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Holes in the Rights Framework: Racial Discrimination, Citizenship, and the Rights of Noncitizens

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Dilcia Yean was born on April 15, 1996, in the Dominican Republic to a Dominican woman of Haitian descent. Although the Dominican constitution establishes the principle of *jus soli* (and thus assigns citizenship to those born on Dominican territory), Yean was denied Dominican citizenship, and was refused permission to register her birth or to obtain recognition of her legal personality.[1] Government officials said they had orders not to register or issue birth certificates to children of Haitian descent. The official in charge of the Civil Registry explained that, as Yean had been born to Haitian parents who were in the country illegally, she had no right to Dominican citizenship. Underlying these explanations was a virulent and pervasive prejudice against ethnic Haitians. As an undocumented person, Yean was refused permission to enroll in school and remained vulnerable to expulsion from her own country.[2]

Yean's case illustrates the vital importance of citizenship in making effective the promise of fundamental human rights protection. Citizenship is a legal status that serves, in practice, as a precondition to the enjoyment of many rights, including voting, property ownership, health care, education, and travel outside one's own country. Yean is one of millions worldwide who have suffered abuse because of their noncitizen status and/or the inability to obtain citizenship. And, like so many others, Yean has been denied these rights largely because of her ethnicity.

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[1] This essay uses the term "citizenship" in its narrowest sense, as a formal legal status articulating the relationship between the individual and the state. So understood, citizenship is used interchangeably with "nationality." This discussion does not address broader, political conceptions of citizenship, such as global citizenship, postnational citizenship, denationalized citizenship, or "citizenship in the global city."

[2] The details of Yean's case are drawn from *Report of Admissibility* No. 28/01 Case No. 12.189 (San José, Costa Rica: Inter-American Court of Human Rights, February 22, 2001); and Open Society Justice Initiative, *Written Comments on the Case of Dilcia Yean and Violeta Bosico v. Dominican Republic*, a Submission from the Open Society Justice Initiative to the Inter-American Court of Human Rights (April 2005); available at www.justiceinitiative.org/db/resource2/fs/?file_id=15874.

Across broad swaths of the globe, the treatment of noncitizens—so-called foreigners and aliens, migrants, refugees, asylum seekers, stateless persons, and others who, by virtue of their exclusion from the political community, enjoy some formal legal protection but little influence—is worsening precisely as states are increasingly bestowing, denying, or retracting citizenship as a political weapon. In countries with high rates of immigration, problems of access are common; in postcolonial countries, deprivation is often the main concern. Racial and ethnic discrimination commonly worsen the problems faced by noncitizens, many of whom are members of minority groups.

In recent years, while globalization has resulted in increased migration across national borders, the primary avenues for obtaining citizenship—birth on a country's territory (*jus soli*), descent from a citizen (*jus sanguinis*), and naturalization—have not changed. As a result, growing numbers of persons—as many as 175 million worldwide—are not citizens of the countries in which they reside. The challenge is to use human rights law to combat the worst effects of citizenship denial and the ill-treatment of noncitizens. In this essay, I will explore some of the ways in which racial discrimination and citizenship intersect, and how antidiscrimination law is relevant to the human rights consequences of citizenship denial and the mistreatment of noncitizens. I argue that the growing divide between citizens and noncitizens is primarily a problem of lapsed enforcement of existing norms. By contrast, combating citizenship deprivation and denial requires clarification and articulation of new legal norms that narrow the boundaries of state prerogative. With respect to both problems (i.e., citizenship denial or deprivation and the mistreatment of noncitizens), even as longer-term objectives are pursued, advocates should intensify their use of existing legal tools on behalf of noncitizens. The most comprehensive, well known, and generally accepted of these are the *jus cogens* rules of international law that prohibit discrimination on the basis of race.

WHY CITIZENSHIP MATTERS: LOOPHOLES IN THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK

"The architecture of international human rights law is built on the premise that all persons . . . should enjoy all human rights unless exceptional distinctions serve a legitimate State objective and are proportional to the achievement of that objective."[3]

[3] "Final Report on the Rights of Non-Citizens," UN Doc. E/CN.4/Sub.2/2003/23 (2003), Executive Summary, para. 6.

Thus, international law grants noncitizens virtually all rights to which citizens are entitled, except the rights to vote, hold public office, and exit and enter at will.[4] The Universal Declaration of Human Rights affirms that "recognition of the inherent dignity and of the equal and inalienable rights of *all members of the human family* is the foundation of freedom, justice and peace in the world" (Preamble). Thus, noncitizens should enjoy equal rights to, inter alia, life; freedoms of religion, assembly, expression, and movement; and freedom from torture and inhuman treatment, arbitrary arrest, unfair trial, and invasion of privacy and family life. Similarly, so-called minority rights to enjoy and practice one's culture, language, or religion ought not to be dependent on citizenship status.[5]

These commitments are reflected in national law in some countries. In the United States, the Supreme Court as long ago as 1886 held that the equal protection clause of the U.S. Constitution's Fourteenth Amendment was "not confined to the protection of citizens," but was "universal in application . . . to all persons within the territorial jurisdiction."[6] Thus, in principle, the consequences of being a noncitizen resident of a given state ought not be dire.

In reality, however, noncitizens remain among the most vulnerable segments of humanity. Increasingly, states have improperly deployed the concept of citizenship to carve out significant exceptions to the universality of human rights protection. This happens primarily in two ways: through deprivation of, and/or restrictions on access to, citizenship, and through the imposition of distinctions between citizens and noncitizens. On the one hand, determining membership in a territorially circumscribed political community remains one of the core attributes of state sovereignty.[7] International law traditionally affords states broad discretion to define the contours of, and delimit access to, citizenship. On the other hand, since the Second World War, states' power over residents who are not citizens has been increasingly limited on paper, but not in practice. When taken together, the powers to deny citizenship and treat noncitizens differently can—particularly when employed arbitrarily—result in the denial of fundamental

[4] See UN Committee on the Elimination of Racial Discrimination (CERD), General Recommendation No. 30: Discrimination against Non Citizens, Preamble; see also International Convention on Civil and Political Rights, which makes no distinctions between citizens and noncitizens, except for Article 25, which reserves to citizens alone the rights to take part in public affairs, to vote, and to hold public office.

[5] See UN Human Rights Committee, General Comment 23, "The Rights of Minorities," Article 27 (50th Sess., 1994).

[6] *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

[7] See Convention on Certain Questions Relating to the Conflict of Nationality Laws (The Hague, 1930).

human rights: entire groups of native-born residents may be excluded from access to public benefits; citizens suddenly stripped of their status may be physically expelled; long-term residents may be fearful of deportation and denied the vote; and acts of violence and discrimination against noncitizens may be abetted or allowed to go unpunished.

At a conceptual level, citizenship's very contribution to cohesion for those who belong to a political community may simultaneously engender division and even hostility toward those left outside.[8] The normal empathy that human suffering engenders can be diminished when the victims at issue are noncitizens. Governments often manipulate citizenship access and mistreat noncitizens without incurring political costs from other states or their own citizens. As a result, citizenship creates a giant loophole in the international human rights framework.

