Dear colleagues, dear recipients of this message,

Please find enclosed the English text prepared based on two constitutional complaints lodged against the judgement of the Supreme Court of the Republic of Slovenia. This judgment set aside the judgment pronounced at the Slovenian "Nuremberg Trial" in 1946 against the most notorious Slovenian collaborationist leader and antisemite, thus violating human dignity and other complainants' rights.

The complaints filed are practically identical. Therefore, the translation only brings the first one, to which the complainants who have filed the second one is added. The constitutional complaints were prepared by Dr Miha Hafner and the undersigned, in cooperation with Dr Ljubo Bavcon. The translation was done by Želja Cilenšek Bončina and Irena Šumi. Added to the complaint are two introductory notes by Prof. Dr Ljubo Bavcon and the undersigned that were penned specifically for the press conference held at the occasion of lodging of the complaints. The translation will be sent to complainant organizations (the Associations of the National Liberation Movement of Slovenia; the Jewish Community of Slovenia; the City Municipality of Ljubljana), to individual complainants and both attorneys who have filed the constitutional complaints, as well as to our colleagues and friends abroad – in particular to those who have expressed their indignation with setting aside of the judgment against General Leon Rupnik.

I am kindly asking you, in the name, and on behalf of the complainants, to use all the channels at your disposal including posting on the web and publishing in the media to draw attention to the setting aside of the judgment, and to the fact that two extensive, well-substantiated complaints have been filed with the Constitutional Court. Please let me know should any publishing get done. In that way, you will support the detailed and well-reasoned complaints regarding the breaching of the complainants' constitutional and conventional rights and demonstrate that the two constitutional complaints are backed by a majority of professionals and the general public in Slovenia and abroad.

I would like to thank you in advance for your support,

Sincerely,

Dr Ciril Ribičič

ciril.ribicic@guest.arnes.si

Inštitut za ustavno pravo (Constitutional Law Institute), Ljubljana

Constitutional complaint against the judgment of the Supreme Court of the Republic of Slovenia no. I Ips 3425/2014 of 8 October 2019 in the case of Leon Rupnik

Ljubljana, March 2020

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Introductory note

The complainants are filing this constitutional complaint in the belief that the Constitutional Court judges will recognise the reasons and argumentations in favour of modification of the judgement of the Supreme Court on the grounds that it represents an abuse of the procedures intended to redress the grievances of those who suffered them following the end of WW II; and because a retrial in the case of Leon Rupnik three quarters of a century after the "Slovenian Nuremberg" would be legally unsustainable and pointless, similar to a situation where someone would demand a retrial of the case against Hermann Göring.

Special gratitude is due to the individual constitutional complainants who contributed sincere and emotional testimonies of the horrors inflicted upon them and their ancestors, and who expressed their shock and offense over the annulment of the judgement against Leon Rupnik which tramples on the dignity of the victims of Fascist and Nazi terror. We are also grateful to the organisations that the complainants have allied with (Associations of the National Liberation Movement of Slovenia; the Jewish Community of Slovenia; the City Municipality of Ljubljana). The complainants' testimonies detail violations of human dignity and other rights and liberties they suffered, as did their ancestors who were, during WW II, victims of the terror of Fascist and Nazi occupiers and their domestic helpers under Leon Rupnik. They are filing this constitutional complaint because they are of the opinion that the retrial will be discontinued, and that therefore their constitutional complaint constitutes the only effective remedy to, and the only possible foundation for, changing the judgement of the Supreme Court Chamber which effects the rehabilitation of crimes against humanity as they are recognised by civilised nations. Or, are the complainants wrong in their conviction that everyone possesses the right to human dignity, therefore also the former partisans and activists of the Liberation Front; the members of vulnerable minorities and others that suffered persecution, torture, forcible migrations, shootings of hostages and transports to death camps?

Further thanks are due to all who have, in Slovenia and abroad, in their public statements protested the attempts at rehabilitation of crimes and history distortion. Permit me to mention only those most resounding statements that came from abroad: the statement of the AJC Global Jewish Advocacy (in appendix); the statement of the Jerusalem Simon Wiesenthal Centre; and the note by the Honorary President of the International Holocaust Remembrance Alliance, Yehuda Bauer, both of which are summarised in the constitutional complaint.

Let me briefly comment also on the doubts on whether the Constitutional Court will find merit in a case wherein not all remedies were exhausted. In exceptional cases – and this complaint addresses a case that is entirely exceptional in many aspects – the Constitutional Court can deliberate on a complaint even when not all appeals are exhausted. This is in accord with the Constitutional Court decision No. Up-203/97 (adopted unanimously on 16 March 2000) in a deportation case of a foreign citizen: »In the part contesting the penalty of deportation of the foreigner from the country, the complainant did not exhaust all the remedies. Namely, he did not claim the violation of the principle of legality in the court proceedings. Despite this, the Constitutional Court had, by applying mutatis mutandis Article 51(2) of the Constitutional Court Act, decided that the procedural requirements for decision-making were given also in this part of the constitutional complaint. These two provisions make possible the deliberation on a constitutional complaint in exceptionally well-founded cases, and in cases of obvious violations of human rights even if some of the procedural requirements (time-limit, exhaustion of legal remedies) are not met. «

The project group of the Constitutional Law Institute (Dr Miha Hafner and Dr Ciril Ribičič in cooperation with Dr Ljubo Bavcon) prepared the legal bases for the constitutional complaint that was filed to the Constitutional Court by the President of the Slovenian Bar Association, Roman Završek, and its ex-President, Miha Kozinc. We have all acted pro bono.

