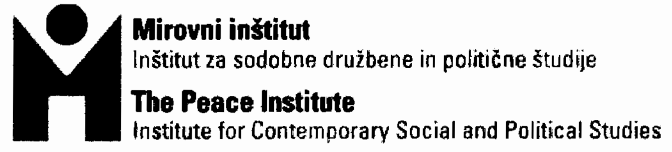

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Legal Information Centre for NGOs – PIC

EUROPEAN COURT OF HUMAN RIGHTS

Council of Europe
Strasbourg, France

THIRD PARTY INTERVENTION

in the case *Makuc and Others v. Slovenia*
Application No. 26828/06

in accordance with Article 36 § 2 of the ECHR

15 October 2007

submitted by

Peace Institute – Institute for Contemporary Social and Political Studies, Metelkova 6, 1000 Ljubljana, Slovenia
and
Legal Information centre for Non-Governmental Organizations – PIC, Povšetova 37, 1000 Ljubljana, Slovenia

I. Introduction

1. On the 4 July 2006 the application of Mr. Milan Makuc and others against Slovenia No. 26828/06 was lodged to the European Court of Human Rights (hereinafter: application). On 6 September 2007 the third parties were, under the Rule 44 (2) of the Rules of Court, granted leave to make joint written submissions to the Court. With this intervention the third parties wish to submit additional information concerning the lack of effective remedy guaranteed by Article 13 of the Convention, connected to the prohibition of discrimination in accordance with Article 14 of the Convention.

II. The Lack of Effective Remedy Connected to the Prohibition of Discrimination

1. 2003 Constitutional Court Decision

2. In Slovenia, the erased people in general exhausted all remedies that were available to them, including the complaint to the Constitutional Court. Pursuant this complaint, the Constitutional Court of the Republic of Slovenia issued a decision No. U-I-246/02 of April 3, 2003 (hereinafter: 2003 Constitutional Court Decision). However, due to the failure of the state to adopt a law that would be in accordance with the 2003 Constitutional Court decision, the right to effective remedy of the applicants has been violated.

3. In this decision the Constitutional Court annulled parts of the *1999 Act Regulating the Legal Status of Citizens of Former Yugoslavia Living in the Republic of Slovenia* (published in Official Journal RS No. 61/1999 on 30 July 1999, hereinafter: ZUSDDD) and found that this act is unconstitutional because it does not regulate certain issues concerning the erased (legal void). ZUSDDD is the only law according to which the erased people can today apply for the permanent residence to be returned to them.[1] If the 2003 Constitutional Court decision was implemented, the protection of the erased people in general would be extended and some of the applicants would be able to obtain permanent residence.

4. The main findings of the 2003 Constitutional Court decision are as follows:
- ZUSDDD is not in accordance with the constitution because it does not recognize the statuses of the erased retroactively (*i.e. from the moment of the erasure on; it only recognizes the status from the moment of issuing the decision*);[2]
- ZUSDDD is not in accordance with the constitution because it does not give a possibility to regain permanent residence to those erased who were forcibly expelled from Slovenia because they were without legal status (*i.e. legal void*);
- The three-month deadline to apply for permanent residence under ZUSDDD is too short (*this part of the decision was enforced because no additional activity was required from the state bodies – the time limits in the law simply ceased to be valid*);
- The legislator is obliged to change the stated disparities within six months since the Constitutional Court decision is published (*the last day of this deadline expired on 4 October 2003 and no law was ever adopted*);
- The Ministry of Interior was ordered by the Constitutional Court to issue supplementary decisions recognizing permanent residence retroactively, to all those erased who already managed to re-gain their permanent residence under ZUSDDD or Aliens Act (*pursuant this Constitutional Court order in 2004 the Ministry of Interior under the Minister at the time Mr. Rado Bohinc issued supplementary decisions to 4093 erased persons who already obtained permanent residence, granting the status back to them retroactively, i.e. from the moment of erasure (26 February 1992) until the moment of obtaining permanent residence* – for more information see point 3).

[1] In general, the erased people could apply for permanent residence in accordance with the Aliens Act, if they fulfilled the required conditions (among them: five years of legal residence in Slovenia). However, since most of the erased, including the applicants, do not fulfill these conditions as a consequence of the erasure, applying in accordance with ZUSDDD remains their only option.

[2] The text on p. 2 in *italics* is added as a commentary of the third parties to the court's findings.