Abuse of Noncitizens' Human Rights

Human rights law has made great strides in constraining states' conduct with respect to their own citizens. But, in many ways, the "protection of noncitizens by international human rights instruments represents an even greater challenge to national sovereignty."[9] The treatment of noncitizens compellingly tests societies' commitment to the rule of law.[10]

In some states, the abuse of citizenship status occurs as a matter of legal or constitutional mandate. For example, the Croatian constitution has been found improperly to limit certain of its rights to "citizens." The government of Qatar has been questioned about a requirement that marriages between Qatari nationals and foreigners are subject to prior approval by the interior minister. Czech legislation that reserved to citizens the right to recover compensation for confiscated property was found to be in breach of international law.[11]

More often, noncitizens suffer discrimination as a matter of practice throughout public life, from access to education, housing, and health care to police protection from acts of violence. UN committee and press reports in recent years

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[8] Amartya Sen, *Identity and Violence: The Illusion of Destiny* (New York: W.W. Norton, 2006), pp. 2–3.

[9] Arthur C. Helton, "Protecting the World's Exiles: The Human Rights of Noncitizens," *Human Rights Quarterly* 22 (2000), pp. 280, 297.

[10] Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge: Cambridge University Press, 2004), p. 178.

[11] UN Human Rights Committee, *Concluding Observations: Croatia* (April 30, 2001), CCPR/CO/71/HRV, para 8; UN CERD, *Concluding Observations: Qatar* (March 20, 2002), CERD/C/60/CO/11; and Views of the UN Human Rights Committee, *Karel Des Fours Walderode v. Czech Republic*, Communication No. 747/1997 (October 30, 2001), CCPR/C/73/D/747/1997.

have documented xenophobic attitudes toward noncitizens on the part of others, employment discrimination against noncitizens with respect to working conditions and language requirements, segregated schooling, forcible eviction and mass deportation, disproportionate numbers of noncitizens subjected to capital punishment, discrimination in access to public accommodations and real estate and the right to run businesses, and patterns of discriminatory treatment of noncitizen domestic workers, including sexual and other physical abuse.[12]

Since 2001, growing public concern with security against acts of terrorism—particularly in Europe and North America—has resulted in heightened restrictions on noncitizens.[13] After the September 11 attacks, many noncitizens in the United States were subjected to indefinite detention, summary deportation, heightened surveillance, and blanket registration programs.[14] The United Kingdom enacted legislation that authorized indefinite detention without trial of noncitizens—but not of British nationals—detained on grounds of national security. In December 2004, Britain's highest judicial authority overturned the legislation. The ruling found that the singling out of noncitizens for differential treatment in the application of detention rules amounted to unlawful discrimination on the grounds of citizenship.[15] A month after the July 2005 terrorist bombings in London, the British government broadened the grounds for deportation to enable it to remove persons who "justify or glorify" terrorism.

Italy has expelled at least five imams since 2003, and an antiterrorism law adopted on July 31, 2005, makes it easier to do so. Authorities in France have also pledged to expel "radical preachers" and to consider withdrawing their citizenship. A change in French law in 2004 allows the authorities to expel foreigners who incite "discrimination, hate or violence against a specific person or group of

[12] See, on xenophobic attitudes, UN CERD, *Concluding Observations on Argentina*, A/56/18 (2001), para. 53, and *Ecuador*, CERD/C/62/CO/4 (2003), para. 21; on working conditions and language requirements, CERD/C/60/3 (Costa Rica); A/57/18, paras. 344–66 (Estonia); on segregated schooling, CERD/C/60/60/C)/14 (Switzerland); on forcible eviction and mass deportation, "Final Report of UN Special Rapporteur on the Rights of Noncitizens—Examples of Practices in Regard to Noncitizens," UN Doc. E/CN.4/Sub.2/2003/23/Add. 3 (2003), para. 24; on capital punishment, CERD/C/62/CO/12, para. 18 (Saudi Arabia); on public accommodations and real estate, Jonathan Watts, "Japanese-only Public Baths to Pay Damages," *Guardian*, November 12, 2002; on the right to run businesses, Frans H. Winarta, "Much Work Needed to End Ethnic Discrimination," *Jakarta Post*, February 13, 2002; and on sexual and other physical abuse, A/48/18 (1993), para. 376 (Kuwait) and A/58/18 (2003), para. 217 (Saudi Arabia).

[13] See Open Society Justice Initiative, "Racial Discrimination and the Rights of Non-Citizens" (February 2004); available at www.justiceinitiative.org/db/resource2?res_id=101639.

[14] American Civil Liberties Union, "Sanctioned Bias: Racial Profiling Since 9/11" (New York: February 2004), p. 1; available at www.aclu.org/FilesPDFs/racial%20profiling%20report.pdf.

[15] *A and Others v. Secretary of State for the Home Department* (U.K. House of Lords, December 2004), UKHL56.

persons." France has expelled at least six imams since the law entered into force in July 2004. New legislation in Germany has aimed to facilitate the deportation of noncitizen imams. German states such as Bavaria are making use of a January 1, 2005, federal law that allows them to expel legal foreign residents who "endorse or promote terrorist acts," or incite hatred against sections of the population. In June 2005, the Dutch Ministry of Justice ordered three foreign-born imams to leave the country for "contributing to the radicalization of Muslims in the Netherlands."[16]

Denial of Access to Citizenship

With the situation of noncitizens becoming more precarious in many parts of the world, it is perhaps not surprising that, for many, the status of citizenship—securing and maintaining it—is gaining greater importance. And yet, a growing number of states have restricted access to citizenship or stripped long-time residents of their nationality. In Europe, citizenship has grown more contested with the post-1989 changes in borders that followed the collapse of Communism. As the multiethnic states, such as the Soviet Union, Yugoslavia, and Czechoslovakia, disintegrated, ethnic minority groups—ethnic Russians, Croats, Bosniaks, and Roma, among others—left on the wrong side of a new border commonly encountered difficulties in effectively acquiring or establishing citizenship in the newly emergent states.

In Africa during the 1990s, citizenship became more significant and controversial precisely as the spread of multiparty elections and other trappings of democratic governance across much of the continent gave added significance to membership in the political community and the concomitant questions of who could and could not vote or hold public office. Increasingly restrictive citizenship laws in some countries, such as Côte d'Ivoire,[17] Zimbabwe,[18] and Zambia,[19] served as effective tools for political manipulation by public officials who sought

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[16] Benjamin Ward, "Expulsion Doesn't Help," *International Herald Tribune*, December 2, 2005, p. 5; Migration Policy Group, "Three Imams Ordered to Leave," *Migration News Sheet* (July 2005), p. 5; Liz Fekete, "'Speech Crime' and Deportation," European Civil Liberties Network (2005), p. 3; available at www.ecln.org/essays/essay-2.pdf; "France Expels 'Radical Preacher,'" BBC News, July 30, 2005; available at news.bbc.co.uk/2/hi/europe/4731857.stm; and Nathalie Malinarich, "Europe Moves against Radical Imams," BBC News, May 6, 2004; available at 212.58.226.44/1/low/world/europe/3686617.stm.

[17] See Human Rights Watch, "The New Racism: The Political Manipulation of Ethnicity in Côte d'Ivoire," *Human Rights Watch* 13, no 6(A) (August 2001); available at www.hrw.org/reports/2001/ivorycoast/cotdivo801.htm.

[18] Grant Ferrett, "Citizenship Choice in Zimbabwe," BBC News, February 28, 2003; available at news.bbc.co.uk/2/hi/africa/2806913.stm.