Ljubljana, 11 March 2020

Dr Ciril Ribičič
Director, Constitutional Law Institute

Introduction at the press conference held after the filing of the constitutional complaint

Esteemed participants,

The Criminal Law Chamber of the Supreme Court has, as it is widely known, annulled the judgement of the Military Tribunal in the Rupnik case, and returned it to the competent court for a retrial. In the name of individual victims of Rupnik's crimes that have undersigned the constitutional complaint on behalf of our ancestors, I would like to express my expectations, indeed, our conviction that the Constitutional Court judges will read our constitutional complaint with outmost care, and will study and weigh our arguments; that they will not arbitrarily reject it by, say, stating that not all remedies were exhausted. In fact, all remedies are indeed exhausted as retrial is impossible following Article 139 of the Criminal Procedure Act; moreover, a retrial would go against the modern, democratic criminal procedure that we call, in short, a fair trial. The latter requires, among other, that the accused is present at all procedural acts; the right to equality of arms for all parties to the proceeding; the right to defence etc., all of which is impossible when the defendant is dead. I refuse to believe that the Constitutional Court will afford themselves the prevarication that the Supreme Court Chamber did: the latter should have known that a dead person cannot be put to trial. They should have been conscious of the fact that the matter pertains to a person who had committed high treason; who had been the leader of the collaboration with the Italian and German Fascist and Nazi occupational forces that were decidedly hostile towards Slovenians; and a war criminal who was pronounced guilty by the Military Tribunal in 1946. Because of the judgement of the Supreme Court, he is now supposed to be considered not guilty, i.e. innocent, including all the consequences of the presumption of innocence.

The only institution in Slovenia that can repeal this shameful judgement of the Supreme Court Chamber is the Constitutional Court of Slovenia. With the support of the Associations of the National Liberation Movement of Slovenia; the Jewish Community of Slovenia; and the City Municipality of Ljubljana, the individuals affected by this case are filing the constitutional complaints, citing thereby Article 160(6) of the Constitution stipulating that the Constitutional Court is competent to decide on constitutional complaints regarding violations of human rights and basic freedoms that *eo ipso* include also human dignity as the source and base of all human rights.

We the complainants expect and believe that the Constitutional Court will understand and appreciate the depth of the unconstitutional nature, and the moral and ethical abjectness of the

Supreme Court's judgement both with regard to Rupnik's personal culpability and the symbolic meaning of the judgement that is part and parcel of the efforts of some neo-Fascist and neo-Nazi political circles to pervert the historical record so as to rehabilitate the national traitors, collaborators and war criminals. I cannot begin to imagine that the Constitutional Court would act otherwise since there is no space here for evasion and relegation of responsibility. A negative decision of the Constitutional Court would be understood by the public as a yet another attempt at distortion of historic facts and rehabilitation of the worst national treason in the history of Slovenia. I would like to draw attention to the Preamble to the Constitution stating, *inter alia*, that the Constitution derives from "[…] the historical fact that in a centuries-long struggle for national liberation we Slovenes have established our national identity and asserted our statehood."[1] Which are the forces that have been liberating and which treacherous in the Slovenian history is not under dispute despite the vile attempts to rehabilitate national treason and collaboration.

Allow me to briefly draw your attention to some of the arguments put forward in the constitutional complaint. As regards the exhaustion of remedies, it is worth considering the comparative analysis set forth in the constitutional complaint which points to the fact that a negative decision of the Constitutional court "would deny the victims (of Rupnik's crimes) the right to efficient judicial protection granted in Article 23 of the Constitution."

Further, let me point out, from among a number of legally relevant arguments in our complaint, also the exhaustive explanation of the violations of human dignity that the judgement of the Supreme Court has effectuated; and connected to that, the argumentation of the legal standing of the complainants. Likewise worthy of attention are the arguments explaining the procedural errors in the Supreme Court ruling, among other especially their oversight of the fact that Leon Rupnik was tried in a Military Tribunal in 1946, and that Military Tribunals were subject to special and precise regulations that the then Military Tribunal consistently observed. It is worth mentioning that the defendants in the Rupnik trial were granted a higher standard of procedural safeguards than those granted to defendants in the Nuremberg trial. In this respect, the Supreme Court's assessment of both the validity of confession of guilt as well as body of evidence was incorrect. The constitutional complaint also argues against the view of the Supreme Court according to which partial setting aside of the previous judgement was not possible; and is puts forth the arguments regarding the authority of the finality of court rulings.

[1] Quoted from the official English translation of the Constitution: https://www.us-rs.si/en/about-the-court/legal-basis/ [translator's note].

The conviction of the complainants, and most of the Slovenian public that the Constitutional Court will listen to our argumentation carefully is founded on everything I have briefly outlined above. We are convinced that the Constitutional Court will set aside the judgement of the Supreme Court and thereby protect individual human rights, liberties and above all, human dignity of the direct and indirect victims of Rupnik's crimes against humanity, war crimes and high treason in the form of armed and otherwise collaboration with the enemies of the Slovenian nation.

Dr Ljubo Bavcon

Constitutional Complaint against the judgment of the Supreme Court of the Republic of Slovenia no. I Ips 3425/2014 of 8 October 2019[2]

No.

Date lodged:

CONSTITUTIONAL COURT OF THE REPUBLIC OF SLOVENIA
BEETHOVNOVA ULICA 10, POB 1713
1001 LJUBLJANA

CONSTITUTIONAL COMPLAINT

against the Supreme Court of the Republic of Slovenia judgment no. I Ips 3425/2014 of 8 October 2019,

1. THE COMPLAINANTS

1. **Terezika Bučar Omahen, Aličeva ulica 2, 1261 Ljubljana-Dobrunje**
2. **Zadnikar Jožefa Ižanska cesta 418, 1000 Ljubljana**
3. **Magda Lovec Trtnik, Pot heroja Trtnika 26, 1261 Ljubljana Dobrunje**
4. **Tomaž Zajc, Črtomirova 21 A, Ljubljana**
5. **Staša Briški Bailey, Baixada de Viladecols 1, Ent. 1., 08002 Barcelona, Spain**

[2] Two practically identical constitutional complaints have been lodged against the judgment of the Supreme Court no. I Ips 3425/2013 of 8 October 2019. They differ mainly with regard to the two sets of complainants who have undersigned the first and the second respectively. For sake of convenience, the part describing the second set of complainants substantiating their legal interest in bringing the proceedings has been added in this translated version after the first one, whereas in other parts of the constitutional complaints, neither are specified.

For better understanding of the contexts and terms used, translators'and/or editors' footnotes have been added. Consequently, the footnote numbering does not correspond to that in the original document; added footnotes are graphically different from the original ones.

The translation has not been proofread by a native speaker.

