

Racial Discrimination and the Rights of Non-Citizens

*Submission of the Open Society Justice Initiative to the
UN Committee on the Elimination of Racial Discrimination
on the occasion of its 64th session*

February 2004



The Open Society Justice Initiative respectfully submits these comments for consideration by the United Nations Committee on the Elimination of Racial Discrimination (hereafter “CERD” or “the Committee”) on the occasion of its thematic session on non-citizens and racial discrimination on March 1-2, 2004.

The Open Society Justice Initiative is an operational program of the Open Society Institute that promotes rights-based law reform and strengthens legal capacity worldwide. Justice Initiative projects shape policy and achieve concrete results through hands-on technical assistance, litigation and legal advice, advocacy, knowledge dissemination and network building. In the field of Equality and Citizenship, the Justice Initiative addresses the shared vulnerabilities of racial/ethnic minorities and non-citizens. We are currently working with partners to document and combat discrimination on grounds of citizenship and/or race/ethnicity at the global level, as well as in Mexico, Russia, parts of Africa, Central Asia, and central and western Europe.

We welcome the Committee’s decision to convene a thematic session on the rights of non-citizens at a time when those rights are under threat in many parts of the world. The human rights problems affecting non-citizens today are legion and have been addressed comprehensively in the report of the Special Rapporteur on the Rights of Non-Citizens of the United Nations Sub-Commission on the Promotion and Protection of Human Rights. In view of this Committee’s mandate, the following comments are limited to those specific aspects of the situation of non-citizens which implicate most directly the rights set forth in the International Convention on the Elimination of All Forms of Racial Discrimination (hereafter “ICERD” or “the Convention”).

Executive Summary

The human rights of non-citizens¹ are increasingly under threat. In the wake of September 11, 2001, restrictions on the rights to asylum and the rights of migrants have accelerated in many countries, with countless individuals falling victim to arbitrary detention and violent acts at the hands of state agents. Denationalization and arbitrary or discriminatory access to citizenship are also growing problems, producing massive displacement and rendering stateless people who have never crossed an international border.

Excluded from most democratic political processes, non-citizens do not have a voice in the making of public policy. They do not enjoy an absolute right of residency in the country in which they live, and often lack access to protective legal mechanisms. The legal status and treatment of non-citizens test traditional notions of state sovereignty at their intersection with evolving human rights norms. In the words of the late Arthur Helton:

Human rights law, it is often argued, touches governments at their most sensitive point: How they exercise power over their own citizens. While this is true, it fails to acknowledge the significance of international human rights law in relation to non-citizens. The protection of non-citizens by international human rights instruments represents an even greater challenge to national sovereignty.²

The particular vulnerabilities of non-citizens are compounded by the fact that many are also racial or ethnic minorities.

The first part of this submission underscores the close links between racial discrimination³ and discrimination based on citizenship status in the enjoyment of fundamental human rights. International law prohibits racial discrimination more clearly and forcefully than citizenship-based distinctions. Given the frequent correlation of these phenomena, it should not be surprising that citizenship-based distinctions commonly serve as a pretext for racial discrimination. The Committee has a critical role to play in piercing the veil of impunity that frequently shields acts of racial discrimination against non-citizens from sanction.

The following two sections discuss manifestations of racial discrimination in the granting and deprivation of citizenship. In each of these areas, the coincidence of citizenship-based and racial discrimination serves to obscure Convention violations and frustrate the search for effective remedies. Section II describes instances of racial discrimination in access to citizenship, in violation of Article 5(d)(iii) of the Convention, through the placement of administrative obstacles in the path to gaining effective nationality, effectively disenfranchising entire segments of the population. Section III documents cases of racial discrimination in the arbitrary deprivation of citizenship, also in violation of Article 5(d)(iii), by amending laws or changing state practice so as to take away citizenship from individuals who previously enjoyed it, often rendering them stateless.

In view of the systematic nature of these problems, the Committee is requested to adopt a General Recommendation that contains the following elements:

- Reaffirms that non-citizens enjoy full and equal rights under the Convention to protection against racial discrimination.
- Expresses the Committee's concern for the frequency with which States employ citizenship-based distinctions to mask racial discrimination.
- Reaffirms that racial discrimination may encompass unjustified distinctions based on ethnic or national origin, as well as race or color.
- Expresses the Committee's concern for the increasing prevalence of violations of the rights of all categories of non-citizens, including through violence, mass expulsion and discrimination in access to rights other than citizenship, particularly insofar as they disproportionately affect racial and ethnic minorities.
- Makes clear that racial discrimination in access to citizenship is a breach of States Parties' obligations to secure non-discriminatory enjoyment of the right to nationality (ICERD Article 5(d)(iii)).
- Observes that States Parties to the ICERD could be in breach of Article 2(c) if their nationality laws have the effect of discriminating against persons of a particular national origin.
- Notes that the denial of citizenship to large numbers of long-term residents, where it results in disadvantaging them in access to employment and social benefits, violates the ICERD's anti-discrimination principles, including Articles 5(e)(i) and 5(e)(iv).
- Clarifies that, for the purposes of this General Recommendation, the term "non-citizens" whose rights are at issue includes not only refugees and migrants, but all persons who are not nationals, or who cannot establish nationality, of the state on whose territory they live, including persons who have never crossed an international border.
- Specifies that the racially discriminatory deprivation of nationality is a breach of States Parties' obligations to secure non-discriminatory enjoyment of the right to nationality (ICERD Article 5(d)(iii)).
- Expresses the Committee's concern for the growing phenomena of arbitrary denationalization and *de jure* and *de facto* statelessness, particularly insofar as they disproportionately affect racial and ethnic minorities.
- Establishes and implements a specialized early warning and urgent monitoring procedure, extending the procedure that currently exists, to assess implementation of the Committee's General Recommendation on the Rights of Non-Citizens. The Committee should also

consider designating a Special Rapporteur with principal responsibility to prepare a detailed report for the Committee on this subject no later than the March 2005 session.

- Given the global nature of the problem, reaffirms the Committee's request that all States Parties include in their regular reports information concerning the implementation of relevant provisions of the ICERD for non-citizens.