[19] See Organisation of African Unity, *14th Annual Activity Report of the African Commission on Human and Peoples' Rights 2000–2001*, 211/98—*Legal Resources Foundation v. Zambia.*

to expel and/or delegitimize particular ethnic groups. These problems have been aggravated by the use of ethno-national theories of citizenship to disqualify leading opposition figures from high political office. In Asia and the Middle East, where nationality is primarily conferred on a *jus sanguinis* basis, there has been a growing trend for governments to use the denial or deprivation of nationality as a tool to exclude and marginalize unpopular racial and ethnic minority groups. In many instances this has led to the mass expulsion of particular ethnic groups whose citizenship is not recognized and who cannot exercise their right to return to their own countries. In the early 1990s, for example, more than 100,000 Bhutanese refugees of ethnic Nepali origin were arbitrarily deprived of their nationality and forcibly expelled from Bhutan.[20] These refugees have been denied the right to return to Bhutan and have also been refused citizenship in Nepal. Women face particular difficulties in regards to citizenship in many Asian and Middle Eastern states due to discriminatory marriage and nationality laws. In a number of Middle Eastern countries, including Bahrain, Kuwait, Lebanon, Oman, Saudi Arabia, and Yemen, for example, the bestowal of citizenship through patrilineal descent means that children born to a female citizen and male noncitizen are denied citizenship in their country of birth.[21]

THE INSIDIOUS ROLE OF RACIAL DISCRIMINATION

The growing vulnerability of noncitizens and the tendency to politicize access to citizenship have deep and myriad origins. A common factor underlying both these trends, however, is discrimination on the grounds of race or ethnicity. Racial discrimination, as defined below, both contributes to and is furthered by the mistreatment of noncitizens and restrictive regimes of citizenship access.

The International Convention on the Elimination of All Forms of Racial Discrimination specifies that racial discrimination encompasses actions "based on race, colour, descent or national or ethnic origin" (Article 1). For the purposes of this discussion, discrimination on the grounds of religion is also relevant, given

[20] See Human Rights Watch, "Nepal: Bhutanese Refugees Rendered Stateless," June 18, 2003; available at www.hrw.org/press/2003/06/nepal-bhutan061803.htm.

[21] Country data is taken from U.S. Department of State, "Country-Specific Abduction Flyers"; available at travel.state.gov/family/abduction/country/country_486.html. See also UN Press Release WOM/1514, "Women's Anti-discrimination Committee Takes up Lebanon's Report, Commends Impressive Steps Taken to Promote Gender Equality, Also Urges Elimination of Discrimination in Family Relations, Citizenship, More Attention to Violence against Women," July 12, 2005; and David Montero, "World's Vast Ranks of Stateless," *Christian Science Monitor*, October 13, 2005, p. 1.

the significance of perceptions of religious faith in motivating differential treatment and the extent to which religion, race, and ethnicity often overlap. Indeed, some terms of apparently religious connotation approximate more closely ethnic origins. For example, the word "Islam" is increasingly being deployed as an "ethnic marker" to "designate a minority group defined on a neo-ethnic basis by the ethnic origin of its members, whatever their personal commitment to faith."[22] In Northern Ireland, Catholic and Protestant identities apply even to nonreligious people and are synonymous with the political denominations of Nationalists and Unionists, respectively.[23]

The prohibition against racial discrimination, contained in all major international and regional human rights instruments, is by now a well-settled rule of customary international law that has become a *jus cogens*, or peremptory, norm: "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted."[24] Indeed, antidiscrimination clauses are a common feature of constitutions and domestic legislation in many countries.

International law recognizes two forms of discrimination, both of which are unlawful: direct and indirect. Direct discrimination is less favorable treatment on the basis of prohibited grounds, such as race. Indirect discrimination—also known as de facto discrimination or disparate/adverse impact or effect—occurs when a practice, rule, requirement, or condition is neutral on its face but impacts particular groups disproportionately, absent objective and reasonable justification.

Applying Nondiscrimination Norms to Noncitizens

Many noncitizens are racial or ethnic minorities in their country of residence. Indeed, as the UN Committee on the Elimination of Racial Discrimination (UN CERD) recently observed, "Xenophobia against non-nationals . . . constitutes one of the main sources of contemporary racism and . . . human rights violations against [them] occur widely in the context of discriminatory, xenophobic and racist practices."[25] It is for good reason, then, that the prohibition against racial

[22] Olivier Roy, *Globalized Islam: The Search for a New Ummah* (New York: Columbia University Press, 2004), p. 133.
[23] Mary O'Rawe, "Ethnic Profiling, Policing, and Suspect Communities: Lessons from Northern Ireland" (New York: Justice Initiative, June 2005), p. 88; available at www.justiceinitiative.org/db/resource2/fs/?file_id=15799.
[24] See *Restatement (Third) The Foreign Relations Law of the United States* (1987), sec. 702; and *Vienna Convention on the Law of Treaties* (Vienna: May 23, 1969), art. 53.
[25] UN CERD, General Recommendation No. 30, Preamble.

discrimination is not limited to citizens. The UN CERD recently reaffirmed states' "obligation to guarantee equality between citizens and non-citizens in the enjoyment of" all human rights except those specifically reserved for citizens, such as the rights to vote and hold public office.[26]

And yet, notwithstanding the breadth of race discrimination law, noncitizens routinely suffer discrimination in access to housing, education, police protection, and other public services. Why? There are three main reasons.

First, legislative and constitutional guarantees against racial discrimination are not effectively enforced, particularly when it comes to noncitizens. As nonvoting and often unwanted residents, noncitizens generally command little respect from law enforcement authorities, many of whom may not even be aware of their obligation to implement nondiscrimination norms. While public opinion broadly disfavors differential treatment based on immutable characteristics, such as race and ethnicity, status as a noncitizen is often wrongly considered the product of voluntary choice—and hence something that states may properly take into account in rationing the distribution of rights and benefits. This perception prevails despite the reality of forced migration, refugees fleeing persecution, and persons made stateless against their will, including in their countries of birth. Hence, citizens are often willing to tolerate, if not endorse, differential treatment for noncitizens, who, it may be believed, should be free to return to their countries of origin.

Second, persons who are noncitizens and members of racial minority groups—for example, dark-skinned, Pakistani immigrants to Britain—are often subjected to multiple forms of discrimination. In such cases, it may not be possible to know, let alone prove, which factor—race, nationality, or religion—underlies the discriminatory treatment. Indeed, the vulnerability of noncitizens is commonly a product of both their citizenship status and their race or ethnicity. This is true across the globe—for many ethnic Russians in the Baltic states, ethnic Haitians in the Dominican Republic, ethnic Chinese in a number of countries in Southeast Asia, and Muslims from the north of Côte d'Ivoire, as well as for many African, Asian, and Latin American–born immigrants in North America and Europe.

Third, while the reality of discrimination is complex and overlapping, the law provides different levels of protection for different grounds of discrimination.

[26] Ibid., paras. 3, 7.

In particular, international and comparative law provides clearer, more widely recognized, and in practice greater protection against racial discrimination than discrimination on the grounds of citizenship status. As a result, citizenship status may be used as a proxy for race by unscrupulous government officials or private parties determined to discriminate and avoid accountability.

