The article analyses the political practice of human rights in the case of the erased residents of Slovenia. The term “Erased” refers to the 25,671 individuals, ethnically mainly Serbs, Croats, Bosnians, Macedonians, Montenegrins and Roma, who were unlawfully erased from the Register of Permanent Residents of Slovenia by the government after the break-up of the Socialist Federal Republic of Yugoslavia in 1992. The Erased were Yugoslav citizens who either did not apply for Slovenian citizenship or whose application was denied in the process of Slovenian state building. At that point, they were formally given the possibility to apply for a permanent residency permit, but in reality the newly adopted Aliens Act did not enable them to maintain their residential status. Hence, many of them became irregular foreigners and lost the political, social and economic rights they had once enjoyed.

The erasure was committed in secret and from 1992 to 1999 the general public was unaware about this event. It was only in 1999 after several unsuccessful legal complaints filed by the Erased that the Constitutional Court declared Article 81 of the Aliens Act unconstitutional and revealed the crime in its entirety. Paralysed by the futile political process of human rights reconciliation, eleven individuals filed a complaint against the Republic of Slovenia at the European Court of Human Rights in July 2006, which reached its final judgement in the case of *Kurić and others vs. Republic of Slovenia* (2012) and held unanimously that there had been a violation of the 8th, 13th and 14th Articles of the European Convention on Human Rights. It took altogether twenty-one years for the political process of human rights redress to be concluded by establishing a compensation scheme for the Erased in 2013.

Close observation of the case of the Erased over the last decade has prompted significant questions about how human rights actually work in practice. Sadly, this case alludes to the fact that when faced with a situation wherein human rights are at risk, those responsible may not take immediate action nor offer the response needed to abolish the elements of human rights violation and abuse. This casts doubt on the efficiency of human rights, for if these rights which are supposed to represent the minimum standard of dignified life can be ignored for so long and with such particular lightness, even after the violation had been already legally established, we must then question and expose the factors which obstruct their implementation and diminish their potential for the individual and humanity.

This paper offers an analysis of the human rights practice in the case of the Erased focusing

in particular on the political construction of their victimhood. By adopting the standpoint of anthropology of human rights, the article contextualizes the erasure and demonstrates how universal human rights were vernacularized (Engle Merry 2006), appropriated (Speed 2006, 2008) and reinterpreted within the Slovenian political setting in order to align with the values of the local community and the rules flowing from the existing political and legal order. The article begins with a brief introduction into the main ideas of the anthropology of human rights and continues by charting the context of the erasure. This is followed by an examination of the significance of legal residence in relation to human rights implementation. Thereafter I introduce the process through which the Erased became recognized as victims of a human rights violation and thus human right-bearing subjects. Finally, I examine the criteria for dividing "true" and "false" victims of the erasure revealing how human rights and victimhood construction operate within a political setting. In this manner, I expose elements of human rights discourse that are not seen as an obvious part but nevertheless a play major role when putting rights into practice.

An Anthropological Approach to Human Rights Practice

Human rights can be considered separately from the political structures by which they were formed and beyond the situations in which they are practised. If considered in a vacuum of legal documents, conventions and declarations regardless of their implementations, we note that human rights law generates a figure of rights built upon the human as its main subject and basic principles such as universality (Donnely 2003) human dignity (Carrozze 2013; Klein and Kretzmer 2002; Kateb 2011), human integrity (Rodley 2014) and equality (Clifford 2013; Moeckli, 2014). Human rights are often understood as legal categories in the instrumentalist sense as a tool for protection against the arbitrary power of the state, especially within the idea that the power of the state is not unlimited, that each individual has some autonomy and rights with which no authority can interfere (Osiatynski 2009: 1; Donnelly 2003).

Stemming from this, we can assert that human rights law constitutes a kind of culture in the sense that the discourse on rights is defined by particular characteristics—for example, a way of speaking, thinking, a construction of the self and sociality (Covan, Dembour and Wilson 2001; Riles 2006). Human rights law, however, is only one part of human rights articulations in a nearly endless array of human rights practices. Although I take human

rights to be those rights enshrined in international human rights law, I also recognize the significance of the wider social and historical context which led to the emergence of human rights and their current practices. Therefore, I tend to rely on Goodale's (2009: 378) description of rights as "a phrase that captures the constellations of philosophical, practical and phenomenological dimensions through which universal rights, rights believed to be entailed by common human nature, are enacted, debated, practised, violated, envisioned, and experienced". This formulation is in line with anthropologists such as Cowan, Dembour and Wilson, (2001), Riles (2006) and Engle Merry (2006), and points to the position that human rights culture is best understood as a discourse with its own logic of operation, its own possibilities and limitations, which is not limited to law but also reflects and contributes to the understanding of perceptions about who we are, and what our social ideals and cultural values are.

In adopting an anthropological view of human rights it is important to recognize two relevant approaches that broaden the above position. The first approach is that of the ethnography of human rights, which examines how the global culture of human rights is subject to transformation by adopting and adjusting to the existing social values, power relations, and powerful structures, when used at the micro-level in a particular socio-cultural context (Cowan, Dembour and Wilson 2001; Engle Merry 2006, 2009; Goodale 2006, 2007, 2009) giving it a specific character that may depart from the official framework of universal human rights. At the heart of the focus here is the "translation" of the human rights principles into local situations by integrating local concerns into the interpretation and implementation of human rights. In line with Speed (2008) and her term "local appropriations", and with Engle Merry (2006) and her concept of "vernacularization" of human rights, special emphasis is put on examining the processes of justification and actualization of human rights within the context of local settings and the never-ending negotiations between agency, culture, and power.

