SPEECH

Stateless Children: Implementing the Right to Have Rights

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THE FOLLOWING REMARKS were delivered by James A. Goldston, executive director of the Open Society Justice Initiative, to an audience of United Nations staff members, delegates and others as part of the 17/17 speaker series at UN headquarters in New York.

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Introduction

The Open Society Justice Initiative uses law to protect and empower people around the world. Through advocacy, research, technical assistance and litigation, the Justice Initiative promotes human rights and builds legal capacity for open societies. One of our key areas of focus is combating statelessness. For those of us engaged in the struggle for the rule of law, statelessness is a prime example of what life without law looks like.

A person is considered stateless when she is not regarded as a national of any country. Being stateless can have devastating consequences, as it effectively blocks off access to a host of other rights that many of us have taken for granted since childhood: to go to school, to access health care and social services, to work, to own property, and to move freely within the country wherein we reside.

Approximately 12 million people around the world are stateless. 5 million of them are children. The UN has done much to try to increase protections and rights to access nationality for stateless people. The 50th anniversary of the Convention on the Reduction of Statelessness, just two weeks ago on August 30, is a reminder of how long the UN has striven towards these goals. But, the work is nowhere near done. Today, I will recommend six ways that the UN, together with states, civil society and academia, can do more to eradicate statelessness.

The right to a nationality is enshrined in international law. The Universal Declaration of Human Rights provides a general right to nationality under article 15. The international human rights treaties—including the Convention on the Rights of the Child, which guarantees and the International Covenant on Civil and Political Rights, as well as the Convention on the Reduction of Statelessness - offer additional protections specifically with respect to the right to nationality for children. Human rights instruments in Africa, the Arab region, Europe and the Americas give further guidance at the regional level.

And yet, states have not actively embraced their legal obligations, nor signed up to the key treaties designed to reduce statelessness. To date, only 38 states have ratified the Convention on the Reduction of Statelessness. Even where, as for the Convention on the Rights of the Child, a treaty has secured near-universal ratification, some states argue that the obligations contained within them are vague and hence not readily implemented. An example is the CRC's Article 7, which states that children have a "right to acquire a nationality." Some states have questioned what obligation, if any, this imposes.

The Committee on the Rights of the Child, which oversees implementation of the Convention, has stressed that states have an obligation to take every appropriate measure to ensure that no child is left stateless. However, state conduct remains far from ideal. For example, some states – Kuwait, Madagascar, Saudi Arabia, and Burundi to name a few – discriminate on the basis of gender in conferral of nationality. In some cases this will leave children stateless even though the mother is a national. In the US, in certain cases American fathers are unable to confer nationality to a child born abroad, which can result in statelessness. In other places – Liberia for example – nationality laws still

explicitly discriminate on grounds of race (you have to be of "negro African descent" to be Liberian).

But to "take every measure to ensure no child is left stateless" means that states need to do more than just remove overtly discriminatory laws and policies. Ultimately, we would argue that article 7 of the CRC implies that states parties have an obligation to give nationality to children born on their territories who would otherwise be stateless – this is indeed also the 1961 Convention standard.

In our own work, the Justice Initiative confronts a related set of challenges stemming from state action (or omission) in combating statelessness. As litigators, we have used international norms and laws as a basis for our cases challenging statelessness and discrimination in access to nationality around the globe. Disappointingly, we've found that even in cases where we and our partners "win" in the courtroom, states have often ignored or failed to implement the changes ostensibly required, despite clear instructions from judges on what they need to do. Alas, this is not a unique phenomenon confined to statelessness. There is a more general and growing problem of the poor implementation of human rights judgments from regional and international judicial bodies. Existing data suggests that the rate of implementation of such rulings is disturbingly low: perhaps 30 percent in the Inter-American Court of Human Rights, and lower still before the African Commission of Human and Peoples' Rights, and in the UN treaty body system. Meanwhile the European Court of Human Rights struggles with a backlog of over120,000 cases yet to be heard, and more than 5000 judgments waiting to be executed. Today I'll share our experiences of problematic implementation in a cases of statelessness from the African and Inter-American systems, as they are instructive for the UN, as well as interested civil society groups, states and academics.

Dominican Republic

Perhaps the clearest example of the challenges emerges from our work in the Dominican Republic. The situation in the Dominican Republic is dire for Dominicans of Haitian descent. Since 2004, this vulnerable population has faced an avalanche of hostile legislative changes and administrative policies which have effectively stripped them of their Dominican nationality and permanently excluded them from the economic, social and cultural life of the only country they have ever known.

Until recently, everyone born on Dominican territory, except for the children of diplomats and parents who were "in transit," had the right to Dominican nationality. Parents were considered to be "in transit" if they remained in the country for a period of 10 days or less. Under this policy many—though not all—of the Dominican Republic-born children of Haitian migrants were officially recognized as Dominican nationals. As children, they were issued official Dominican birth certificates, and as adults, they received national identity cards. These documents enabled them to live full and productive lives as Dominican citizens.

