Written Comments in the case of *Kurić and Others v. Slovenia*

May 2011

OPEN SOCIETY
JUSTICE INITIATIVE

IN THE GRAND CHAMBER OF
THE EUROPEAN COURT OF HUMAN RIGHTS

Application no. 26828/06
Kurić and Others v. Slovenia

WRITTEN COMMENTS BY
THE OPEN SOCIETY JUSTICE INITIATIVE

INTRODUCTION

1. Pursuant to leave granted on 21 April 2011 by the President of the Grand Chamber, and in accordance with Article 36(2) of the European Convention on Human Rights and Rule 44(3)(a) and 71 of the Rules of the Court, the Open Society Justice Initiative respectfully submits updated written comments in this case.

2. By way of background, these written comments address the legal situation that applied to those citizens of the former Socialist Federal Republic of Yugoslavia (SFRY) resident in Slovenia in 1992 who were erased from the Slovenian registry of permanent residents on 26 February 1992 pursuant to Slovenia's transitional Citizenship Act of 1991, and who were not citizens of any other SFRY republics under the operation of applicable law, or who could not meet voluntary requirements for gaining citizenship due to practical impediments, referred to as the "erased" in the Chamber judgment.[1] In both cases, many of the individuals concerned became stateless as a result of the lack of regularized legal status and consequent denial of a realistic pathway to citizenship.

3. In its judgment of 13 July 2010, the Court recognized the intricate relationship between private and family life as concepts protected under Article 8 of the Convention and the effects of their erasure from the registry of permanent residents. In finding Slovenia's actions violated Article 8, the Chamber also rightly underscored the discriminatory nature of the erasure, which improperly left former SFRY citizens who had made their lives on Slovenia's territory in a less favorable legal position than aliens seeking temporary stays in Slovenia.[2]

4. These written comments will address two issues:

   - *A. Article 8: Arbitrary Denial of Citizenship Leading to Statelessness.* A process by which individuals are left at risk of being arbitrarily denied citizenship and of becoming stateless has such a profound impact upon the victims as to interfere with Article 8, and violates numerous international norms, making it

[1] The deletion *ex lege* of citizens of the former SFRY who had not obtained Slovenian citizenship under Slovenia's transitional Citizenship Act of 1991 will be referred to throughout these comments as the "erasure" and those affected as the "erased." *See* Chamber judgment, at paras. 43, 351-376. Four of the original 11 applicants remained stateless at the time of the Chamber judgment. *See* Chamber judgment at paras 1, 43, 65, 89, 91-103, 120-121, 171.
[2] At paras. 356-357, 368. The Chamber also found a violation of Art.13, in relation to Art.8 (paras. 383-386.)

disproportionate. A failure to regularize their legal status and to provide them with an effective pathway to citizenship further compounds the impact on their lives.

- *B. Article 14: Discrimination.* In much of Europe and beyond, statelessness and discrimination are intimately linked. Statelessness does not occur randomly. Those at risk of statelessness are often selected or neglected for discriminatory reasons. There is thus a strong public interest in the Grand Chamber making a separate finding on the applicability of Article 14.

A. ARTICLE 8: ARBITRARY DENIAL OF CITIZENSHIP LEADING TO STATELESSNESS

5. Individuals who are arbitrarily removed from a national register are left in an acutely vulnerable situation where they are at risk of being arbitrarily denied citizenship and, in some cases, of becoming stateless, despite longtime habitual residence or other genuine and effective links with the relevant territory. Such a situation has such a profound impact upon the lives of those affected as to interfere with Article 8, and is contrary to international standards and disproportionate to any legitimate purpose.