The second approach – critical anthropology of human rights – is complementary to ethnography, but tends to reflect critically on the concepts of society, culture, and human rights beyond their manifest declarative level to discover the power relations which reside within the human rights framework itself (Goodale 2009). Human rights law often operates with categories that at a first glance may appear to be self-evident and unproblematic. In this sense, recognition of the political element of the human rights regime is essential; as

observed by Žižek, human rights as a supposedly "non" or "pre-political" phenomenon demonstrate "that every naturalization of some partial content as "non-political'' is a political gesture par excellence" (Žižek 2005: 125). Such an approach builds upon establishing a critical distance to human rights law in order to examine the political dimensions and power relations that reside within and reproduce a political world order that may finally not be entirely in line with the principles of human rights.

The category of a victim of a human rights violation is undoubtedly one place where a myriad of political dimensions and power relations intersect. If we take a closer look at how the figure of a victim is articulated in practice, either in international law or local contexts, we soon realize that victimhood is far from being clear-cut and unambiguous. Instead it points to the very issue of power relations by raising significant questions such as who counts as a victim of a human rights violation, what are the elements of the criterion for establishing victimhood, who determines the human rights redress and what constitutes the legitimacy of a human rights claim.

An anthropological approach to the question of victimhood construction draws attention to examining how political tensions which appear during the process are navigated in different ways. In this paper, I will demonstrate that the notion of territorial attachment, political loyalty and compliance with the legal order, readily entering the process of victimhood constitution and operating as an important element of interpretation and implementation of human rights despite having little or nothing to do with the idea of human rights as such. Following the standpoint of anthropology this should not surprise us, for if victimhood construction takes place in political discourse – the prime place for exhibiting nationalist rhetoric, pride, and self-glorification (van Dijk 1990) – it is expected that through the process of vernacularization, the values of human rights will be entangled with the values of the local political setting.

The theories of human rights which take humanity as their base obviously aim to create a connection of essentialism where it does not exist. We must agree with Foucault on his view that throughout history men have never ceased to construct themselves and their subjectivities in multiple series that never end and can "never bring us in the presence of something that would be "man."" (Foucault 2002: 276). Human rights, as they exist in international law are rights constructed as a result of the knowledge and power relations of

contemporary society and not something that exist beyond or independent of that knowledge and power. Victimhood is, in the same vein, a social construct, consisting of views, opinions, perceptions and social practices which define and demonstrate our understanding of humanity. The anthropological approach to victimhood construction is therefore not about examining the process of applying the language enshrined in international legal documents as a one-way process with an aim to resolve the cases of human rights violations. An analytical look beyond the essentialism offered by the rationality of human rights on the declarative level is required. Consequently, the task of analysing victimhood within human rights can therefore not be setting the interpretation to a level showing primarily how things *should be* – although this cannot be entirely avoided – but mainly to exposing *how* things are and *why*.

A Contextualization of the Erasure

The erasure from the register of permanent residents of the Republic of Slovenia in 1992 befell citizens of other republics of the former Yugoslavia who had not applied for Slovenian citizenship, whose application for citizenship had not been accepted by officials at the administrative units, and for those whose application for citizenship was rejected. Among the Erased, there were 20,311 adults and 5,360 minors, of whom 14,775 were men and 10,896 were women. They represent a heterogeneous group of people; some were internal immigrants from other republics of the former Yugoslavia who held common Yugoslav citizenship, while others were born and raised in Slovenia. Most had spent a significant part of their lives there and had developed personal, social, cultural, linguistic and economic bonds in their private and family lives.

The story of the erasure begins in the early 1990s', after the separation from Yugoslavia. One of the first documents of Slovene statehood, the *Statement of Good Intent* (1990), guaranteed, "the members of all other nations and nationalities their right to an overall cultural and linguistic development, and to all those who have their permanent residence in Slovenia that they can obtain Slovene citizenship, if they so desire". On 25th June 1991, the

Republic of Slovenia formally declared its independence and adopted legislation related to internal affairs, citizenship and sovereignty. In line with Article 40 of the Citizenship Act (1991) individuals who held citizenship from other republics of former Yugoslavia and who had permanent residency in the Republic of Slovenia were given the possibility to apply for Slovenian citizenship without additional requirements related to length of stay, language proficiency and material status or similar[1]. Under this article, approximately 171,000 out of 200,000 citizens of other Yugoslavian republics gained Slovenian citizenship (Zorn 2009).

Although the Slovenian government proved to be liberal in this regard, it had expressed exclusivist tendencies toward permanent residents of Slovenia from other Yugoslavian republics who did not wish to, could not, or were not eligible to obtain Slovenian citizenship. These individuals came under the rules of the Aliens Act (1991). They reasonably expected to be able to maintain their permanent residency status, however, Article 81 of the Aliens Act stipulated that a permanent residence permit could be granted if a person had been living in Slovenia for three years on the basis of a *temporary residence permit*. The decisive fact was that no such permits were needed for citizens of other republics of former Yugoslavia before the break-up of the country. This bureaucratic banality was used as an argument for taking away their status as permanent residents.

But the legal void of the Aliens Act was neither a mistake nor an unfortunate coincidence. The transcript of the 19th session of the then Assembly of the Republic of Slovenia from 1991 demonstrates that parliamentarians were conscious of the difficulties foreigners would face if the Aliens Act was passed without preliminary provisions for Yugoslav citizens which allowed them to keep their permanent residency. Member of Parliament, Metka Mencin, proposed an amendment to article 81 of the Aliens Act which could have prevented the erasure by suggesting that:

Citizens of the SFRY who are citizens of other republics and have not filed a request for citizenship of the Republic of Slovenia, but who do have a registered permanent residence or are employed in the Republic of Slovenia on the day this law takes effect, will be issued a permanent residence permit in the Republic of Slovenia.

(transcript of 19th Session of the Socio-political Chamber, 3rd June 1991).