6. **Jože Hartman, Vodovodna 11, 1000 Ljubljana**
7. **Judovska skupnost Slovenije (Jewish Community of Slovenia), Tržaška cesta 2, 1000 Ljubljana, represented by its president Boris Čerin-Levi**
8. **Zveza združenj borcev za vrednote narodnoosvobodilnega boja Slovenije (Associations of the National Liberation Movement of Slovenia), Einspielerjeva 6, 1000 Ljubljana, represented by its president Marijan Križman,**

all of them represented by the Odvetniška družba (Law Firm) Završek & Šnajder, o.p., d.o.o., Roman Završek, attorney,

1.* Dr Ljubo Bavcon, Devinska ulica 2, Ljubljana[3]
2.* David Pollak, Linhartova ulica 3, Ljubljana
3.* Branka Kastelic, Litijska 363, 1621 Ljubljana – Dobrunje
4.* Marjan Jernej Virant, Vinterca 30, Ljubljana
5.* City Municipality of Ljubljana (CML), Mestni trg 1, 1000 Ljubljana

all of them represented by Miha Kozinc, attorney.

2. THE CONTESTED ACT

The Supreme Court of the Republic of Slovenia judgment no. I Ips 3425/2014 of 8 October 2019

3. REPRESENTATION

The complainants 1.-8. are represented by the
Odvetniška družba (Law Firm) Završek & Šnajder, o.p., d.o.o., Roman Završek, attorney,
Dalmatinova ulica 10, 1000 Ljubljana.

The complainants 1.*-5.* are represented by
Miha Kozinc, attorney,
Dalmatinova ulica 2, 1000 Ljubljana

[3] The complainants marked by asterisk (*) have lodged a separate constitutional complaint with practically identical content [editor's note].

4. REASONS IN SUPPORT OF THE CONSTITUTIONAL COMPLAINT

4.1. Arguments as to the exhaustion of legal remedies:

For the reasons presented below, the legal remedies have not been exhausted since they would be ineffective.

Judicial decisions:

- **the Supreme Court of the Republic of Slovenia judgment no. I Ips 3425/2014 of 8 October 2019, object of the complaint;**

- the Supreme Court of the Yugoslav Army order no. II Sod 882/46 of 1 September 1946;

- the Fourth Army Military Tribunal judgment no. I Sod 117/46 of 30 August 1946.

4.1.1. Reasons why the constitutional complaint lodged prior to the exhaustion of extraordinary legal remedies should exceptionally be dealt with

In accordance with Article 51 of the Zakon o ustavnem sodišču (Constitutional Court Act, hereinafter: the ZUstS), a constitutional complaint may only be lodged after all legal remedies have been exhausted. Paragraph 2 of the same Article allows for a constitutional complaint to be lodged before extraordinary legal remedies have been exhausted where the alleged violation is manifestly obvious and if irreparable consequences for the complainant would result from the implementation of the individual act. The European Court of Human Rights (hereinafter: the ECtHR) has ruled in especially justified cases that in specific circumstances the application has to be accepted for consideration even where available legal remedies have not been exhausted provided that the latter are ineffective or if it is more than obvious that by filing them the applicants would be unable to improve their legal position (cf. the ECtHR judgments in cases Donnelly v. the United Kingdom, Reed v. the United Kingdom, and Plakhteyev and Plakhteyeva v. Ukraine). The ECtHR has repeatedly ruled this way also where applications were lodged against Slovenia, e.g. in cases regarding reasonable time of trial, until the respondent state remedied that breach of Article 13 of the European Convention of Human Rights (hereinafter: the ECHR) by amending its legislation.

The complainants note that in the aforementioned judgment the Supreme Court set aside the Fourth Army Military Tribunal judgment no. I Sod 117/46 of 30 August 1946 in conjunction with the Supreme Court of the Yugoslav Army order no. II Sod 882/46 of 1 September 1946 and remitted the case for a retrial to the Okrožno sodišče v Ljubljani (Ljubljana District Court). Formally, this does not mean that the exhaustion of legal remedies has occurred as the aforementioned court of first instance will still have to rule on the case; however, in the complainants' view, waiting for a formal exhaustion of legal remedies in the retrial proceedings would obviously result for them in consequences that would be impossible to remedy. This follows from the clear-cut provisions of the Zakon o kazenskem postopku (Criminal Procedure Act, hereinafter: the ZKP) providing in such a case for a discontinuation of criminal proceedings. In the present case the defendant died and Article 139 of the ZKP provides that the proceeding shall be discontinued in such circumstances. This is the prevailing point of view by legal commentators and in the case-law: "The defendant's death is a procedural bar preventing the criminal proceedings from being conducted. This provision applies to all phases of the criminal proceedings, i.e. from its commencement until the moment the decision becomes final" (Supreme Court of the Republic of Slovenia (hereinafter also: SCRS) decision no. Kp 7/2007 of 1 June 2007),[4] and the proceedings may not be continued nor finished when the defendant is dead (SCRS judgment no. I Ips 14200/2010). In case no. I Ips 11/2006 the Supreme Court of the Republic of Slovenia has ruled that where the court of second instance fails to take into account in the appeal proceedings the defendant's death during the proceedings – be it that it overlooked it be it that it had not been brought to its attention – this fact is a breach of an essential procedural requirement, the latter stating that only a living defendant may be subject to criminal proceedings, and is consequently also a breach of essential procedural requirements under Article 371(2) of the ZKP *juncto* Article 139 of the ZKP. Conducting criminal proceedings against a deceased defendant is in evident contradiction with the principle of equality of arms and the established safeguards regarding the right to a fair trial provided for in Article 6 of the European Convention on Human rights as further developed in the European Court of Human Rights case-law. Such was the explicit view of the ECtHR in cases Magnitsky and Others v. Russia of 27 August 2019 and Grădinar v. Moldova of 8 April 2008. Consequently, the complainants believe that once the case is remitted to the first instance the proceedings will be discontinued whereas they as injured parties have no effective remedy whatsoever at their disposal in that regard. As regards their appeal against the order on

[4] Cf. also the SCRS judgment no. I Ips 11/2006 of 26 January 2006, and the SCRS judgment no. I Ips 60450/2011.

discontinuing the proceedings it is bound to be unsuccessful since, as stated above and as decided by the SCRS in case no. I Ips 11/2006, the court of appeal may not take any other decision but discontinue the proceedings. As the things stand, the complainants have no effective legal remedy at their disposal that would enable them to pursue their interest and to prove that their human rights as presented in this complaint were breached; this is so since the subject matter of the continuation of the proceedings will only be to examine whether or not the requirements necessary to conduct the proceedings against the defendant are met, which more than obviously is not true because the defendant is dead, and so there is no way that the court of first instance may conduct the proceedings on the merits.