I. Violations of the Rights of Non-Citizens: Citizenship-Based Distinctions as a Mask for Racial Discrimination

Racial discrimination and discrimination on the grounds of citizenship often overlap such that distinguishing between the two can be difficult. As a result, the grounds for a particular discriminatory act may not always be clear. As the 2001 United Nations Conference against Racism, Racial Discrimination, Xenophobia, and Related Intolerance underlined, manifestations of racism often involved intolerance of, and/or violence against, non-citizens.⁴

The prohibition of racial discrimination, recognized in the United Nations Charter⁵ and all major international and regional human rights instruments,⁶ is a *jus cogens* norm,⁷ more clearly developed than those protecting non-citizens and offering different, more extensive remedies. The ICERD specifically exempts from its application the “legal provisions of States Parties concerning nationality, citizenship or naturalization,”⁸ although it prohibits “discriminat[ing] against any particular nationality” among non-citizens.⁹

Citizenship-based distinctions are nonetheless limited to an extent by international human rights instruments. This Committee has affirmed that the ICERD’s exemption for citizenship-related provisions “must not be interpreted to detract in any way from the rights and freedoms” in other international instruments.¹⁰ More generally, “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.”¹¹ Thus, “the rights set forth in the International Covenant on Civil and Political Rights apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.... [T]he general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.”¹²

The principle of equality for non-citizens is subject to exceptions with respect to freedom of movement and rights of political participation, such as voting and holding public office.¹³ The limited attention given to the rights of non-citizens by human rights monitoring organs has meant that the particulars of the legal regime governing discrimination against non-citizens are not clear.¹⁴ The Special Rapporteur on the Rights of Non-Citizens of the UN Sub Commission on the Promotion and Protection of Human Rights has acknowledged this uncertainty in calling for “clear, comprehensive standards governing the rights of non-citizens, their implementation by States, and more effective monitoring of compliance.”¹⁵

Regional and national law and jurisprudence mirror the different levels of protection at the international level against racial and citizenship-based discrimination. For example, the European Union’s Race Equality Directive,¹⁶ which entered into force in 2003, is perhaps the most detailed regional anti-discrimination norm in the world. It sets forth strong prohibitions against both direct and indirect racial discrimination,¹⁷ 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,¹⁸ and requires that member states establish “judicial and/or administrative procedures” to implement its provisions¹⁹ and provide for “effective, proportionate and dissuasive sanctions.”²⁰ 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....”²¹

The less-developed nature of the prohibition against discrimination on the grounds of citizenship status reflects public opinion in many countries. A broad consensus disfavors differential treatment based on immutable characteristics such as race and ethnicity. By contrast, notwithstanding the reality of forced migration, refugees fleeing persecution and persons made stateless against their will, status as a non-citizen is considered the product of voluntary choice—something which states may properly take into account in rationing the distribution of rights and benefits.

The gap between law (the more settled and comprehensive protection against racial discrimination) and practice (the mixed nature of much discrimination against racial minority non-citizens) creates the potential for two distinct but related problems.

On the one hand, what is in fact racial discrimination is sometimes confused with, or characterized as, a problem of citizenship, even where the victims of discrimination are *de jure* citizens of the country at issue. In some regions, the concepts used to describe discrimination reflect the legacy of an anti-colonial struggle, “couched in the language of citizenship, that is, the right of the natives to become citizens.”²² The term “citizenship” may have particular historical or political resonance. In addition, it may not be widely appreciated that “racial discrimination” under Article 1 of the Convention encompasses different grounds, and that persons of the same skin color but different ethnic or national origin can be victims of racial discrimination. In such circumstances, a ban on ownership of land by a particular racial or ethnic group may be termed a denial of “citizenship” even though it is a clear case of racial discrimination.

On the other hand, perpetrators of discrimination may intentionally exploit the ambiguity between race and nationality to shield racial discrimination from challenge where the victims happen to be non-citizens. The racial discrimination at issue—while clearly contrary to the law under the Convention—is “justified” on the grounds that non-citizens are its victims. An employer in the European Union who, for example, refuses to hire qualified African-born immigrants may succeed in defending the practice by focusing on their non-citizen status, even though this would appear to be a clear case of racial discrimination.

The temptation to cloak racial discrimination in the language of citizenship may increase during times of national crisis. More than one observer has noted that the heightened scrutiny, surveillance and detention of certain non-citizens in the United States since September 11, 2001 have targeted specific religious and ethnic communities.²³ Racial profiling—a practice that had been broadly criticized in the United States and other countries—has gained renewed legitimacy in some quarters.

Both problems—the confusion of racial discrimination with citizenship-based distinctions, and the use of the language of citizenship to justify racial discrimination—are compounded by the fact that, since racial and ethnic categories are socially and politically defined, race and nationality may be different lenses for viewing the same phenomena. Since international law treats racial and ethnic discrimination differently from discrimination based on citizenship status, how the

violations at issue are characterized may affect public perceptions, legal remedies, and political solutions.

Recommendations

In relation to the use of citizenship-based distinctions as a mask for racial discrimination, the Committee should:

- Reaffirm that non-citizens enjoy full and equal rights under the Convention to protection against racial discrimination.
- Express the Committee's concern for the frequency with which States employ citizenship-based distinctions to mask racial discrimination.
- Reaffirm that racial discrimination may encompass unjustified distinctions based on ethnic or national origin, as well as race or color.
- Express concern for the increasing prevalence of violations of the rights of all categories of non-citizens, including through violence, mass expulsion and discrimination in access to rights other than citizenship, particularly insofar as they disproportionately affect racial and ethnic minorities.

II. Racial Discrimination in Access to Citizenship

International law affords states broad discretion to define the contours of, and delimit access to, citizenship. Determining membership in the territorially circumscribed political community remains one of the core attributes of state sovereignty. Article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws is generally considered to reflect customary international law in stating: “It is for each State to determine under its own laws who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.”

Nevertheless, as the Convention suggests, there is an emerging international consensus that nationality laws and practice must be consistent with general principles of international law. This view is reflected in two seminal judgments. In 1923, the Permanent Court of International Justice (PCIJ) ruled, in the context of state allocation of nationality, that:

The question whether a certain matter is or is not solely within the domestic jurisdiction of a State is an essentially relative question; it depends on the development of international relations.²⁴

A 1984 Advisory Opinion of the Inter-American Court further held:

[D]espite 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.²⁵

State discretion in the granting of nationality is not completely unfettered. Article 15 (1) of the Universal Declaration of Human Rights states that “everyone has the right to a nationality.” Subsequent international and regional human rights instruments have echoed this principle, particularly as regards to children.²⁶

The right to a nationality implies that nationality should be granted where the alternative is statelessness.²⁷ Nonetheless, both the limited number of ratifications of the principal conventions against statelessness,²⁸ and the widespread practice of states in creating, and refusing to protect against, statelessness, seem to leave open the question of whether there exists a general obligation under customary international law to grant nationality in case of statelessness.²⁹

Statelessness is a widespread problem that, though formally recognized by scholars and official bodies, has yet to generate an adequate response on the part of states. The United Nations High Commission for Refugees has “identified many 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.”³⁰ One major obstacle to addressing statelessness is the difficulty of accurately assessing the scope of the problem: “To date, it has proven impossible to

introduce a statistical mechanism for identifying cases of statelessness globally, in part because very few States have a means of registering stateless persons.”³¹

International law prohibits discrimination on the grounds of race or ethnicity in the granting of nationality. As noted above, notwithstanding its general exemption clause relating to citizenship and nationality,³² the ICERD prohibits states from “discriminat[ing] against any particular nationality,”³³ among other areas, in establishing criteria for citizenship. In its concluding observations and comments on the reports of several States Parties, the Committee has expressed concern about various forms of discrimination against non-citizens, including discriminatory requirements for entry, residence, and citizenship.³⁴ Articles 5 (1) and (2) of the European Convention on Nationality (which as of January 2004 had been signed by 22 states and ratified by 10), prohibit discrimination in all state rules pertaining to nationality on grounds of, *inter alia*, race, color, or national or ethnic origin.