For example, the European Union's Race Equality Directive, which entered into force in 2003, is perhaps the most advanced and detailed regional antidiscrimination norm in the world.[27] It sets forth strong prohibitions against both direct and indirect racial discrimination (Articles 1, 2), places the burden on alleged discriminators to prove that "there has been no breach of the principle of equal treatment" once a prima facie case of discrimination has been made (Article 8), and requires that member states establish "judicial and/or administrative procedures" to implement its provisions (Article 7(1)) and provide for "effective, proportionate and dissuasive sanctions" (Article 15). But the directive expressly exempts from its coverage "difference of treatment based on nationality and is without prejudice to provisions . . . relating to the entry into and residence of third country nationals and stateless persons on the territory of Member States"(Article 3(2)). As a result, perpetrators of discrimination may exploit the directive's differential treatment of race and nationality to shield racial discrimination from challenge where the victims happen to be noncitizens. The racial discrimination at issue, while clearly contrary to law, may be justified or explained away on the grounds that its victims are noncitizens. An employer in the European Union who refuses to hire qualified and lawfully resident African-born immigrants may defend the practice by focusing on their noncitizen status.[28]

If the power of citizenship to divide the "insiders" from the "outsiders" increases in times of national strife, so does the temptation to use shortcuts—including racial and ethnic origin—in identifying security threats. Since September 11, 2001, the targeting of noncitizens has often been accompanied by an open

[27] "Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin," European Council Directive 2000/43/EC, June 29, 2000.

[28] A further complication is that, in some countries, what is in fact racial discrimination may be understood and characterized as a problem of citizenship, even where the victims of discrimination are lawful citizens of the country at issue. In parts of Africa, the concepts used to describe discrimination may reflect the legacy of an anticolonial struggle, "couched in the language of citizenship, that is, the right of the natives to become citizens." Said Adejumobi, "Citizenship, Rights and the Problem of Conflicts and Civil Wars in Africa," *Human Rights Quarterly* 23 (2001), pp. 148, 158.

policy of ethnic profiling, where whole religious and ethnic communities have been subjected to heightened scrutiny, and some have been singled out for special registration or prioritized deportation.[29] This is not to suggest that governments may not focus scarce law enforcement and intelligence resources on persons who, according to objective indicia, such as time- and place-specific evidence, are more likely to pose a risk of terrorist violence. The challenge is to do so in ways that are fact-based and proportionate. Too often, government responses have appeared to rely on unsubstantiated racial or ethnic stereotypes, such as those that presume an association worth acting upon between dark-skinned Muslim men from certain countries and terrorism. Experienced law enforcement officials are among the first to say that such profiling is not just "the wrong thing to do"—it is "ineffective," in part because persons bent on terrorist acts are themselves "aware of how easy it is to be characterized by ethnicity," and hence can adapt their appearance to defeat the profile.[30]

In the United States, after September 2001,

> the [Bush] administration subjected 80,000 Arab and Muslim immigrants to fingerprinting and registration, sought out 8,000 Arab and Muslim men for FBI interviews, and imprisoned over 5,000 foreign nationals in antiterrorism preventive detention initiatives. As part of this program, the government adopted an aggressive strategy of arrest and prosecution, holding people on minor charges—in fact pretexts—such as immigration violations, credit card fraud, or false statements, or, when it had no charges at all, as "material witnesses."[31]

Have these people been singled out for invidious treatment because of their Muslim religion, their Arab ethnic origin, their Middle Eastern nationality, or for some other reason? The likely answer is that more than one factor has played a role.[32] And yet, the result so far is that none of these individuals has been convicted of a terrorist crime: "In what has surely been the most aggressive national campaign of ethnic profiling since World War II, the government's record is zero for 93,000."[33]

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[29] See "Final Report of UN Special Rapporteur on the Rights of Noncitizens," para. 34.
[30] Malcolm Gladwell, "Troublemakers: What Pit Bulls Can Teach Us about Profiling," *New Yorker*, February 6, 2006.
[31] David Cole, "Are We Safer?" *New York Review of Books*, March 9, 2006.
[32] See Migration Policy Institute, "America's Challenge: Domestic Security, Civil Liberties and National Unity after September 11" (Washington, D.C.: 2003), p. 8; and David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* (New York: New Press, 2004).
[33] Cole, "Are We Safer?"

Applying Nondiscrimination Norms in Citizenship Policies

International norms prohibiting racial discrimination are relevant not only to the treatment of noncitizens but also to state actions in denying, depriving, and withdrawing access to citizenship. Racial discrimination in access to citizenship has a long history. In the United States, the Naturalization Act of 1790 established qualifications for citizenship, including the requirement that the person seeking naturalization be a "free white person."[34] From 1883 until 1943, the United States expressly barred all Chinese from naturalization. And in a series of naturalization cases in the nineteenth and early twentieth centuries, U.S. federal courts explicitly employed racial criteria in determining qualifications for citizenship. In one case, the petitioner, whom the court referred to as a "native Chinaman," was denied naturalization on the ground that the Naturalization Act permitted whites and blacks to become citizens but not "persons of the Mongolian race."[35] In another, the court held that a Syrian could become a naturalized citizen because he was "of Semitic stock, a markedly white type of race."[36] In 1922, the U.S. Supreme Court upheld the denial of naturalization to a Japanese national who was culturally assimilated—he spoke English at home, had resided in the United States for twenty years, had attended the University of California at Los Angeles, and had educated his children in American schools—on the grounds that "the appellant . . . is clearly of a race which is not Caucasian."[37] Only in 1952 did the United States abolish racial discrimination in access to citizenship.[38]

In European countries during the eighteenth and nineteenth centuries, Jews, Roma, and other minority populations were often excluded from citizenship.[39] The classic case is, of course, the 1935 Nazi Law on the Retraction of Naturalizations and the Derecognition of German Citizenship, which authorized the denationalization of any person who had acquired German citizenship between the end of World War I and the day Hitler took power in January 1933. The law's implementing order—and its subsequent execution—made clear that East European Jews were among its main targets. Similarly, in the immediate aftermath of World War II, ethnic Germans were deprived of citizenship in Czechoslovakia.

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[34] Naturalization Act of March 26, 1790, ch. 3, 1 Stat. 103 (repealed 1795).
[35] *In re Ah Yup*, 1 F. Cas. 223 (1878).
[36] *In re Ellis*, 179 F. 1002, 1002 (C.C.D. Ore. 1910).
[37] *Takao Ozawa v. United States*, 260 U.S. 178, 198 (1922).
[38] Section 1422 of the Immigration and Nationality Act of June 27, 1952.
[39] Joanne Mariner, "Racism, Citizenship and National Identity," *Development* 46, no. 3 (2003).