On the 3rd of June 1991, they turned down the amendment to article 81 of the Aliens Act by two votes. On the 27th of February 1992, Minister of the Interior, Igor Bavčar, dispatched the Official Communication to local administrative units, instructing them to start "clearing up the records" and managing the status of all citizens of other republics of former Yugoslavia who did not apply for citizenship in the Republic of Slovenia by the stipulated deadline (MI, 1992a). Even though the Aliens Act did not provide a legal basis for such a procedure, 25,671 individuals were erased from the Register of Permanent Residents of Slovenia. These persons became known as the "Erased." Some were deported, some left Slovenia of their own accord, others stayed on the basis of temporary work permits, while others had no choice but to live without legal residency status or even found themselves stateless. Three months after the erasure Bavčar, acquainted with the difficulties the Erased had been subjected to, argued in another Official Communication to the government that the previously existing rights of the individuals who had not applied for Slovenian citizenship or whose application had been rejected, needed to be ignored (MI, 1992b) as his standpoint was that they needed to be treated as foreigners entering Slovenia for the first time.

Legal Residence as a Condition of Human Rights

The Erased experienced a number of adverse consequences, such as the destruction of identity documents, loss of employment and health insurance, the impossibility of renewing identity documents or driving licences, difficulties in claiming pension rights, etc. Those who did not meet the conditions necessary to obtain a temporary residence permit were simply unable to overcome the legal vacuum caused by their irregular residency status and the consequences it had upon their lives. When attempting to arrange their status at the administrative units they faced innumerable formal and informal obstacles (see Lipovec Čebron and Zorn 2011). The situation in local courts was similar; between 1992 and 1999 the courts operated as a subsidiary of the state's executive power. Even the Supreme Court, which accepted several complaints on behalf of the Erased, did not respond to the restrictive measures of the Ministry of the Interior but instead uncritically followed the laws which were clearly unfair (Kogovešek Šalamon 2011). The question arising in regard to this

situation is why it was so difficult, even impossible, for the Erased to overcome the situation of absolute rightlessness (Arendt 1976) which rendered them superfluous and "out of place".

The case of the Erased demonstrates that the legal residence given to an individual by a sovereign state on the basis of its sovereign right to decide who shall be admitted to its territory proves to be an important condition for full access to human rights. The status of (ir)regular foreigner remains as one of the most far-reaching "common-sense" inclusions/exclusions even when human rights are at stake. Kesby (2012: 108) notes that irregular or undocumented migration status is absent from the prohibited grounds of discrimination, which can be understood as a deliberate exclusion of irregular migrants from the position of the right-bearing subject. If a person does not hold permission to be in the territory of the state, the state is not deemed responsible for protecting and ensuring his or her rights. This is a stance which is clearly evident, for instance, in the International Covenant on Civil and Political Rights – that the obligation of the state is to respect and ensure rights to individuals who reside lawfully within its territory or are subject to its jurisdiction. The relation between the state's responsibility to protect and the lawfulness of the individuals' residence thus puts legal residence as the very source of a human rights claim, the source of the paramount of all human rights i.e. the "right to have rights" (Arendt 1976).

Legal residence in this sense is a crucial element in the practice of making and unmaking an individual a bearer of human rights. Many contemporary authors have been successful in exposing the complex relationships between states, sovereignty and human rights law (e.g. Arendt 1976; Kesby 2012; Agamben 2008; Ranciere 2004; Gündoğdu 2012, 2015; Vincent 2010) and have explained the difficulties arising from this as well as the consequences for the universal recognition of human rights. Although, as Gündoğdu (2015) notes, individuals within contemporary human rights law are not completely robbed of their legal personhood when ejected from the "the old trinity of state-people-territory," – as notably believed by Arendt (1976) – they are nevertheless often deprived of their rights by the normalization of deportation of irregular foreigners, the illegalization of residency, or other forms of state population control. Kesby (2012) and Bosniak (2006) assert that the illegalization of residency constitutes internal borders so that even if a person may be physically present, they are to be socially and legally absent through the denial of key rights or formal and

practical impediments.

As seen in the case of the Erased, legal residency provides a person with a legal personality, which is key to having the right to action and speech. Noted by Arendt (1976: 296) "the fundamental deprivation of human rights is manifested first and foremost in the deprivation of a place in the world which makes opinions significant and actions effective." This is precisely what happened to the Erased – their lack of a legal residence permits in practice stripped away the significance of their arguments, which were considered void and worthless, having neither legitimacy nor importance. Hence the paradox, despite the fact that the human rights of the Erased were violated, they could not be recognized as victims of a violation as their claims were not considered legitimate. So it is that the construction of victimhood is inherently linked to the question regarding who has the right of a "speaking subject" (Foucault 1982)[2], and consequently to the concept of who is considered to be "in place" and who is "out of place" (Kesby 2012: 7). In other words, irregular residency constitutes a position of profound victimlessness, which can only be overcome by "gaining a voice" by the legalization of resident status. This means that a victim of human right violations can only be constituted in line with the rules of the recognition of the victim, as set out by sovereign nation states.

The exclusion of the Erased through the illegalization of their resident status points to the boundaries of humanity and human rights, which in this case overlap the boundaries of the state. Although human rights are often explained as moral entitlements people possess by virtue of common humanity, we can note here that having access to human rights is not linked to the question of being human. The idea of humanity providing the right to have rights or the right of every individual to be a member of humanity is not provided by humanity itself. As the case of the Erased shows, the idea of humanity is beyond the current realm of international law, as the latter still operates on the basis of the decision-making of sovereign states (Arendt 2003: 379). The concept of universal all-encompassing humanity is thus under question as it is evident that humanity in reality is not sealed from the exclusionary practices which nation-states employ (Kesby 2012: 103).

It appears that the right of a nation-state to control the admission and residence of non-citizens rests above the humanity postulated in international human rights law. This works not only through border control and restricted access state territory but also through the

construction of the illegality of persons who are territorially present, but nevertheless expelled from humanity (ibid). Having the right to stay in the territory of a country functions in this case as a vital entry point that endows the individual with "the right to have rights" and "the right to be heard" (Arendt 1976) and thus become the subject of human rights in a full sense. In the case of the Erased it can be seen that the principle of territorial sovereignty based on controlling the admission of foreigners to the territory of the state, justified as legitimate acts of sovereign statehood, ended up creating divisions within humanity itself.