Since the decision on discontinuation of the retrial proceedings is by itself lawful it would be impossible to challenge it successfully with either ordinary or extraordinary legal remedies. This is why the court would not even start considering the complainants' arguments on the merits. By discontinuing the proceedings against the defendant by way of a final judgment, the defendant would irreversibly be presumed innocent (Article 27 of the Constitution). Thereby the rights invoked by the complainants as set out in Article 25 of the Constitution (Right to Legal Remedies) and in Article 13 of the ECHR (Right to an Effective Remedy) would be irreparably breached.

It goes without saying that by executing the SCRS judgment against which the constitutional complaint has been lodged would cause irreparable consequences to the complainants. The complainants in their capacity of victims were not able to participate in the proceedings before the Supreme Court regarding the request for the protection of legality, or to assert their rights in it, since they had no idea that the proceedings had been pending, nor will they be able to assert those rights in the retrial proceedings at the first instance which will be discontinued. Should the Constitutional Court not accept this constitutional complaint for consideration the victims will be denied the right to an effective remedy as set out in Article 23(1) of the Constitution. In the light of the above, the complainants believe that the Constitutional Court should accept the constitutional complaint for consideration under Article 51(2) of the ZUstS based on the fact that no legal remedy would be available to them if/once the retrial proceedings will have been discontinued.

Furthermore, many of the complainants and other persons who have in person lived through the atrocities of WW II for which Leon Rupnik was responsible are of advanced age and in poor health. Time is not their ally, and requiring that they formally exhaust legal remedies would

mean that due to their age and health condition they would be sooner dead than being able to lodge a constitutional complaint. This is why it is of utmost importance to prevent the proceedings from lagging, in particular since filing an application with the ECtHR is considered an option. Postponing the decision would also further undermine the international reputation of Slovenia which, owing to the National Liberation Fight (NOB), was on the side of the winning allies in their battle against Fascism and Nazism. Besides, the Supreme Court judgment had been faced with protests not only by Slovenian politicians, wider public, and the Jewish Community of Slovenia but also by the international public what negatively affected the international reputation of Slovenia. Postponing the decision in the case at hand would therefore be especially detrimental as regards the affected victims as well as the public interest.

In view of the foregoing the complainants are filing this complaint prior to actual exhaustion of legal remedies before the courts of general jurisdiction since those remedies – albeit possibly at their disposal – obviously will not be and cannot be effective. However, the exhaustion of legal remedies by itself cannot be, as is evident from the ECtHR case-law, examined in a strictly formal manner; special circumstances must be taken into account when the complainant is, due to special circumstances, excused from exonerating those remedies prior to filing the application to the ECtHR since such a requirement would be disproportionate (cf. the ECtHR judgment in case Reed v. the United Kingdom).

4.2. As to timeliness of the constitutional complaint

Pursuant to Article 52(1) of the ZUstS a constitutional complaint shall be lodged within 60 days of the day the individual act against which a constitutional complaint is admissible is served. The judgment of the Supreme Court of the Republic of Slovenia no. I Ips 3425/2014 was not served on the complainants (i.e. the injured parties) nor were they informed of it being filed or of the fact that the request for the protection of legality was being decided upon, and they have only learned of that judgment from the media. To be precise, it was in the article by the journalist Peter Lovšin published in the newspaper Dnevnik on 8 January 2020[5] that the information on the Supreme Court judgment against which the complainants' constitutional complaint is being filed was brought to the attention of a broader public. It is evident from the

[5] Lovšin, P. (8 January 2020) Razveljavljena obsodba domobranskega generala Rupnika (Home Guard General Rupnik's Condemning Judgment Set Aside), in: *Dnevnik*, available at: https://www.dnevnik.si/1042918961 .

Supreme Court website that the judgment was published on that site on 6 January 2020[6] and consequently this complaint is being filed in time.

In addition, the complainants submit the following with regard to timeliness and exhaustion of legal remedies. Pursuant to Article 52(3) of the said Act, in especially well-founded cases the Constitutional Court may exceptionally decide on a constitutional complaint which has been lodged after the expiry of the said time limit. In its decisions no. Up-599/04-23 of 24 March 2005 and no. Up-642/05-13 of 7 February 2007 the Constitutional Court accepted for consideration a complaint lodged after the expiry of the time limit by two complainants who due to objective reasons could not or did not know how to lodge it although they had learned of the contested decision in good time. It follows from the above that the complainants' ground in even more reasonable in the case at hand since they were not acquainted with the Supreme Court judgment despite being victims of the criminal offences in the case at hand.

Where there are justifiable reasons for untimely lodging the Constitutional Court examines the especially well-founded cases as to the merits of the case, i.e. as a case that is important due to its contents. In the complainants' view the Constitutional Court must accept the constitutional complaint for consideration according to Article 52(3) of the ZUstS, regard being had to the exceptional importance of the case as explained below.

The fact that the case if especially well-founded follows clearly from the exceptional importance of the contested Supreme Court decision. The latter transcends the complainants' interest and interferes with the broadest public interest possible. The Supreme Court judgment thus violates not only the complainants' fundamental constitutional rights and general fundamental constitutional principles but also the rights of countless other victims, and their descendants, of Rupnik's crimes, and finally, of all civilized states and organizations which in WW II fought against the Fascist and Nazi terror on the side of the winning allies. It is the complainants' strong belief that the Supreme Court decision brings about multi-layered and far reaching legal, political, symbolic, and pecuniary consequences that will lead, *inter alia*, to the rehabilitation of a historically proven, internationally notorious war criminal (i.e. to an irreversible reinstatement of presumption of Rupnik's innocence), to profound interferences with pecuniary rights (i.e. claims for the defendant's confiscated property to be returned, actions