In this field, as in others, the intertwining of race and nationality poses a challenge to the enforcement of norms prohibiting racial discrimination. Governments may, and commonly do, give preferential treatment to nationals of certain states in accessing citizenship, for reasons of common history, shared language, or other attachments. Thus, Costa Rica’s naturalization rules were found to be not impermissibly discriminatory, although they placed less stringent residency requirements on Central Americans, Ibero-Americans and Spaniards, because “[i]t 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.”³⁵

Parties to ICERD could be in breach of Article 2(c) if their nationality laws have the effect of discriminating against persons of a particular national origin.³⁶ Moreover, the denial of citizenship to large numbers of long-term residents could result in disadvantaging them in access to employment and social benefits, in violation of ICERD’s anti-discrimination principles.³⁷

Notwithstanding the foregoing norms, governments not uncommonly discriminate on the grounds of race and ethnicity in allocating rights of entry and access to citizenship.³⁸ A leading authority has suggested that in practice, the non-discrimination norm “has not been applied to impose close scrutiny in evaluating the widely varied distinctions that states use for admission and expulsion grounds. In this field, the 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.”³⁹

In recent decades, governments have been more careful to couch their preferences in the internationally accepted language of nationality and citizenship. Many governments continue effectively to discriminate in entry on grounds of race, however, even though they do not officially recognize it as such. In some countries, such as Japan, it is still quite difficult to become a naturalized citizen. In other countries, states determinedly deny citizenship to members of certain ethnic groups. An authority on citizenship in Africa has written, “The permanent alienation of

whole [ethnic] communities due to relatively strict citizenship laws is an especially important problem in Africa.”⁴⁰

As the following case studies show, the practice of racial and ethnic discrimination in access to citizenship is still prevalent throughout the world:

Rohingya in Burma⁴¹

The Rohingya Muslim minority has been living in the northern state of Ankara in Burma since the 12th century. Although nearly all Rohingya or their parents were born in Burma, have resided there, and have family there, the Burmese government refuses to recognize them as citizens, terming them “illegal immigrants.” The Burmese citizenship law of 1982 provides for several categories of citizenship. The Rohingya are deemed to satisfy none, rendering them potentially stateless, as no other state recognizes them as nationals. The Burmese government has restricted Rohingya freedom of movement, limited their access to secondary education and employment, subjected them to forced labor, arbitrarily confiscated their property, and forced Rohingya couples to request permission at many different levels of government in order to marry.

Dominicans of Haitian Descent⁴²

Haitians have migrated and settled in the Dominican Republic throughout the course of the past century, entering the country primarily as workers in the sugar plantations (“*bateys*”) or other low-income occupations. Today, a sizeable population of Dominicans are of Haitian descent, including individuals and families who have resided in the country for decades. Due to the pervasiveness of anti-Haitian animus at many levels of government and society, Haitians born in the Dominican Republic are denied the possibility to establish nationality. They continue to be treated as “foreigners” or “black invaders” conspiring to take over the country and leave no jobs for “true” Dominicans.

Under the Dominican Constitution, all persons born within the country’s territory are Dominican citizens. The only exception, under Article 11, is for children of foreigners “in transit” through the Dominican Republic. In an effort to bar Dominicans of Haitian descent from claiming lawful citizenship, Dominican authorities routinely claim that Dominicans of Haitian descent are, in fact, “in transit”—even those who have lived in the country for decades. Some medical personnel have refused to provide undocumented parents of newborns with birth certificates—a prerequisite for obtaining a *cedúla*, proof of Dominican citizenship. The inability to secure proof of citizenship has generated a cycle of discrimination and mistreatment in many spheres of public life. Fear of deportation has led many ethnic Haitians to avoid hospitals, local electoral boards or other organs of state authority.

The Bidun of Kuwait⁴³

The Kuwaiti government applies the classification Bidun to several groups of individuals, including descendants from nomadic groups and migrants who have lived in Kuwait for decades and have therefore lost all effective links with their ancestral homes. Kuwait’s Nationality Law creates a category of “original Kuwaiti nationals” who are, by virtue of that status, eligible for

automatic nationality, resulting in a higher level of rights and protections in Kuwaiti law. “Original Kuwaiti nationals” are “persons who were settled in Kuwait prior to 1920 and who maintained their normal residence there until the date of the publication of the law [May 21, 1959].” The Bidun are among those unable to meet these requirements and have thus been denied automatic nationality. All children of Bidun parents are also considered Bidun, including the children of Kuwaiti mothers and Bidun fathers.

Until the mid-1980s, even though they were denied automatic nationality, the Bidun were treated as lawful residents of Kuwait whose claims for citizenship were under consideration. In 1985, the government began applying provisions of Alien Residence Law 7/1959 to the Bidun and subsequently issued a series of regulations stripping them of almost all their previous rights and benefits. Commencing in 1986, the government restricted Biduns’ eligibility for travel documents and fired all Bidun government employees (except for those employed by the police or the military) who could not provide valid passports; private employers were required to pursue the same policy. In 1987, the government began to refuse Bidun registration for automobiles and applications for driving licenses, severely restricting their freedom of movement. That same year, Bidun children were barred from attending public schools. In 1998, this ban was extended to the university level. The government has also instructed all private clubs and associations to dismiss any Bidun members.

In May of 2000, the Ministry of the Interior ended a nine-month program during which Bidun who signed affidavits admitting to a foreign nationality and renouncing claims to Kuwaiti nationality could apply for a five-year residency permit. Despite the fact that many Biduns have lived in Kuwait for generations, have effective links to the national society, and reasonably consider Kuwait as their home country, their access to Kuwaiti citizenship is increasingly blocked.

