reforms to ensure that the curriculum responds to the needs of students at all levels, with community participation in design and implementation. They further call for a stronger evaluation system of students, teachers, and schools to ensure they meet quality criteria.¹⁹²

Guatemala created a Directorate General of Bilingual and Intercultural Education (DIGEBI) in 1995,¹⁹³ and established a Vice Ministry of Bilingual Education in 2003.¹⁹⁴ DIGEBI is responsible for the intercultural bilingual education (hereinafter “IBE”) program in Guatemala,¹⁹⁵ and the Vice Ministry runs schools to train bilingual education teachers.¹⁹⁶ Despite these efforts to organize and strengthen IBE, the program remains poorly defined and implemented.

Guatemala’s 2008-2012 Plan sets the specific goal of improving completion of primary education, with government programs to help populations in extreme poverty and the indigenous population who have completion rates even lower than the dismal national average of 39 percent.¹⁹⁷ To this end, the plan lists such specific objectives as ensuring that primary schools have textbooks

¹⁹⁰ Raising Student Learning, *supra* note 96, at 28.

¹⁹¹ Educational Policy, *supra* note 100.

¹⁹² *Id.*, at 4–5.

¹⁹³ Bilingual Education Study, *supra* note 193, at 4. The Guatemala Bilingual Education model originated in the National Program of Bilingual Education (PRONEBI), created by Government Decree No. 1093-84, under Government Agreement No. 726-95, and was supported by USAID from 1984-1997. In 1995, through the Governmental Decree No. 726-95, PRONEBI was transformed into DIGEBI. *Id.*

¹⁹⁴ Lopez, *supra* note 90, at 243.

¹⁹⁵ Creación de la Dirección General de Educación Bilingüe Intercultural, May 25, 2005, available at: http://www.mineduc.gob.gt/administracion/dependencias/centrales/digebi/Noticias/2/memoria_digebi_vol1.htm.

¹⁹⁶ Ines Benitez, *Guatemala: Teaching With Two Voices*, Inter Press Service News, Dec. 4, 2007, available at: <http://ipsnews.net/news.asp?idnews=40344> (last visited Mar. 8, 2008).

¹⁹⁷ Educational Policies, *supra* note 100, at 9.

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relevant to students' culture.¹⁹⁸ Further, the policy sets the goal of strengthening bilingual and intercultural education. To achieve this, the policy calls for an increased budget, consultation with indigenous organizations, and improved structure and leadership for the State's intercultural bilingual education program.¹⁹⁹ The program would guarantee of textbooks in 18 Mayan, Garifuna, and Xinca languages, a 100 percent training level for bilingual teachers, and a strengthening of the bilingual programs in place.²⁰⁰

b. Outcome Indicators: The Government's standards do not meet regional or even domestic minimum educational standards for quality, language, or cultural diversity.

Guatemala's failure to graduate students from primary school reflects an unacceptably low level of educational quality.²⁰¹ This problem is further underscored by a high percentage of students who fail university entrance exams.²⁰² Furthermore, in-service testing of teachers on their knowledge of various subject areas showed "serious issues of low quality."²⁰³ As one Guatemalan woman who completed only sixth grade notes, a "clear example of the education failure is the study conducted by the Rigoberta Menchu Tum foundation in which 61 percent of children knew how to use a box to shine shoes, but did not know how to write 'shine'."²⁰⁴ International comparisons demonstrate that repetition and completion problems cannot be blamed on lack of money: Guatemala's primary completion rates and secondary education gross enrollment rates are behind low-income neighbors, Honduras and Nicaragua.²⁰⁵

Despite the Government's stated policy commitment to improving educational quality, bilingual education throughout Guatemala remains inadequate both in scope and in quality. The government devoted only 0.1 percent of its GDP to bilingual education from 2001-2006, and increased its expenditure only marginally to 0.13 percent in 2007.²⁰⁶ Though State sponsored efforts at IBE started in 1980, they lack a clear definition and remain unregulated even today.²⁰⁷ As a result, the coverage of this education program is inadequate. Out of 754,483 total primary school students, only 174,321 indigenous students (approximately 23 percent) receive IBE.²⁰⁸ Of 7,832 schools physically located in bilingual departments, only 23.9 percent, or 1,869, were bilingual and intercultural.²⁰⁹ "Two thirds of Maya[n] first graders are taught by teachers who neither understand nor speak the children's maternal language."²¹⁰ Educational notebooks, posters, and textbooks that are commonly used in primary school are rarely available in indigenous languages.²¹¹ Furthermore, most IBE teachers are neither trained beyond the upper secondary level, nor are they required to

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*, Policy 4, at 10–11.

²⁰⁰ *Id.*

²⁰¹ PRONACOM Agenda, *supra* note 137, at 21.

²⁰² *Id.*

²⁰³ WORLD BANK APPRAISAL, *supra* note 93, at 5.

²⁰⁴ Interview with woman from the Escuintla department, *supra* note 116.

²⁰⁵ WORLD BANK APPRAISAL, *supra* note 93, at 5.

²⁰⁶ OMBUDSMAN'S REPORT, *supra* note 91, at 77.

²⁰⁷ WORLD BANK REPORT, *supra* note 14, at 140.

²⁰⁸ *Id.* at 141.

²⁰⁹ PRONACOM Agenda, *supra* note 137, at 20.

²¹⁰ USAID Education Profile, *supra* note 88, at 2.

²¹¹ Bilingual Education Study, *supra* note 16, at 11.

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pass any standardized exam to be qualified as “bilingual.”²¹² They lack IBE-specific teaching guides and often lack even a textbook.²¹³

The serious deficiencies in bilingual education demonstrate a failure to provide both a higher quality education for indigenous students and one that respects their unique cultural backgrounds. Importantly, in bilingual schools, which serve approximately 15 percent of the Guatemalan population at primary and secondary school levels, grade repetition is about half that of traditional schools and drop-out rates are about 25 percent lower.²¹⁴ These results are all the more significant because children receiving instruction in their first language are often from at-risk populations.²¹⁵ Additionally, the use of local languages for instruction often leads to greater inclusion of local content in the curriculum and greater participation of parents and community members as classroom resources. Parents are better positioned to become involved in IBE schools and to value education for their children, recognizing that their knowledge and their culture are relevant. The legitimization of local languages that comes from their use in schooling can also strengthen the child’s, families’, and communities’, sense of inclusion in schooling. The use of local languages in formal education has a positive impact on adult literacy as well. When children successfully learn to read and write in their own language, their parents are often motivated to attend literacy classes as well.²¹⁶

Despite curricular reforms designed to adapt to local needs and characteristics, there remains a general criticism that the education system lacks cultural relevancy.²¹⁷ Evidence demonstrates that indigenous members of the population acutely feel the disconnect between their culture, identity, and the public education provided. According to a UNESCO study, five of eight Mayan communities stated that they perceived a conflict between formal education and traditional oral teaching.²¹⁸ Furthermore, the bilingual education provided does not necessarily translate into skills that enable graduates to progress socially and economically. A 2003 study undertaken by the Guatemalan General Directorate of Bilingual Intercultural Education reported that 58 percent of bilingual education graduates still worked in the agriculture sector.²¹⁹

4. Adaptability: Guatemala’s educational programs are too limited to effectively address individual student needs, languages, and cultures.

An adaptable education should provide opportunities for all members of society to receive an education and must involve parents and communities in school decisions to ensure that the education meets the requirements of the individual child, regardless of their background or particular family needs. In order to ensure an adaptable education, the Guatemalan government is

²¹² WORLD BANK REPORT, *supra* note 14, at 141.

²¹³ *Id.* at 143.

²¹⁴ Education Notes: In Their Own Language...Education for All, World Bank, June 2005, *available at*: http://siteresources.worldbank.org/EDUCATION/Resources/Education-Notes/EdNotes_Lang_of_Instruct.pdf, at 2.