[6] Web portal Sodna praksa, available at: http://www.sodnapraksa.si/?q=I%20Ips%203425/2014%20&database%5bSOVS%5d=SOVS&_submit=i%C5%A1%C4%8Di&rowsPerPage=20&page=0&id=2015081111434213 .

for damages), and to a severe derogation of the international reputation of the Republic of Slovenia. The latter is already evident from the letter of protest by the eminent international human rights organization, the Simon Wiesenthal Jerusalem Center, which was officially handed by this organization to the Slovenian Embassy in Israel. The letter states that the "shameful decision [of the Supreme Court] constitutes a shocking distortion of the history of the Holocaust and a horrific insult to Rupnik's many victims and their families."[7] The concrete case is also being mentioned in the public statement by the AJC Global Jewish Advocacy (see Appendix) stating the indignation with the attempts to revise history as regards Holocaust and expressing astonishment over such attempts occurring in an internationally respected state as is Slovenia. This AJC statement has also been supported by the IHRA (International Holocaust Remembrance Alliance) honorary president, Mr Jehuda Bauer.[8]

The European Parliament has – also in respect to the fact that some of the convictions of the Fascist and Nazi collaborators in the present European Union member states have been set aside, especially in Bulgaria, Romania, and Croatia – adopted several resolutions relating to the importance of consistent fight against racism and xenophobia (European Parliament resolution of 19 September 201[9]); consistent and more efficient and effective functioning of judicial authorities in prosecuting antisemitic acts, by following the example of the United Kingdom and Austria (European Parliament resolution of 1 June 2017), and the importance of repeated reminding of the atrocities of Holocaust, antisemitism, and racism that may not be allowed to happen again (European Parliament resolution of 27 January 2005).

The international reputation of the Republic of Slovenia is further blemished by the fact that the Home Guard members (*domobranci*) under Rupnik's command consistently turned over the captured soldiers belonging to ally states (American and British pilots) to Germans all of which was undisputedly documented in historical material.

Thus, the legal consequences of the contested Supreme Court judgment surpass in their contents not only the scope of individual legal acts but also the scope of several legal acts of general

[7] Quoted after the official statement on the Simon Wiesenthal Center website of 14 January 2020, available at: http://www.wiesenthal.com/about/news/wiesenthal-center-slams-13.html .

[8] The statement addressed to the Jewish Community of Slovenia reads in its entirety as follows: "I would like to share the deep concern voiced by colleagues, the AJC, and others, at the overturning of the verdict of the Ljubljana Court in 1946 condemning the Nazi collaborator, Leon Rupnik, to death. Rupnik, as is well known, was responsible, i.a., for the deportation to their deaths of the remnant of Ljubljana Jews. He was a consistent Nazi and radical antisemite. I do expect the Slovenian government's delegation to IHRA to take a clear stand on this issue, as the rehabilitation of Nazis stands in clear contravention to everything IHRA stands for, and of course contradicts the Stockholm Declaration."

application. In this context the criminal proceedings and the judgment against Leon Rupnik and his co-defendants are an unprecedented act in recent history. Accordingly, these proceeding may well be seen as the "Slovenian Nuremberg process". In this regard explicit attention has to be brought to the infamous symbolic meaning of the defendant's acts in the historic conscience of the people and in the broader international arena. This is why the complainants believe that in view of the above facts, it is quite obviously demonstrated that this case is especially well-founded.

4.3. Human rights or fundamental freedoms presumably violated

The following complainants' human rights emanating from the Constitution of the Republic of Slovenia (hereinafter: the Constitution) were breached in the proceedings by the contested act:

- generally accepted principles of international law and of the international treaties that are binding on Slovenia, as enshrined in Article 8 of the Constitution;
- equality before the law (Article 14 of the Constitution);
- inviolability of human life (Article 17 of the Constitution);
- prohibition of torture (Article 18 of the Constitution);
- right to effective judicial protection (Articles 23(1) and 25 of the Constitution),
- all of the above in conjunction with the right to protection of human personality and dignity (Article 21 of the Constitution), the right to personal dignity and safety (Article 34 of the Constitution), and the right to protection of the right to privacy and personality rights (Article 35 of the Constitution) *juncto* the principle of rule of law (Article 2 of the Constitution).

In addition to the aforementioned rights the following complainants' human rights provided for in the European Convention for the Protection of Human Rights and Fundamental Freedoms were breached:

- prohibition of torture (Article 3 of the ECHR);
- right to liberty and security (Article 5 of the ECHR);
- right to a fair trial (Article 6(1) of the ECHR);
- right to an effective remedy (Article 13 of the ECHR);
- prohibition of discrimination (Article 14 of the ECHR);
- all of the above in conjunction with the right to personal dignity (Article 8 of the ECHR).

4.3.1. Substantiation of the complainants' legal interest in bringing the proceedings

The complainants have been victims of the most serious crimes perpetrated by the defendant, or else it was their parents and grandparents who were the injured parties of those crimes. It is from their status of injured parties and/or victims that their legal interest in bringing the proceedings in this case directly stems from. The injured persons' legal interest has been extensively examined by the Constitutional Court in its decision no. Up-320/14-32; U-I-5/17-11 of 14 September 2017:

> *The fact that the injured party's legal interest in criminal proceedings is broader than the mere protection of a civil claim follows, moreover, from the definition of an injured party. In Slovenian criminal procedural law, an injured party is defined as a person whose personal or pecuniar right has been violated or threatened by a criminal offence. An individual is recognized a status of an injured party by the simple fact that a criminal offence has been committed, and not only at a certain point within the criminal proceedings. Every criminal offence in the Criminal Code (Kazenski zakonik; KZ-1) […] is set out in such a way that the (central) good protected by criminal law that is protected by a particular incrimination is clearly visible from its definition and position within the specific part of the KZ-1. The holders of this good protected by criminal law are the injured parties; committing a criminal offence means either a threat or a damage to some of their goods that may, according to the ZKP, be in a form of pecuniary or non-pecuniary damage, the latter including also personality rights. An individual, when he/she or his/her goods are a subject of criminal law protection, becomes an injured party by the very fact that damage has occurred and/or the criminal offence was committed. In criminal proceedings, the ZKP guarantees him/her procedural rights because he/she was injured by the criminal offence, regardless of whether or not he/she has filed a civil claim. It is evident from the above that under the ZKP injured parties in criminal proceedings do not only protect their pecuniary claims deriving from the criminal offence but are in these proceedings, by exercising any right provided to them by the ZKP, protecting their additional interest. Due to the reasons stated below, this interest is legally protected (para. 20 of the reasoning).*

In the continuation of the same decision, the Constitutional Court stated:

By exercising procedural rights in criminal proceedings relating to criminal offences such as those in the case giving rise to this review, the injured party protects his/her personal dignity (Article 34 of the Constitution) with which the criminal offence interfered. Thus, procedural rights are recognized by the ZKP to the injured party, not only with the aim of influencing the filing of a civil claim but also in order to ensure that in criminal proceedings his/her personal dignity, in his/her capacity of a criminal offence victim, is sufficiently respected (para. 23 of the reasoning).