This all changed in August 2004, when a new General Law on Migration was enacted. According to this law, persons classified as "non-residents" would now be considered "in transit" and therefore excluded from the constitution's nationality guarantee. The category of "non-residents" was defined to include temporary foreign workers, migrants

with expired residency visas, undocumented migrant workers, and people who are unable to prove their lawful residence in the Dominican Republic—all categories overwhelmingly dominated by people of Haitian origin.

As of 2004, children of "non-residents" no longer have an automatic right to Dominican nationality, even when they are born and are habitually resident in the Dominican Republic. Instead, they must endeavor to become citizens of Haiti—a country to which few of them have any effective link, and whose laws bar many first- and second-generation Dominicans from acquiring its citizenship.

The discriminatory effects of the 2004 migration law have been amplified by its retroactive application to Dominicans of Haitian descent who were previously granted Dominican nationality. Government officials have argued that the thousands of Dominicans of Haitian descent who, up until now, have enjoyed Dominican nationality never should have been recognized as Dominican citizens in the first place, as their parents were all "non-residents" at the time of their birth – never mind that the "non resident" exception to the nationality law was introduced only seven years ago. The Dominican civil registry has sought to rectify this "mistake" by making it almost impossible for Dominicans citizens of Haitian descent to apply for or obtain copies of state-issued identity documents that would prove their Dominican nationality. The cumulative effect of this document denial has been to leave thousands of Dominicans of Haitian descent effectively stateless.

The Justice Initiative joined in challenging these legislative and administrative changes in April 2005 when we submitted an amicus brief in the case of *Yean and Bosico v. Dominican Republic* before the Inter-American Court of Human Rights. The two applicants—both children born on Dominican territory to mothers who had also been born in the Dominican Republic—had been arbitrarily denied Dominican nationality on the basis that their mothers were "Haitians." Since the two girls were not considered Dominican nationals, they were denied a Dominican birth certificate. As a result they were barred from going to school since birth certificates were a pre-requisite to enroll.

Later in 2005, the Inter-American Court issued a landmark judgment which found that the Dominican Republic had violated the right to nationality under the American Convention on Human Rights. The court held that the principle of *jus soli* – that is, nationality acquired by birth on the territory -- was enshrined in the constitution and could not be further restricted. The court further held that parents' migration status could not be passed down to children. It found that racial discrimination in access to nationality breached the American Convention of Human Rights and concluded that the discriminatory application of nationality and birth registration laws rendered children of Haitian descent stateless. The court ordered that the law be changed to ensure that birth certificates were issued in a way that was not discriminatory.

Instead, the Dominican Republic reacted by working in the opposite direction. In October 2005, the Senate of the Dominican Republic denounced the judgment as an infringement on its national sovereignty and issued a resolution rejecting its validity. Two months later, in direct defiance of the decision of the Inter-American Court, the Supreme Court of the Dominican Republic affirmed the constitutionality of the 2004 migration law which considered as "in transit" all "non-residents" and barred their children from

automatically acquiring Dominican nationality. A 2010 change to the constitution enshrined the "non-residency" exception to nationality, threatening to make the exclusion of Dominicans of Haitian descent a permanent feature of Dominican life.

A recent and tragic example of the impact of this defiance of the Inter-American Court's decision on real people emerged about a month ago – just two weeks before the anniversary of the 1961 Convention on the Reduction of Statelessness. A 17-month old baby who suffered from complications arising from Downs Syndrome and a host of other congenital health problems died after being denied the urgent medical care she needed. The reason? Her parents could not produce a valid Dominican birth certificate to ensure her eligibility for insurance.

The baby's mother had unsuccessfully tried to get a birth certificate for her daughter from five days after her birth, only to be told by Dominican civil registry officials that she and her husband were Haitians – even though both had been born in the Dominican Republic and had previously been recognized as Dominican citizens. And so their child was ineligible for citizenship and hence, a Dominican birth certificate. All of this because the baby's grandparents were migrants. This was in direct breach of the Inter-American Court's decision that migration status cannot be inherited. Unfortunately, it shows the ultimately fatal consequences which can flow from failure to implement court judgments providing protection in principle against statelessness.

Mauritania

To be sure, not all implementation stories are so dire. A case from Mauritania offers an example of a decision on statelessness by a regional human rights body – in this case the African Commission on Human and People's Rights – that has led to both successes and disappointments.