Interference with Article 8

6. The Court has long recognized the possibility that an arbitrary denial of citizenship might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such a denial on the private life of the individual. The Chamber made such a finding in this case.[3] There is also a positive obligation to ameliorate the condition of those who are left stateless, especially in cases of State succession.[4]

7. Individuals who are denied citizenship will be marginalized and particularly vulnerable, as such a status undermines their ability to establish and maintain relationships with other human beings, even where they have a genuine and effective link to their former country of citizenship. In this case the Court recognized that the insecurity experienced by the erased as a result of Slovenia's failure to regularize their legal status engaged Article 8, even for those who were not deported, separated from their families or rendered stateless.[5]

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[3] See Chamber judgment at para. 353. See also: *Milan Makuc and others v Slovenia*, ECtHR admissibility decision of 4 July 2006, at para. 106 (same); *Savoia and Bounegru v Italy*, ECtHR Decision of 11 June 2006, at para. 2 (same); *Slivenko v Latvia*, ECtHR Judgment of 9 October 2003, at para. 94-95, 114, 122-129; *Karassev v Finland*, ECommHR, Decision of 25 September 1998, at p. 9 (concluding that the denial of citizenship was not sufficiently arbitrary to raise an issue under Article 8 of the Convention); *Kafkasli v Turkey*, ECommHR, Report of 1 July 1997, at para. 33-34 (finding that a requirement to report to the police every three months to renew stateless residence card could give rise to an interference with private life, but determining that the justification for the interference was in accordance with domestic law, necessary and proportionate, and fell within the margin of appreciation left to the states); *East African Asians v the United Kingdom*, ECommHR, Decision of 14 December 1973, at para. 229-232.

[4] Chamber Judgment at para. 354 (recognizing that "there may be positive obligations inherent in effective respect for private or family life") (citing authorities). See also: *Sisojeva and Others v Latvia*, [GC] Judgment of 16 June 2005, at para. 104 ("[I]t is not enough for the host State to refrain from deporting the person concerned; it must also, by means of positive measures if necessary, afford him or her the opportunity to exercise the rights in question without interference.").

[5] Chamber Judgment, at para. 361.

8. The Court recognizes the importance of the relationship between the individual and the state as an element of this network of connections, which is compromised by the denial of citizenship and exposure to statelessness, violating an individual's personal development, social and legal identity, juridical personality and dignity,[6] and that a commitment to protecting human dignity comprises the "very essence of the Convention."[7] Other international instruments and judicial decisions confirm this commitment. To date the Inter-American Court's *Yean and Bosico v Dominican Republic* decision remains the most comprehensive consideration of the human rights implications of statelessness for an individual, using human dignity as a touchstone:

> "A stateless person, *ex definitione,* does not have recognized juridical personality, because he has not established a juridical and political connection with any State.…[T]he failure to recognize juridical personality harms human dignity, because it denies absolutely an individual's condition of being a subject of rights and renders him vulnerable to non-observance of his rights by the State or other individuals."[8]

International Standards: The Duty to Avoid Statelessness

9. An interference with Article 8 will be disproportionate where it violates international standards. The Council of Europe recognizes the obligation to avoid statelessness as a part of customary international law, binding on all states and requiring additional protections in the context of state succession.[9]

10. The Court has repeatedly recognized that the Convention, as a living instrument, "must be interpreted in light of present-day conditions," taking into account "evolving norms of national and international law…."[10] "[T]he Court has never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein. On the contrary, it must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties."[11] The Court has not traditionally drawn hard distinctions between sources of law according to whether the respondent State has signed or ratified the relevant instruments to the extent that common ground among member states manifests around the norms at issue.[12]

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[6] *Pretty v United Kingdom*, ECtHR Judgment of 29 July 2002, at para. 61 ("Article 8 protects a right to personal development, and the right to establish and develop relationship with other human beings and the outside world."); *Goodwin v United Kingdom*, ECtHR Judgment of 11 July 2002, at para. 90 (obtaining legal recognition of gender reassignment necessary to correct the "unsatisfactory situation" of legal limbo in which applicant found herself, forcing her to "live in an intermediate zone").

[7] *I v United Kingdom*, ECtHR (GC), Judgment of 11 July 2002, at para. 70.