In the quoted decision the Constitutional Court emphasises on several occasions that injured parties in criminal proceedings protect not only their pecuniar interests but also their personal dignity. Despite their victim status in the present case, the complainants were unable to protect their personal dignity within the procedural sense in the proceedings before the Supreme Court, and will be unable to do so in the criminal proceedings in the retrial. What is more, the complainants as victims were not even informed of the proceedings. They only found about the proceedings before the Supreme Court in the case at hand approximately eight years after its commencement, and about the decision three months after it had been delivered – and even that not by the court but through the media.

Thus, the complainants base their legal interest directly on their status of victims of Rupnik's criminal offences. The Supreme Court decision led to a significant deterioration of their legal position since there had been an interference with their right to human dignity. As victims of the most atrocious crimes they were, due to the wrongful Supreme Court decision, deprived of the possibility to participate in the criminal proceedings and thereby to protect their human dignity in these proceedings. The Supreme Court decision therefore interfered with their fundamental constitutional right to personal dignity.

4.3.2. The complainants and the substantiation of their victim status in these proceedings

1. **Terezika Bučar Omahen** was eight years old in 1944 when she was taken to the Home Guard base on Urh. Her father, Jože Omahen, was taken there and was inhumanely tortured, beaten and terrorized. He was a member of the resistance and the National Liberation Movement in the area of Sostro – Zadvor and Dobrunje. Terezika's entire family was part of the movement, her mother, who was beaten by the members of the Home Guard several times, as well. Given the setting aside of the judgement of Leon Rupnik, Terezika Bučar Omahen is

personally affected as she knows that her parents, who have been subjected to inhumane treatment in the hands of the Home Guard on Urh and in other places in the broader vicinity of Ljubljana, suffered life-long psychological and physical consequences of the war time terror led by L. Rupnik. With the setting aside of the judgement by the Supreme Court, General Rupnik is seemingly innocent of all crimes he perpetrated on the Slovenian nation during the National Liberation Fight (NLF). This is impermissible and unacceptable, as war crimes are not subject to statute of limitations and cannot be erased, as the judgement setting aside Rupnik's condemnation attempted to do.

2. **Jožefa Zadnikar** testifies that her entire family was engaged in the NLF: her father Franc Braniselj, his two brothers Lojze and Jože and sister Justina. They all joined the partisan units. Jožefa's mother Ivana stayed at home with four children. The Home Guard took revenge on her mother as they wanted to know how to reach the father who was in the NLF units. Despite pressure, both physical and psychological, her mother did not betray anything. The Home Guard then targeted Jožefa's grandparents and kept interrogating them in vain. So, they took revenge and led them to the Home Guard position in Barje (near Ljubljana). Their home was burnt down. At the position, Jožefa's grandparents were interrogated and inhumanely tortured. After interrogation, they tied them with wire and took them to Kozlerjeva gošča where they were beaten to death with gun butts. They killed her grandmother as well. As Jožefa was born in 1941, she was told of these horrors after the war when her parents told her about them. Jožefa knows that her parents suffered immensely because of the horrors they survived during the war, both physically and mentally. The memory on the war and the terror marked Jožefa as well, therefore she was deeply affected to learn that the Supreme Court set aside the judgement that recognised Leon Rupnik as guilty and sentenced to death by shooting. All the events she described, and all the horrors, are documented in the book »Memories on the partisan years« (1948).

3. **Magda Lovec Trtnik**, daughter to Anton Trtnik, a pre-war Communist killed as hostage in Gramozna jama in Ljubljana, and Justina Grad Trtnik, likewise a pre-war Communist who was betrayed and arrested by the Rupnik's Home Guard and sent to Rab concentration camp. Having returned from Rab, she was betrayed again, arrested and taken to Urh where Rupnik's Home Guard tortured her inhumanely and murdered her. Magda, then a child, was aware of all this, and suffered greatly. She too was hunted by the Home Guard, and was taken at gunpoint in one instance, but was saved by her grandmother. Magda's mother's grave was never found.

As a child, Magda was present at the exhumations of the victims of the butchers, Rupnik's Home Guard members, at Urh. She saw 87 opened graves with the remains of the victims. She remembers vividly to this day the scene with the opened graves with the remains. During her childhood, she suffered greatly, not only because of the horrors she witnessed, but also because she was an orphan without her parents, herself a victim of the terror of the butchers of Urh. All these events are documented in the book "St. Urh" authored by Štefanija Podbevšek, and in the brochure titled »Little Illegals«. Magda is gravely personally affected by the setting aside of the judgement effected by the Supreme Court, since by so doing, the responsibility of L. Rupnik for all the war crimes he was convicted for is erased. This goes for all members of the Home Guard on the territory of the Ljubljana Province and Ljubljana respectively who were under command of Mayor Leon Rupnik. With this act (of the Supreme Court), the Home Guard butchers are made equal to the fighters on the other side, the partisans who liberated our motherland. The setting aside of the judgement of Leon Rupnik is unacceptable and intolerable. Magda is deeply hurt, not only because of the loss of her parents in the hands of the Home Guard, but also because of the unacceptable deeds and crimes perpetrated during the war on their own, Slovenian people, by the Home Guard led by L. Rupnik.