²¹⁵ *Id.*

²¹⁶ *Id.* at 2–3.

²¹⁷ UNESCO, Final Report of Project “Mobilization for Mayan Education”, Guatemala 2004, *available at*: <http://unesdoc.unesco.org/images/0014/001413/141346eo.pdf>, at 20.

²¹⁸ *Id.*

²¹⁹ Bilingual Education Study, *supra* note 66, at 18.

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obligated to include the special needs, cultures, religions, and languages of Afro-descendants and indigenous peoples.

Guatemala's focus on "relevance" in its recent 2008-2012 Educational Policies features a prominent role for parents and communities. They will help plan and design school curricula; and a new model of management, responsive to the needs of the community, is to be implemented. These policies add to the decentralized education system in place since 1996, in which departments, municipalities, and individual schools are given various administrative tasks.²²⁰

While Guatemala's decentralization efforts have moved school management into many communities, the program suffers from inferior teacher training and funding and infrastructure problems that render the schools an inadequate replacement for traditional public schools. Moreover, Guatemala has made insufficient efforts to reach other needy segments of its population, such as overage and disabled students.

a. Process Indicators: Guatemala's policies and programs recognize the need to incorporate parents and communities into the educational process.

The National Program for Educational Development (hereinafter "PRONADE"), which began in the early 1990s, aims to increase coverage and quality of educational services through community participation.²²¹ PRONADE's objectives are to promote parental involvement and responsibility for the education of their children, strengthen local organization and community development, decentralize education services, and distribute the roles and responsibilities shared with the Education Committees (hereinafter "COEDUCA"), the institutions of Educational Services (hereinafter "ISE") and other units of the Ministry of Education. PRONADE provides pre-primary and primary schooling to rural communities that traditionally lack educational service or where schools have not previously existed.²²²

In theory, under this program, communities are to receive funding directly from the Ministry of Education to operate a school if they express interest, select a school site at least three kilometers from the nearest public school, have at least 25 school-age children, and have no teachers on the government payroll.²²³ COEDUCA school committees are staffed by locally-elected parents and members of the community, who handle the administrative aspects of the school, including contracting and paying teachers, defining the school calendar, purchasing school materials, and

²²⁰ UNESCO Guatemala Case Study, *supra* note 110, at 15.

²²¹ PRONADE Program Description (*Programa Nacional de Autogestión para el Desarrollo Educativo*), <http://www.mineduc.gob.gt/default.asp?seccion=559>. PRONADE's legal basis is found in Governmental Agreement 457-96 [hereinafter PRONADE Program Description]. In 1997, Law 24-97 placed PRONADE under the Ministry of Education and gave the Ministry power to approve COEDUCA's. The Ministry of Finance allocates resources to a trust fund and disburses funds to individual COEDUCA bank accounts every three months. The ISEs help develop the budget and ensure that funds are spent according to that budget. "History of PRONADE," USAID Working Paper 2007, *available at*: http://www.equip123.net/docs/e2-MeetingEFAGuatemalaCaseStudy_WP.pdf [hereinafter USAID Working Paper on PRONADE].

²²² *Id.*

²²³ "Decentralizing Education in Guatemala: School Management by Local Communities," World Bank Education Notes, Feb. 2005, *available at*: http://siteresources.worldbank.org/EDUCATION/Resources/Education-Notes/EduNotes_Guatemala.pdf at 2 [hereinafter World Bank Education Notes Feb. 2005].

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monitoring school libraries.²²⁴ ISEs are contracted by PRONADE to organize, assist, and train COEDUCAs.

In addition to the programs targeted to rural populations, Guatemala's 2008-2012 Educational Policies recognize the need to strengthen and evaluate the State's special education and technical education programs as an alternative to formal education. The Department of Special Education provides services for people with special education needs and disabilities.²²⁵ Though these programs target important segments of the population, they are not sufficiently developed or widespread to reach many of the people they are designed to benefit.

b. Outcome Indicators: Despite an increase in parent and community involvement, Guatemala's programs are not adequately developed to meet the educational needs of individual students, particularly from indigenous and Afro-descendant communities.

Recent studies show that administrative support services benefit from control at the individual school level, because it enables them to identify urgent needs and leads to an expansion of school enrollment and attendance throughout the country.²²⁶ Data from 2003 demonstrates that PRONADE provides services to children in 21 of Guatemala's 22 departments and accounts for 15.2 percent of primary enrollment nationwide.²²⁷ In addition to improved attendance, PRONADE students averaged more hours per day in the classroom than traditional rural schools and more school days per school year.²²⁸

Similarly, evaluations of PRONADE show that parents and community members control decisions over the school calendar, teacher supervision, and teaching methods.²²⁹ Increased community participation in the form of school boards and COEDUCAs led to improved decision-making and quality control.²³⁰ Promotion to higher levels is higher in PRONADE schools than traditional schools, though test score results are mixed.²³¹

PRONADE schools are not, however, without significant drawbacks. They have worse infrastructure, which may be related to the fact that communities are required to provide their own financing for school structure.²³² They have fewer latrines and less access to water and electricity

²²⁴ *Id.* COEDUCAs receive funds to pay for teacher salaries, bonuses, and pensions, as well as annual funds approximating \$6USD per student for school materials, \$28USD per teacher for teaching supplies, and \$12USD per child for snacks.

²²⁵ MINEDUC *Educacion Especial* program description, available at: <http://www.mineduc.gob.gt/default.asp?seccion=180>.

²²⁶ PRONADE Program Description, *supra* note 137.

²²⁷ World Bank Education Notes Feb. 2005, *supra* note 223, at 4.

²²⁸ *Id.* PRONADE students spend 4.04 hours per day in the classroom, while traditional rural school children spend only 3.69 hours. This amounts to 12.6 more days of instruction in the school year. Additionally, PRONADE schools are in session 180 days during the year, while traditional rural schools have "far fewer." *Id.*

²²⁹ UNESCO Guatemala Case Study, *supra* note 110, at 15.

²³⁰ *Id.*

²³¹ World Bank Education Notes Feb. 2005, *supra* note 223 at 4. One study cited (Wu 2003) states that third and fourth graders performed at an equivalent level to other rural schools in math and better in reading. Other data, however, relies on World Bank data from 2002 and finds that "PRONADE students are scoring significantly lower than their public school counterparts" in Spanish and Math (Emanuela Di Gropello, "A Comparative Analysis of School-Based Management in Central America," World Bank Working Paper No. 72 (2006)).

²³² Indigenous Students Study, *supra* note 139, at 65.

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than traditional schools.²³³ Teacher payments are frequently delayed, which impacts teacher morale and job satisfaction.²³⁴ Teacher training is inconsistent, leading to quality issues in the classroom.²³⁵ Moreover, PRONADE schools may only be established where there is no other rural school nearby — as is the case with many indigenous communities²³⁶ — which means that communities with a public school nearby may still suffer from problems of culturally insensitive and impractical school policies. For example, a World Bank study notes that parents often take their children out of school and some students drop out when seasonal agricultural demands interfere with class or homework.²³⁷ Additionally, economic strains on the family may cause parents to pull children out of school at an early age and put them to work.²³⁸ Thus, while the PRONADE program enables community participation in its schools, resulting in culturally sensitive practices and school calendars, such government-run schools do not adequately account for individual student needs, particularly for indigenous and Afro-descendant students.

In addition to general primary education that adapts to each child's need, Guatemala also must account for the special needs of its population, including indigenous and Afro-descendant disabled children, as well as adults in need of education. Guatemala's Department of Special Education has limited coverage, so far assisting only 4,233 students with 165 teachers nationwide.²³⁹ Furthermore, much of the funding and program development comes from international sources, indicating that Guatemala has yet to establish an independent program that adequately meets the needs of its population.²⁴⁰

5. Accountability: Existing legal and administrative mechanisms are inadequate to remedy or even to provide a measure of redress for violations of the rights to education and non-discrimination, particularly for members of Guatemala's indigenous and Afro-descendant communities.