2. Legal Regulation of the Implementation of Constitutional Court Decisions in Slovenia

5. In this section we would like to present to the honorable Court the legal system which is in place in Slovenia for the implementation of the Constitutional Court decisions. First, in accordance with Article 1 (1) of the Constitutional Court Act, the Constitutional Court is the highest body of the judicial power for the protection of constitutionality and legality and for the protection of human rights in the Republic of Slovenia. Further, in accordance with Article 1 (3) of the Constitutional Court Act, the Constitutional Court decisions are mandatory which means that all individuals and institutions in the Republic of Slovenia have to comply with them. In accordance with its competencies, defined with Article 21 of the Constitutional Court Act, the Court can declare a certain act unconstitutional or a certain implementing act or another act of the state unlawful, and consequently annul the act concerned. The annulment enters into force the next day after the Constitutional Court decision is published or in the time limit set by the Constitutional Court (Article 43 of the Constitutional Court Act). The Constitutional Court also has the competency to declare a certain act unconstitutional or a certain implementing act unlawful, if such act does not regulate a certain issue (i.e. legal void). In such case the legislator (or another competent body that adopted the act which was declared unconstitutional by the Constitutional Court) has to remedy the established unconstitutionality or unlawfulness in the time limit set by the Constitutional Court (Article 48 (2) of the Constitutional Court Act).

6. Therefore, normally in the cases when acts are annulled or when the Constitutional Court establishes a legal void in the legislation, the necessary measures are adopted by the competent body (including the legislator) within the time limit set by the Constitutional Court. In cases of laws that need to be adopted, the competent Ministry prepares a legislative proposal (a draft law), which is then confirmed by the Government of the Republic of Slovenia and sent to the National Assembly for adoption. If the competent bodies act in the described manner, the legal remedy of the constitutional complaint is effective.

3. The Activities of the State Aimed at the Implementation of the 2003 Constitutional Court Decision

7. In order to implement the 2003 Constitutional Court decision the Slovenian administration first prepared the so-called Technical Act. In order to prevent the adoption of the law the then opposition parties (today parties in the Government office) called a referendum in April 2004 where the majority of voters voted against the adoption of the law. Simultaneously the Minister of Interior at the time Mr. Rado Bohinc decided not to wait for the legislative basis concerning the implementation of the finding of the Constitutional Court about the necessity to issue supplementary decisions to those erased who have already obtained permanent residence permit, to cover the void in the their legal status history. This way 4093 erased obtained supplementary decisions directly on the basis of the 2003 Constitutional Court decision, recognizing permanent status retroactively to them. Then the administration prepared the so-called Systemic Act. Although this draft law was restrictive in nature and would not resolve the problem of the erased entirely, it was blocked by the then opposition and was not adopted by the National Assembly. Since then the Ministry of Interior of the Republic of Slovenia (under the new government composed of parties that consistently blocked all efforts for the implementation of the Constitutional Court decisions) prepared another legislative proposal with an aim to resolve the problem of the erased: the 2006 Draft Constitutional Law.[3]

8. <u>The current situation is that no act has ever been adopted to implement the 2003 Constitutional Court decision. Arguably, the third parties are of opinion that solely due to this fact the Republic of Slovenia is in breach of Article 13 of ECHR.</u> However, since the form and content of the Draft Constitutional Law reveal intent of the government to bypass the Constitutional Court decision, to subject the erased to the

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[3] The Draft Constitutional Law was marked "internal" and was not revealed to the public. On 10 April 2006 the mark "internal" was removed from the document after the Information Commissioner of the Republic of Slovenia decided that the Draft Constitutional Law has to be available for the public in accordance with the Freedom of Information Act, invoked by both the journalist of weekly "Mladina" Siniša Gačić and Amnesty International Slovenia.

conditions contrary to the 2003 Constitutional Court decision and to further discriminate the erased, the Draft Constitutional Law will be presented and analyzed in detail in the continuation.