Becoming a Right-Bearing Subject

In the two decades following the erasure, the Erased were represented in the media and especially in political discourse as disloyal and potentially dangerous; they were repeatedly represented as criminals, calculating and speculative individuals, national enemies and aggressors, even if there were no objective reasons for such a demonization, as they were mainly ordinary people living Slovenia. In the years following the erasure, journalists who wrote about the Erased in *Mladina*, a traditionally liberal weekly newspaper, were often confronted by questions from their editors, "Why do we need to write about this at all?", "After all, they are the aggressors", "Do you think this will increase the number of our copies?" (Mekina 2007). Devaluation and dehumanization excluded the Erased from political life, left them without the rights of a speaking subject and pushed them into a "bare life" (Agamben 1998) which additionally diminished the legitimacy of their human rights struggle.

Agamben (2008) recognized that the political order of the nation-state does not offer an autonomous space that would allow for the existence of a "mere" human; according to him, refugees or undocumented migrants can only gain full access to human rights either by deportation or naturalization i.e. inclusion into the polity of a state. Similarly, the claims of the Erased could only be recognized as legitimate by reintegration into the political community; it was 1999, seven years after the erasure, when the Constitutional Court

established the unconstitutionality of Article 81 of the Aliens Act (CC 1999). This had a significant impact in that it provided legitimacy to the claims of the Erased, although only by including them into the national polity according to the rules of the nation-state – not as mere humans –could they enforce their human right claims. In its decision, the court ordered the government to resolve the inconsistency within a period of six months and demanded the abolition of unconstitutional conditions taking into account 'the status that the Erased should have had but due to the improper legislation did not have' (ibid).

As the court explained in its judgement, Article 81 of the Aliens Act was unconstitutional because it did not specify the conditions for obtaining a permanent residence permit after the expiration of the deadline for citizens of other republics of the former Yugoslavia. The Constitutional Court's Decision had a decisive impact on transforming the Erased into rights-bearing subjects: (1) it revealed the actual extent of the erasure; (2) it created a potential core for developing a new subjectivity of the Erased as victims of human rights violations; (3) it formed a legitimate position from which the Erased could claim their rights; (4) it brought the issue to the political and parliamentarian agenda. The decision was the first document that clearly articulated the Erased from the perspective of constitutionality and also had a binding request to eliminate the injustice. What is more, it discontinued the silence and the political ignorance and in this respect succeeded in exceeding the impacts of the totalitarian elements of power previously shown in the Slovenian legal system (Kogovšek Šalamon 2011: 177).

Despite the ruling, the human rights struggle was far from over. Most politicians indeed emphasized their distance toward human rights violations, not only because these are generally against the law but also because this would most likely result in constructing their negative self-presentation. What they failed to do, however, was to adopt genuine human rights positions. What could be traced in the case of the Erased was that in general, politicians acted humanely and in a tolerant manner towards those among the Erased whom they perceived as victims of rights violations, but at the same time strongly defended the national interests indicating how conflicting ideologies of cosmopolitan humanitarianism and nationalism intertwine. The political debates that followed demonstrated the classical 'firm, but fair' position (van Dijk 1993), where the fairness served as a cosmopolitan disguise intended to avoid impressions or accusations of nationalism, whereas the firmness was the actual aim being pursued from their standpoint. Within the political setting of the

human rights redress of the Erased, we were actually faced with simultaneous support toward human rights values, on the one hand, and the denial of human rights claims to a particular group within the Erased on the other hand.

In this respect, it is not important to establish whether individual politicians were xenophobic and intolerant toward the Erased, but to focus on the systematic flaws, elements in the processes, activities, and cognitions involved in the construction of victimhood. For instance, politicians applied various means to adjust the values of human rights, discredited the human rights holders and justified the crime of erasure with relativization. As highlighted by Jalušič (2008: 97), dealing with mass human rights violation involves several approaches and one of them, and also the most problematic one, is to explain the violent crime "through "contextualization" and their apologia – sometimes even in the form of an open justification of what has been done which can serve to legitimize further exclusion". Indeed, there was an obvious attempt to represent the erasure as an administrative injustice which happened unintentionally during the state-building process, which also implied the reluctance of Slovenian political actors to determine objective or subjective responsibility for the violation of human rights.

Another way of dealing with mass violation of human rights, Jalušič notes (ibid), involves denial and silence about the criminal past and attempts to exculpate oneself using negative propaganda, powerlessness, and nationalist politicians as a pretext. As typified by Cohen (2007) in relation to other atrocities and human suffering, the case of the Erased likewise exhibited various states of denial such as outright denial (*the erasure did not happen*), discrediting (*they were aggressors, criminals, and speculators*), renaming (*they were not erased but transferred from one register to another*), and justification (*they did not wish to reside in Slovenia anyhow*). In this way, the politicians simultaneously denied the meaning of the erasure, claimed that it happened independently of their will and justified it in nationalistic terms. Politicians invented a particular discourse in relation to the Erased that was highly coded, full of references to political loyalty, territorial attachments, right and wrong, good and bad, and the responsibility to protect the state against its opponents.

The shift in recognition of the Erased as victims of a human rights violation has been to a large extent a result of the Constitutional Court's decision from 1999 as well the critical approach of academics and legal experts, however, it turned out that the fundamental

problem of the Erased was that the issue was being solved on the political and not the legal level. The political process of the recognition of the human rights violation following the constitutional court decision indeed demonstrated how much human rights are not just a matter of law, but are to a great extent dependent on the will found within a political setting where the battle to determine the final interpretation of human rights takes place. To grasp this troublesome development, we can examine the key milestones in the political process of human rights reconciliation.