[8] *Yean and Bosico v the Dominican Republic*, Inter-Am. Ct. H.R. Judgment of 8 September 2005, at para. 142.

[9] Council of Europe, Explanatory Report to the Council of Europe Convention on the avoidance of statelessness in relations to State succession, at para.1 ("In accordance with customary international law States have an obligation, when determining who are their nationals, to avoid cases of statelessness . . . The avoidance of statelessness is closely linked to the right of the individual to a nationality, since the non-fulfilment of this right leads to statelessness."). *See also* Council of Europe, Explanatory Report to the European Convention on Nationality, at para. 33 (same).

[10] *Soering v the United Kingdom*, ECtHR Judgment of 7 July 1989, at para. 102.

[11] *Demir and Baykara v Turkey*, ECtHR (GC), Judgment of 12 November 2008, at para. 67 (applying Council of Europe standards to interpret the Convention)

[12] *Ibid.* at para 74-75. *See also, e.g.*, *Muller et al v Switzerland*, ECtHR Judgment of 24 May 1988, at para. 27 (applying provisions of the ICCPR even though Switzerland had not signed it).

Definition of a Stateless Person

11. Under the internationally recognized definition, a *de jure* stateless person is "a person who is not considered a national by any State under the operation of law."[13] Theoretical nationality available in another state cannot translate into a finding of citizenship there for the purposes of determining an individual's status under international law. Rather, the individual or individuals concerned will be defined as *de jure* stateless, unless and until another nationality is acquired. According to this definition, the stateless persons among the erased are accordingly *de jure* stateless.

12. The UNHCR has recently issued authoritative comments on the concept of statelessness, based on extensive consultations with legal experts. The "Prato Conclusions" of May 2010 state:

> "The Article 1(1) definition [of the 1954 Convention relating to the Status of Stateless Persons] employs the *present tense* ('who is…') and so the test is whether a person is considered as a national at the time the case is examined and not whether he or she might be able to acquire the nationality in the future."[14]

13. *De jure* stateless persons are entitled to protection under international law and fall under the protective mandate of the UNHCR.[15] Within the Council of Europe, states are furthermore encouraged to accord special protections such as guaranteeing citizenship to those born stateless on their territories and facilitating access to citizenship with appropriate expediency.[16]

14. According to the United Nations Refugee agency (UNHCR), 4,090 stateless persons were living in Slovenia at the end of 2009. All 4,090 were former SFRY citizens, residing on Slovenian territory at the time of independence, whose permanent resident status in Slovenia was erased in 1992.[17]

The Right to Nationality and the Obligation to Avoid Statelessness

15. In response to regional political developments in the 1990s, the Council of Europe developed a comprehensive normative framework governing nationality, particularly in the context of avoiding statelessness in cases of State succession. Article 4 of the European Convention on Nationality (ECN), adopted in 1997, requires that the rules on nationality of each State Party shall be based on the principles that "everyone has the right to a nationality" and that "statelessness shall

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[13] Article 1(1) UN Convention relating to the Status of Stateless Persons 1960.

[14] *See* UNHCR, *Expert Meeting: The Concept of Statelessness under International Law, Summary Conclusions*, Prato, Italy, May 27-28, 2010, at 3, para. 16. *See also*, Justice Initiative, De Jure *Statelessness in the Real World: Applying the Prato Summary Conclusions* (2011), available at http://www.soros.org/initiatives/justice/focus/equality_citizenship/articles_publications/publications/prato-20110302.

[15] *See* UNHCR, Executive Committee, Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons, No. 106(LVII) (2006).

[16] *See, e.g.*, Art.6 ECN; Principle I.2 and I.5 of Committee of Ministers Recommendation CM/Rec (09)13 (2009).