4. The 2006 Draft Constitutional Law

a. Constitutional Law instead of Ordinary Law

9. The third parties would like to draw the Court's attention to the fact that there is a reason behind selecting the form of "constitutional" law instead of the "ordinary" law. In the opinion of the third parties the main purpose of selecting the form of a constitutional law is to bypass the Constitutional Court decisions concerning the erasure, with which the Constitutional Court persistently and consistently annulled legal provisions, decisions and administrative measures causing the erasure. The selection of constitutional law derives from the opinion of some authors that the Constitutional Court is not competent for assessing the constitutionality of constitutional laws or of the Constitution itself (but only laws, implementing acts and other general acts, as stipulated in the Article 153 of the Constitution). However, in the opinion of the third parties, if an ordinary law was adopted with an aim to resolve the problem of erasure (as it was ordered by the Constitutional Court) it would again be subject to assessment of the Constitutional Court. Taking into account that the Constitutional Court already issued a decision about the same content and that the majority of the provisions from the Draft Constitutional Law is in contradiction with the Constitutional Court decisions, it can be concluded, that the form of a constitutional law has been selected solely for the purposes of excluding the competence of the Constitutional Court over such law. In the third parties' opinion, such law would also be subject to the Constitutional Court assessment, regardless of the Article 135 of the Constitution, since it is regulating the issue that is not constitutional in nature. It is also important to stress that if the 2003 decision was implemented with the constitutional law, this would be a unique in the history of the independent Republic of Slovenia.

10. Not only the form, but also the content of the Draft Constitutional Law is problematic. If adopted, the Draft Constitutional Law will bypass the Constitutional Court decisions and disregard the real-life situations in which the erased found themselves pursuant the erasure; it will put the erased people in a less favorable situation than other foreigners in Slovenia; it will enable new trials and further withdrawals of statuses of permanent residence (and by it enable new injustices), and it will exclude individual and objective responsibility of those who committed the erasure (and consequently justify the erasure and its consequences) and exclude a possibility of compensation for material and non-material damage caused to the erased.

11. Due to the lack of compatibility of the Draft Constitutional Law with the Constitutional Court decisions some members of the National Assembly of the Republic of Slovenia refuse to support the Draft Constitutional Law. For the adoption of the constitutional law, a two-third majority is needed in accordance with Article 174 of the Constitution of the Republic of Slovenia, which can, however, not be secured without the members of the parties of political opposition.

12. With the adoption of the Constitutional Law the legislator would actually amend the *Constitutional Law for the Implementation of the Basic Constitutional Charter of the independence of the Republic of Slovenia* of 25 June 1991 (which is a basis for the current Constitution and all the legislation adopted later on). Article 13 of this act stipulates that "citizens of other republics, who on the day of plebiscite on the independence of Slovenia had permanent registry in Slovenia and actually live here, are equal in their rights and duties as citizens of the Republic of Slovenia, until they receive citizenships of Slovenia under article 40 of the Citizenship Act or until the expiration of deadlines under Article 81 of the Aliens Act" (except for the right to own property). With this Draft Law another ten articles (13.a – 13.i) would be inserted between Article 13 and 14 of the Constitutional Law, which would in the opinion of third parties change the bases of the independence and justify all further legal and administrative measures that brought to the erasure.

b. Bypassing the 2003 Constitutional Court Decision

13. Almost all provisions in the Draft Constitutional Law are in contradiction with the 2003 Constitutional Court decision. The law begins with giving the opportunity to the erased people to re-apply for their statuses. Article 13.a, paragraph 1 of the Draft Constitutional Law states that, "a person who actually and uninterruptedly lives in Slovenia since 23 December 1990 may obtain permanent residence permit." We would like to draw the Court's attention to the word "*may*". The word "may means that the officials will have the right of discretion, giving them a possibility not to return permanent residence to a person, although he or she would fulfill all conditions, which puts the erased in a very uncertain position.

14. The Draft Constitutional Law retains the problematic standard of "**actual uninterrupted residence**", introduced by ZUSDDD which the erased have to fulfill to re-gain their status. In the 2003 Constitutional Court decision Court found that ZUSDDD is unconstitutional because it does not regulate the statuses of those erased who were forcibly expelled from Slovenia (they cannot fulfill the standard of actual uninterrupted residence for reasons outside their powers). This part of the decision remains unimplemented. Further, the provision of paragraph 1 of Article 13.c of the Draft Constitutional Law attempts to introduce a further definition of the legal standard of actual uninterrupted residence: it requires proof that Slovenia was a "**centre of the erased person's life interests**". The main problem of this provision remains that it does not take into account the people who left Slovenia due to circumstances which were completely outside their power and is therefore indirectly in contradiction to the spirit of the 2003 Constitutional Court decision since it restricts the rights of the erased instead of expanding the protection. For example, one of the applicants cannot re-obtain his residence permit because of the seven years of work in Serbia where he also raised a family, which was held against him in the procedure for re-obtaining a permanent residence permit before the Ministry of Interior. The state requires from the erased people to show that either they stayed in Slovenia for fifteen years uninterruptedly without any status at all (illegally) or to prove effective ties to Slovenia. Either of the two is many times impossible due to the erasure and its consequences.