The Hill Tribes in Thailand⁴⁴

Thailand’s Hill Tribe people, who include members of the Akna, Lanu, Lisu, Yao, Hmong, and Karen ethnic communities, number over one million. Despite being born in Thailand, almost half of the Hill Tribe people lack Thai citizenship, and are thus unable to vote, buy land, seek legal employment, or travel freely. Since an influx of refugees and migrants into Thailand in the 1980s, the Thai government has effectively denied Hill Tribe people citizenship, with some officials maligning them as drug dealers, environmental criminals, national security threats, and illiterate and uncivilized “foreigners.”

On August 28, 2001, the Thai Cabinet granted temporary residency rights for one year to those “tribal and indigenous” peoples who had previously taken part in government surveys and to others lacking identification. A deadline of August 28, 2002, was set for these groups to regularize their status. To secure citizenship, Hill Tribe members had to show that they, and at least one of their parents, had been born in Thailand. This has been difficult for those born in remote mountainous communities where birth registration is rare. The process of verification of status itself has been fraught with bureaucratic delay and allegations of corruption. The government extended the deadline to August 28, 2003, but by July 2003 more than 200,000 applications for citizenship had not been reviewed. An additional 200,000 people had no supporting evidence to document their birth and continuous residence in Thailand.

Following expiry of the most recent filing deadline, many Hill Tribe people, considered illegal migrants and/or stateless, have lived under threat of expulsion, and been denied access to many economic and social benefits.

Meskhetians in Russia⁴⁵

In the Russian Federation, the regional authorities in Krasnodar Krai have arbitrarily denied approximately 13-16,000 Meskhetians, a Turkish-speaking Muslim ethnic minority, all rights of Russian citizenship to which they are entitled as former Soviet citizens. As a consequence, the Meskhetians cannot secure permanent employment, officially register their marriages, or access social security, health care, and post-secondary education. Furthermore, many are subject to arbitrary checks of their registration documents, and are prevented from officially registering their home or vehicle purchases.

The local Krasnodar authorities have repeatedly singled out the Meskhetians through special residency regulations citing their ethnicity as the basis for their disparate treatment. These authorities openly admit that their goal is to coerce the Meskhetians to leave the region—to “squeeze” them out. These racist policies are unabashedly supported by high-level regional officials. In 2001, the governor of Krasnodar was quoted as saying, “I say to them [Meskhetians], do not forget that you are guests in our land... [All] available mechanisms of pressure and persuasion will be employed to increase the number of ‘guests’ leaving.”

UNHCR has described Meskhetians *de jure* citizens, *de facto* stateless: under federal Russian law, they are entitled to Russian citizenship because they were “permanently residing” in the Russian Federation at the time the 1992 Citizenship Law came into effect and did not decline Russian citizenship. In direct violation of federal regulations, local authorities have subjected the Meskhetians to constraints on their freedom of movement, arbitrary determination of their right to reside in the Krasnodar territory by local “Commissions of Migration Control,” onerous taxation policies targeted specifically at their ethnic group, and unofficial sanctioning of violence perpetrated by self-styled “Cossack” groups.

Kenyan Nubians

The Nubian community of Kenya is composed of more than 100,000 descendants of persons originally from the territory of Sudan, who were brought to East Africa by the British colonial government and resettled in various regions of modern-day Kenya over 100 years ago. “Although the Nubians should be considered as Kenyan citizens under the prevailing laws, the overwhelming majority of them live as *de facto* stateless persons without adequate legal protection. They are systematically denied their right to Kenyan citizenship and to own land....”⁴⁶ When pursuing citizenship documentation, Nubians have been requested to produce grandparents' identification cards, which are almost impossible to obtain. Unlike other ethnic groups in Kenya, the Nubians have not received official recognition as a distinct Kenyan community with a unique culture, language, history and religion.⁴⁷

Recommendations

In relation to access to citizenship, the Committee should:

- Make clear that racial discrimination in access to citizenship is a breach of States Parties' obligations to secure non-discriminatory enjoyment of the right to nationality (Article 5(d)(iii)).
- Observe that States Parties to the Convention could be in breach of Article 2(c) if their nationality laws have the effect of discriminating against persons of a particular national origin.
- Note that the denial of citizenship to large numbers of long-term residents, where it results in disadvantaging them in access to employment and social benefits, violates the Convention's anti-discrimination principles, including Articles 5(e)(i) and 5(e)(iv).

III. Racial Discrimination in Deprivation of Citizenship

In countries across the world, racial and ethnic minorities have been arbitrarily stripped of their nationality and rendered stateless. Arbitrary deprivation of nationality leaves minority groups vulnerable to expulsion, imprisonment and arbitrary detention, and frequently results in the denial of social services, education, and employment opportunities. Victims who flee abusive conditions, as well as those forcibly expelled, often are unable to re-enter their own country and are not recognized as former residents.

Deprivation of nationality is a phenomenon of concern well beyond the circle of direct victims. During the 1930s and 1940s, the failure of European governments to provide protection to Jews and others rendered stateless by Nazi-inspired Nuremberg nationality laws degraded the very concept of human rights in the eyes of the world.⁴⁸

While states retain broad control over access to citizenship, the power to withdraw citizenship once granted is more limited. In particular, states may not deprive persons of citizenship arbitrarily or in such a way as to engender statelessness.⁴⁹ In order not to be arbitrary, deprivation of citizenship must be prescribed by law, non-discriminatory, and accompanied by procedural due process, including review or appeal.⁵⁰ In addition, while permissible in some instances (for example, to avoid dual nationality), any deprivation of nationality that resulted in statelessness would be considered arbitrary.

The prohibition of statelessness and arbitrary deprivation of nationality has been strongly reinforced by various United Nations bodies. In 1988, the UN Sub-Commission's Special Rapporteur on the Right of Everyone to Leave Any Country, Including His Own, and to Return to His Country, stated:

In view of human rights law, denationalization should be abolished. It constitutes a breach of international obligations ... The recognition of the right to nationality as a basic human right, in effect, limits the power and freedom of a State arbitrarily to deprive its citizens of nationality.⁵¹

The UN General Assembly also reiterated the principle of the avoidance of statelessness at its 50th session (1995) when it called on states:

[T]o adopt nationality legislation with a view to reducing statelessness, consistent with the fundamental principles of international law, in particular by preventing arbitrary deprivation of nationality and by eliminating the provisions that permit the renunciation of a nationality without the prior possession or acquisition of another nationality⁵²

States may not discriminate against particular ethnic or racial minorities in the withdrawal of nationality. The 1961 Convention on the Reduction of Statelessness stipulates that states "may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds."⁵³ Other regional and international instruments pertaining to nationality also reflect this principle of non-discrimination.⁵⁴

While statelessness was first recognized as a global problem during the First and Second World Wars, in the past decade and a half growing numbers of persons have again lost their nationality. The manifestations of this most recent wave of denationalization have varied from place to place. However, one common denominator has been that ethnic and racial minorities have been the principal victims.