It is no longer permissible under international law for states to single out particular racial or ethnic groups for exclusionary or invidious treatment in access to citizenship. Thus, while the Race Convention, following the tendency in international law more generally, grants states discretion in applying race-based distinctions when it comes to citizenship rules, there are limits to such discretion. In particular, citizenship provisions may "not discriminate against any particular nationality."[40]

While states retain broad control over access to citizenship, the legal power to withdraw citizenship once granted is more limited.[41] In particular, states may not deprive persons of citizenship arbitrarily or in such a way as to engender statelessness.[42] In order to not be arbitrary, deprivation of citizenship must be prescribed by law, nondiscriminatory, and accompanied by procedural due process, including review or appeal.[43] Finally, "deprivation of citizenship on the basis of race, colour, descent, or national or ethnic origin is a breach of States Parties' obligations to ensure non-discriminatory enjoyment of the right to nationality."[44]

The clearest cases of unlawful discrimination in access to citizenship involve state policies that single out particular racial or ethnic groups for invidious treatment. These should be viewed with skepticism, and, as a general rule, disfavored. Unfortunately, such policies are present in many countries. In Kenya, for example, more than 100,000 Nubian descendants of persons resettled in the country by the colonial British authorities over a century ago have been denied citizenship and are de facto stateless with no rights to land ownership or to recognition of their language, culture, or religion.[45] And in the Democratic Republic of the Congo (DRC), tens of thousands of Banyamulenge—a Kinyarwanda-speaking ethnic group of Rwandan origin, many of whose members started settling in the

[40] International Convention on the Elimination of All Forms of Racial Discrimination, art. 1(3).

[41] There is a "fundamental distinction between *denying* someone citizenship and *divesting* someone of citizenship." *Haile v. Gonzales*, 418 F.3d 798, No. 03-3953 (Chicago: U.S. Court of Appeals, 7th Circuit, August 29, 2005), p. 4.

[42] Universal Declaration of Human Rights, art. 15(2); and 1961 Convention on the Reduction of Statelessness, art. 8. See also International Convention on the Elimination of All Forms of Discrimination against Women, art. 9(1); American Convention on Human Rights, art. 20(3); and European Convention on Nationality, arts. 4, 7(3). Arbitrary deprivation of citizenship may also raise concerns under articles 3 and 8 of the European Convention on Human Rights.

[43] See Johannes M. M. Chan, "Nationality as a Human Right," *Human Rights Law Journal* 12 (1991), p. 11; and Amnesty International, "Nationality, Expulsion, Statelessness and the Right to Return," ASA 14/01/00 (September 2000).

[44] CERD, General Recommendation No. 30, para. 14.

[45] African Society of International and Comparative Law and Minority Rights Group International, Joint Oral Intervention at UN Commission on Human Rights, 59th Sess., 2003.

eastern Congo more than two centuries ago—were effectively stripped of citizenship by a 1981 law.[46] Although the law was not initially enforced, it served as fodder for politically motivated discrimination and attacks against the Banyamulenge prior to, and during, the crisis in the Great Lakes region in the 1990s. In Côte d'Ivoire in the 1990s, the concept of "Ivoirité" underlay the adoption of new citizenship laws that required that both parents had been born in the country. In practice, these laws targeted mostly Muslim northerners, who—given the difficulties of securing appropriate documentation of parental birthplaces, as well as the shifting nature of colonial boundaries—were routinely "stripped of Ivoirien citizenship and . . . classified as 'foreigners.'"[47]

Beyond these clear-cut instances of singular, targeted exclusion, the boundaries of permissible state action are not always clear. Race-based distinctions that expressly bar access to citizenship for some racial or ethnic groups should be considered presumptively invalid, absent particular evidence showing that they are both necessary and proportional to the specific, legitimate purpose at issue. The history of such distinctions, as outlined above, reveals that they generally have no proper aim, and the harm they cause—often the stigmatization of an entire racial or ethnic group—is almost always disproportionate to their benefit.

But what about rules or policies that are less explicit about their focus on racial categories or their targeting of the members of one group? One scholar has suggested that, in practice, the nondiscrimination norm "serves primarily to place a modest burden on the state to come forward with a plausible justification for any distinctions drawn in law or practice."[48] It is often hard to divine the dividing line between, on the one hand, a legitimate state interest in retaining the loyalties of and connections to emigrants to other lands, and, on the other, an illegitimate aspiration for ethnic purity. In practice, the test should be drawn from the nondiscrimination norm. In evaluating a given citizenship policy, one might ask the following: To start, does the policy impose disproportionate burdens on members of particular racial or ethnic groups? If so, does the policy that generates disproportionate burdens nonetheless pursue a legitimate aim? And finally, if the aim

[46] Francis M. Deng, "Ethnic Marginalization as Statelessness: Lessons from the Great Lakes Region of Africa," in T. Alexander Aleinikoff and Douglas Klusmeyer, eds., *Citizenship Today: Global Perspectives and Practices* (Washington, D.C.: Carnegie Endowment for International Peace, 2001).
[47] Daniel Chirot, "The Debacle in Côte d'Ivoire," *Journal of Democracy* 17 (April 2006), p. 68.
[48] David A. Martin, "The Authority and Responsibility of States," in T. Alexander Aleinikoff and Vincent Chetail, eds., *Migration and International Legal Norms* (The Hague: Asser Press, 2003), pp. 34–35.

is legitimate, does the policy bear a sufficiently close relationship to the aim as to warrant imposing the disproportionate impact? As in the field of nondiscrimination, once a disparate impact is shown, the burden should in practice be on the government to demonstrate both a legitimate aim and a reasonable relationship of proportionality between the means employed and the aim pursued.[49]

Some citizenship rules are neutral on their face but are intentionally applied in a manner so as to systematically deny persons of certain ethnic groups access to citizenship. A number of countries employ *jus sanguinis* rules of citizenship accession and strict naturalization rules in order to disfavor minority ethnic groups. In Japan, hundreds of thousands of long-resident ethnic Koreans and other foreigners have been denied citizenship through strict application of the country's *jus sanguinis* rules, regardless of long-standing cultural, linguistic, and historical ties. As a result, many of these Japanese residents have a precarious, second-class legal status.[50] States with *jus soli* citizenship rules may also deploy restrictive naturalization and/or immigration requirements in a manner that discriminates against particular ethnic groups.

While race-based barriers to citizenship are presumptively invalid, some countries' immigration requirements explicitly *prefer* one group defined by reference to ethnic origin or descent. There may well be strong justifications for these preferential policies, but their ultimate legitimacy depends on the specificities of time, place, and circumstance.

Thus, Israel's Law of Return and Law of Citizenship grant preferential treatment to Jews returning to what they consider their ancestral homeland. Although citizenship is available to non-Jews who meet certain criteria, persons of Jewish descent are automatically granted citizenship. At the time this legislation was adopted, in 1950, Israel was commonly viewed as the only option for Jews seeking refuge from persecution. The Holocaust's explicit threat to the continued existence of the Jewish people lent legitimacy to the aim of creating and preserving a "Jewish state," which might not extend to analogous citizenship policies of other countries. It may reasonably be asked whether, at a certain point in time, the interest in preserving the unique character of the Jewish state will give

[49] As an example of this test applied in the context of the nondiscrimination guarantee of Article 14 of the European Convention on Human Rights, see *Willis v. United Kingdom* (Strasbourg: European Court of Human Rights, June 11, 2002), ECHR 36042/97; available at www.worldlii.org/eu/cases/ECHR/2002/488.html.