15. The Draft Constitutional Law introduces one additional condition concerning actual uninterrupted residence: In order to re-obtain the status, the erased person concerned **must have already applied for permanent residence in the past.** In the explanation of the Draft Constitutional Law it is written that this condition is necessary to show that the erased person concerned had an interest to regulate the status in Slovenia. This condition is restrictive and opposes the intent of the Constitutional Court decision which is to expand the protection of the erased. In addition to that there are other additional conditions that the Draft Constitutional Law is introducing for the erased to re-obtain their status: Under the conditions set out by the paragraph 3 of the Article 13.a, only the following persons could apply:

i. Those whose applications were denied, rejected or the administrative body did not grant them permanent residence, although it should have done so in accordance with the law (*this condition reveals that the state is aware of the procedural injustices which the erased were subject to in the past and whishes to give another chance to those erased whose applications were denied, rejected or even never decided upon*) or

ii. Those whose applications were denied, because due to the wars on the territory of the former Yugoslavia they could not obtain the documents required in the procedure (*with this condition the state indirectly recognizes that the administrative units first erased the people from the register of permanent residence, and then required them to fulfill impossible conditions which they were objectively unable to prove due to the non-functioning state systems in war zones on the territory of the former Yugoslavia*).

16. In addition, even if permanent residence was granted to the person, it would – again – not be granted retroactively (since 26 February 1992, when the erasure took place), but only since the moment of filing the application. This is in direct contradiction with the 2003 Constitutional Court decision that declared ZUSDDD unconstitutional exactly because it does not grant statuses retroactively.

17. The next problematic provision is paragraph 3 of Article 13.b of the Draft Constitutional Law, which defines a possibility to obtain supplementary decisions since the day of filing the application for permanent residence for those erased, who already re-obtained permanent residence on the basis of ZUSDDD. In order for the supplementary decision to be issued, the Draft Constitutional Law requires different conditions than set by the provisions of ZUSDDD on the basis of which they re-gained permanent residence. The erased would therefore have to fulfill **different conditions for different periods** of their residence in Slovenia, and this would be required for them by the Draft Constitutional Law with the retroactive effect! Under this provision the erased would also re-obtain permanent residence **only since the moment of filing the application**, but not since the moment of erasure (26 February 1992), which directly contradicts the 2003 Constitutional Court decision.

18. In addition, the provision of Article 13.e of the Draft Constitutional Law states that the erased people have to file the application for permanent residence in the time limit of six months after the entry into force of this law. Let us remind that a three-month time limit, set out by ZUSDDD, was declared unconstitutional by the 2003 Constitutional Court decision. The Court stated that the preclusive time limit of three months was extremely short, and that the legislator should take into account personal and other circumstances, which would prevent the beneficiaries to file their applications on time. The Constitutional Court also stated that the state should take into account that "the citizens of other republics, considering the long-term non-regulated legal situation, could not have expected that missing such a short time limit would mean loosing the right to re-gain permanent residence permit and they justifiably expected that for the regulation of their long-term non-regulated legal situation a longer time limit will be set." Considering that the 2003 decision and the Draft Constitutional Law are about resolving the same problem – the statuses of the erased – the proposed solution of a **six-month time limit** shows that such a short time limit is – again – in contradiction with the 2003 Constitutional Court decision.

c. Putting the Erased in a Less Favorable Situation

19. The provision of paragraph 4 of Article 13.c states that the conditions to obtain permanent residence are not fulfilled if the person left Slovenia with an intention to leave it permanently. Considering the nature of the erasure, the situation without a way out into which the people were forced, illegality, constant threat of expulsion, inability to work, study, benefit from health, pension or social insurance for which the erased for many years paid contributions, it is impossible to expect that after the erasure the people would not be leaving Slovenia and try to regulate their lives elsewhere. They did not leave Slovenia by their own choice, but were forced to it by the situation of illegality systematically created and maintained by the Slovenian authorities.

20. For those who would leave Slovenia by their own choice, the Aliens Act in Article 45, paragraph 2, states that the competent body may withdraw permanent residence from a person who does not reside here. This is the article which is generally in place and can always be used for any foreigner living in Slovenia, and for that reason such provision of the Constitutional Law is not necessary. Moreover, it puts the erased in a **less favorable position** than other foreigners in Slovenia: it imposes additional conditions to the erased which other foreigners are not subject to.