In Europe, the primary cause has been the changes in post-1989 borders that followed the collapse of Communism. As multi-ethnic states such as the Soviet Union, Yugoslavia and Czechoslovakia disintegrated, ethnic minority groups—ethnic Russians, Croats, Bosnians 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 same period, citizenship became more important and controversial, precisely as democratization in much of the continent gave added significance to membership in the political community and the concomitant questions of who can and cannot vote or hold public office. Increasingly restrictive citizenship laws in some countries, such as the Democratic Republic of Congo, Côte d'Ivoire, and Zambia, served as effective tools for political manipulation by public officials who sought to expel and/or delegitimize particular ethnic groups.

In Asia and the Middle East where nationality is primarily conferred on a *jus sanguinis* rather than a *jus solis* basis (by descent rather than by birth), there has been a growing trend for repressive 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 country. Women face particular difficulties in regards to citizenship in many Asian and Middle Eastern states due to discriminatory marriage and nationality laws.

The following are examples:

Bhutanese Refugees⁵⁵

Over 100,000 Bhutanese refugees of ethnic Nepali origin were arbitrarily deprived of their nationality and forcibly expelled from Bhutan in the early 1990s, in clear violation of international law. The refugees' right to return to Bhutan has been systematically obstructed by the Bhutanese government. They are also refused citizenship in Nepal, and are stranded in a legal limbo.

The Bhutanese government stripped the southern Bhutanese of their citizenship in order to expel and exclude an unpopular ethnic and religious minority. The Bhutanese refugees in Nepal are predominantly Hindus from southern Bhutan, ethnically and culturally distinct from the majority ethnic group and ruling elite in Bhutan—the Buddhist Ngalongs from northern Bhutan, who are of Tibetan origin and speak the national language, Dzonkha.

Many southern Bhutanese had been granted citizenship under Bhutan's 1958 Nationality Law. However, in 1977 and 1985, Bhutan introduced two new Citizenship Acts, the second of which narrowed the requirements for naturalization to include: twenty years of residency in

Bhutan; the ability to speak, read and write Dzongkha proficiently; good knowledge of the history and culture of Bhutan; a good moral character; no “record of imprisonment for criminal offenses in Bhutan or elsewhere”; and “no record of having spoken or acted against the King, country and people of Bhutan in any manner whatsoever.” Most controversially, the Act retroactively made 1958 the cut-off date for determining citizenship. In order to be granted citizenship, it was necessary to produce land tax receipts or other proof of residency in Bhutan dating from on or before December 31, 1958.

The racist roots of the citizenship laws were evident in the draconian “Bhutanization” policies that accompanied them. In the late 1980s, the government forced the language, dress and cultural etiquette of northern Bhutan on the southern Bhutanese. The Nepali language was banned in public places and removed from the school curriculum. Southern Bhutanese were fined and punished if they did not wear northern Bhutanese dress in public. Schools and health services were closed and southern Bhutanese were expelled from the public services. Government forces destroyed houses, confiscated crops, and forced southern Bhutanese off their lands.

By 1992, tens of thousands of southern Bhutanese had fled these abuses or were forcibly deported. Many were forced to sign so-called “voluntary migration” certificates by local officials when they left the country—surrendering their rights to Bhutanese citizenship. Most sought refuge in Nepal where they now live in camps administered by UNHCR. After fifteen rounds of joint ministerial talks between Nepal and Bhutan, the refugees are no closer to returning to their homes in Bhutan.

Banyamulenge in the Democratic Republic of the Congo

The Banyamulenge are a Kinyarwanda-speaking ethnic group many of whose members have resided in the northeastern corner of the Democratic Republic of the Congo (DRC, formerly Zaire) since before the creation of colonial boundaries. Other Banyamulenge immigrated to the DRC from Rwanda and Burundi, with the approval of the Belgian colonial authorities.⁵⁶

Although the Banyamulenge were considered citizens in previous constitutions and laws, in 1981 the Zairian government limited citizenship to those individuals who could prove that their ancestors belonged to an ethnic group “known to exist” within the borders of the territory later known as Zaire “as defined in August 1885.”⁵⁷ This change in the citizenship laws affected more than 1.5 million Banyamulenge, who were no longer automatically Zairian; in principle, they had to formally apply and be granted citizenship.⁵⁸ Although the law was not actively enforced during the 1980s, it represented an official discriminatory stance toward Banyamulenge, which was aggravated by the crisis in the Great Lakes Region in the 1990s.

Politicians used the citizenship law and growing unrest to stir up feelings against the Banyamulenge among neighboring ethnic groups. In 1991, a politician from the Bembe ethnic group in the South-Kivu region of DRC led a move to exclude the Banyamulenge, claiming they were not Zairians but Rwandan (also Kinyarwanda-speaking) immigrants. Following the sharp influx after 1994 of Rwandan refugees fleeing genocide in their home country, leaders of other ethnic groups increasingly challenged the rights of Banyamulenge to Zairian citizenship. On April 28, 1995, the parliament passed a law preventing recent Rwandan and Burundian refugees from

claiming citizenship, and defined the Banyamulenge as “immigrants who have acquired Zairian nationality fraudulently.”⁵⁹ This law forbade “foreigners” to sell or trade any assets (including land and houses), authorized the cancellation of any transactions underway, and barred them from political and military office. Banyamulenge were banned from administrative posts.⁶⁰ The government also began to interfere in Banyamulenge-initiated civil society activities. In October 1996, the DRC authorities ordered that all Banyamulenge leave the country.⁶¹

The increasing violence and discrimination faced by Banyamulenge played a role in the deepening crisis in Zaire. In September 1996, militia supported by the Zairian Armed Forces attacked Banyamulenge villages, killing, raping, and forcing survivors to flee.⁶² Although many Banyamulenge joined Laurent-Desiré Kabila, little changed on his accession to power in 1997.⁶³ In 1998, a draft constitution again stripped most Banyamulenge of citizenship.⁶⁴ Violations of the rights of Banyamulenge are seen as a pivotal factor in sparking the civil war that embroiled the country and region.

According to the Congolese ambassador to South Africa, citizenship has been restored to Banyamulenge since Joseph Kabila became president in 2001.⁶⁵ However, a new DRC constitution has yet to be adopted by the new power-sharing government, and inter-ethnic tension remains high.

Ethnic Serbs from Croatia⁶⁶

Citizens of the former Socialist Federal Republic of Yugoslavia (SFRY) possessed both federal citizenship and citizenship of one of the six republics: Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia. However, the latter was of little practical use, and many failed to claim it.