Guatemala's failings in the areas of availability, accessibility, acceptability, and adaptability of education are at least partially attributable to a broader failure with respect to accountability. Importantly, "[w]ithout accountability, gains in the other components of the '5-A Right to Education Framework' will not be realized."²⁴¹

To provide meaningful accountability, Guatemala must create a structure that allows rights holders to adequately monitor the state of education and provides information (disaggregated to reflect the specific conditions of Afro-descendants and indigenous peoples) in an accessible and fully transparent manner. There should also be formal legal mechanisms in place that provide fora for the hearing and redress of complaints when the State falls short of its obligations. Further, potential

²³³ World Bank Education Notes Feb. 2005, *supra* note 223, at 4.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ USAID Working Paper on PRONADE, *supra* note 221, at 2.

²³⁷ WORLD BANK REPORT, *supra* note 14, at 135.

²³⁸ Mireya Obregon, *A Step Forward But Still a Long Way to Go: Guatemala*, UNESCO Background Paper Prepared for the Education for All Global Monitoring Report, 2003, *available at*: <http://unesdoc.unesco.org/images/0014/001468/146820e.pdf>, at 6.

²³⁹ MINEDUC *Educacion Especial* program description, *available at*: <http://www.mineduc.gob.gt/default.asp?seccion=180> (Programas).

²⁴⁰ *Id.*

²⁴¹ WOODROW WILSON FRAMEWORK, *supra* note 13, at 30.

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claimants should be adequately informed of the mechanisms available to them in situations where the State breaches any of its regional, international, or domestic obligations with respect to the rights to education and non-discrimination. There must also be a focus on community participation and communication across all levels of society, with a specific emphasis on bottom-up communication.²⁴²

a. Structural indicators: Guatemala currently provides limited mechanisms for rights holders to seek redress against the State.

A properly accountable education system involves the establishment of structural mechanisms that provide effective channels for inter-State communication, participation, and responsiveness. To this end, Guatemala has constitutional provisions addressing allegations of rights violations (the *amparo*) and maintains a national Ombudsman for Human Rights (as part of a national human rights committee).²⁴³

Within the Office of the Human Rights Ombudsman is the Indigenous Ombudsman's Office, an agency that receives complaints and makes decisions on whether collective rights of indigenous peoples have been violated. If a violation is found, condemnations are released along with a legal analysis. The real problem is that the Office is unable to initiate prosecutions and can only issue recommendations to the Ministerio Público.²⁴⁴ Thus, while this agency provides a potentially useful channel for the hearing of complaints, it functions as something of an intermediary body and lacks the authority to provide meaningful opportunities for redress.

The Guatemalan Constitution guarantees access to the *amparo* for rights holders in instances where fundamental rights are alleged to be violated.²⁴⁵ Use of the *amparo*, however, requires the retention of legal counsel,²⁴⁶ which limits access and renders the mechanism overly restrictive.²⁴⁷ Furthermore, "it is notorious that recourse to *amparo* tends to be used more often as a delaying tactic by those attempting to evade justice than as an accessible means for the underprivileged sectors to defend their fundamental rights."²⁴⁸ To this end, defense counsel often assert due process claims aimed at delaying the proceedings against their clients.²⁴⁹ Importantly, the average *amparo* appeal lasts more than three months, despite legal provisions that establish shorter requirements for their duration.²⁵⁰

Though there are structural mechanisms that link indigenous rights to judicial recourse, the following description highlights a binding inadequacy:

[New State institutions] are highly dependent on international development funds, and it is doubtful whether the government and judiciary will continue to support

²⁴² See *id.*

²⁴³ See Procuraduría de los Derechos Humanos, available at <http://www.pdh.org.gt/> (last visited Mar. 8, 2008).

²⁴⁴ Rachel Sieder, *The Judiciary and Indigenous Rights in Guatemala*, 5 I-CON 211, 225 (2007), available at <http://icon.oxfordjournals.org/cgi/reprint/5/2/211.pdf>.

²⁴⁵ See Guat. Const., *supra* note 8, arts. 265 & 272.

²⁴⁶ Sieder, *supra* note 244, at 238.

²⁴⁷ See also discussion that follows on prohibitively high costs of education.

²⁴⁸ *Id.* at 238–39.

²⁴⁹ *Id.* at 239.

²⁵⁰ *Id.*

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them after those funds dry up. Although in different ways, they all monitor compliance with collective rights commitments for indigenous people, it is notable that none of them has a specific mandate to defend and advance collective rights through strategic litigation.²⁵¹

Without the establishment of such a mandate, and in the absence of domestic support, it is doubtful that the State has demonstrated the commitment necessary for a system of accountability that incorporates the specific interests of Guatemala's Afro-descendants and indigenous peoples.

While these mechanisms are necessary to pursue grievances against the State, they are not sufficient to remedy breaches of education duties. Many potential claimants, particularly in indigenous and Afro-descendant communities, cannot afford the prohibitively high costs of seeking redress.²⁵² Thus, there must be adequate means for the economically disadvantaged to obtain subsidized legal (and other forms of) aid.

As a subset of this general concept of accountability, Guatemala must ensure that its obligations for progressively realizing educational rights, particularly concerning the provision of free secondary education, are sufficiently enforceable and integrated into the legal mechanisms for redress and responsiveness. Progressive realization must also be considered in light of a standard for "reasonable time," in order to ensure that the State does not allow resources or the complexity of the matter to become a rationale for justice delayed.²⁵³

- b. Process indicators: To ensure that these structural and legal mechanisms prove efficacious in granting those whose educational rights have been compromised appropriate modes of redress, accurate information must be collected regularly and documented transparently. Furthermore, remedies and compensation for violated rights must be meaningful and not merely symbolic.**

A precondition for an effective system of accountability is the compilation, documentation, and monitoring of various forms of data assessing the implementation of educational services. Without such information, the State cannot accurately assess the state of education and adapt its services and policies to the reality of the situation. It is crucial that this data be disaggregated to track progress for Afro-descendants and indigenous peoples. Since these populations are particularly at risk for receiving inferior services and because they face unique obstacles in securing

²⁵¹ *Id.* at 226.

²⁵² *Id.* at 227.

²⁵³ American Convention, *supra* note 4, art. 8(1) ("Every person has the right to a hearing, with due guarantees and within a reasonable time, ..."). See *Case of Tibi v. Ecuador*, 2004 Inter-Am. Ct. H.R. Preliminary Objections, Merits, Reparations and Costs, (ser. C) No. 114, at para. 53 (Sept. 7, 2004) (Sergio García Ramírez, J., separate concurring opinion) ("Justice delayed, according to the well-known adage, is justice denied."). See also, *Case of Suárez-Rosero v. Ecuador*, 1998 Inter-Am. Ct. H.R. Merits Judgment, (ser. C) No. 35, at para. 72 (Nov. 12, 1997):

This Court shares the view of the European Court of Human Rights, which in a number of decisions analyzed the concept of reasonable time and decided that three points should be taken into account in determining the reasonableness of the time in which a proceeding takes place: a) the complexity of the case, b) the procedural activity of the interested party, and c) the conduct of the judicial authorities (cf. *Genie Lacayo Case*, Judgment of January 29, 1997. Series C No. 30, para. 77; and cf. Eur. Court H.R., *Motta judgment of 19 February 1991*, Series A No. 195-A, para. No. 30; Eur. Court H.R., *Ruiz-Mateos Case v. Spain judgment of 23 June 1993*, Series A No. 262, para. 30).

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their rights, data must be available that pinpoints the status of their educational condition. As the data presented in this Report indicates, the severe shortage of disaggregated statistics frustrates comprehensive assessment of the educational circumstances of vulnerable populations. This situation must be remedied immediately to address the peculiar barriers separating these individuals and their communities from the full realization of their educational rights.