21. The provision of Article 13.d of the Draft Constitutional Law defines exclusion clauses under which the erased persons could not obtain permanent residence, even if they fulfill all requirements. The first five indents of paragraph 1, Article 13.d. of the Draft Law define **stricter conditions for the erased than for other foreigners in Slovenia, and consequently discriminates them.** Every state has the right to withdraw permanent residence permit from a person who is, e.g. a threat to public order and security, while a final judgment issued for a serious crime can be a proof that the person indeed represents a threat to public order or security. In accordance with the Aliens Act, which generally regulates the conditions for foreigners' residence in Slovenia, the withdrawal of the residence permit should not be automatic. The withdrawal can only be carried out if a foreigner is issued an additional punishment of the "deportation of a foreigner from the state". The possibility (and not the obligation) to issue this punishment is defined with Article 40 of the Penal Code of the Republic of Slovenia. Therefore, the

exclusion clauses, set out in Article 13.d. to deny the residence permit to an erased person, would be in accordance with the principle of non-discrimination only if the convicted erased persons would be issued an additional punishment of the deportation of a foreigner from the state. There is no justification to put the erased in a less favorable situation than other foreigners regarding the withdrawal of permanent residence.

22. Further, provisions of indent six, paragraph 1 and paragraph 2 of the Article 13.d exclude certain erased from the right to re-obtain their permanent residence due to their involvement or employment in Yugoslav People's Army – YPA. These provisions are *discriminatory* because they **unjustifiably put those erased who worked for YPA in a less favorable position than other erased and other foreigners.** These provisions are also *misleading*. The arguments that the erased people deserved to be erased, that they are responsible for the erasure because they were allegedly members of the YPA which carried out the aggression against Slovenia, are not consistent with facts. According to the available data, only 2-3 % of the erased had some kind of involvement with YPA, including both people with ranks and other employees, such as nurses, cooks etc. The latter could hardly be considered as those who carried out aggression towards Slovenia and tried to prevent its independence. If any of the erased committed any of the crimes from chapters 33., 34. and 35. of the Penal Code (crimes against security of Slovenia and its constitutional order, crimes against the defense power of Slovenia and crimes against humanity and international law) and this has been proven before Court with a final judgment, and the person has been issued the additional punishment of the deportation of a foreigner from the state, the exclusion would be justified. However, even in such case the person should have been granted permanent residence from the day of the erasure (26 February 1992) until the day of finality of the Court decision.

d. Enabling New Trials of Solved Cases

23. The provisions of the first three paragraphs of Article 13.h of the Draft Constitutional Law introduce additional reasons for new trials concerning the returning of permanent residences. New trial means that the procedure, in which a final decision has been issued, may be renewed, if there is e.g. new evidence or new facts available, which have not been available when the procedure was taking place. This **additional option** for new trial could be used for any procedure in which the erased already re-obtained their permanent residences, even if there was no particular reason for the renewal of the trial. Consequently, the erased people would again be put in a **less favorable situation** than other foreigners with permanent residence in Slovenia. The provisions allowing for new trials put them in a completely insecure situation in which they would never know whether their case would be subject to a new trial or not. This would be worsened because of the **extended time limits** in which new trial could be started, as foreseen by the Draft Constitutional Law: namely, the general time limit for a new trial in accordance with the General Administrative Procedure Act is one month since the new fact or evidence has been found (a relative time limit) or three years since the final decision has been issued (an absolute time limit). The Draft Constitutional Law introduces new time limits: six moths since the establishment of the reason for new trial or one year since the Constitutional Law entered into force.

24. In addition to that, the Draft Constitutional Law also proposes an **expanded circle of authorized persons who can initiate new trials** (public prosecutor, public defender, Ministry of Interior or administrative unit), while in accordance with the General Administrative Procedure Act only the applicant or the body that issued the decision may initiate new trials. Accordingly, these provisions are considerably and unreasonably strict towards the erased people and put them in a discriminatory position comparing to all other applicants involved with any kind of administrative procedures. These provisions would enable situations of another withdrawal of permanent residence from the erased person if it was established that the person does not fulfill the conditions, set out by the Draft Constitutional Law which would be applied retroactively!