Following the SFRY’s dissolution, the emerging states re-drafted their own citizenship laws, and republican citizenship—once an afterthought—became a central point of contention. As all the successor states recognized the principle of legal continuity in their new citizenship laws, no citizen of the SFRY was rendered *de jure* stateless at the time of dissolution. In practice, however, in those states overrun by armed conflict, hundreds of thousands were unable to obtain citizenship of the state in which they were habitually resident, where this differed from their state of original citizenship. Ethnic minorities were worst affected. Through a variety of legal devices, some states attempted to bar long-term minority residents from citizenship. As a result many were effectively denationalized.

In Croatia, for example, residents who had not previously held Croatian republican citizenship were required to apply for naturalization, unless they were ethnic Croatians, or were born in Croatia to at least one Croatian parent. Croatian Serbs often found themselves foreigners in their own country. Large numbers who had fled to Bosnia and the Federal Republic of Yugoslavia were unable either to obtain citizenship or to return to their homes in Croatia. Lack of citizenship affected Croatian Serbs in myriad other ways, restricting their freedom to leave and re-enter Croatia; their ability to access reconstruction assistance; their right to work, and their ability to obtain official returnee status.⁶⁷

Recommendations

In relation to the arbitrary deprivation of nationality and statelessness, the Committee should:

- Make clear that, for the purposes of this General Recommendation, the term “non-citizens” whose rights are at issue includes, not only refugees and migrants, but all persons who are not nationals, or who cannot establish nationality, of the state on whose territory they are present, including persons who have never crossed an international border.
- Specify that the racially discriminatory deprivation of nationality is a breach of States parties’ obligations to secure non-discriminatory enjoyment of the right to nationality (Article 5(d)(iii)).
- Express concern for the growing phenomena of arbitrary denationalization and *de jure* and *de facto* statelessness, particularly insofar as they disproportionately affect racial and ethnic minorities.

ENDNOTES

¹ Throughout this document, the terms “non-citizen” and “non-national”, and “citizenship” and “nationality”, are used interchangeably.

² Transcript of a video discussion, “Protecting the World’s Exiles: The Human Rights of Non-Citizens,” 22 *Human Rights Quarterly* 280, 297 (2000). Helton was Senior Fellow for Refugee Studies and Preventive Action at the Council on Foreign Relations when he was killed in Iraq in August 2003.

³ Throughout this document, the term “racial discrimination” is used as defined in Article 1 of the ICERD: “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”

⁴ Durban Declaration against Racism, Racial Discrimination, Xenophobia and Related Intolerance, September 8, 2001, paras. 24-33 (addressing the situation of non-citizens). Paragraph 24 “requests all States to combat manifestations of a generalized rejection of migrants and actively to discourage all racist demonstrations and acts that generate xenophobic behaviour and negative sentiments towards, or rejection of, migrants.” Paragraph 25 “invites international and national non-governmental organizations to include monitoring and protection of the human rights of migrants in their programmes and activities and to sensitize Governments and increase public awareness in all States

about the need to prevent racist acts and manifestations of discrimination, xenophobia and related intolerance against migrants.”

⁵ Article 1(3) of the UN Charter includes among the purposes of the United Nations “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion....” Article 55(c) of the Charter commits the United Nations to promote non-discrimination.

⁶ See, e.g., International Covenant on Civil and Political Rights (ICCPR), Article 26 (“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status”); International Covenant on Economic, Social and Cultural Rights, Article 2(2) (“The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”); European Convention of Human Rights, Article 14 (“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”); African Charter on Human and Peoples’ Rights, Chapter 1, Article 2 (“Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status”); American Convention of Human Rights (ACHR), Article 1(1) (“The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition”).

⁷ International Court of Justice, Case Concerning Barcelona Traction, Light and Power Company, 1970 ICJ Reports 33-34.

⁸ ICERD, Art. 1(2).

⁹ ICERD, Art. 1(3).

¹⁰ Committee on the Elimination of Racial Discrimination, General Recommendation XI on Non-citizens (Forty-Second Session, 1993).

¹¹ UN Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, “Prevention of Discrimination: The rights of non-citizens – Final report of the Special Rapporteur, Mr. David Weissbrodt,” May 26, 2003, E/CN.4/Sub.2/2003/23, para. 6.

¹² UN Human Rights Committee, General Comment 15 on the position of aliens under the Covenant, (1986), paras. 1-2.

¹³ See, e.g., ICCPR, Article 12(1) (granting to persons lawfully within the territory of a State the “right of liberty of movement and freedom to choose [one’s] residence”); Art. 12 (4) (stating that non one shall be arbitrarily deprived the right to enter “his own country”); Art. 13 (granting procedural protections in expulsion proceedings only to non-citizens “lawfully within the territory”); Art. 25 (granting to “every citizen “ rights to participate in public affairs, hold office and have access to public service).

In the United States, the Supreme Court has held that “classifications based on alienage, like those based on nationality or race, are inherently suspect,” *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (sustaining constitutional challenge to state statutes disqualifying aliens from certain forms of welfare assistance); *Plyler v. Doe*, 457 U.S. 202 (1982) (invalidating Texas policy of refusing to provide free public education to illegally present alien children). However, the Court has similarly carved out exceptions to this policy—in the areas of immigration and political participation—where non-citizens enjoy less protection. Thus, for example, the Court has upheld state restrictions on the employment of non-citizens on the ground that the positions involve the formulation of public policy and may

therefore be limited to members of the political community. See, e.g., *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (upholding citizenship requirement for probation officers); *Ambach v. Norwick*, 441 U.S. 68 (1979) (upholding citizenship requirement for public school teachers); *Foley v. Connelie*, 435 U.S. 291 (1978) (upholding citizenship requirement for state police officers).

¹⁴ UN Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, "Prevention of Discrimination: The rights of non-citizens – Final report of the Special Rapporteur, Mr. David Weissbrodt," May 26, 2003, E/CN.4/Sub.2/2003/23, para 31.

¹⁵ *Ibid.*

¹⁶ European Council, "Implementing the principle of equal treatment between persons irrespective of racial or ethnic origin," European Council Directive 2000/43/EC of June 29, 2000.

¹⁷ *Ibid.*, Arts 1, 2.

¹⁸ *Ibid.*, Art. 8.

¹⁹ *Ibid.*, Art. 7(1).

²⁰ *Ibid.*, Art. 15.

²¹ *Ibid.*, Art. 3 (2).

²² S. Adejumobi, "Citizenship, Rights and the Problem of Conflicts and Civil Wars in Africa", 23 *Human Rights Quarterly* 148 (2001).

²³ See D. Cole, *Enemy Aliens* (2003).