The judiciary must also take an active role in enforcing the rights guaranteed by Guatemala's legal infrastructure. However, to the contrary, "the judiciary has largely failed to defend the collective rights of indigenous peoples, despite reforms to the legal system that ostensibly were aimed at ensuring respect for indigenous peoples and their fundamental rights."²⁵⁴

Though a much broader consideration within the ambit of access to justice, it is essential that proceedings be accessible for individuals in their native languages. At least in the criminal context, interpreters are rarely available for non-Spanish speakers.²⁵⁵ According to the U.S. State Department's 2006 report on human rights in Guatemala, for the 561 tribunals nation-wide, only 63 judges spoke Mayan languages, and only 62 court interpreters were available.²⁵⁶ This situation is clearly inadequate and must be fairly addressed so that indigenous and Afro-descendant communities can access formal mechanisms of redress.

c. Outcome indicators: The relationships between duty bearers and rights holders should be strengthened to improve community participation, expand multi-level discourse, and heighten educational responsiveness.

The implementation of the State's PRONADE program is evidence of efforts to improve communication between duty bearers (the State) and rights holders (school-age children and their parents).²⁵⁷ The program's mandate includes increasing parental involvement and decentralizing the education system, two objectives that directly relate to strengthening relationships at all societal levels while promoting responsiveness through the formation of bottom-up channels for communication. Such communication is essential to any functioning educational system.²⁵⁸ It not only reflects multi-level participation on the part of rights holders, but also enhances empowerment while diminishing subjugation. The related concepts of human dignity and empowerment are fundamental to the full realization of any human rights and their importance in the educational context cannot be overstated.

As noted in the preceding section on adaptability, there are problems affiliated with PRONADE, though it seems to have had a generally positive impact where implemented. The State would do well to address the flaws in the program while working to further advance multi-level participation in all aspects of education, particularly in government schools.

²⁵⁴ Sieder, *supra* note 244, at 212. "[D]espite some notable advances, the quality of ordinary justice remained extremely poor and highly likely to exclude indigenous people." *Id.* at 227.

²⁵⁵ U.S. Department of State Bureau of Democracy, Human Rights, and Labor, Country Profile (Guatemala): Mar. 6, 2007, available at <http://www.state.gov/g/drl/rls/hrrpt/2006/78893.htm> (last visited Mar. 8, 2008).

²⁵⁶ *Id.* See also, Sieder, *supra* note 244, at 227.

²⁵⁷ For specific details on this program, see Part V.D.4. *supra* (discussing adaptability of education in Guatemala).

²⁵⁸ See WOODROW WILSON FRAMEWORK, *supra* note 13, at 30.

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E. CONCLUSION: GUATEMALA HAS FAILED TO MEET ITS LEGAL OBLIGATIONS WITH REGARD TO THE RIGHT TO EDUCATION, AND MUST TAKE STEPS TO REMEDY THE PRESENT SITUATION.

Given the above considerations evidencing breaches of Guatemala's duties for the provision of education and the right to non-discrimination, particularly in the context of Afro-descendants and indigenous peoples, it is clear that remedies should be implemented to further the realization of these rights. This Case Study has revealed these failures within the parameters of the "5-A Right to Education Framework," demonstrating Guatemala's shortcomings in making education available, accessible, acceptable, and adaptable, while instituting measures and encouraging community participation in ways that hold it accountable. We respectfully submit the following recommendations to the Inter-American Commission; all are measures that will help Guatemala fulfill the right to education among Afro-descendants and indigenous persons.

F. RECOMMENDATIONS TO THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS AND THE GOVERNMENT OF GUATEMALA

Structural, process, and outcome indicators and the "5-A Right to Education Framework" suggest that Guatemala has not satisfied its obligations to Afro-descendants and indigenous persons with respect to education under numerous inter-American and international treaties to which it is a State Party.

Consequently, we recommend that the Inter-American Commission on Human Rights and the Government of Guatemala:

1. Enhance availability by increasing educational spending from its current level of 1.8 percent GDP to the UNESCO-recommended six percent as soon as possible given budgetary constraints, without delay and without regression. Specifically, allocate funds for adequate infrastructure—classrooms, electricity, water and sanitation—and take effective measures to lower the student/teacher ratio.
2. Improve economic accessibility with a view to eradicating structural and systematic discrimination among other means by expanding scholarship and affirmative action programs available to indigenous, Afro-descendant, and other rural children. Such programs should be tailored to better target the indigenous and Afro-descendant communities and should be developed, implemented, and monitored with their full participation and informed consent. The Government should undertake an assessment of current costs borne by students, including fees associated with school attendance and opportunity costs, with a view to eliminating these costs and eradicating fees from the public education system. The Government should reduce geographic barriers to access, for example, by providing transportation at no cost, especially in rural areas.
3. To address acceptability, improve instructional quality by devoting more resources to teacher training and advanced education, particularly for curricula and programs targeting

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indigenous and Afro-descendant students. The Government should ensure the intercultural bilingual education (IBE) program is sufficiently funded and staffed.

4. Strengthen adaptability by ensuring that education is relevant to students and sufficiently flexible so that it takes into account their diverse social and cultural environments. With this in mind, the Government should increase its efforts to incorporate indigenous languages, perspectives, worldviews, histories and cultures into the educational system, with the full participation of Afro-descendants and indigenous peoples, to improve student and community involvement and educational outcomes.
5. Increase accountability by collecting and recording statistics that are disaggregated to reflect conditions of Afro-descendants and indigenous peoples, with an eye to analyzing progress and critically assessing the implementation of educational services.

All measures affecting Afro-descendants and indigenous peoples should be taken with their full and effective participation and their free, prior, and informed consent, in accordance with internationally guaranteed human rights standards.

VI. COUNTRY OVERVIEW: DOMINICAN REPUBLIC

A. INTRODUCTION

This brief overview¹ addresses the denial of the right to education for children of Haitian descent born in the Dominican Republic. Specifically, the Dominican Republic is in violation of Article 26 of the American Convention on Human Rights (hereinafter “the American Convention”).² Because it fails to provide documentation to Dominico-Haitian children, the government effectively excludes them from the educational system, thereby failing to uphold its obligation to progressively realize the right to education.³ Additionally, the State is violating Articles 1, 19, and 24⁴ of the American Convention by failing to provide education to these Dominico-Haitian children with equal protection and without discrimination.⁵ Furthermore, as the Inter-American Court of Human Rights (hereinafter “the Inter-American Court”) noted, the country’s restrictive birth registration policy, General Migration Law No. 285-04, violates Articles 18 and 20 of the American Convention by denying children of Haitian descent born in the Dominican Republic the rights to a name and nationality.⁶ In violation of the fundamental right to education, the discriminatory treatment that results from this policy restricts their access to education.

The Dominican Republic also fails to comply with its domestic legislation,⁷ Constitution,⁸ and regional and international laws guaranteeing the right to education for all children without discrimination. Instead, the country maintains practices that deny Dominican children of Haitian descent the means to access education.

The Dominican Republic’s policy of refusing to issue documentation to Dominicans of Haitian descent and the country’s history of discrimination against Haitian descendants⁹ are important factors contributing to the government’s failure to realize the right to education, especially for these communities. The history of migration between the Dominican Republic and Haiti contributed significantly to the ongoing and systematic discrimination against Haitians and Dominico-Haitians, including the pervasive discrimination that denies them access to education.

¹ This brief overview is a preliminary report and not an in-depth study of the structural, process and outcome indicators in the educational system of the Dominican Republic. Additionally, this overview does not follow the same “5-A Right to Education Framework” methodology used in the Colombia and Guatemala case studies.

² American Convention on Human Rights (American Convention) art. 26 (right to education), O.A.S. Treaty Series No. 36, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter American Convention].

³ HUMAN RIGHTS WATCH, “ILLEGAL PEOPLE”: HAITIANS AND DOMINICO-HAITIANS IN THE DOMINICAN REPUBLIC 4 (2002).