[50] Asia-Pacific Human Rights Network, "Caste, Ethnicity and Nationality: Japan Finds Plenty of Space for Discrimination," HRF/39/001 (June 2001); available at www.hrdc.net/sahrdc/hrfeatures/HRF39.htm.

way to the nondiscrimination norm. The justification for granting preferences in citizenship to persons of Jewish descent may lose some of its force as the burdens on non-Jews—a disproportionately expanding part of the population—increase.[51] Israel is not alone in privileging a favored ethnic group in access to citizenship. Section 13(3) of the Armenian constitution confers automatic citizenship on a "native Armenian" living in the Armenian republic. Section 25(2) of the Bulgarian constitution gives people of "Bulgarian origin" special access to obtaining Bulgarian citizenship. Section 18a of the Finnish foreigners' law states that a person from the Soviet Union who is of "Finnish origin" may, along with his or her spouse and children, receive permission for permanent residence and citizenship. Section 375 of the Greek citizenship law confers automatic citizenship to people of "Greek nationality" if they enlist in military service. And Section 14a of the Irish citizenship law of 1986 grants the interior minister authority to confer automatic citizenship on any applicant of "Irish origin or affiliation."

Other countries accord preferential treatment in citizenship access not to one ethnic group but to nationals of a number of states—for reasons of common history, shared language, or other attachments. Although Costa Rica's naturalization rules placed less stringent residency requirements on Central Americans, Ibero Americans, and Spaniards, they were found to be not impermissibly discriminatory, because:

> it would not appear to be inconsistent with the nature and purpose of the grant of nationality to expedite the naturalization procedures for those who, viewed objectively, share much closer historical, cultural and spiritual bonds with the people of Costa Rica. The existence of these bonds permits the assumption that these individuals will be more easily and more rapidly assimilated within the national community and identify more readily with the traditional beliefs, values and institutions of Costa Rica, which the state has the right and duty to preserve.[52]

This reasoning is, on first glance, persuasive, particularly because here the granting of an affirmative preference to a number of different nationalities in accessing Costa Rican citizenship does not necessarily disadvantage any particular

[51] To take one example, in 2003, Israel adopted a law specifically prohibiting Palestinian residents of the West Bank and Gaza who marry Israelis from obtaining Israeli citizenship, residency, or entry permits. In May 2006, the Israeli Supreme Court found the law unconstitutional and disproportionate. "Who's a Citizen?" *Economist*, May 18, 2006.

[52] Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84 (Inter-American Court of Human Rights, January 29, 1984); available at www.umn.edu/humanrts/iachr/b_11_4d.htm.

groups. But the court's reliance upon "historical, cultural and spiritual bonds" may not always lead to clear-cut answers. For example, is there any reason why Spanish-speaking Africans from Equatorial Guinea—another former Spanish colony—would not share equally powerful—if somewhat different—ties with Costa Ricans?

Citizenship requirements commonly include language proficiency or knowledge of social practices that bear on the capacity to participate fully in political life. Governments have a legitimate concern to ensure that members of the political community can capably communicate and make decisions about questions on the public agenda. Many countries impose language proficiency requirements with respect to citizenship access, including Australia, Austria, Canada, Denmark, France, Germany, Mexico, the Netherlands, the United Kingdom, and the United States. Insofar as language proficiency can be learned, and enjoys a reasonable relationship to the legitimate aim of ensuring public participation, it would seem less problematic from the perspective of nondiscrimination law.[53]

And yet, the potential for abuse is real. Language proficiency requirements and citizenship tests have proven to be a particular obstacle to citizenship for Russian-speaking minorities in the Baltic states. The postindependence restoration of the 1938 Law on Citizenship in Estonia disenfranchised the majority of the Russian-speaking minority, based, at least in part, on "a desire to obtain or at least to approximate ethnic purity."[54] Citizenship tests on the history and constitution of Latvia have been among the principal obstacles to citizenship for Russian-speaking minorities highlighted by international monitoring organs.[55] Similarly, citizenship tests that ask for detailed historical or geographical information that few native-born citizens might be expected to know raise serious questions. A citizenship test now employed by at least one state in Germany (and, as of spring 2006, being actively considered for use by the national government) asks a number of questions that "many German university students might have trouble" answering correctly.[56] One might reasonably ask what legitimate purpose is served by such questions.

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[53] Patrick Weil, "Access to Citizenship: A Comparison of Twenty-Five Nationality Laws," in Aleinikoff and Klusmeyer, eds., *Citizenship Today*, pp. 22–23.

[54] Rein Mullerson, *International Law, Rights and Politics: Developments in Eastern Europe and the CIS* (New York: Routledge, 1994), pp. 147–48.

[55] Weil, "Access to Citizenship," p. 33; and Open Society Institute, *Monitoring the EU Accession Process: Minority Protection* (New York: Open Society Institute, 2001), pp. 265–301.

[56] Richard Bernstein, "True or False: Do You Want to Be a German?" *International Herald Tribune,* March 29, 2006, p. 2.

SOVEREIGNTY, SELF-DETERMINATION, AND DISCRIMINATION

International law's deference to state prerogative in matters of citizenship was self-evident in a world populated only by nation-states. More recently, as the rights of individual human beings have increasingly taken center stage in international legal discourse, arguments for broad state discretion when it comes to citizenship are drawing support from new sources. One is the principle of self-determination, which holds that the citizens of a state have the right to determine their destiny, including the right to decide the terms and conditions of membership in their community. The right of "national self-determination" has retained substantial popular appeal, from the nineteenth-century struggles of national groups within multinational European empires, through Woodrow Wilson's (qualified) support at Versailles of the claims to statehood of some national minorities, to the post–World War II surge of national liberation movements that ended most colonial regimes. Common Article 1 of the international covenants on civil and political rights and economic, social and cultural rights affirms the right of "all peoples" to "self-determination." To be sure, the principle of self-determination is not inherently defined in ethnic terms, and applies as well to national communities constituted by virtue of their common territorial space. Nonetheless, it has often been employed by ethnically homogeneous communities to support their claims to statehood. When used in this limited sense, self-determination may conflict with a notion of entitlement to citizenship grounded in human rights norms.

How should these two principles—the right of a community to determine its own terms of membership and the commitment to nondiscrimination on the grounds of racial or ethnic origin—be reconciled? As yet, international law establishes only the outer boundaries of a resolution, and a great deal remains to be clarified.

There is an emerging international consensus that nationality laws and practice must be consistent with general principles of international law—particularly human rights law. A 1984 Advisory Opinion of the Inter-American Court held:

> Despite the fact that it is traditionally accepted that the conferral and regulation of nationality are matters for each state to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by the states in that area, and that the manner in which states regulate matters bearing

> on nationality cannot today be deemed within their sole jurisdiction; those powers of the state are also circumscribed by their obligations to ensure the full protection of human rights.[57]

State discretion in the granting of nationality is not completely unfettered. Thus, international law has established two principal restrictions on state sovereignty over the regulation of citizenship: first, the prohibition against racial discrimination, discussed above; and second, the prohibition against statelessness. Each of these is buttressed by the prohibition on arbitrary deprivation of citizenship.

