OPEN SOCIETY JUSTICE INITIATIVE

Submission to the Office of the High Commissioner for Human Rights regarding children's and women's right to nationality
December 3, 2012

I. INTRODUCTION

The Open Society Justice Initiative uses law to protect and empower people around the world. One of our key areas of focus is combating statelessness, which currently affects approximately 12 million people around the world. Five million of them are children.

This submission provides a brief overview of the Justice Initiative's work in the Dominican Republic, Mauritania and Kenya and offers a number of recommendations for continued attention by the Human Rights Council and the UN system to statelessness with a view to ensuring that all people can enjoy their right to nationality and the full panoply of rights to which they are entitled.

Being stateless can have devastating consequences, as it effectively blocks off access to a host of other rights, including the right to education, to access health care and social services, to work, to own property, and to freedom of movement.

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, the International Covenant on Civil and Political Rights, as well as the 1961 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, many states have not actively embraced their legal obligations, nor signed up to the key treaties designed to reduce 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 implementable. 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 (one has 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. In order to provide necessary protections against statelessness Article 7 of the CRC must be understood to oblige states parties to grant nationality to children born on their territories who would otherwise be stateless – this is indeed also the 1961 Convention standard, and can be found in regional treaties as well.

II. 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 populated 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 eight 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.

A recent and tragic example of the impact of this defiance of the Inter-American Court's decision on real people emerged a year 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 because her parents were unable to 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. As a result, their child was ineligible for citizenship and hence, a Dominican birth certificate--all 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.

III. MAURITANIA

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 expelled most of them into neighboring Senegal and Mali.

Many of those expelled were black civil servants, merchants, and peasant farmers, and the government of the time distributed vacant jobs and unprotected assets as a means of building its political support. With a subsequent softening of state policy, by 1997, about half of the exiles had been allowed to return; however, many subsequently left again voluntarily because they could not regain recognition of their nationality and get their lands back.

From 1991, several claims were filed with the African Commission on Human and Peoples' Rights, claiming, among other things, that Black Mauritanians had been evicted from their homes and deprived of their citizenship in violation of Article 12(1) of the African Charter on Human and Peoples' Rights. In May 2000, the African Commission held that Mauritania had violated the African Charter. Among the 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 the UN High Commissioner for Refugees (UNHCR), and the governments of Senegal and Mauritania signed a tripartite agreement to facilitate the returns of Mauritanians who were stranded in Senegal. This constituted recognition by the government that the expulsions had been discriminatory acts against citizenship. The process of repatriation began in January 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 many still have not been able to firmly re-establish their Mauritanian nationality. In 2010, the government began an exercise of 'civil registration' in which all Mauritanians must participate in order to obtain national identity cards. This process is wrongly being applied to returning expellees, who were accepted as citizens as a matter of principle by the Mauritanian authorities prior to their return. Without national identity cards, thousands of people are literally stuck in overcrowded camp-sites in the south of the country. Furthermore, the returnees have mostly not been able to reclaim their former lands.

Some returnees told the Justice Initiative in 2010 that without an identity document, they cannot go to the nearest town to buy food since they are unable to 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 to returnees – 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, an unknown number of expellees are still stranded in Mali.

IV. KENYA

The Justice Initiative has advocated on behalf of Nubian children in Kenya for many years. 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. Most Kenyan children have a legitimate expectation that their Kenyan citizenship will be recognized when they become adults, simply because their parents come from one of the main Kenyan ethnic groups. 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—in many cases ID cards are handed out at school. However, Nubian children are forced to go through a long and complex vetting procedure with an uncertain result, simply because they belong to an ethnic minority group. Many get national identity cards after a long delay, which restricts their opportunities to pursue higher education, get a job, or marry. Some Nubians never receive ID cards. This situation has been described by the Kenyan National Commission on Human Rights as "institutionalized discrimination."

The historic failure to recognize Nubians' nationality has led to the government not recognizing their property rights and frequently treating 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 half of Kenya's Nubians live. 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, making three key arguments: First, 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. This violates their rights of equal access to services such as education and healthcare.

In March 2011, the Committee of Experts found against the Kenyan government, accepting all the plaintiffs arguments and finding that the government of Kenya has failed to promote, protect, respect and fulfill the best interests of the children of Nubians in Kenya.

V. RECOMMENDATIONS

The Justice Initiative believes that this first report by OHCHR to the Human Rights Council is an important step. We recommend that in the future:

- The Council should continue efforts to analyze the problem of statelessness as it leads to severe violations of human rights and to suggest ways in which it can be addressed, such as legislative reform and civil registration campaigns.
- During the Universal Periodic Review process, members of the Council should review state records on statelessness and raise issues of compliance with regional and international human rights bodies' decisions as they relate to statelessness.
- The Council should welcome and encourage the efforts of relevant special procedures and treaty bodies to follow up the Council's request in resolution 20/4 to report on statelessness affecting women and children.
- Statelessness should be mainstreamed across all relevant UN agencies and a system should be put in place to ensure that UN agencies can effectively collaborate in combatting it, in compliance with the UN Secretary General's June 2011 guidance note on statelessness.