In line with the constitutional court decision from 1999, the first political initiative to resolve the status of the Erased occurred the same year when the government filed the *Act Regulating the Legal Status of Citizens of Former Yugoslavia Living in the Republic of Slovenia* (the Status Regulation Act 1999). In 2000, the Constitutional Court ruled that this act was unconstitutional as it lay down stricter conditions for obtaining a permanent residence than those laid down in the Aliens Act of 1991 (CC 2000) in 2003, when it declared the unconstitutionality of the Status Regulation Act because it recognized the Erased's residence only from the date of the re-application for residency and not from the date of erasure (CC 2003). The constitutional ruling returned the Erased to the parliamentary agenda debates in 2003 when the government attempted to pass two acts. One was adopted but later rejected in 2004 in a public referendum, while the legislative procedure of the other was suspended in 2004 due to a right-wing government. Under the rule of this government, i.e. from 2004 to 2008, all procedures for granting residence permits to the Erased on the basis of the decision of the Constitutional Court in 2003 was suspended. After the change of government in 2008, the Status Regulation Act from 1999 was finally amended and adopted in 2010. In 2012 the European Court of Human Rights (2012) delivered its final judgement in the case of *Kurić and others vs. Republic of Slovenia*. The Grand Chamber unanimously held that there had been a violation of the 8th, 13th and 14th Articles of the European Convention on Human Rights and ordered the Slovenian government to set up an ad hoc domestic compensation scheme within one year of the final judgement. Following a six-month delay, the Slovenian government passed *The Act on Restitution of Damage for Persons who were erased from the Register of Permanent Population* (the Restitution Act 2013).

As evident from the brief sketch, becoming a rights-bearing subject may not be achieved immediately after the legitimacy of the rights claim is constituted in legal terms. It points to

the fact that the violation of a right, even after it has been recognized by the court, does not provide an immediate solution to the problem. The whole process indicates that human rights are not simply a question of legal recognition, but more than that, a political decision of those in power to decide about whom human rights belong to and under which conditions. This brings us immediately to the question of victimhood construction along with an examination of who counts as a victim of a human rights violation and what constitutes the legitimacy of the human rights claim. As we shall see in the next section, the political setting and its approach to human rights violations may be deemed particularly ineffective, since it does not necessarily stem from human rights law and human dignity but builds upon a particular political interest justified outside human rights discourse.

Construction of Victimhood of the Human Rights Violation

The Constitutional Court as well as the European Court of Human Rights recognized the erasure *per se* as a human rights violation, essentially applying to all individuals affected. The Slovenian government, however, did not recognize every erased person as a victim. On the contrary, during the reconciliation process, members of parliament were constantly "sifting the wheat from the chaff" by establishing differences between the "true" and the "false" victims of the erasure. Their debates had been generally rather technical in the sense that they discussed what the precise rules were, the conditions and other measures which needed to be applied so that only the "most loyal" among the Erased could obtain a residence permit and essentially, to cut down the number of individuals eligible to claim compensation for suffering and loss of rights. At the same time, and what is especially worrying, the basic notions of human rights discourse such as human dignity and human equality as well as the inalienability and universality of the rights of the Erased were more or less absent from the process of victimhood construction. Instead the political construction of victimhood was intersected with references to political loyalty, legal compliance and territorial attachment.

Victimhood through Territorial Attachment

In the case of the Erased, territorial attachment turned out to be one of the prime features of the process of the victimhood construction. Article 1 of the Status Regulation Act determined that the Erased "who were registered as permanent residents in the territory of the Republic of Slovenia on 23 December 1990 and *are actually resident* in the Republic of Slovenia, and foreigners who were actually resident in the Republic of Slovenia on 25 June 1991 and *have been living there continuously ever since*, shall be issued with a permanent residence permit" (The Status Regulation Act, Article 1 2010).

The Act also stipulated that the condition of actual and uninterrupted residence was likewise met if the person left the Republic of Slovenia as a consequence of erasure from the Register of Permanent Residents and if the person left the Republic of Slovenia because he or she could not acquire a residence permit in the Republic of Slovenia owing to non-fulfilment of the relevant conditions and the application for a permit was rejected or dismissed or the procedure was terminated (The Status Regulation Act, Article 1č 2010).

Following this, an erased person who had left Slovenia and had not attempted to return did not meet the conditions for obtaining their lost permanent residence and consequently could not be counted as a victim of a human rights violation. Such a condition, entirely incompatible with the principle of universal human rights, created a differentiation within the victims of the erasure. The logic behind this is that the human rights of individuals who had emigrated from Slovenia after the erasure were not violated since they did not wish to live in Slovenia anyhow, which is evident from the following transcript:

Everybody who expressed some kind of interest to live in Slovenia in the period of ten years after they left Slovenia and those who regardless of the erasure remained living in Slovenia have the opportunity to arrange their status as permanent residents

[…] I believe the selection of rightful claimants has been thoughtfully determined. […] we have individualized our approach so that the eligibility of claimants depends on the fact that they have tried to arrange residential status, that is to say, they have expressed interest. Those who have not expressed any interest, those who have left Slovenia and have not attempted to return and to live in Slovenia, those have not suffered a loss and it would be absurd to give them financial compensation.

(Transcript of 17th parliamentary session, 24 September 2013)

Such an argument is not only inconsistent with the basic orientations of human rights law but also shows a lack of understanding and knowledge about the life situations of the Erased; a considerable part of those in question had not actually and uninterruptedly resided in Slovenia because in many cases, this was impossible owing to the erasure (Kogovšek Šalamon, 2007). From the view of the erasure itself, it is absolutely absurd to require from the Erased that they return and live in Slovenia as it was precisely because they were erased that they did not meet the conditions to do so. In other words, by this condition the government actually required them to do something against the law, i.e. to return to Slovenia illegally (Krivic 2013). By this measure the government denied the Erased who had left Slovenia their right to be heard before any action concerning the violation of their rights was taken. In this manner, they were stripped of the possibility to explain their individual circumstances as well as the reasons for leaving Slovenia as if the actual impact of the erasure on their lives was *a priori* irrelevant.