[17] *See* U.S. Department of State, Bureau of Democracy, Human Rights and Labor, 2010 Country Report: Slovenia, April 2011, at 9 (citing UNHCR statistics). According to the report, "[t]he government determined that 'erased' persons who had left the country or were expelled while their status was undecided had forfeited their ability to prove continued ties to Slovenia and thus their ability to establish residency under the law. The law does not address the citizenship status of the 'erased.'"

be avoided."[18] This European standard is reflected globally and regionally, and has achieved the status of customary international law.[19] Protecting the right to nationality and avoiding the creation of statelessness in the context of state succession comprise the central preoccupations of a growing body of international law and European law in particular.[20]

16. The ECN places a distinct emphasis on the importance of habitual residence in nationality rules, by recognizing habitual residence as a basis for the grant of nationality in Article 6(3).[21] Under Article 6(4)(g) States are required to facilitate the acquisition of nationality for stateless persons habitually resident on their territory.[22]

17. Article 18(2)(a) of the ECN imports the notion that a "genuine and effective link" to the State in question should be taken into account in granting or maintaining nationality in situations of state succession, referring specifically to habitual residence, the will of the individual and the individual's territorial origin as elements of a meaningful link with the country.[23] The Committee of Ministers of the Council of Europe has extended the concept beyond instances of state succession, affirming the principle that "access to the nationality of a State should be possible whenever a person has a genuine and effective link with that State, in particular through birth, descent or residence."[24] It bears recalling that Slovenia had no historical heritage of independent statehood prior 1991.[25] In the case of the erased, their legal residence in Slovenia prior to the breakup of the SFRY entitled

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[18] *See* Article 4 European Convention on Nationality (1997). Slovenia has not signed the Convention.

[19] See note 9 above. Relevant standards include Article 15 of the Universal Declaration of Human Rights, which affirms that "everyone has the right to a nationality" and that "[n]o one shall be arbitrarily deprived of his nationality." Article 20(1) of the American Convention on Human Rights guarantees the right to nationality, while the ICCPR and the UN Convention on the Rights of the Child affirm the right of children to acquire a nationality at birth. Article 5(d)(iii) of the International Convention on the Elimination of All Forms of Racial Discrimination prohibits racial discrimination with respect to "[t]he right to nationality."

[20] *See especially* UN General Assembly, Resolution on nationality of natural persons in relation to the succession of States, UN Doc. A/Res/63/118, 15 January 2009; International Law Commission, Draft Articles on Nationality of Natural Persons in relation to the Succession of States, with commentaries (Annex to the UN General Assembly Resolution 55/153 of 2000) ["Draft Articles"] (providing that States must take "all appropriate measures" to prevent statelessness arising from State succession, "giv[ing] consideration to the *will of persons concerned* whenever those persons are qualified to acquire the nationality of two or more States concerned"); Council of Europe, Recommendation No. R (99)18 of the Committee of Ministers to member States on the avoidance and reduction of statelessness, 15 September 1999; Council of Europe, Recommendation CM/Rec. (09)13 of the Committee of Ministers to member States on the nationality of children, 9 December 2009.

[21] *See* European Union Democracy Observatory (EUDO) Citizenship Observatory, International Law and European Nationality Laws, March 2011, at 7.

[22] Facilitating mechanisms proposed in the accompanying Explanatory Report include reducing the length of required residence as a precursor to naturalization, relaxing language requirements and easier procedures with lower fees. *See* Council of Europe, Explanatory Report to the European Convention on Nationality, at para. 52. Similar examples can be found in Council of Europe, Recommendation No. R (99)18 of the Committee of Ministers to member States on the avoidance and reduction of statelessness, 15 September 1999.

[23] The "genuine and effective link" test was first articulated in the case of *Nottebohm (Liechtenstein v Guatemala)*, second phase, Judgment of 6 April 1995, ICJ Reports 1955, p. 13-14. It focuses on factual ties as the basis for nationality rights, determined by "the habitual residence of the individual concerned […] the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated into his children, etc…."