⁴ American Convention, *supra* note 2, at arts. 1 (right to non-discrimination), 19 (rights of the child) & 24 (right to equal protection).

⁵ HUMAN RIGHTS WATCH, *supra* note 3, at 27–28; Yean and Bosico Children v. Dominican Republic, 2005 Inter-Am. Ct. H.R. (ser. C) No. 130, (Sept. 8, 2005), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_130_esp.pdf [hereinafter Yean & Bosico Case].

⁶ Yean & Bosico Case, *supra* note 5; Dominican Republic, Law 285-04 (2004) [hereinafter General Migration Law].

⁷ See, e.g., General Migration Law, *supra* note 6.

⁸ Constitution of the Dominican Republic, art. 11 (2002), available at <http://pdba.georgetown.edu/Constitutions/DomRep/domrep02.html> (last visited Mar. 10, 2008) [hereinafter Dominican Republic Constitution].

⁹ General Migration Law, *supra* note 6, at art. 28.

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The Inter-American Commission on Human Rights (hereinafter “the Commission”) noted that in the Dominican Republic, ethnic Haitians are “denied recognition as citizens”¹⁰ and are left in a perpetual state of “permanent illegality.”¹¹ During the last century, hundreds of thousands of Haitians migrated to the Dominican Republic to work on sugarcane plantations and factories.¹² At that point, many Haitians remained permanently in the Dominican Republic, established families, and presently live with their children and grandchildren who were then born in the Dominican Republic.¹³ The government granted these sugarcane plantation and factory workers identification cards that allowed them to register their Dominican-born children as citizens.¹⁴ However, the current government’s immigration policies marginalize and cast Dominican-born Haitians as irregular or illegal immigrants despite the fact the Constitution grants them the right to be recognized as citizens.¹⁵

General Migration Law No. 285-04,¹⁶ as detailed below, operates as a vehicle for government officials to discriminate against Dominican-born Haitians. For example, the process for registering births under this law is structured such that it is almost impossible for Dominico-Haitians to register their newborns and obtain identification cards, thereby rendering proper documentation for these children impossible.¹⁷ Because proper documentation is necessary for all children to attain citizenship, access services, and enroll in school,¹⁸ the government’s use of the General Migration Law effectively denies Dominican children of Haitian descent the right to nationality and other fundamental rights, such as the right to education. Commenting on this issue, the U.N. Special Rapporteur on Racism, Racial Discrimination, Xenophobia and Related Intolerance, Doudou Diène, and U.N. Independent Expert on Minority Issues, Gay McDougall emphasized in their 2008 report that “the discriminatory impact of certain laws, particularly those relating to migration, civil status and the granting of Dominican citizenship to persons of Haitian heritage born in the Dominican Republic [such as] Migration Law No. 285-04 presents problems of conflict with the Dominican Constitution, retroactivity and discriminatory application.”¹⁹

Experts confirmed that discrimination against Haitians and Dominico-Haitians is a pervasive problem in the Dominican Republic. For instance, Diène and McDougall reported that “there is nevertheless a profound and entrenched problem of racism and discrimination against such groups as Haitians, Dominicans of Haitian descent, and more generally against blacks within Dominican society.”²⁰ Furthermore, Dominicans consider themselves Hispanics while identifying Haitians as

¹⁰ HUMAN RIGHTS WATCH, *supra* note 3, at 3.

¹¹ *Id.*

¹² Maureen Lynch, Refugees International, *Dominican Republic, Haiti and the United States: Protect Rights, Reduce Statelessness* (Jan. 11, 2007), available at <http://www.refugeesinternational.org/content/article/detail/9770/> (last visited Mar. 11, 2008).

¹³ HUMAN RIGHTS WATCH, *supra* note 3.

¹⁴ *Id.*

¹⁵ Dominican Republic Constitution, *supra* note 8, at art. 11.

¹⁶ General Migration Law, *supra* note 6.

¹⁷ *Id.* at art. 28.

¹⁸ *Id.*; HUMAN RIGHTS WATCH, *supra* note 3, at 27.

¹⁹ U.N. Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Doudou Diène, and the Independent Expert on Minority Issues, Gay McDougall, *Follow-up Report to and Implementation of the Durban Declaration and Programme of Action, Addendum, Mission to Dominican Republic*, at 2, A/HRC/7/19/Add.5, A/HRC/7/23/Add.3 (Mar. 18, 2008) [hereinafter U.N. 2008 Report].

²⁰ United Nations Experts on racism and minority issues call for recognition, dialogue and policy to combat the reality of racial discrimination in the Dominican Republic. See U.N. Experts on Racism & Minority Issues Doudou Dien,

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blacks.²¹ This distinction, motivated by racial prejudice, ignores the Dominican Republic's racial diversity.²²

Finally, the Dominican Republic has failed to implement measures to combat discrimination. Examples of the results of this failure were seen in a shadow report²³ submitted by human rights advocates to the Committee on the Elimination of Racial Discrimination (hereinafter "CERD"), which detailed the violations of the State's treaty obligations under the Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "ICERD").²⁴ Advocates reported that "Haitians [*sic*] migrants tend to live in communities together, isolated from Dominican communities, in constant fear of being assaulted, arrested, repatriated or scapegoated in some way."²⁵ Additionally, the report confirmed discriminatory effects of government policies, finding that Dominican children of Haitian descent do not receive proper birth certificates, proper identification cards, nor can they enroll in schools.²⁶ Thus, without non-governmental assistance, "Haitian communities [in the Dominican Republic] have virtually no access to . . . education."²⁷

B. ALTHOUGH THE DOMINICAN REPUBLIC'S CONSTITUTION AND EDUCATION LAWS COMPLY WITH REGIONAL AND INTERNATIONAL OBLIGATIONS, THE STATE HAS FAILED TO IMPLEMENT THESE LAWS, RESULTING IN DISCRIMINATION IN EDUCATION, ESPECIALLY FOR DOMINICAN CHILDREN OF HAITIAN DESCENT.

The Dominican Constitution guarantees free and compulsory education to all. Article 8(16) generally guarantees the right to education and establishes compulsory primary education.²⁸ The country is obligated to provide fundamental education to all persons within State borders and to take necessary measures to eliminate illiteracy.²⁹ Article 8(16) also provides that primary, secondary and other forms of education, such as agricultural, vocational, artistic, commercial, manual arts, and domestic economics, be free to all.³⁰ Thus, the Constitution on its face complies with regional and international protections of the right to education.

In addition to Constitutional protections for the right to education, Dominican laws ensure access to education for all without discrimination. For instance, Dominican Law No. 66-97,³¹ the

Preliminary Views: U.N. Experts on Racial and Minority Issues Call for Recognition, Dialogue and Policy to Combat the Reality of Racial Discrimination in the Dominican Republic.

²¹ HUMAN RIGHTS WATCH, *supra* note 3, at 27–28.

²² *Id.*

²³ See HUMAN RIGHTS ADVOCATES, COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION 2008 REVIEW OF THE DOMINICAN REPUBLIC (2008), available at <http://www2.ohchr.org/english/bodies/cerd/cerds72.htm> (last visited Mar. 11, 2008).

²⁴ International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) arts. 1, 2, 5(e)(v) & 7, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter ICERD].

²⁵ HUMAN RIGHTS ADVOCATES, *supra* note 23, at 1.

²⁶ *Id.* at 2.

²⁷ *Id.*

²⁸ Dominican Republic Constitution, *supra* note 8, at art. 8(16).

²⁹ *Id.* Article 8 states that "[i]t is the duty of the State to provide fundamental education to all inhabitants of the national territory and take necessary measures to eliminate illiteracy." *Id.*

³⁰ *Id.* It reads that "[p]rimary and secondary education as well as the education offered at agriculture, vocational, artistic, merchant, artesan, and commercial trade schools shall be free." *Id.*

³¹ See Dominican Republic Law 66-97 (1997), available at http://www.oas.org/juridico/spanish/mesicic2_repdom_sc_anexo_7_sp.pdf [hereinafter the Organic Education Law].