In the same way the compensation scheme, which was set by the government by adopting The Restitution Act in accordance with the final judgement of the Grand Chamber of European Court of Human Rights, admitted compensation exclusively to individuals who had put at least some effort into settling their status in Slovenia, or in the words of a member of parliament:

Speculators, meaning those who have left the country and never cared, never wished to come back to Slovenian territory, cannot just appear and demand some kind of compensation. This [the compensation] is meant for the people who made an effort, who endeavoured to arrange their statuses.

(Transcript of 17th parliamentary session, 24 September 2013)

On the basis of this argument approximately 13,000 of the erased individuals who had left Slovenia were not eligible to regain their status or be indemnified for the loss and damages inflicted upon them by the erasure. From the human rights point of view, however, whether an individual has lived in Slovenia, left, or attempted to return is of no significance. It does not change the fact that by erasing them from the register of permanent residence the state

had robbed these people of their human rights. The members of parliament now tried to put forward an interpretation which translated as the rights of those who had left Slovenia was not really violated as they wanted to leave anyhow.

Such an explanation truly modifies and denies the real meaning of the erasure and consequently also modifies the meaning of human rights. The fact remains that the erasure inflicted a violation of human rights no matter if the Erased left Slovenia afterwards and had not attempted to return. But the case of the Erased demonstrates what happened after the violation of rights, that in this case, the individual place of residence has the ability to confirm or deny the violation itself. What one must understand in this regard is that territorial residence here does not merely operate as geographical location, but primarily as an objective signifier of belonging, attachment and membership that at the same time serves to indicate loyalty to the values of the Slovene nation state. For this reason, introducing the territorial dimension into victimhood construction, which appeared as a result of the power of the nationalist discourse, must be understood in the sense that the territorial identity of the Erased was also considered a way of expressing loyalty and defining group membership. In the last instance, this means that the victims of the erasure could only be the ones who proved to be those most loyal through territorial attachment.

Territory has another important political aspect from the view of human rights victimhood construction. As Elden (2013) convincingly proposes, territory cannot be understood as a part of a land in the simple political-economic sense of rights of use, appropriation, and possession attached to a place. Territory can be thought of as the extension of the state's power or as a mechanism though which state power is exercised. The practice of human rights is clearly not particularly successful in diminishing the idea of the territory in regard to exercising state power. To be in the territory is to be subject to sovereignty and to be subject to sovereignty is to be recognized as entitled to human rights protection. One is subject to sovereignty while in the territory and not beyond (Elden 2013: 329). In other words, the state legitimizes itself as the supreme legal institution in charge of the protection of all inhabitants in its territory, regardless of their nationality, which gives rise to problematic distinctions between those in the territory and those who are outside it, even when it comes to the question of who is entitled to rights (Gündoğdu 2015: 43). In the same vein, Kesby (2012: 110) highlights that the territorial border is distinctive in that it eclipses the question of one's humanity in that it bestows human rights obligations exclusively to

those under its jurisdiction in a territorial sense, so that only those physically present in the territory trigger a state obligation to protect their human rights. The result is that the Erased who left Slovenia and never tried to return did not appear to the state as a 'human' to whom human rights obligations were owed, despite the fact that they were unlawfully erased from the Register of permanent residents and as a result of that erasure, their human rights were violated.

Victimhood through Deviancy and Imprisonment

Another problematic condition for settling the status of the Erased was the provision of the Status Regulation Acts determining that a residency permit could not be granted to anyone among the Erased who had been convicted of an offence resulting in imprisonment of at least three years or sentenced to more than one term of imprisonment with a total length of more than five years (Status Regulation Act, Article 3 2010). There is no official data regarding the numbers of the Erased who would be denied permanent residency on the basis of the above provisions, but it can be assumed that the number is very low or even zero. For this reason in particular it is thought-provoking that such a provision exists despite the fact that in reality there were not many cases, if any, to which they could have been referring. The restrictions on human rights protection on the ground of deviancy are indeed illustrative of the connotative content of the victim figure; my concern here, however, is also related to the role of international law in overcoming exclusions on the basis of deviancy.

What is most important is this regard is that international human rights law does not interfere with the right of the sovereign state to control the entry of aliens into its territory nor to set the rules of their residence and expulsion. The role of human rights law in this regard remains tenuous as it considers the matters of citizenship and the residence of foreigners to be within domestic jurisdictions insofar as they are consistent with international conventions and customary international law (Ersboll 2007: 253) i.e. as long as the state action is not arbitrary, discriminatory or has statelessness as a result. It has to be

noted that the same reasons – imprisonment of three years or a total imprisonment length of more than five years – were listed in the Aliens Act from 1991 as the reason for possible renouncing permanent residence to a foreigner (Aliens Act, article 24 1991); from this aspect it cannot be claimed that the provisions related to the Erased are arbitrary or discriminatory.

The implicit message of the exclusion of prisoners from the victimhood construction of the Erased therefore is that they could lose their permanent residency in any case no matter if the violation of their human rights was recognized. That may be true, however, to deny erasure as a violation of human rights in the case of former prisoners actually means to deny the true meaning of the erasure – as an act of violation of human rights law *per se*. Such provisions namely make a statement that among the Erased, some do not deserve to be recognized as victims of a human rights violation and that their human dignity and equality may perhaps be disregarded when it comes to recognition of their right claims. The problem lies in that it is not the state that appears to be a "savage" who violated human rights, but the former prisoners who appear to be "savages" not worthy enough to have their rights fully respected.

We may turn to the question of why is it reasonable to restrict the human rights of prisoners, if these are the rights that everybody is supposed to be entitled to on the basis of being human, and why such discrimination against prisoners is not deemed discrimination but as a reasonable restriction? The main point of the criticism here is the automatic denial of human rights victimhood on the basis of deviancy alone. Recognition of human rights is not a privilege and also a convicted prisoner remains the bearer of human rights (Kesby 2012: 72). Within this relationship and these exclusions, we find a profound expression of the existing values of modern societies we come across when dealing with prisoners. Kesby (2012: 71) illustratively depicts prisoners as society's outcasts, forcing us to reflect whether human rights are a privilege to be denied to those who are deviant and undeserving and thus not worthy of being placed inside a political community. Although everybody is considered a bearer of human rights which do not depend upon individual moral worthiness, the fact of being imprisoned, especially in the case of a grave offence, reveals "the "natural man" beneath, says Kebsy (2012: 78) by lifting the veil of formal equality stemming from humanity, the distinctions between deviant and law-abiding individuals come to the front.