[24] Recommendation R (99)18 of the Committee of Ministers, at Principle I(b).

[25] EUDO Citizenship Observatory, Country Report: Slovenia, December 2009 (revised May 2010), at 5.

them to a wide array of rights, with few rights reserved exclusively for Slovenian citizens.[26] Under the circumstances, habitual residence constituted one of the strongest possible links to the territory.

18. The Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession entered into force on 1 August 2010. The accompanying Explanatory Report states that "[t]he avoidance of statelessness is one of the major preoccupations of the international community" and forms a part of customary international law, binding even on states, like Slovenia, which have not ratified the Convention itself.[27] Most relevant here, Article 5, echoing Article 18(2) ECN and the notion of "genuine and effective link" as a basis for acquiring nationality, requires a successor State to grant its citizenship to those who had the nationality of the predecessor State who would become stateless through State succession, provided those persons were "habitually resident" in or had another "appropriate connection" with the successor state.

19. The International Law Commission's Draft Articles and commentary supply the authoritative guidance on international law in cases of state succession. Like the ECN, they suggest that the chief mechanism for preserving the right to nationality is the basic assumption that the nationality of a successor state will be attributed on the basis of habitual residence in the relevant territory.[28]

The Child's Right to Nationality

20. International law and European standards place special emphasis on the right to nationality enjoyed by children.[29] Article 7(2) of the UN Convention on the Rights of the Child obliges states to grant citizenship to children born within their territory where such children would otherwise be stateless.[30] The UN Human Rights Council has recognized "the special needs of children for protection against arbitrary deprivation of nationality."[31] In 2009, the Committee of Ministers of the Council of Europe adopted Recommendation CM/Rec (09)13 on the nationality of children, which seeks comprehensively to protect children from arbitrary deprivation of nationality and statelessness, including through many of the mechanisms discussed here. Principle I.2, for example, contains the bedrock norm that member states should "provide that children born on their territory who otherwise would be

[26] *Ibid. See also Kurić and Others v Slovenia*, Judgment of 13 July 2010, at para. 25.
[27] Council of Europe, Explanatory Report to the Council of Europe Convention on the avoidance of statelessness in relation to State succession, at para. 1.
[28] *See, e.g.*, Draft Articles, Article 5, establishing a presumption of nationality under circumstances directly relevant to the case of the erased: "[P]ersons concerned having their habitual residence in the territory affected by the succession of States are presumed to acquire the nationality of the successor State on the date of such succession." *See also* Bronwen Manby, International Law and the Right to Nationality in Sudan 9 (2011) (stressing that habitual residence forms one of several forms of "appropriate connection" to a successor State within the meaning of the Draft Articles, and "a right to opt" for nationality where such a connection exists, "has been common practice in many cases of state succession").
[29] *See, e.g.*, Article 24 ICCPR; UN Human Rights Committee, General Comment 17 on the rights of the child; 1961 United Nations Convention on the Reduction of Statelessness, European Convention on Nationality; Council of Europe Convention on the avoidance of statelessness in relation to State Succession.
[30] Art. 7(2) CRC: "States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless".
[31] UN Human Rights Council Res. 10/13, 26 March 2009 (Tenth Session), at para. 8.

stateless acquire their nationality subject to no other condition than the lawful and habitual residence of a parent."[32]

21. In the watershed *Yean & Bosico v Dominican Republic* decision, the Inter-American Court affirmed the close connections between statelessness, the child's right to nationality, and discrimination.[33] The case concerned the Dominican Republic's refusal to issue birth certificates to two girls of ethnic Haitian origin born in the Dominican Republic, despite their entitlement to automatic citizenship under the country's *jus soli* regime. The Inter-American Court found "that for discriminatory reasons, […] the state failed to grant nationality to the children, which constituted arbitrary deprivation of their nationality, and left them stateless," in breach of the American Convention.[34] In finding a breach, the Court described the right of children to a nationality in terms that accord with the right to private life in Article 8:

> "The importance of nationality is that, as the political and legal bond that connects a person to a specific State, it allows the individual to acquire and exercise rights and obligations inherent in membership in a political community."[35]

22. In its 2010 informational report on the status of the erased, the Slovenian Ministry of the Interior acknowledged that the children of the erased – including those born stateless on the territory – had no regulated status under Slovenian law, which "was a violation of the [UN] Convention on the Rights of the Child."[36] The same document states that a total of 5,360 children were originally erased in February 1992.