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Organic Education Law, structures the educational system as well as provides mandatory school guidelines.³² The Law reiterates the Constitution's guarantee of the right to education for all persons within the State's borders.³³ It also declares the right to education to be "permanent and one that may not be renounced," as well as a right to be enjoyed without discrimination.³⁴ Furthermore, it obligates the State to effectuate the principle of "equality of educational opportunity" for all.³⁵ The State must accomplish this through "political action and through the provision of the means necessary for the development of educational life, through social, economic and cultural support to the family and to the student, especially in terms of providing students with the help needed to overcome a lack of family and social-economic resources."³⁶ Each individual, including gifted children, those with physical disabilities, and those with learning disabilities, is also guaranteed an "appropriate" and free education.³⁷

The Dominican government also passed legislation to codify Law No. 136-03, the System for the Protection of the Fundamental Rights of Children and Adolescents.³⁸ Law No. 136-03 provides for equal application of its provisions to all children and adolescents without discrimination.³⁹ Articles 45 and 46 further guarantee access to high quality education system for all children and adolescents⁴⁰ and reiterate that fundamental education is mandatory and free of charge.⁴¹ Moreover, this law guarantees that no children or adolescent should be denied access to education for reasons such as the lack of an identification card.⁴²

³² *Id.*

³³ *Id.* at art. 1.

³⁴ *Id.* at art. 4(a). Article 4(a) declares that "[e]ducation is an inherent and nonderogable right of all human beings . . . without any form of discrimination due to race, sex, creed, economic and social position, or any other reason." *Id.*

³⁵ *Id.* at art. 4(j).

³⁶ Dominican Republic Law 66-97, *supra* note 31. Article 4(j) states that the State must ". . . [p]romote policies and provide the necessary means for development of educational life, through social, economical and cultural programs for families and students, especially provide to students the necessary help to overcome family and socio-economic barriers. . . ." *Id.*

³⁷ *Id.* at art. 4(m).

³⁸ Dominican Republic Law No. 136-03 (2003) [hereinafter the System for the Protection of the Fundamental Rights of Children and Adolescents].

³⁹ *Id.* at Principle IV: Principle of Equality & Non-discrimination.

⁴⁰ *Id.* at art. 45 (right to education). Article 45 declares that:

[a]ll children and adolescents have the right to essential education of the highest quality, geared toward the development of their potential and abilities, that contributes to personal, family and societal development. At the same time, they ought to be prepared to fully exercise their rights as citizens, respect human rights and develop their own national and cultural values, in a setting of peace, solidarity, tolerance and respect.

Paragraph I.- Basic education is compulsory and free. Parents and the State are both responsible for guaranteeing the means for all children to complete basic, primary education.

Paragraph II.-Under no circumstances can children or adolescents be denied education for reasons such as: the absence of parents, representatives or guardians, lack of documents proving identity or economic resources or any other cause that violates their rights. *Id.*

⁴¹ *Id.* at art. 46 (guarantees of the right to education). Article 46 states that:

In order for children and adolescents to exercise their right to education, the State, and in particular, the State Secretary of Education, must guarantee:

- a) Access to pre-school education beginning at three years of age;
- b) Basic, compulsory and free education; La enseñanza básica obligatoria y gratuita;

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Although on their face the Dominican Republic's Constitution and laws comply with State obligations to respect, protect, and fulfill the right to education, the government, in violation of domestic, regional and international guarantees, has failed to properly implement these laws. For example, a survey conducted in one Haitian settlement⁴³ found that 48 percent of the adult residents over 15 years of age could not read in Spanish.⁴⁴ This settlement's school building lacked paper, books, and desks, and many in the community did not even consider it a real school.⁴⁵ Even when books are available, their contents perpetuate prejudices and stereotypes against Haitians, fostering discrimination and intolerance.⁴⁶

Additionally, the survey concluded that only 38 percent of settlement residents could read and write, as compared to 80 percent of residents who lived in urban areas.⁴⁷ A second survey conducted in 28 Haitian settlements in the Dominican Republic found that the average illiteracy rate was 35 percent and as high as 64 percent.⁴⁸ In contrast, the overall illiteracy rate for the country stands at only 13 percent.⁴⁹ These statistics demonstrate a reality for Dominicans of Haitian descent that does not reflect the State's Constitutional and legal guarantees.

C. THE DOMINICAN GOVERNMENT'S BIRTH REGISTRATION POLICY FURTHER IMPEDES THE REALIZATION OF THE RIGHT TO EDUCATION FOR DOMINICAN CHILDREN OF HAITIAN DESCENT.

"I have asked for a *cédula* several times. My father is Haitian but legally in the country for 35 years. My mother is Dominican and I was born here. I want to go to university and work but I can't without a *cédula*. I don't know any more whether I am Dominican or Haitian."⁵⁰

Article 11(1) of the Dominican Constitution grants Dominican nationality based on the principles of *jus sanguinis* ("right of blood") and *jus solis* ("right of soil").⁵¹ All of those born in the

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- c) Adoption of measures to foster regular assistance to schools and reduce school drop outs;
 - d) Secondary education, including professional schooling for all adolescents;
 - e) Information and orientation about professional and vocational development for all children and adolescents. *Id.*

⁴² *Id.* at art. 45. The relevant part of Article 45 declares that "[u]nder no circumstances can education be denied to children and adolescents due to . . . the lack of identification documents . . ." *Id.*

⁴³ This settlement, Batey 1, is located in the the Bahoruco Province of the Dominican Republic on the western end of the island near the Dominican-Haitian border.

⁴⁴ HEALTH JUSTICE COLLABORATIVE, 2005 BATEY, 1 Survey. Survey of the demographics, health, and healthcare utilizations of households with children 0-5 yrs old in Batey 1, Bahoruco Province, Dominican Republic. Sponsored by The Health Justice Collaborative.

⁴⁵ *Id.* at 16.

⁴⁶ See U.N. 2008 Report, *supra* note 19, at ¶ 48.

⁴⁷ Dr. Leonardo Martínez, Análisis del context sociodemográfico de la base poblacional Batey, p. 55, available from the author of this report (RFK Center).

⁴⁸ *Id.* at 56.

⁴⁹ World Bank, *Dominican Republic Data Profile*, Development Statistics 2006, available at <http://devdata.worldbank.org/external/CPPProfile.asp?SelectedCountry=DOM&CCODE=DOM&CNAME=Dominican+Republic&PTYPE=CP> (last visited Mar. 11, 2008).

⁵⁰ U.N. 2008 Report, *supra* note 19, at ¶ 83 (quoting a student of Haitian descent in Santo Domingo).

⁵¹ Dominican Republic Constitution, *supra* note 8, at art. 11. Article 8 declares that:

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Dominican Republic, with the exception of children born to diplomats or parents who are “in transit,”⁵² become Dominican by virtue of their birth within Dominican territory.⁵³ Article 11(3) also grants nationality to any child born to a Dominican mother or father, regardless of the place of birth.⁵⁴

Article 36(10) of Law 285-04, the General Law on Migration,⁵⁵ undermines this *jus solis* provision by declaring that all “non-residents”—including tourists, business people, persons in transit to a third country, temporary workers, and those unable to prove Dominican nationality or their lawful residency in the country—are to be considered “in-transit” for the purposes of Article 11 of the Constitution.⁵⁶

Additionally, Article 28(1)⁵⁷ of the 2004 General Law on Migration mandates that all health centers issue pink birth declarations rather than the standard white ones to children born of foreign mothers who lack documentation proving their legal residency status.⁵⁸ Only white declarations allow parents to later obtain official birth certificates, which are required to register for Dominican citizenship.⁵⁹ Thus, children with pink declarations are not eligible to register for Dominican citizenship and, as a result, are denied the essential rights and protections that come along with

[D]ominicans are: (1) All persons who were born within the Republic’s territory, with the exception of legitimate children of foreign residents in the country who are diplomatic representatives or those who are traveling here. (2) Persons who presently are naturalized from previous constitutions or laws. (3) All persons born abroad, whose mother or father is Dominican, in accordance with the laws of the place of birth, had not acquired a foreign nationality; or who, in the case of having acquired foreign citizenship, demonstrate, through act before a public official of the Executive Branch, after reaching eighteen (18) years of age, voluntarily opts to receive Dominican citizenship . . .