The distinction between victims of human rights violations justified in terms of deviancy is used to define the preferred human rights bearers and to outcast those deemed unworthy. In the case of the Erased this can be seen as the arrogance of power over morality, especially from the point of view that it was the state which broke the law and violated human rights in the first place, and that the same state then denied the recognition of those human rights violations and once more acted against the idea of the universal human rights. The civilizing mission comes to the fore here, which strips away the full humanity and dignity of prisoners who are depicted as "savages" and defined as undesired, unwelcome, and dangerous and as such clearly impossible to be considered victims of human rights violations as they are themselves represented as the negation of humanity.

Victimhood through Political Loyalty

The case of the Erased revealed another significant element within the process of victimhood construction, i.e. political loyalty. The Status Regulation Act determined that the status of a permanent resident could not be returned to individuals who had been convicted of an offence directed against the Republic of Slovenia, irrespective of where the crime was committed (Status Regulation Act 2010). While loyalty does not appear to be in any way a factor of respecting human rights – as already explained human rights are not something that is either earned or can be lost – here it played a crucial role in the construction of victimhood in the case of the Erased. Although the provisions related to the actions against the sovereignty of Slovenia have no real significance in actual life, since no individuals were convicted of such criminal acts, the process of victimhood construction nevertheless shows what society generally understands as legitimate reasons for denying one's human rights.

The Status Regulation Act namely denied access to permanent residency to an erased person if he or she was, "after 25 June 1991, convicted of an offence under the 15th or 16th chapter of the Criminal Code of SFRY, directed against the Republic of Slovenia […], irrespective of where the crime was committed; […] or convicted of an offence under the 33rd, 34th or 35th chapter of the Criminal Code of the Republic of Slovenia" (Status

Regulation Act, 2010). The 33rd, 34th and 35th chapters of the Criminal Code, include acts such as damage to commercial buildings, means of transport and equipment and public facilities in order to undermine the constitutional regime or security of the Republic of Slovenia; invasion of the territory of the Republic of Slovenia for infringement of its territorial integrity; collection of confidential military, economic or official information for foreign countries; failure to respond to the call to fulfil defence duties when an emergency or state of war had been declared; careless handling of weapons, which can lead to damage or destruction; recruitment for foreign armies, etc. (Criminal Code 2008). I do not claim that the recognition of human rights has no restrictions whatsoever nor that freedom of action should not be limited by the human rights of other people, but what stems from the above list is that human rights are to be denied to those who have committed an act against the sovereignty of a particular state. The irony of this relationship is that human rights do not operate as a protection of the individual against the state but as protection of the state against the individuals.

The exclusion of the Erased as legitimate human rights bearers was thus targeted at those individuals who did not prove to be "loyal" residents, did not share "our" values and acted against the Republic of Slovenia. Moreover, denying human rights based on the above described arguments essentially means denying human rights on the basis of a person's political opinion, especially in the context of the Yugoslavian break-up and related political confrontations. Such exclusion therefore casts doubt on the recognition of political opinion as a category within the prohibited grounds of discrimination, particularly if one's political opinion opposes the sovereignty of a particular state. A contradiction of this kind can never be part of human rights and morality; denying human rights to political opponents does not contribute to greater respect for human rights, as Douzinas (2000: 141) says "in these circumstances, the righteous commit the crime they set out to prevent" i.e. they violate human rights in the name of preventing the human rights violation. But the approach applying the distinctions in regard to political loyalty of the Erased was, in fact, the only acceptable approach for parliamentarians. Recognition of all the Erased, including the "disloyal" ones, as victims of human rights violations would in their opinion mean high treason and betrayal of the Slovene national community as well as denial of the values of Slovene statehood and independence. The members of the parliament were essentially saying that:

The individuals, who suffered injustice due to the loss of resident status, these [injustices] will be abolished […] in a selective style and holds guarantees that those, who acted against the interests of the Republic of Slovenia in an unlawful mode and threaten the highest values, acknowledged by the civilized world, those will not be able to regain the status under provisions of this [Status Regulation] act.

(Transcript of 30th parliamentary session, 28 October 2003)

We do not deny the right to enforce his or her rights deriving from Constitutional Court Decision, of course, selectively, in a manner, which will clearly examine what these people did in 1991, when the country bled/…/all of them who operated against the country, this [recognition of their rights] needs to be prevented.

(Transcript of 2nd parliamentary session, 29 January 2009)

The discourse was evidently not merely ideological but messianic: ultimately, the exclusion of disloyal individuals from the victimhood of the erasure was a defence of the "civilized world". Such exclusion may be one of the most "common sense" exclusions throughout the history of the modern nation-state; however, it is incompatible with the idea of human rights. By using such an approach, politicians acted against the universality and inalienability of human rights and the equality of the Erased. Instead, the legal provisions subordinated their just claims to the operation of the state, exemplifying the dominant logic of the state's supremacy. Such conditions, useful in terms of distinguishing between loyal and disloyal individuals, point to the weakness of the idea of human rights, especially because they apply a selective approach where the recognition of human rights is subordinated to the logic of the state. Humanity as the basis for inalienable rights was replaced by a community of people loyal to the legal system and the sovereign power of the state. An analogy may be drawn from Kesby's (2012) explanation in regard to disenfranchised prisoners that individuals may be denied rights because they have assaulted the special relationship of rights and duties which exist between a community and its citizens. This illustrates the dominant logic according to which the sovereignty of the state operates contrary to the universality of human rights, thereby showing that human rights, which are supposed to be the cornerstone of the rule of law, are actually protected only when a person proves to be a good citizen.