Conclusion

23. The Chamber stopped short of sustained engagement with the Article 8 implications of denial of access to nationality and creation of statelessness, particularly in the context of State succession.[37] Under other Council of Europe instruments and international customary norms, long-time residents of a country should be able to acquire citizenship automatically upon the dissolution of the former state. According to one European Union study, only five stateless persons naturalized in Slovenia after 2002.[38]

24. Given the prominent role the Council of Europe has undertaken in developing a body of law to safeguard rights to nationality, the Grand Chamber should consider the extent of the impact of the erasure on the lives of those affected, including the applicants, as it reviews the scope of protection afforded for the violations of Article 8 under consideration in this case.

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[32] Council of Europe, Committee of Ministers, Recommendation CM/Rec (09)/13, Principle I.2.
[33] *Dilicia Yean and Violeta Bosico v Dominican Republic*, IACtHR, Judgment of 7 October 2005, at para. 174.
[34] *Ibid.*
[35] *Ibid.* at paras. 136-137 (internal citations omitted).
[36] Slovenian Ministry of the Interior, *Q&A Concerning the Erased*, undated English version (Slovenian version dated July 2010), at 9, available at http://www.mnz.gov.si/en/splosno/vstopna_stran/topics/#c17705
[37] The Chamber did acknowledge, without more, that the interference with Article 8 rights occurred "especially in cases of statelessness." *See* Chamber judgment at para. 361.
[38] EUDO Citizenship Observatory, Country Report: Slovenia, December 2009 (revised May 2010), at 15. Available at http://eudo-citizenship.eu/country-profiles/?country=Slovenia

ARTICLE 14: DISCRIMINATION AS A KEY CAUSE OF STATELESSNESS

25. The principle of nondiscrimination embodied in Article 14 of the Convention plays a fundamental role in cases involving arbitrary denial of citizenship.[39] Discrimination is a key cause of statelessness and routinely leads to the arbitrary denial of access to and full enjoyment of nationality, and the substantive rights that go with it, throughout Europe and the world. Indeed, the obligation to ensure "the equal and effective protection of the law" – non-discrimination – is, together with the prohibition against statelessness, one of the two core principles of international law which limits states' discretion to grant or deny nationality.[40] The link between discrimination and the institutionalized vulnerability of stateless persons threatens the principles of democracy and rule of law that underpin the European system of human rights protection, and would benefit from consideration by the Court.

Discrimination on Grounds of National and Ethnic Origin Leading to Statelessness

26. Arbitrary denial of the right to nationality and the existence of statelessness are often bi-products of discrimination.[41] The relationship is particularly crushing in such cases because the individuals affected are, by definition, deprived of the essential means of improving their situation in a democratic society – they cannot vote, work, educate themselves or remain freely in the territory. Each of the international and regional instruments discussed above stresses the central importance of nondiscrimination in ensuring access to and enjoyment of the right to nationality, including with respect to the naturalization process in cases of noncitizens and stateless persons. Given that the relationship between discrimination and denial of citizenship leading to statelessness is so fundamental, such situations should be examined under Article 14 taken in conjunction with Article 8.[42]

27. The Justice Initiative and other groups have documented numerous cases of discrimination in access to nationality and statelessness in many contexts, often

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[39] *See, e.g.*, Human Rights Council, Report of the Secretary-General on Human Rights and Arbitrary Deprivation of Nationality, A/HRC/13/34, 9 December 2009, at para. 26, available at http://www.unhcr.org/refworld/pdfid/4b83a9cb2.pdf ("The prohibition of arbitrary deprivation of nationality, which aims at protecting the right to retain a nationality, is implicit in provisions of human rights treaties that proscribe specific forms of discrimination.").