25. The provision of Article 13.h, paragraph 4, of the Draft Constitutional Law introduces an **obligation of new trials in all cases when the erased were issued supplementary decisions** in 2004 by the

Ministry of Interior under the Minister Rado Bohinc, pursuant the order of the Constitutional Court.[4] This provision is one of the most extreme provisions foreseen by the Draft Law. It is in a direct contradiction with the 2003 Constitutional Court Decision. Since the position of the authorities is that the 2004 supplementary decisions were issued without any legal basis, it can be expected that all supplementary decisions would be annulled, which would again violate the 2003 Constitutional Court decision.

e. Excluding the Responsibility and Disabling the Right to Compensation

26. Finally, the Draft Constitutional Law introduces an extreme provision of Article 13.i, which **limits the right to compensation by excluding the responsibility** of the state and the officials who were carrying out the administrative practices that brought to the erasure, for damages caused to the erased. First of all, the first paragraph stating that "the erased have the right to compensation" is in a direct contradiction with the following five paragraphs. **Namely, all paragraphs except for the first one limit the right to compensation to such extent that the right to compensation becomes a non-right.** Next, the provision of paragraph 3 goes as far as declaring that all actions that were carried out by the administrative state bodies and the state officials are legal if they acted in accordance with the laws that were at the time in place – even though the Constitutional Court later annulled all these laws! This provision is in contradiction with the right to compensation and the Slovenian tort law in general and is clearly discriminatory towards the erased people which at the same time are a group that suffered the most damage because of the state actions. Moreover, this provision is in direct contradiction with Article 46 of the Constitutional Court Act, stipulating that anyone who suffered harmful consequences due to the laws which were later declared unconstitutional by the Constitutional Court, has the right to demand the elimination of these consequences (paragraph 1); if this cannot be done, the person my claim just compensation before courts for the harmful consequences suffered (paragraph 4). In addition, Article 13.i **conditions the right to compensation** with the activity of the erased people: the right to compensation will not be recognized to those erased who have not yet applied for permanent residence and have not used all available legal remedies. These conditions for accessing compensation are not set out for any other person or group claiming compensation in Slovenia which puts the erased in a less favorable situation. By introducing such provision the state ignores the fact that the erasure was committed by the state authorities, *ex officio*, and that accordingly the statuses should have been returned to the people *ex officio*, without expecting all the people concerned to resort to all courts that exist (including the Constitutional Court) to secure their rights.

27. In addition, the provision of paragraph 5 **excludes the right to compensation for non-material damage** even though the erased suffered such non-material damage that it is impossible to express it in money – broken families, deprivation of liberty, deportations, inability to enroll in schools, serious health problems, homelessness, harassment, fear from deportations. Further, paragraph 5 **limits the right to compensation for material damage** to 200.000,00 SIT (834,58 EUR) which could never cover all lost pensions, child benefits, unemployment benefits, health service bills, apartment rents and tuitions as well as administrative and judicial procedures' costs.

28. The Draft Constitutional Law finishes with an extreme provision of paragraph 6 of Article 13.i which states that the general **statutes of limitations** should be used for the compensation claims, while in any case it is presumed that the beneficiary of the compensation found out about the damage on 12 March 1999 (the day when the 1999 Constitutional Court decision was published). This provision should be read jointly with the general principles of the right to compensation. Namely, the Obligations Code states that the time limit for claiming compensation is three years since the person found out about the damage (relative statute of limitations) and five years since the damage was done (absolute statute of limitations). In accordance with the provisions of paragraph 6, it can be calculated that the state would be able to

[4] The problem of these decisions was that they were not issued to all erased persons who already re-obtained permanent residence. Also, pursuant to these decisions, the state made different categories of the erased: some of those who already re-obtained their status obtained supplementary decisions (by which the hole in the history of their legal status was filled in) while those who were still left without status did not obtain anything.

defend itself that **all statutes of limitation expired on 20 March 2003** – three years after the date of presumption.

III. The Prohibition of Discrimination

29. First, possible violations of the prohibition of discrimination have already been pointed out in examining specific aspects of the law (see paragraphs 20 – 23 of this submission). We would like to draw the Court's attention to the fact that according to the *Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*, Article 2 (2 (a)), "direct discrimination shall be taken to occur where one person is treated less favorably than another is, has been or **would be treated** in a comparable situation on grounds of racial or ethnic origin". Arguably, although the Draft Constitutional Law has not been adopted yet, its draft articles are clearly discriminatory towards the erased, which is sufficient to establish an act of discrimination.

30. Second, the erased are being discriminated against also due to the fact that the only Constitutional Court decision that remains unimplemented is the constitutional decision concerning the erased. The form in which discrimination is taking place is 'omission' – the erased are directly discriminated against because of the failure of the state to implement the Constitutional Court decision.