Conclusion

Human rights are thought to be the rights protecting individuals against the excess power of the modern nation state, obviously pointing to the fact that one of the problems in this regard is the nation-state itself. Yet, paradoxically, observes Vincent (2010: 106), if human rights are to be successful they require states to bring them into practice and enforce them. What can be noticed in relation to this is precisely that the dependency of human rights upon the state, i.e. that the implementation of human rights is so intensely intertwined within the state which provides the space and infrastructure for their implementation, that at times human rights operate through bypassing the considerations related to humanity, dignity and equality, turning to notions that have little to do with human rights, such as territorial attachment, political loyalty and compliance with legal order.

The case of the Erased proved the reason the State functions as a resilient argument for adjusting the values of international law, modifying the claims for legitimacy and altering the morality of human rights. By focusing less on the equality of individuals and more on the State as an end in its own right, politicians covertly implied that individuals matter only insofar that they prove to be somehow relevant for a reinforcement of state power. In this sense, the political discourse of victimhood construction manifestly contributed to the particularity of the state-centrism prevailing over human rights and confirmed the political logic of human rights discourses, which are often expressed in exclusionary practices that deny full participation to those who fail to support the interests of the dominant group (Evans 2005).

As shown at the beginning of the paper, the construction of victimhood is inherently linked to the question of a right-bearing subject and consequently to the conceptions of who is considered to be “in place” and who is “out of place” (Kesby 2012: 7). A nation-state constitutes a mode of exclusion manifesting through a differentiation between legal and irregular residents which is at the same time also an exclusion from the position of a legitimate human rights bearer. Irregular residency constitutes a position of complete

victimlessness, which can only be overcome through legalization of resident status. It is equally important to note the contradiction between human rights recognition and practices of exclusions in the process of victimhood construction which are justified by diminishing the moral capacities of individuals who were subjected to a violation. Although human rights are not rights which are to be "deserved with proper behaviour", the case of the Erased proves that this might be the case in practice.

Mutua (2001: 228-9) explains that the typical image of a victim in human rights discourse is founded on a helpless and innocent subject, abused by the state, its agents or pursuant to an offensive cultural or political practice. Distinguishing characteristics of the victim are powerlessness and inability to defend oneself against the state. The victims are usually represented as nameless, desperate and pitiful individuals, many of them poor and uneducated. This image corresponds with the part of the Erased who lived in Slovenia and tried to retrieve their permanent residence but were unsuccessful, who suffered due to their life without rights, who were violently separated from their families or who for many years hopelessly wished to return to Slovenia. In this manner victimhood could not be recognized to anyone who proved to be convicted, imprisoned or who had been deemed politically disloyal or who had acted against the sovereignty of the Republic of Slovenia, as such a person could not be acknowledged as a helpless suffering subject but instead seen as an immoral individual. From this aspect, it turns out that the construction of victimhood in the case of the Erased ironically demonstrates not the protection of the individual against the state but the protection of the state against the individuals.

The idea of the nation-state overruled the idea of universal human rights which was evident in the fact that members of parliament adopted legislation that stipulated criteria for selectively admitting violations of international law. The problematic provisions of the Status Regulation Act and The Restitution Act set the criteria for dividing legitimate and illegitimate victims of the erasure and thus lost the opportunity to develop a genuine discourse on human rights by introducing the dichotomy between the "real" and "false" victims of the erasure. The construction of the victim in the case of the Erased did not stem from the basis of human nature or the dignity human equality. As seen, the victimhood evolved around the notions linked to the relationship between the individual and the state, especially to a person's obedience to the state's legal and political order, avoidance of deviancy, loyalty and territorial attachment.

This whole process of victimhood construction demonstrates how parameters which are in fact antagonistic to the idea of human rights play an important role in the implementation and interpretation of the right on a micro-level. Local concerns shaped and determined the ways in which universal rights were implemented, resisted and transformed, while the specificities of particular struggles demonstrated the tangible limitations of the global human rights law in a local context. The discrepancies between universality of human rights and the selectivity of the nationalist state-centric logic revealed the fact that even if everybody should enjoy the same human rights, the case of the Erased demonstrates that in contemporary societies, particular groups or individuals are viewed as victims only with great difficulty. Even those parliamentarians who argued for protection of the human rights of the Erased did not recognize the difficulties and inconsistencies that the selective approach brings in terms of the principle of universality. What is particularly intriguing is that such an implementation of human rights does not undermine the concept of those rights itself but transforms their interpretation by introducing the values of state sovereignty into the human rights idea.

Such a mode is problematic as it employs the power of the state-centric discourse to modify the meaning of human rights according to its own values; it turns and transforms the 'universal' into the 'particular', without denying the universality of human rights so that in the end, the final impression is that justice has been done and human rights have been fully respected. This approach, hidden behind the mask of human rights as a discourse that follows the norms and values of human rights law, leaves little or no space for an effective political human rights struggle. The conclusion then brings us to the question whether the victims of the erasure in fact reclaimed their human rights – as they actually were given rights which could not be justified on the basis of their humanity, equality and dignity. In this sense Arendt (1979: 293) appears to be particularly illuminative in her thought-provoking statement that "although everyone seems to agree that the plight of these people consists precisely in their loss of the Rights of Man, no one seems to know which rights they lost when they lost these human rights."

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Endnotes

1 This provision was applicable to citizens of other Yugoslav republics (Serbs, Croatians, Macedonians, Bosnians, and Montenegrins) who held permanent residency in Slovenia on 23rd December 1990 i.e. the Plebiscite Day, when the people voted for an independent state.

2 Foucault (1982: 52) says in his lecture that "in society like ours, the procedure of exclusion are well known. […] We know quite well that we do not have the right to say everything, that we cannot speak of just anything in any circumstances whatever, and tht not everyone has the right to speak of anything whatever.