Article 15(1) of the Universal Declaration of Human Rights states that "everyone has the right to a nationality." This principle has been echoed in subsequent international instruments. And yet, the general right to a nationality has not yet been translated into a specific, actionable duty on the part of any particular state.[58] It is a right without a remedy. Although nationality should be granted where the alternative is statelessness, it remains unclear whether this constitutes an obligation of customary international law.[59] The principal conventions against statelessness have to date secured a limited number of ratifications.[60]

Furthermore, Article 1 of the 1954 Convention relating to the Status of Stateless Persons defines statelessness as the condition of "a person who is not considered as a national by any State under the operation of its law." Such a definition does not encompass the myriad situations of de facto statelessness—where persons who in principle satisfy the respective criteria of national citizenship law (for example, they are born on the territory of a state that has *jus soli* citizenship rules) nonetheless have no effective proof to document their citizenship. This reflects the fact that, when the 1951 Refugee Convention and the 1954 Statelessness Convention were adopted, the operating assumption was that all de facto stateless persons would be outside their countries of habitual residence, and hence refugees. It was also assumed that an individual would have had to act—by, for example, fleeing her country of birth—to render herself de facto stateless.[61] And yet, the United Nations High Commission for Refugees has "identified many

[57] Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84.
[58] A limited exception is Article 20(2) of the American Convention of Human Rights.
[59] See 1961 Convention on the Reduction of Statelessness.
[60] As of April 4, 2006, fifty-nine states had ratified the 1954 Convention relating to the Status of Stateless Persons, and thirty-one had ratified the 1961 Convention on the Reduction of Statelessness.
[61] Deng, "Ethnic Marginalization as Statelessness," p. 187.

instances throughout the world in which individuals may be physically present in a country, even for generations, but cannot normalize their stay nor establish lawful residence. This, in turn, means they can never aspire to full integration through naturalization."[62] The practice of states in creating, and refusing to protect against, statelessness remains widespread.

In seeking to give further content to the limits on state discretion in regulating citizenship access, one might look beyond the prohibitions against racial discrimination and statelessness to the notion of a "genuine and effective link." In the *Nottebohm* case, the International Court of Justice defined nationality as "a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments."[63] Whether (for the purposes of assigning nationality) a "genuine and effective link" exists between a person and a state is determined by considering factors laid out in *Nottebohm*, including the "habitual residence of the individual concerned but also the centre of interests, his family ties, his participation in family life, attachment shown by him for a given country and inculcated in his children, etc." The *Nottebohm* principle is supported by the recognition that democratic rights of political participation may themselves act as constraints on state discretion to deny nationality. As one scholar has observed, because "democratic values are deeply offended by the exclusion from citizenship of persons long resident in a political community . . . international law has moved in the direction of establishing a presumptive right to citizenship in the state of habitual residence."[64]

Thus, a citizenship policy grounded in the principle of community self-determination might not disproportionately single out or burden the members of a particular racial or ethnic group, and yet still infringe the rights of persons who—by virtue of their long residence and/or family ties in the country—have established a genuine and effective link that deserves protection. State citizenship policies that affirmatively preference one ethnic or descent group but do not invidiously discriminate against any other single group might run afoul of this principle if they failed to accord rights of access to persons who, though not among the preferred group, nonetheless had established a genuine and effective

[62] UN High Commissioner for Refugees, "UNHCR's Activities in the Field of Statelessness: Progress Report" (June 3, 2003), EC/53/SC/CRP.11, para. 7.
[63] *Nottebohm Case* (*Lichtenstein v. Guatemala*) (Second Phase), 1955 ICJ Reports, pp. 4, 23.
[64] Diane F. Orentlicher, "Citizenship and National Identity," in David Wippman, ed., *International Law and Ethnic Conflict* (Ithaca: Cornell University Press 1998), p. 323.

link with the country at issue. In this sense, *Nottebohm* as refined by the developing principle of democratic participation would override the power of exclusion implicit in the community's right of self-determination.

WHAT IS TO BE DONE?

Ill-treatment of noncitizens and arbitrary denial of citizenship are both pressing problems that implicate fundamental questions of nondiscrimination, human rights, and state sovereignty. But they must be addressed in different ways.

The growing divide between citizens and noncitizens is primarily a problem of lapsed enforcement of existing norms. Provisions of international law make clear that, with respect to all rights except political participation and exit and entry, distinctions between citizens and noncitizens are presumptively invalid. But those provisions are little known and rarely applied. Existing international mechanisms must be activated to provide effective protection for noncitizens.

By contrast, combating citizenship deprivation and denial requires the clarification and articulation of new legal norms that make clear the boundaries of state prerogative. Eventually, international law must not simply set forth the individual right to a nationality: it must specify states' obligations to provide it. Over time, the broad discretion that states enjoy over citizenship questions must be narrowed by the incorporation of human rights concerns, including the prohibition against racial discrimination, into international legal rules on citizenship. The resulting new or modified norms should be rooted firmly in the evolving body of international human rights law giving primacy to the principle of human dignity.

With respect to both problems, even as longer-term objectives are pursued—on the one hand, better implementation of the rights of noncitizens; on the other, new and refined standards governing access to, and deprivation of, citizenship—advocates should intensify their use of existing legal tools on behalf of noncitizens. The most comprehensive, well-known, and generally accepted of these are the *jus cogens* rules of international law that prohibit discrimination on the basis of race.

Given that states themselves have no incentive to enforce regulations that diminish their discretion, three major tasks confront those concerned with the human rights consequences of citizenship denial and the ill-treatment of noncitizens: first, documentation and public education; second, clarification and

distillation of legal standards related to citizenship; and third, enforcement of existing norms, including those that prohibit racial discrimination. One central objective underlies each: to transform public understanding so as to render politically unacceptable the abuse of noncitizens and arbitrary denial and deprivation of citizenship.

Documentation and Public Education

First, there is a need for improved documentation and public education concerning the extent, and human rights and security consequences, of discriminatory access to citizenship and the ill-treatment of noncitizens. Gaps in the provision of citizenship are often both reflections and causes of political instability and conflict. States and intergovernmental bodies must be persuaded of their own long-term interests in filling these gaps more systematically and expeditiously. Citizenship denial and statelessness must increasingly be seen not as arcane legal matters but as the human tragedies, political problems, and security threats they are.

To this end, issues of citizenship access and deprivation and the treatment of noncitizens must increasingly be mainstreamed into human rights reporting mechanisms, including those of the United Nations. UN bodies have jurisdiction to address many issues falling under the rubric of citizenship. Recent reforms of the UN human rights bodies—including the new Human Rights Council—are likely to give them enhanced authority and resources to address these problems. UN bodies should consider the following measures:

- The United Nations High Commission for Refugees (UNHCR) should pursue its existing mandate more vigorously in Asia, the Middle East, and Africa, including through enhancement of field capacity, training for government staff and local officials, technical advice on nationality legislation, and interventions to resolve situations of statelessness and disputed nationality. UNHCR should also consider creating an Inter-Agency Task Force on Statelessness with representation from other relevant UN agencies, other international organizations, and the NGO sector, to lay the foundation for mainstreaming nationality denial and statelessness issues within UN and related structures. UNHCR should make a concerted effort to quantify the number of stateless persons worldwide, including by improving its methodology to collect data on statelessness.

- The United Nations Children's Fund should expand its birth registration programs and monitoring of Article 7 of the Convention on the Rights of the Child, and increase its activities on behalf of stateless children.[65]
- Correspondingly, the United Nations Development Fund for Women should increase its activities on behalf of stateless women and its monitoring of Article 9 of the Convention on the Elimination of Discrimination Against Women.[66]
- The Office of the High Commissioner for Human Rights, which will be doubling its staff over the coming six years, should establish a position to deal specifically with issues of nationality and statelessness, and should include citizenship and statelessness in all monitoring, reporting, training, and protection activities.[67]
- The UN Human Rights Council should create a Special Rapporteur for the Rights of Noncitizens that includes statelessness and access to citizenship within its mandate.
- Finally, the UN treaty bodies should monitor issues of access to nationality, statelessness, and treatment of noncitizens in country reports and, where appropriate, in individual complaints.[68] All the UN treaty bodies might constructively build upon existing norms to generate a unified general comment that addresses access to citizenship and treatment of noncitizens. These actions do not require treaty modifications, new powers, or express grants of state consent. Creative individuals in each of the respective agencies can, acting with foresight and intelligence, undertake these reforms.