⁵² According to Dominican jurisprudence, “in transit” typically means a period of less than 10 days.

⁵³ Dominican Republic Constitution, *supra* note 8, at art. 11(1).

⁵⁴ *Id.* at art. 11(3).

⁵⁵ Ley de Migración 285-04, [hereinafter Ley de Migración] art. 36:

Foreigners who qualify in one of the following subcategories are admitted as Non-residents: . . . (10) Non-residents are considered persons in Transit, in order to apply Article 11 of the Constitution of the Republic.

⁵⁶ *Id.* at art. 36(10).

⁵⁷ *Id.* at art. 28.

Foreigners: Non-residents who during their time in-country give birth to a child, they should be directed to the Consulate of their nationality in order to register their child there. If the father of the child is Dominican, they may register as well before the appropriate official of the Dominican city clerk in conformity with the laws regarding the matter. (1) All health centers that offer assistance with the birth of a foreign woman without proper documentation of legal residence, shall issue a Certificate of Birth of the **Color Pink** *different from the Official Birth Certificate*, with all personal information of the mother. (2) All health centers shall submit birth certificates of children born to foreign mothers to the Central Electoral Committee and the Secretary of Foreign Relations, who will register her in a book of foreigners, if it is not Dominican nationality. The Secretary of Foreign Relations shall notify the embassy of the country of the foreign mother to locate them. (3) All of the Official Delegates are obligated to notify the Director General of Migration the birth of the child whose foreign mother does not have the required documentation.

⁵⁸ These pink birth declarations are not birth certificates; rather, they serve as a document attesting to the birth of a child.

⁵⁹ Ley de Migración, *supra* note 55, at art. 28 §§ 1..

Hospitals and clinics issuing pink birth declarations must provide three copies of the document: one to the parents, one to the Central Electoral Board (“JCE”), and one to the Ministry of Foreign Relations. *Id.* The JCE, via its local registry offices, then provides a copy of this pink birth declaration to the General Migration Directorate and the birth declaration of the child along with the personal information of the mother which is inscribed in a “book of foreigners.”

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citizenship, such as the right to education as discussed above.⁶⁰ Moreover, parents' inability to register their children renders these children stateless in violation of additional fundamental rights and excludes them from the educational system.⁶¹

In 2005, the Secretary of Education issued an order allowing undocumented children to attend school through fourth grade, while previous administrations had allowed such children access to education until eighth grade.⁶² Nonetheless, enrollment is discretionary—decided by local and regional education administrators—and, as a result, undocumented children have been expelled from school or even denied their enrollment at all.⁶³ Indeed, numerous Dominican youth of Haitian descent reported that they are denied proper identification; thus, it is impossible for them to pursue any education beyond the sixth grade or to enter university.⁶⁴

Further, the government has been denying copies and revoking documentation from individuals who are legally carrying them. On March 29, 2007, the Dominican Republic's administrative body of the Central Electoral Board (the "JCE") issued "Circular No. 017".⁶⁵ This document mandates that government officials closely examine birth certificates whenever a person is requesting a copy of any document related to civil registry status, for example when a person wants to obtain an identification card.⁶⁶ The JCE apparently issued this circular in response to reports that some government offices had previously issued irregular birth certificates to foreign parents who had never demonstrated their legal status or their residency in the Dominican Republic.⁶⁷ According to the circular, government officials must refrain from issuing, signing, and copying all documents with any "irregularities" and immediately remit them to the administrative body.⁶⁸ Interviews with civil registry officials uncovered evidence that staff are "not to issue any documents to 'Haitians' or those of Haitian descent even when they have documents attesting to their Dominican nationality."⁶⁹ What this means is that in addition to those children who were denied documentation upon birth, even children who did obtain it, can be stripped of that documentation and then be denied the services, such as education, that require them to have it.

⁶⁰ Dominican Republic Constitution, *supra* note 8, at art 8(16).

⁶¹ In situations where the father is a Dominican national with valid identification, he can register the child in the local Civil Registry Office. However, the Movement of Dominico-Haitian Women (MUDHA), a Dominican NGO, recently reported that there are children of Dominican mothers and documented Dominico-Haitian fathers who are not being registered, thus denying the child citizenship based on the father's ancestry. In addition, many Dominico-Haitians do not have any Haitian documentation and are unable to register themselves or their children for Haitian or Dominican nationality. See "Mudha denuncia increment de las redadas contra inmigrantes y las expulsions masivas," *DiarioDigitalRD*, at <http://www.diariodigital.com.do/articulo,22843.html> (last visited Mar. 11, 2008).

⁶² "Republica Dominicana: Las Metas del Milenio y el Derecho a la Nacionalidad," Aug. 10, 2005, at <http://www.jesref.org/reports/index.php?lang=es&sid=56> (last visited Mar. 11, 2008).

⁶³ Interview with Sonia Pierre, Founder of MUDHA, in Washington, D.C. (Mar. 7, 2008).

⁶⁴ U.N. 2008 Report, *supra* note 19, at ¶ 82.

⁶⁵ See OPEN SOCIETY JUSTICE INITIATIVE, RACIAL DISCRIMINATION AGAINST DOMINICANS OF HAITIAN DESCENT IN ACCESS TO NATIONALITY, (FEB. 28-29, 2008) ANNEX, *available at* <http://www2.ohchr.org/english/bodies/cerd/cerds72.htm> (last visited Mar. 11, 2008).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See U.N. 2008 Report, *supra* note 19, at ¶ 72. Even when children of Dominicans of Haitian descent obtain birth certificates through late registration—a process requiring approval and signature of a judge—*cédulas* (identification cards) have been denied. *Id.* at ¶ 74.

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Several Dominican human rights organizations challenged the constitutionality of the General Migration Law No. 285-04 in 2005.⁷⁰ These challengers argued that this law sought to limit the scope of Article 11 of the Constitution by defining all “non-residents” as people “in transit” and imposing unconstitutional limitations on their right to Dominican nationality.⁷¹ However, the Supreme Court of Justice found the challenged articles to be in accordance with the Dominican Constitution and ruled the law to be constitutional.⁷² By upholding the General Migration Law, the Supreme Court effectively reinforced the discriminatory policies that deny the right to nationality and, consequently, the right to education for Dominican children of Haitian descent.

The Supreme Court declared the law constitutional following and in complete defiance of the *Case of the Girls Yean and Bosico v. the Dominican Republic* (hereinafter the “*Yean & Bosico Case*”),⁷³ an important decision issued by the Inter-American Court of Human Rights (discussed below) which determined that the Dominican government should ensure equal access to birth certificates and school enrollment for *all* children in the country.⁷⁴

D. THE INTER-AMERICAN COURT OF HUMAN RIGHTS’ DECISION ON THE YEAN & BOSICO CASE, REQUESTING THE COUNTRY TO ENSURE EQUAL ACCESS TO BIRTH CERTIFICATES AND SCHOOL ENROLLMENT FOR ALL CHILDREN IN THE DOMINICAN REPUBLIC, WAS A LANDMARK DECISION FOR THE RIGHT TO EDUCATION.