In 1989, Mauritania's Arab-dominated government revoked the citizenship of an estimated 75,000 black Mauritanians. The police and army confiscated and destroyed their identification papers and deported most of them into neighboring Senegal and Mali. Many of those deported were black civil servants, merchants, and land owners, so the government of the time found itself with a windfall of vacant jobs and unprotected assets to distribute to Arabic-speaking loyalists. By 1994, the Mauritanian government had begun to reconsider the expulsions. And by 1997about half of the exiles had been allowed to return; however, many subsequently left again because they could not regain recognition of their nationality and get their lands back.

In 1997, the Institute on Human Rights and Development in Africa took a claim on behalf of some of the victims to the African Commission. Several arguments were made, including that Black Mauritanians had been evicted from their homes and deprived of their citizenship in violation of Article 12(1) African Charter.

In May 2000, the African Commission held that Mauritania had violated the African Charter on Human and People's Rights. Among the most serious violations found was that the government of Mauritania's actions constituted arbitrary and discriminatory deprivation of citizenship and wrongful expulsion of citizens.

In 2004, the Justice Initiative began to monitor implementation of the decision. One important step towards implementation was taken in 2007, when UNHCR, and the governments of Senegal and Mauritania signed a tripartite agreement to facilitate the returns of Mauritanians who were stranded in Senegal. The return process began in January of 2008 and has in some ways been a success. As of today, approximately 20,000 expelled Mauritanians have been permitted to return officially to their country. An uncertain number of others – possibly as many as 50,000 – have managed to return on their own, but little is known about them.

The main problem however, is that while some have been allowed to repatriate to Mauritania, they have for the most part not been given access to their former lands. Furthermore, many still have not been able to firmly re-establish their Mauritanian nationality. Since the end of 2009, the Mauritanian government is no-longer issuing ID cards to returnees, which means that thousands of people are literally stuck in the over-crowed camp-like sites in the south.

Some returnees told the Justice Initiative in 2010 that without an identity document, they can't go to the nearest town to buy food since they can't get through the police checkpoints; they cannot engage administrative procedures to obtain their nationality certificates; and they cannot obtain marriage certificates that for example are now compulsory in the Trarza region to register children born in returnee sites. Figures from UNHCR confirm the situation. As of October 2009 – only a month or so before the government stopped issuing ID cards – only some 3,000 cards had been distributed among an adult returnee population of just over 10,000. Nobody knows at this point how many other returnees have managed to re-establish their nationality and how many live as stateless persons on the margins of society. In addition, a population of expellees of unknown size is still stranded in Mali.

Kenya

We are hoping for a better result in Kenya, where Nubian children have launched a legal challenge against ethnic discrimination and forced statelessness through judicial bodies.

Although the Nubians have lived in Kenya for over 100 years, they were always regarded as "aliens" and continue to have an uncertain citizenship status. Children in Kenya do not have their nationality recognized at birth. While most Kenyan children have a legitimate expectation that their Kenyan citizenship will be recognized when they become adults, Nubian children have no such expectation.

On reaching the age of 18, Kenyan children apply for the ID cards that are necessary to prove citizenship. For most Kenyan children, this is a simple process. However, Nubian children are forced to go through a long and complex vetting procedure with an uncertain result. Some will never receive ID cards. Some will get them only after a long delay. Nubians are the only non-border people to be treated in this way. This situation has been described by the Kenyan National Commission on Human Rights as "institutionalized discrimination."

The failure to recognize nationality or what has been called the "right to have rights," means that the government does not recognize the property rights of the Nubians and treats them as squatters on their own land. For example, the Kenyan government

systematically refuses to pave roads or provide clean drinking water, sanitation, or healthcare to residents of Nairobi's Kibera neighborhood, where Nubians are the majority of residents. Schools and health clinics are fewer and of lower quality here, as the state argues that it is not obliged to deliver services to squatters.

In 2009, the Justice Initiative launched a case before the African Committee of Experts on Rights and Welfare of the Child on behalf of Kenyan Nubian children against Kenya. We made three key arguments: Firstly, that the extended denial of secure nationality status to Nubian children violates the child's right to acquire a nationality at birth, protected by Article 6 of the African Charter on the Rights and Welfare of the Child. Without a clear nationality at birth, Nubian children grow up effectively stateless. Second, the fact that Nubian children are treated differently from other children in Kenya because of their ethnic and religious origins, for which there is no legitimate justification, violates the prohibition of discrimination in Article 3 of the Charter. Finally, as a result of their historical treatment as foreigners, their continued uncertain citizenship status, the failure to recognize their nationality at birth, and the discrimination against them, Nubian children are consigned to live without secure property rights in enclaves such as Kibera, the only ancestral homeland that they have. This violates their rights of equal access to services such as education and healthcare.

In March this year, the Committee of Experts found against the Kenyan government on all grounds While the full decision is not yet available, the Committee in its report from the March session stressed that it will issue recommendations for remedies in order to "promote, protect, respect and fulfill the best interests of the children of Nubians in Kenya." Once the decision is released, we will work to ensure it is implemented. With a new constitution in place, and legislative reforms underway, this is an important time in Kenya. And one that offers an opportunity to correct past wrongs on citizenship and statelessness.