31. Third, the third parties would like to draw the Court's attention to the fact that the erased people were already discriminated against in the past, since other foreigners in Slovenia, who at the time of the independence had permanent residence in Slovenia, but were not citizens of other republics of former Yugoslavia and did not apply for citizenship on time, were not erased. This is confirmed by the 1999 Constitutional Court decision No. U-I-284/94 of 4 February 1999 and Amnesty International's Briefing to the UN Committee on Economic, Social and Cultural Rights[5] (please seen the document enclosed).

32. **The erased people were and are subject to direct discrimination on the ground of not obtaining a Slovenian citizenship, and to both direct and indirect discrimination on the ground of ethnicity.** The erased were subject to indirect discrimination on the grounds of ethnicity at the erasure as such: the erasure was carried out against those who did not apply for Slovenian citizenship, but affeceted only people from other ewthnicities originating in other republics of former Yugoslavia). Namely, the erased people were of Serbian, Montenegrin, Bosnian, Macedonian, Croatian and Roma ethnicity. Roma were disproportionably affected (the assessment of the European Roma Rights Centre from 2001 is that two thirds (66 %) of the Slovenian "non-indigenous" Roma population is without Slovenian citizenship, while many of them are even stateless), which is also confirmed by the stated Amnesty International Briefing. It is important to know that in Yugoslavia the ethnic origin of erased translated into republican citizenship which was not Slovenian. The republican citizenship was granted to people in accordance with the principle of *ius sanguinis* – on the basis of their ethnic origin.[6] Permanent residence statuses were withdrawn without any prior notification and without legal basis from the people from other republics of former Yugoslavia, while at the same time this measure was not carried out against other third country nationals (e.g. nationals of European countries, Americas, African or Asian countries, etc). The measure was carried out only against those who were in accordance with the principle of ius sanguinis (the principle of ethnicity) listed in the registers of republican citizenship of Croatia, Bosnia and Herzegovina, Serbia, Montenegro or Macedonia. The measure was therefore on the face carried out against them because they were not citizens of the Republic of Slovenia, but in fact it was carried out against them because they were of Croat, Bosniak, Serb, Montenegrin, Albanian, Romani, Macedonian or other ethnic origin. However, later on the indirect discrimination turned into direct discrimination on the ground of ethnicity, expressed in the 2003 referendum, the lack of the implementation of the Constitutional Court decision and discriminatory provisions in the Draft Constitutional Law.

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[5] Available at http://web.amnesty.org/library/Index/ENGEUR680022005?open&of=ENG-SVN.

[6] It needs to be mentioned, however, that some of the erased were also ethnic Slovenes who for some reason were not signed into the register of Slovenian republican citizenship.

33. Besides citizenship and ethnicity, there were also other grounds direct of discrimination present with respect to rejected applications for citizenship: one of them was **previous conviction for a crime** (convicted persons were not granted citizenship due to representing 'a threat to public order'); another was **employment in the former Yugoslav National Army**: people who were employed in the army (even if they were employed as cooks, nurses etc.) were not granted citizenship because of their alleged "aggression" towards Slovenia.[7] The result of such practice was indirect discrimination on the ground of ethnicity of those who had genuine link with the Republic of Slovenia: this link was completely ignored, the only element that was taken into account when deciding who would be erased and would not, was the lack of possession of the republican citizenship of Slovenia.

34. After the period of granting Slovenian citizenship to about 171.000 people, there were numerous initiatives proposed to the National Assembly by the right-wing members of the parliament, to withdraw citizenships granted by the independent Slovenian state to those people ethnically from other Yugoslav republics who did not obtain it automatically or to those who consequently had double citizenship (both Slovenian and of one of the other Yugoslavian successor states). The initiatives were accompanied by the xenophobic and racist public discourse of members of the parliament (also available in transcripts of the debates in the National Assembly), but they did not obtain a green light of the legal department of the government. In addition to that, the referendum initiative for the revision and revocation of citizenships granted under Article 40 of the Citizenship Act was stopped only by the Constitutional Court.