In the *Yean & Bosico Case*, the Inter-American Court found that the Dominican government failed to comply with its obligations to guarantee the rights embodied in the American Convention and other international treaties. The decision unanimously declared the Dominican Republic in violation of Articles 3 (right to juridical personality), 5 (right to humane treatment), 18 (right to a name), 19 (rights of the child), 20 (right to nationality), and 24 (right to equal protection) of the American Convention.⁷⁵

The facts of the case typify the Dominican government’s countless violations toward Dominico-Haitian children in denial of their fundamental right to education. Dilcia Yean and Violeta Bosico were born and raised in the Dominican Republic. Both of their mothers are Dominican nationals and both fathers are Haitians.⁷⁶ The Dominican Republic, through its Registry Office authorities, refused to issue birth certificates for the children, despite the fact that they were born within the State’s territory and the Constitution of the Dominican Republic establishes the principle of *jus solis* to determine those who have a right to Dominican citizenship.⁷⁷

⁷⁰ Decision of the Supreme Court of the Dominican Republic, involving Servicio Jesuita a Refugiados y Migrantes, Dec. 14, 2005, available at <http://www.suprema.gov.do/sentscj/sentencias.asp?B1=VR&llave=51084>

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Yean & Bosico Case*, *supra* note 5.

⁷⁴ *Id.*

⁷⁵ American Convention, *supra* note 2 at arts. 3, 5, 18, 20 & 24; Universal Declaration of Human Rights, Article 6; the ICCPR, Article 16; the American Declaration, Article XVII, and the African Charter of Human’s and People’s Rights, Article 5.

⁷⁶ *Yean & Bosico Case*, *supra* note 5.

⁷⁷ *Id.*

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Violeta Bosico was unable to attend day school for one year because the government would not issue her an identification card.⁷⁸ The Court ruled that the Dominican Republic, by refusing to issue Violeta Bosico and other children of Haitian ancestry a birth certificate, violated her right to nationality, rendering her stateless, and in consequence violating her right to education.⁷⁹ The court explicitly recognized the right to nationality as the gateway to the enjoyment of all other rights and found that children who are denied their birth certificates are also denied their membership to a political community.⁸⁰

E. RECOMMENDATIONS TO THE DOMINICAN REPUBLIC GOVERNMENT

The Dominican Republic's guarantees of free compulsory education without discrimination to all as set forth in its Constitution and laws are not sufficient to realize the right to education. The lack of enforcement of those laws and the implementation of a discriminatory birth registration policy that results in denial of the right to education show the country's defiance in complying with inter-American and international treaties and conventions. In light of these facts, we recommend that the Dominican Republic:

1. Ratify the Protocol of San Salvador;
2. Revise General Migration Law No. 285-04, bring it into conformity with Article 11 of the Dominican Republic's Constitution, withdraw the "Pink Book" provisions, and recognize the right of all persons born on Dominican territory to Dominican citizenship without discrimination;
3. Implement and enforce its domestic laws on education;
4. Immediately retract the internal administrative procedures of "Circular 017" that deny the issuance of and retroactively revoke legal documentation; and
5. Fully comply with the decision of the Inter-American Court of Human Rights in the case of *Yean & Bosico vs. the Dominican Republic* and implement measures to ensure non-discriminatory issuance of birth certificates and access to education.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* The Inter-American Court ordered the Dominican government to: (i) pay damages for the Yean and Bosico children; (ii) issue a public apology and publish the sentence; and (iii) implement legislative and administrative measures to ensure equal access to birth certificates and school enrollment for *all* children in the country. As of publication of this Report, the Dominican Republic has not fully complied with the decision. *Id.*

VII. RECOMMENDATIONS

In light of our findings regarding the right to education for Afro-descendants and indigenous peoples in the Americas, we respectfully recommend:

A. TO THE COMMISSION:

1. Establish an Inter-American Special Rapporteurship on Economic, Social, and Cultural Rights to ensure the protection of and commitment to economic, social and cultural rights in the Americas and to investigate violations of the right to education for Afro-descendants and indigenous peoples commencing with investigations of the situation in each of Colombia, Guatemala, and the Dominican Republic.
2. Urge both the Special Rapporteur on the Rights of Persons of African Descent and Racial Discrimination and the Special Rapporteur on the Rights of Indigenous Peoples, to investigate, report, and make recommendations regarding the right to education for Afro-descendants and indigenous peoples in the Americas commencing with investigations of the situation in each of Colombia, Guatemala, and the Dominican Republic.
3. In addition to the structural, process, and outcome indicators that the Commission advocates in analyzing economic, social, and cultural rights, adopt a framework that uses availability, accessibility, acceptability, adaptability, and accountability as measures for assessing violations of the right to education. This framework is further described in Section III (Methodology) of this Report.
4. Include assessments of the right to education in the economic, social, and cultural rights chapter of its annual reports.

B. TO THE GOVERNMENT OF COLOMBIA:

1. Increase availability by allocating more funds for the creation and maintenance of both primary and secondary public schools in areas with large minority populations, including rural areas.
2. Improve accessibility to minorities, who are disproportionately represented among the poor, by amending the Constitution to delete the language that requires people can afford to pay to pay for education. Specifically, delete from Article 67 of the Constitution, the phrase “sin perjuicio del cobro de derechos academicos a quienes puerdan sufragarlos” (without prejudice to those who can afford to defray the costs).
3. Address acceptability by refusing to provide public funding to low quality schools that currently exist in minority communities, especially “garage schools.”
4. Make schools more adaptable by focusing on the needs of Afro-Colombian and indigenous peoples, especially by incorporating ethno-education into school curricula.

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5. Increase accountability for its actions by maintaining and broadening the scope of tutela actions.

C. TO THE GOVERNMENT OF GUATEMALA:

1. Enhance availability by increasing educational spending from its current level of 1.8 percent GDP to the UNESCO-recommended six percent as soon as possible given budgetary constraints, without delay and without regression. Specifically, allocate funds for adequate infrastructure—classrooms, electricity, water and sanitation—and take effective measures to lower the student/teacher ratio.
2. Improve economic accessibility with a view to eradicating structural and systematic discrimination among other means by expanding scholarship and affirmative action programs available to indigenous, Afro-descendant, and other rural children. Such programs should be tailored to better target the indigenous and Afro-descendant communities and should be developed, implemented, and monitored with their full participation and informed consent. The government should undertake an assessment of current costs borne by students, including fees associated with school attendance and opportunity costs, with a view to eliminating these costs and eradicating fees from the public education system. The government should reduce geographic barriers to access, for example, by providing transportation at no cost, especially in rural areas.
3. To address acceptability, improve instructional quality by devoting more resources to teacher training and advanced education, particularly for curricula and programs targeting indigenous and Afro-descendant students. The government should ensure the intercultural bilingual education (IBE) program is sufficiently funded and staffed.
4. Strengthen adaptability by ensuring that education is relevant to students and sufficiently flexible that it takes into account their diverse social and cultural environments. With this in mind, the government should increase its efforts to incorporate indigenous languages, perspectives, worldviews, histories and cultures into the educational system, with the full participation of Afro-descendants and indigenous peoples, to improve student and community involvement and educational outcomes.
5. Increase accountability by collecting and recording statistics that are disaggregated to reflect conditions of Afro-descendants and indigenous peoples, with an eye to analyzing progress and critically assessing the implementation of educational services.

All measures affecting Afro-descendants and indigenous peoples should be taken with their full and effective participation and their free, prior, and informed consent in accordance with internationally guaranteed human rights standards.

D. TO THE GOVERNMENT OF THE DOMINICAN REPUBLIC:

1. Ratify the Protocol of San Salvador;

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2. Revise General Migration Law No. 285-04, bring it into conformity with Article 11 of the Dominican Republic's Constitution, withdraw the "Pink Book" provisions, and recognize the right of all persons born on Dominican territory to Dominican citizenship without discrimination;
3. Implement and enforce its domestic laws on education;
4. Immediately retract the internal administrative procedures of "Circular 017" that deny the issuance of and retroactively revoke legal documentation; and
5. Fully comply with the decision of the Inter-American Court of Human Rights in the case of *Yean & Bosico vs. the Dominican Republic* and implement measures to ensure non-discriminatory issuance of birth certificates and access to education.

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