[40] Inter-American Court of Human Rights, *Case of Yean and Bosico children v Dominican Republic*, Series C, Case 130, 8 September 2005, para. 140.

[41] *See, e.g.*, G. McDougall, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development – Report of the Independent Expert on Minority Issues*, A/HRC/7/23, 28 February 2008, available at http://www.unhcr.org/refworld/docid/47d685ea2.htm

[42] "Discrimination on the basis of race or ethnicity is one of the most serious harms against which the Convention was designed to protect." *East African Asians v. U.K.*, ECommHR, Decision of 14 December 1973, para. 207; *Cyprus v. Turkey*, Judgment of 10 May 2001, paras. 308-10. See also Inter-American Court of Human Rights, *Case of Yean and Bosico children v Dominican Republic*, Series C, Case 130, 8 September 2005; African Commission on Human and Peoples Rights, Malawi African Association and Others v Mauritania, AHRLR 149 (ACHPR 2000), 2000.

[42] *See* Chamber Judgment at para. 368.

with the same unfortunate outcomes: lives on hold, families separated and scarce assistance from the only State that victims have ever called home. [43]

28. In this case, the Chamber considered the difference in treatment that arises where there is a denial of citizenship, and the lack of justification for such an interference:

> "[C]itizens of the former SFRY with permanent residence status in Slovenia were in a less favourable legal position than 'real' aliens who had lived in Slovenia since before independence and whose permanent residence permits remained valid under section 82 of the Aliens Act. There were no objective reasons for such differential treatment."[44]

29. Because the Slovenian population was ethnically homogenous as compared to other former SFRY republics, the victims of the erasure were exclusively non-ethnic Slovenian, ex-SFRY minorities and Roma.[45] Erasure of "foreign" SFRY permanent residents thus served as a proxy for excluding non-ethnic Slovenes resident on the territory from citizenship in the newly created State. Under the Court's case-law, distinctions based exclusively on ethnic origin have no objective justification.[46]

30. Discrimination may also be measured by looking at the negative effects – including statelessness and decades of legal limbo – experienced by the protected group.[47] Thus, even if the erasure is viewed as a neutral measure, such measures would fall within the Court's definition of indirect discrimination.

Failure to Treat Differently Those at Risk of Statelessness

31. The Convention requires the state to take positive measures to ameliorate the condition of those left at risk of becoming stateless,[48] particularly if they are

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[43] *See, e.g.*, Bronwen Manby, *Struggles for Citizenship in Africa* (2009) (describing many of the most egregious cases of citizenship discrimination in Africa); Justice Initiative, *De Jure Statelessness in the Real World: Applying the Prato Summary Conclusions* (2011), available at http://www.soros.org/initiatives/justice/focus/equality_citizenship/articles_publications/publications/prato-20110302; J. Goldston, "Holes in the rights framework: Racial discrimination, citizenship and the rights of non-citizens," in *Ethics and International Affairs*, Vol. 20, No. 3, 2006, available at http://www.soros.org/initiatives/justice/focus/equality_citizenship/articles_publications/articles/noncitizens_20061030; G. McDougall, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development – Report of the Independent Expert on Minority Issues*, A/HRC/7/23, 28 February 2008, available at http://www.unhcr.org/refworld/docid/47d685ea2.htm; B. Wooding, "Contesting discrimination and statelessness in the Dominican Republic" in *Forced Migration Review*, Issue 32, April 2009, available at http://www.fmreview.org/FMRpdfs/FMR32/23-25.pdf.

[44] *See* Chamber Judgment at para. 368.