4. **Tomaž Zajc** testifies that his entire family was arrested and deported to concentration camps because of their Jewish background: My mother was Regina Zajc b. Steinberg (1910–1981), before WW II employed as head secretary to the Ljubljana construction engineer Adolf Leo Dukić, daughter to the co-owner and director of the Glue Factory Viljem/Wilhelm Steinberg (1879–1944) in Zelena jama in Ljubljana. My father, Ladislav Zajc (1901–1990), worked as a banking clerk. The Steinberg family was Jewish but has converted to Christianity in 1921 and originated from Graz in Austria; my grandmother, Lili Steinberg b. Offner (1889–1944), was also Jewish, born in Poland. At the partitioning of Slovenia and Yugoslavia following the occupation, Ljubljana came under the Italian authority until Italy capitulated in 1943; after their retreat, Ljubljana was occupied by Germany. Although the Jews in Slovenia and Yugoslavia were oppressed since the antisemitic legislation passed in 1940, the Italian occupying authority, in accord with its politics, did not persecute the Jews neither radically nor systematically. In the first phase, the intent was to concentrate, and intern the Jews without citizenship on the occupied territory, both settled and those who came to the territory fleeing the neighbouring Nazi and Ustasha territories. By end of 1941, the Italian authority issued a warrant to transport to Italy, mostly towards the Ferramonte di Tarsia concentration camp, also the more visible and well-to-do Jewish families in Ljubljana who were Yugoslav citizens or

possessed the so-called homeland rights, among them my grandfather Viljem Steinberg. The immediate goal was to take hold of their industrial possessions. The families affected somehow managed to obtain the permission of the municipality to stay in Ljubljana, but some were deported nevertheless, for instance the families Lorant, Alles Percy and Moskovič, the latter because of their cooperation with the partisans. The German occupation that followed was of course radical and all but eradicated the Jewish population in Ljubljana. In late 1943, my grandparents were arrested and deported: my grandfather Viljem on 25 November to Dachau, and my grandmother Lili on 28 January 1944 to Ravensbruck. They did not survive the Holocaust. In my family and my maternal Aunt Lidija's family (she was married to Ludvik Filipec) the arrest took place on 12 September 1944. My mother Regina was deported to Begunje on 14 October 1944. As a coincidence, the night my parents were arrested, my nanny, Elizabeta Savica Rožanc, slept in our house in Resljeva ulica 8 in Ljubljana; normally, she only stayed during the day. When she heard the banging on the door, she grabbed me and ran to the kitchen balcony wherefrom she climbed to the balcony of the lower flat where our neighbours whom we knew well lived. They took Savica and me in and hid us. Once the house fell silent again, Savica took me, still in the dark, to the Tivoli park where her parents lived on the ground floor of the Tivoli Castle as renters of the municipality. Miha and Ema Rožanc did not think twice: they decided to reveal me to the neighbours and acquaintances as Savica's hitherto hidden illegitimate child. Savica was 23 at that time. I do remember that our immediate neighbours at Cekinov grad in Tivoli knew this cannot be true as they never saw Savica pregnant, but they kept their silence and have often invited me, Tomaž Rožanc, over to perform my honorary job as a "chicken herder". Both the Rožanc family and their neighbours understood very well the danger of keeping a Jewish child in hiding; Savica bravely exposed herself not only to the punishment in the hands of the occupying forces, but also to the stigma of unmarried mother. She kept taking care of me after the war as well; my parents treated her as their adoptive daughter. They kept in contact with her until the day they died, also after she met her future husband, a Vojvodinian Izstvan/Pišta Horvath, with whom she moved to United States. In 2016, the Holocaust Remembrance Centre Yad Vashem proclaimed Elizabeta and her parents, Ema and Miha Rožanc, Righteous among Nations because they had saved me. I finished university studies in geography specialising in tourism in Ljubljana and have worked for many years in management positions in various tourist enterprises. I served as State Secretary for tourism in two mandates in the years 1997 – 2000. I am particularly proud to have been a close friend and confidante to the Olympian Leon Štukelj. I live in Ljubljana with my wife Gordana with whom we have two grown sons and two grandchildren. All my life, until

her death, I kept in contact with Elizabeta Savica Horvath, by mail and phone, and have visited her in United States three times, in 1993, 1996 and 2008; Savica never returned to her old homeland. Her son's Feri's family I deem my family. About Savica, I can say, short and simple: she was my second mother. Without her, I would have been killed as a child, as were so many of my Jewish peers, and my grandparents.

5. **Staša Briški Bailey**, daughter to Marjana Baumgarten-Briški, Barcelona, Spain, from family Baumgarten, testifies: My family fled to Ljubljana from Trbovlje in 1941 following the Nazi occupation. My uncle Otto/Oton Baumgarten (*4/9 July. 1913, Loka (Trbovlje)-✡28 February 1945, Neuengamme), was son to my grandfather Dr Hugo Baumgarten (*16 December 1881, Vienna-✡15 March 1945, Bergen-Belsen) who was a physician in Trbovlje before 1941, and was brother to Georg/Jurij Baumgarten (*30 October 1908, Annaberg-), a pre-war dentist in Ljubljana, and my mother, Dr Marijana/Marjana Baumgarten, later married Baumgarten-Briški (*11 November 1914, Maribor-✡25 August 1969, Ljubljana), who worked as a an instructor and professor of English language at Faculty of Arts in Ljubljana. My uncle Oton studied physical culture in Venna before the Anschluss in 1938 but could not graduate. In Vienna, he became familiar with jiujitsu and judo. After the war started, Oton retreated from Trbovlje to Ljubljana, as did his father Hugo. It would seem that it was in order to survive that he started to teach jiujitsu and judo. His first advertisement was published in Družinski tednik (Family Weekly) on 9 October 1941 that brings also his then address: Cesta 29. oktobra No. 5, nowadays Gosposvetska cesta 5. How seriously he dedicated himself to his work is also shown by his manual that he published in 1942 entitled Džiu-džitsu. Sistem Kano v 149 slikah (Jiujitsu. Kano System in 149 pictures). I am not privy to the details of his life in Ljubljana in the next two years. Assuredly his situation turned for the worse with the German occupation. The turn for the worse he could understand also from the fact that his brother Jurij who had previously lived in Ribnica in Dolenjsko was arrested and deported to Dachau where he arrived on 8. January 1944; his concentration camp number was 60985. He survived until liberation in the Allach part of the camp. My mother, Jurij's sister Marjana, was arrested on 12. September 1944 during the general arrests of the Ljubljana Jews. She was deported to Ravensbrück and survived the Holocaust. Oton was, together with the last Jews in Ljubljana, among them also my grandfather Hugo and his wife Frida, arrested by the Slovenian Home Guard police on 12 September 1944. Oton's last address in Ljubljana was Križevniška ulica 7, and the last address of Hugo, Frida and Marjana, Lepodvorska ulica 26. Hugo and Oton arrived at Dachau on 14