Clarification of Legal Standards

The trend of gradually incorporating the sphere of citizenship within the expanding corpus of human rights law must be accelerated and intensified so that, over time, statelessness, arbitrary denationalization, and discriminatory access

[65] See United Nations Children's Fund, "Birth Registration"; available at www.unicef.org/protection/index_birthregistration.html.

[66] See UNIFEM at a Glance; available at www.unifem.org/about/fact_sheets.php?StoryID=283.

[67] "OHCHR Plan of Action: An Attempt to Turn Rhetoric into Reality," *Respect: The Human Rights Newsletter*, no. 6, June 2005; available at www.ohchr.org/english/about/publications/docs/issue6respect.pdf.

[68] Specifically, the Human Rights Committee; the Committee on Economic, Social and Cultural Rights; the Committee against Torture; the Committee on the Elimination of Racial Discrimination; the Committee on the Elimination of Discrimination against Women; the Committee on the Rights of the Child; and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families.

are eliminated. International norms governing access to nationality, deprivation of nationality, and the prevention of statelessness must be clarified, disseminated, and more widely ratified and applied by national governments.

As part of this process, guidelines for citizenship access should be developed that adequately take account of, on the one hand, a democratic society's right to determine its membership, and, on the other, universal human rights norms, including nondiscrimination. Many of these may be drawn from, and/or built upon, existing international standards. Gathering all relevant provisions into one document would be important, because to date their dispersion in different materials has contributed to their relative anonymity and lack of effective force. Guidelines might include the following:

- In order to effectuate the principle that "everyone has the right to a nationality," nationality should be granted by the state of birth if the person at issue does not clearly enjoy the right to another nationality.
- States should be under an affirmative duty to ensure that adequate documentation capable of establishing citizenship is afforded to all persons within their jurisdiction. Children should be registered immediately after birth, and provided with necessary documentation at that time.
- The notion of a genuine and effective link implies that, in the ordinary course, persons continually resident in a state for a reasonable period of time—perhaps five years—should be entitled to citizenship.
- The process and criteria for gaining citizenship should be readily accessible and transparent. Cases of contested citizenship should be resolved either by the courts or by a special administrative mechanism independent from the executive branch of government. The government should bear the burden of persuasion with respect to citizenship status.
- Citizenship should be withdrawn only where such withdrawal is prescribed by law, is nondiscriminatory, and is accompanied by procedural due process, including the opportunity for appeal and review by a judicial organ. It should be clear that any withdrawal of citizenship that results in statelessness is unlawful.
- Access to citizenship should not be denied arbitrarily or apportioned on the basis of race, ethnicity, religion, gender, sexual orientation, political opinion, or any criteria that would be inadmissible grounds for distinctions among citizens.

It would be useful to work toward the adoption of an international legal instrument that expressly incorporates the above principles. In the meantime, these norms should be enforced by UN treaty bodies—such as the Human Rights Committee—empowered to review country reports and decide upon individual communications. In addition, governments should be encouraged to act now to amend national legislation in conformity with these standards, and to ratify the 1954 and 1961 Statelessness Conventions, which provide important if limited protection to stateless persons. Finally, regional bodies should consider the adoption of region-wide nationality legislation, such as the European Convention on Nationality. Supervisory mechanisms and/or monitoring bodies should oversee implementation of such legislation.

Law Enforcement

The clarification and distillation of legal norms are important, but they take time. As this long-term process moves forward, more can and should be done now—by civil society, governments, and international monitoring bodies—to enforce existing standards with respect to citizenship access and the rights of noncitizens. To date, antidiscrimination norms, already on the books in most countries, have gone largely unenforced when it comes to citizenship access, statelessness, and the treatment of noncitizens. This neglect stems both from the generally poor level of enforcement of antidiscrimination norms and the particular challenges affecting stateless persons and other noncitizens. Stateless persons and others deprived of citizenship on racial grounds have little or no access to legal advice and assistance. A constellation of factors—physical location (in camps or isolated neighborhoods), fear of making themselves known to government officials, limited awareness of their rights, and poverty—conspires to render noncitizens inaccessible and unattractive to those few persons or institutions who might help vindicate legal claims. As a result, there exists relatively little jurisprudence on these questions, even though, as international institutions have affirmed, racial discrimination in access to nationality is unlawful, and stateless persons and other noncitizens enjoy the full protection afforded by antidiscrimination law.

Training for judges, lawyers, and relevant government administrative officials is necessary to make clear that existing antidiscrimination laws may be applicable to citizenship issues and that governments have a responsibility to address discriminatory citizenship patterns. Senior officials should publicly underscore the

unacceptability of discrimination and violence against noncitizens, and the importance of adequately implementing legal protections. This is a more controversial undertaking in some countries than it might seem at first glance, given the scarce political benefits and the often substantial political costs that come with defending the rights of people who generally don't vote. Complaints of abuse should be acted upon swiftly, professionally, and effectively. Where state oversight agencies do not exist or are under-resourced, international donor assistance should be channeled for such purposes.

Government-sponsored legal aid offices, university-based legal clinics, and NGOs should explicitly include noncitizens within their target client base and access to citizenship among their areas of focus. In addition, noncitizens' rights advocates working with counsel should seek to identify suitable cases that may be brought before national, constitutional, and regional tribunals or UN treaty bodies to secure concrete legal remedies for racial discrimination against noncitizens, including in access to citizenship. The recently adopted CERD General Recommendation No. 30 on Discrimination against Non Citizens offers a useful legal platform for advocacy, litigation, and monitoring efforts.

In this regard, even absent the enactment of new legislation or ratification of existing international conventions, much can be done simply by changing the way that lawyers and others think about discrimination in relation to noncitizens. Examples of innovative uses of antidiscrimination principles already exist. They must be publicized, and, in some cases, reconceived in the context of citizenship.

The Challenge Ahead

With respect to each of these tasks, a major challenge is that the principal constituency for any action—persons who are not citizens of the states where they reside—is not a unified political force. To the contrary, noncitizens are dispersed geographically; are divided by language, religion, and ethnicity; and are intimidated by the threat of arrest and deportation. Identity, a crucial variable for policy on so many other questions, is equally important. Many noncitizens will understandably prioritize their identification with persons who share other characteristics—gender, ethnic origin, skin color—rather than citizenship status. So, building a movement aimed at expanding both citizenship access and effective rights protection for noncitizens requires developing alliances among a broad range of potential constituencies. As there are few NGOs composed by and for stateless people or noncitizens as such, a movement to promote the

rights of these persons will have to enlist NGOs working on minority rights, race relations, women's rights, children's rights, and many others. Advocates will have to tailor their articulation of what is at stake to different contexts. In some countries, arguments about what is really racial discrimination may have more resonance in the language of citizenship. A major goal must be to reconceptualize what at first seem to be locally specific matters—whether it's schooling for Hill Tribe people in Thailand or surveillance of Arab and Muslim immigrants in the United States and western Europe—as a global issue of noncitizens' rights.

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