To date, our litigation against statelessness and discrimination in accessing nationality has yielded mixed results. At the same time, the past few years have seen advances in other efforts to tackle statelessness. The High Commissioner for Refugees has played a helpful and leading role in trying to further define and conceptualize statelessness in international law. We have been pleased to take part in UNHCR expert meetings designed to develop guidance notes on statelessness-related issues, including the arbitrary deprivation of statelessness and children's right to nationality. In June this year, the UN Secretary General issued a valuable guidance note to UN entities on combating statelessness. Above all, the guidance note makes a very strong case for cross-agency collaboration in order to combat statelessness. And in terms of jurisprudence, soft law, and guidance to states, the UN treaty bodies – particularly the Committee on the Rights of the Child through its periodic review of states – have worked to enhance protection for stateless persons both on paper and in practice.

Recommendations

To build on these developments, and help remedy the types of systemic challenges that we have experienced in trying to implement judgments in various national settings, we offer six recommendations for the UN and the broader international community of states, civil society and academics.

First, an evergreen recommendation is resource commitment: **The UN – especially through UNHCR – must commit more resources, human and financial, to fight statelessness.** UNHCR has done much. More is needed. In particular, the UN should invest in understanding this problem better – who are the stateless, how many are they, where do they live, and why are they stateless. And more resources are needed for UNHCR to continue its important work with states and civil society to find appropriate solutions to statelessness. Sometimes that involves legislative reform, sometimes a large-scale civil registration campaign is needed, and sometimes it's a matter of educating civil servants about statelessness and how to assist stateless persons.

Second, beyond resources, political commitment is always required. States could use this year recognizing the 50th anniversary of the Convention on the Reduction of Statelessness to trigger efforts to enhance the "soft law" around statelessness. For example, the Human Rights Council could, at its next session, adopt a resolution on children's right to nationality, with a particular provision ensuring that states grant their nationality to children born on their territories if they would otherwise be stateless. This is essential if statelessness is ultimately to be eradicated. Similarly, the General Assembly here in New York could include such a provision as part of a thematic segment on statelessness in its omnibus resolution on the rights of the child.

Third, States should use the United Nations system more broadly and effectively to combat statelessness. For example, the Human Rights Council's Universal Periodic Review is a key opportunity not only to review state records on statelessness generally, but also to raise compliance with regional and international human rights bodies' decisions as they relate to statelessness. States on the Council could raise these issues during peer reviews, as could civil society in the shadow reports supplied in advance.

Fourth, in cases in which there have been persistent statelessness problems, States can raise the issue in bilateral discussions and make it a policy priority – particularly in the context of aid or other forms of assistance. States can take a "carrot" approach (through offering additional funding or technical assistance to help address statelessness problems, particularly in countries against which a human rights decision on statelessness has been delivered and yet there is little movement –Mauritania is an example of where this may be helpful approach) or use a "stick" if, in a case such as the Dominican Republic, the situation gets so bad that the state's actions acutely undermine the rule of law and respect for the international and regional legal systems.

Fifth, expert groups within the UN – such as the relevant treaty bodies – should pay particular attention to statelessness as part of their periodic review responsibilities. Some bodies are already starting to do this. Earlier this year, for example, in reviewing the Czech Republic, the Committee on the Rights of the Child underscored the importance of children's right to acquire the nationality of the country of birth if they would otherwise be stateless. This is a welcome development which can and should be extended. Treaty bodies such as the CRC can use the occasion of state review to reinforce the prohibition against statelessness and probe states' records. The CRC could issue a General Comment on Children's right to nationality, clarifying state obligations under the CRC's Article 7. By providing independent documentation, civil society and academics can help keep statelessness on Committee agendas. Behind all of this, the

OHCHR staff who support the Committees can gain expertise on statelessness and help ensure statelessness issues remain a priority.

Finally, the UNSG's June 2011 guidance note on statelessness was a good step forward – but much follow up is now needed by the UN to achieve the goals it set forth. **Statelessness needs to be mainstreamed across all relevant UN agencies, and a system put in place -- and supported politically and financially -- to ensure that UN agencies can effectively collaborate in combatting it.** Civil society and academia would also do well to focus attention and support the goals set out in the Secretary General's Guidance Note – including through efforts to build political will in domestic settings to combat discrimination against stateless persons, advocate for access to citizenship for stateless persons, and help build the capacity and knowledge of stateless persons so that they can become more effective advocates in their own right.

E-mail: info@justiceinitiative.org
www.justiceinitiative.org

You can find out more about the Open Society Justice Initiative's efforts to bring about the eradication of statelessness by clicking here.

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