²⁴ *Tunis and Morocco Nationality Decrees Case*, *P.C.I.J., Series B, no. 4* (1923), at 24.

²⁵ Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion, Inter-American Court of Human Rights, No. OC-4/84, January 29, 1984, reprinted in 5 *Hum. Rts. L. J.* 161, 167, para. 32 (1984).

²⁶ See e.g. ICCPR, Art. 24 (3) ("Every child has a right to acquire a nationality"); International Convention on the Elimination of All Forms of Discrimination against Women, Art. 9 (1) (States Parties undertake to grant women "equal rights with men to acquire, change or retain their nationality") and Art. 9 (2) ("States Parties shall grant women equal rights with men with respect to the nationality of their children"); International Convention on the Rights of the Child, Art. 7 (affirms "the right to acquire a nationality" and enjoins States Parties to ensure the implementation of this and other rights in cases "where the child would otherwise be stateless"); American Convention on Human Rights, Art. 20 (1) (ensures that "every person has the right to a nationality"); European Convention on Nationality, Art. 4 ("everyone has the right to a nationality").

²⁷ The 1961 Convention on the Reduction of Statelessness requires States Parties, under certain circumstances, to grant nationality to persons who would otherwise be stateless.

²⁸ As of July 1, 2003, 55 states had ratified the 1954 Convention relating to the Status of Stateless Persons, and 27 had ratified the 1961 Convention on the Reduction of Statelessness.

²⁹ Indeed, even the Convention Relating to the Status of Stateless Persons does not set forth an absolute obligation to naturalize stateless persons. Rather, Article 32 requires contracting states to "as far as possible facilitate the assimilation and naturalization of stateless persons." See K. Hailbronner, "Nationality," in T. Aleinikoff and V. Chetail, *Migration and International Legal Norms* (2003), p. 76 (noting "largely unanimous state practice" concerning duty to extend birthright citizenship so as to avoid statelessness); p. 77 (noting "almost uniform acceptance" of rules

mandating nationality for foundlings found or children born in the territory who otherwise would be stateless, such that they “may therefore be considered as a codification of customary international law”).

³⁰ UNHCR, “UNHCR’s Activities in the Field of Statelessness: Progress Report” (June 3, 2003), EC/53/SC/CRP.11, para. 7.

³¹ *Ibid.*, para. 14.

³² ICERD, Art. 1(2).

³³ ICERD, Art. 1(3).

³⁴ CERD/C/62/Misc.17/Rev.3, p.2; (Switzerland) A/57/18, paras. 251, 255; para. 100 (Croatia); para. 193 (Qatar); para. 464 (Yemen); UN Doc.A/56/18, para. 334 (Sri Lanka).

³⁵ See Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion, Inter-American Court of Human Rights, No. OC-4/84, January 29, 1984, reprinted in 5 *Hum. Rts. L. J.* 161, 173, para. 60 (1984).

³⁶ ICERD Art. 2(c) requires States parties to “nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination.”

³⁷ See, e.g., ICERD, Arts. 5(e)(i); 5(e)(iv).

³⁸ Historically, some governments were quite open about their racial prejudices in limiting access to citizenship. The example of the United States is illustrative. In a series of naturalization cases in the 19th and early 20th centuries, federal courts in the U.S. explicitly employed racial criteria in determining qualifications for citizenship. In *re Ah Yup* 1 F. Cas. 223 (1878), the petitioner, whom the court referred to as a “native Chinaman of the Mongolian race,” was denied naturalization on the ground that the Naturalization Act permitted whites and blacks to become citizens but not the Chinese. In a 1910 case, the Federal district court in Oregon held that a Syrian could become a naturalized citizen because he was “of Semitic stock, a markedly white type of race.” 179 F. 1002, (C.C.D. Ore. 1910). 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 U.S. 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.” *Takao Ozawa v. United States*, 260 U.S. 178, 198. Indeed, even while protesting the racially discriminatory “separate but equal” rule established in *Plessy v. Ferguson*, 16 S. Ct. 1138 (1896), Justice Harlan said of ethnic Chinese persons (at 561), “There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States.”

³⁹ D. A. Martin, “The Authority and Responsibility of States,” in T. Aleinikoff and V. Chetail, eds., *Migration and International Legal Norms* (2003), pp. 34-35.

⁴⁰ J. Herbst, “The Role of Citizenship Laws in Multiethnic Societies: Evidence from Africa,” in R. Joseph, ed., *State, Conflict and Democracy in Africa* (1999), p. 275.

⁴¹ See generally J. Lobe, “Burmese Rohingya Still Need Protection,” *Asia Times*, May 31, 2000; Human Rights Watch, “Living in Limbo: Burmese Rohingya in Malaysia” (2000); Commission on Human Security and Human Rights Watch, “Being Recognized as Citizens: A Human Security Dilemma in South and Southeast Asia” (2002).

⁴² See Human Rights Watch, “‘Illegal People’: Haitians and Dominico-Haitians in the Dominican Republic” (2002).

⁴³ See Human Rights Watch, “Kuwait: Promises Betrayed: Denial of Rights of Bidun, Women, and Freedom of Expression” (2000); “The Bedoons of Kuwait: Citizens without Citizenship” (1995).

⁴⁴ See generally “Between the Lines: Hill Tribes Villagers Deserve Thai Citizenship,” *The Nation*, July 2, 2003; Macan-Markar, “Thailand: Fear of Expulsion Haunts Hill Tribes,” *Asia Times*, July 30, 2003; Ashoka, “Claiming the Right to Citizenship” (online at: <http://www.changemakers.net/studio/03august/amg5.cfm>); “Petition to the Royal Government of the Kingdom of Thailand,” (online at: <http://www.thai.to/aop/Lettersupport109.htm>).

⁴⁵ See Amnesty International, “‘Dokumenty!’ Discrimination on grounds of race in the Russian Federation”, (2003); Memorial Human Rights Center, “Compliance of the Russian Federation with the Convention on the Elimination of All Forms of Racial Discrimination, NGO Report to the CERD, 62nd Sess.” (March 2003); Forced Migration Project/Open Society Institute, *Meskhetian Turks: Solutions and Human Security* (1998) (online at: <http://www2.soros.org/fmp2/html/meskintro.html>).

⁴⁶ African Society of International and Comparative Law and Minority Rights Group International, “Joint Oral Intervention at UN Commission on Human Rights, 59th Session (2003)”.

⁴⁷ See K. Singo'ei, “Meet the Nubians, Kenya's Fifth-Generation 'Foreigners,’” *East African Magazine*, July 15, 2002.