[45] *See ibid.* at para. 33. *See also D.H. and Others v Czech Republic*, [GC] Judgment of 13 November 2007, at paras. 13, 181, 203 (recognizing in Roma communities with a particularized need for special protection).

[46] *See Sejdić and Finci v Bosnia and Herzegovina*, [GC] Judgment of 22 December 2009, at para. 44; *Timishev v Russia*, Judgment of 13 December 2005, at para. 58.
See also UNHCR, The State of the World's Refugees: A Humanitarian Agenda, ch. 6, p. 20, available at, http://www.unhcr.org/4a4c72719.html. (citing J. Pejic, "Citizenship and statelessness in the former Yugoslavia: the legal framework," *Refugee Survey Quarterly*, vol. 14, no. 3, 1995, p. 8 ("The main problem is that some of the newly established states have, by means of various legal devices, attempted to exclude from their nationality or at least delay the acquisition of their nationality by persons who have been residing in their territory for considerable lengths of time. Such cases have invariably involved persons belonging to an ethnic minority which is perceived as 'undesirable' from the point of view of the majority's nationalist faction." (internal quotation omitted)).

[47] *See, e.g., D.H. and Others v Czech Republic*, [GC] Judgment of 13 November 2007, at paras. 182-184; *Slawomir Musial v Poland*, Judgment of 20 January 2009 (finding lack of access to healthcare resulting from discrimination); *Zarb Adami v Malta*, Judgment of 20 June 2006, at para. 80.

[48] See note 4, above.

children, and Article 14 requires the State to treat them differently on account of their status. [49]

32. Given the elaborate international and regional guidance on appropriate measures for protecting the right to nationality in relation to State succession that has emerged in recent years, there is a clear duty to extend effective protection to those left at risk of statelessness, by treating them differently. The *Explanatory Report on the Avoidance of Statelessness in Cases of State Succession* suggests that for those who "fail to fulfill the conditions for the acquisition of nationality in a successor State" who may remain stateless, "it is important that the successor State provide more favorable conditions for the acquisition of its nationality for stateless persons lawfully and habitually resident on its territory" (at para.38).

33. Instead of assisting those who are statelessness or at risk of becoming so, states often leave them to navigate the complex labyrinth of permanent residency and naturalization laws. At the time of the erasure, the Slovenian Alien Act contained no special provisions for longtime habitual residents who did not have registered permanent residence at the time of succession or did have registered permanent residence but did not apply for or acquire Slovenian citizenship within the original six-month deadline. These individuals became illegal aliens; many of them became *de jure* stateless. Basic procedural protections like adequate notice were not observed, interfering with the private and family lives of the erased, as the Chamber recognized.

34. Throughout the history of Slovenia's treatment of the erased, the burden has consistently fallen on applicants for citizenship or permanent residency to show proof of residence, where in reality such hurdles often prove insurmountable.[50] Living in Slovenia remains a precondition even for restoration of residency status in the country, even though many of the erased were forcibly expelled from Slovenia.[51] As Amnesty International recently cautioned: "In this way this particular group could be considered victims of multiple discrimination; first of all as victims of the 'erasure' and secondly as excluded in a discriminatory way from claiming restitution of rights."[52]

Conclusion

35. This case presents an important opportunity for the Court to clarify Convention obligations on the part of member states, in particular in the context of state succession, where discriminatory rules have effectively prevented a specific ethnic group from having access to citizenship for nearly twenty years.

[49] "The Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different." *Thlimmenos v Greece*, [GC] Judgment of 6 April 2000, at para. 44.
[50] *See* Amnesty International, Submission to the UN Universal Periodic Review: Slovenia, 8 September 2009, at 5.
[51] *Ibid*.
[52] *Ibid. See also* Council of Europe, Explanatory Report on avoidance of statelessness in relation to State succession, at para. 33 (In certain situations arising in connection with State succession, "it is impossible or very difficult for a person to fulfill the standard requirements of proof to meet the conditions for the acquisition of nationality.").