35. Although the third parties are aware of the fact that intent is irrelevant in cases of discrimination since it is the discriminatory result that is being examined, we would like to demonstrate to the Court that **the erasure and all the consequences were intentional and systematically planned and implemented**, and not at all coincidental or a "mistake". This fact, which constitutes an aggravated circumstance, is supported by the following evidence:

- **Failure to support the amendment that would prevent the erasure:** While adopting the "legislation of independence" the National Assembly refused to accept and support the amendment to the Aliens Act which was proposed in May 1991 by Ms. Metka Mencin, member of the then Liberal Democracy of Slovenia party. This amendment would prevent the creation of the legal void which enabled the erasure and would ensure that all those people with permanent residence in Slovenia who would not apply or obtain citizenship, to be issued permanent residence permits of the Republic of Slovenia. The proposed amendment clearly indicates that there was awareness among the politicians on the implications that the lack of regulations of their statuses will have.
- **Failure to inform the people about the consequences of not applying for citizenship**: While adopting the "legislation of independence" the National Assembly refused to accept and support the amendment that required the Slovenian state to inform those who would have to apply for Slovenian citizenship about the necessity to apply and the consequences of not applying. Such amendment was not supported with the explanation that anyway the state has the obligation by the international law to inform its residents about the intention to adopt measures that will affect the legal status and rights of the people. At the end, the obligation to inform was not included in the law, while the stated international obligations were also not respected since no official notification has ever been issued to the erased. As a consequence the general public got to know about the erasure only after 1999 when the Constitutional Court issued its first decisions concerning the erasure. When the measure was taken the authorities also did not inform the public which shows that it could only have been successful if taken far from the spotlight.
- **Consistent denial of the Slovenian authorities:** Until June 2002, when the Ministry of Interior presented the first official figures on erased, the Slovenian authorities implicated themselves in consistent denial that anything as the erasure took place or that it was implemented. However, even after

[7] However, since the latter have never been charged or convicted for any crimes, the Ministry of Interior used the criterion of threat to public order, defense and security of state which has been included in the Citizenship of the Republic of Slovenia *after* the independence (December 1991). This also means that the Ministry of interior used this article *retroactively*: this article did not exist in the time of the alleged aggression on the Republic of Slovenia (June 1991) and could therefore not be used to process the acts of aggression allegedly committed during the independence process. The fact that the nature of these provisions was inconsistent with the law and the constitution was also confirmed by the Constitutional Court decision No. U-I-147/92 of May 6, 1993.

the erasure became widely known and undisputable fact, the present Slovenian government re-took the position that the erasure did not happen and that Slovenian authorities bear no responsibility for the erasure whatsoever (which reflects in the Draft Constitutional Law). Indeed, constant denial is perhaps the most (self)implicating action of the Slovenian authorities, because if the erasure was only coincidental or a "mistake", then, there would be no need for denying it, and for shifting the responsibility onto the erased, but would rather sincerely engage themselves in the remedying of the injustice inflicted upon the erased.

IV. Conclusion

36. As it derives from the facts and legal arguments stated above, the erased people in general used all the available remedies in Slovenia, including the complaint to the Constitutional Court. Although it was not the applicants who filed the constitutional complaint, the described facts on the lack of implementation of the 2003 Constitutional Court decision show that any constitutional court decision requiring a systemic solution for the erased would not be implemented. When the erased people won the case and achieved the issuing of a decision that would assist many of them to regulate their status, the implementation of the decision failed due to the lack of political will. The erased (including the applicants) are currently involved in numerous administrative and judicial procedures and are planning to file other constitutional complaints in cases when current legislation prevents them from regulating their status (e.g. by requiring a proof of actual uninterrupted residence). However, this failure of implementation showed that in Slovenia the legal system is not functioning for the erased in general and that the legal remedies that are successful and whose implementation requires the activity of the state administration, were, are and will not be effective for them. It ought to be stressed that this is not a coincidence or a mistake of the state – failure to implement the Constitutional Court decision is taking place precisely because the beneficiaries are the erased. They are the only group in Slovenia that is being subject to such treatment. The state had a simple obligation to adopt a law which would be in accordance with the Constitutional Court decision and it failed. The only state activity in the last two years concerning the erasure was a preparation of a Draft Constitutional Law which is in such contradiction with the 2003 Constitutional Court decision that it is subject to criticism by human rights community and that members of the parliament refuse to support it. Third parties are not aware of any other example in Slovenia when the state would put so much effort into not implementing a Constitutional Court decision. Moreover, according to its content, the Draft Constitutional Law has been only another element in the discriminatory treatment that the erased have been subject to since the Slovenian independence. Accordingly, the third parties are of opinion that the described facts constitute a violation of the right to effective remedy, defined with Article 13 of ECHR, in connection with the violation of the prohibition of discrimination, defined with Article 14 of ECHR.

Dr. Lev Kreft
Director
Peace Institute

Mirovni inštitut
Peace Institute
Metelkova 6
SI - 1000 Ljubljana

Primož Šporar
Director
Legal Information Centre
for NGOs – PIC