⁴⁸ “Denationalization became a powerful weapon of totalitarian politics, and the constitutional inability of European nation-states to guarantee human rights to those who had lost nationally guaranteed rights, made it possible for the persecuting governments to impose their standard of values even upon their opponents. Those whom the persecutor had singled out as scum of the earth – Jews, Trotskyites, etc. – actually were received as scum of the earth everywhere; those whom persecution had called undesirable became the *indésirables* of Europe.... The very phrase ‘human rights’ became for all concerned – victims, persecutors, and onlookers alike – the evidence of hopeless idealism or fumbling feeble-minded hypocrisy.” H. Arendt, *The Origins of Totalitarianism* (1951), p. 269.

⁴⁹ See, e.g., Universal Declaration of Human Rights Art. 15 (2) (“no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality”); 1961 Convention on the Reduction of Statelessness, Art. 8 (“A Contracting State shall not deprive a person of his nationality if such deprivation would render him stateless”). See also International Convention on the Elimination of All Forms of Discrimination against Women, Art. 9 (1) (States Parties must ensure that “neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of her husband”); American Convention on Human Rights, Art. 20 (3) (“No one shall be arbitrarily deprived of his nationality or of the right to change it”); European Convention on Nationality, Art. 4 (“statelessness shall be avoided and no one shall be arbitrarily deprived of his or her nationality”); Art. 7 (3) (“A State Party may not provide in its internal law for the loss of its nationality [i]f the person concerned would thereby become stateless”). Arbitrary deprivation of citizenship may also raise concerns under Articles 3 and 8 of the European Convention of Human Rights.

⁵⁰ See J.M.M. Chan, “Nationality as a Human Right”, 12 Human Rights Law Journal 11 (1991); Amnesty International, “Nationality, Expulsion, Statelessness and the Right to Return” (2000).

⁵¹ UN Doc. E/CN.4/Sub.2/1988/35, para.107.

⁵² UN General Assembly Resolution 50/152.

⁵³ 1961 Convention on the Reduction of Statelessness, Art. 9.

⁵⁴ See, e.g., European Convention on Nationality, Art. 5 (1) (“The rules of a State Party on nationality shall not contain distinctions or include any practice which amount to discrimination on the grounds of sex, religion, race colour or national or ethnic origin”). See also ICERD, Art. 1(3) (forbidding discrimination “against any particular nationality” in rules relating to, inter alia, nationality).

⁵⁵ See generally Human Rights Watch, “Nepal: Bhutanese Refugees Rendered Stateless” (2003).

⁵⁶ See Human Rights Watch, *Democratic Republic of the Congo: What Kabila is Hiding—Civilian Killings and Impunity in Congo*, October 1997.

⁵⁷ G. Nzongola, “Conflict in Eastern Zaire,” *Africa Policy E-Journal*, November 19, 1996.

⁵⁸ *Ibid.*

⁵⁹ N. Dixon, “Zaire-Sponsored Ethnic Cleansing Behind Crisis,” *Green Left Weekly* (1996).

⁶⁰ *Ibid.*

⁶¹ Human Rights Watch, *Democratic Republic of the Congo: What Kabila is Hiding—Civilian Killings and Impunity in Congo* (1997).

⁶² *Ibid.*

⁶³ J. Sarkin, “Towards Finding a Solution for the Problems Created by the Politics of Identity in the Democratic Republic of the Congo (DRC): Designing a Constitutional Framework for Peaceful Cooperation,” in *Politics of Identity and Exclusion* Report on the proceedings of a workshop conducted by the Konrad Adenauer Stiftung in conjunction with the Unit of African Studies at the University of Pretoria and the Institute of Foreign and Comparative Law at the University of South Africa, p. 71 (online at:

<http://www.kas.org.za/Publications/SeminarReports/PoliticsofIdentityandExclusion/sarkin.pdf>).

⁶⁴ *Ibid.*, 75.

⁶⁵ M. Majavu, “Congo still a Sensitive Subject,” *Centre for Civil Society* (online at: <http://www.nu.ac.za/ccs/default.asp?2,40,5,263>).

⁶⁶ See generally J. Pejic, “Citizenship and Statelessness in the Former Yugoslavia: the Legal Framework,” 14 *Refugee Survey Quarterly* 1, 2 (1995); Human Rights Watch, “Second Class Citizens: the Serbs of Croatia” (1999).

⁶⁷ The eligibility requirements for obtaining Croatian citizenship through naturalization were extremely stringent. Measures such as familiarity with the Croatian language and Latin alphabet discriminated against ethnic minorities. In addition, the requirement that applicants for citizenship prove through their behavior that they respect the legal order and customs of the republic of Croatia and accept Croatian culture invited arbitrary interpretation. Indeed, naturalization claims by Croatian Serbs have often been rejected on these grounds.

The Open Society Justice Initiative, an operational program of the Open Society Institute, promotes rights-based law reform, builds knowledge and strengthens legal capacity worldwide. Justice Initiative projects seek to shape law reform policy and achieve concrete results through hands-on technical assistance; litigation and legal advice; knowledge dissemination and network building; and counsel to donor institutions. The Justice Initiative works in the following thematic areas: national criminal justice reform; international justice; freedom of information and expression; anticorruption; equality and citizenship. Its offices are in New York, Budapest, and Abuja.

The Justice Initiative is governed by a Board composed of the following members: Aryeh Neier (Chair), Chaloka Beyani, Maja Daruwala, J. 'Kayode Fayemi, Anthony Lester QC, Juan E. Méndez, Diane Orentlicher, Wiktor Osiatyński, András Sajó, Herman Schwartz and Christopher E. Stone.

The staff includes James A. Goldston, executive director; Zaza Namoradze, Budapest office director; Kelly Askin, senior legal officer, international justice; Mariana Berbec, junior legal officer, equality and citizenship, Helen Darbishire, senior program manager, freedom of information and expression; Indira Goris, program coordinator, equality and citizenship, Julia Harrington, senior legal officer, equality and citizenship; Stephen Humphreys, senior officer, publications and communications; Katy Mainelli, administrative manager; Chidi Odinkalu, senior legal officer, Africa; Darian Pavli, legal officer, freedom of information and expression; and Martin Schönteich, senior legal officer, national criminal justice.

New York

400 West 59th Street
New York, NY 10019 USA
Phone: +1 212-548-0157
Fax: +1 212-548-4662

Budapest

Oktober 6. u. 12
H-1051 Budapest, Hungary
Tel: +36 1 327-3100
Fax: +36 1 327-3103

Abuja

Plot 1266/No.11, Amazon Street
Maitama, Abuja, Nigeria
Phone: +234 9 413-3771
Fax: +234 9 413-3772

E-mail: info@justiceinitiative.org

www.justiceinitiative.org