September 1944 and were given concentration camp numbers 107977 (Oton), and 107976 (Hugo). Oto was on 22 November 1944 transferred from the Dachau camp to the Neuengamme camp where he died on 28 February 1945, 32 years old, of typhus. My grandfather Hugo also did not survive the Holocaust. On 9 December 1944, he was transferred from the Dachau camp to Bergen-Belsen where he died on 15 march 1945, that is to say, approximately in the same time that Anne Frank (*1929-✡1945), one of the most renown victims of the Holocaust, also lost her life.

6. **Jože Hartman** was, upon return from Italian internment, arrested again in mid- 1944. Until May 1945, he was incarcerated by the Rupnik's special police. He was "saved" from the prison by Gestapo who transferred him to their jails, else he would have been shot in Turjak in May 1945 where the Home Guard killed several activists of the NLF, especially the intellectuals. The stressful time he spent jailed and the constant danger of being killed as a hostage took so much toll on him that he died at the age of 65; all his brothers and sisters died between the ages of 80 and 100. My father was a lawyer and Christian Socialist. While in high school, he was beaten by the principal of the Classic Gymnasium as a »Communist« and was temporarily expelled from school. A Home Guard loyalist wounded him with a bayonet and was constantly harassed by Clero-Fascists, the founders of the Home Guard, while in high school. He acted as a currier of the NLJ in Ljubljana when he was 13 years old.

7. **Jewish Community of Slovenia (JCS)** is the umbrella organisation for Jewish people living on the territory of Slovenia. Its organs are the highest representatives of the Jewish religious community in Slovenia. The JCS is the only legitimate representative of the Slovenian Jews and holds continuity of a legal person of all the historic Jewish communities on the territory of present-day Republic of Slovenia. The JSS holds full membership in the Euro-Asian and European Jewish Congresses, the European Union of Jewish Students, the European Jewish Fund, and is a partner organisation to Israeli Jewish Congress. The membership of the JCS are following, in great consternation, the attempts at rehabilitation of war criminals who were responsible for the persecution of Jews in Slovenia. In his public appearances, Leon Rupnik time and again called for persecution of Jews and played a major role in the deportations of the Jews from Ljubljana and vicinity in the years 1943 and 1944; very few survived. The setting aside of the judgement of Leon Rupnik our membership views as a shameful decision and an attempt at Holocaust distortion that is a terrifying insult to the dignity of all the numerous Rupnik's victims.

8. **Associations of the National Liberation Movement of Slovenia (ANLMS)** endeavours to permanently unite all the residents of Slovenia with the values that gave the Slovenians strength to come victorious out of historic afflictions, especially WW II. The ANLMS is one of the civil organisations in Slovenia that boasts numerous memberships. Since 1993, the ANLMS holds full membership in the World Veterans Federation. By its statute, the ANLMS works in public interest in the fields of war veterans, victims of war violence, the deportees, internees, stolen children, political prisoners, the incarcerated, and wartime cemeteries and burial sites. Its organisations span the entire country and strives, with diverse activities, to preserve the memory on the struggle of the Slovenian nation during WWII and fortify the national confidence. It strives to uphold the Slovenian statehood and is working for democracy, patriotism and a sovereign stance in international relations. It also stands for a reconciliatory dialogue about the past, respect for historical truth about the most traumatic time in the Slovenian history, and reconciliation among all Slovenians. The ANLMS members were aggravated and deeply hurt to learn that the Supreme Court set aside the judgement against Leon Rupnik who is a symbol of treason and collaboration with Italian and German occupying forces during WW II. As Mayor of Ljubljana and President of the Ljubljana province under command of SS General Erwin Rösener, Leon Rupnik was leading a treasonous fight against his own nation and propagated Fascism, aggrandized the role of Nazi Germany and spread antisemitic hysteria. With the annulment, the dignity our numerous ANLMS members, and the personal dignity of the organisation itself, was seriously attacked.

Among the complainants are some who have been directly victimised by the violence that Leon Rupnik was the key figure in as a symbol of treason and collaboration with the Italian and German occupation, directing and encouraging it in his public appearances. Other complainants are those whose family members and close relatives were subjected to arrests, physical and mental violence, torture, forced relocations and deportations to death camps. Still other complainants are organisations and their membership whose testimonies on the episodes within WW II paint the picture of rebellious and national liberating movements in the occupied Ljubljana and other Slovenian lands whose courage placed Slovenia on the side of victorious Allied Forces at the end of the war.

1. **Dr Ljubo Bavcon,*** Devinska ulica 2, Ljubljana[9]

Distinguished professor of the University of Ljubljana, Honorary Citizen of Ljubljana, I am joining the constitutional complaint against the annulment judgement of the Supreme Court in the case of Leon Rupnik in the name of my late mother Cilka Bavcon b. Pevc, and in my own name, because this judgement violates inherent human dignity which is, according to the Preamble to the International Covenant on Civil and Political rights »... the foundation of freedom, justice and peace in the world«. My mother was one of the initial organisers of the network of activists of the Liberation Front (LF) first for Bežigrad, and then for the entire city of Ljubljana. She organized the collecting of supplies for the partisans, took care of the families of incarcerated people and hostages that were murdered, partook in the demonstrations in front of the Ljubljana bishopric in 1943, etc. In the autumn of 1944, she was arrested by Rupnik's police who, during interrogations, physically tortured her so badly that she suffered life-long health consequences. My mother is of those brave and committed LF activists who earned Ljubljana the title of Hero City. The treatment my mother received in the hands of Rupnik's police represent violations according to Articles 7, 9 and 10 of the International Covenant on Civil and Political Rights with respect to which the annulment judgement frees Rupnik of all responsibility. The setting aside of the judgement against L. Rupnik is clearly a grave violation of dignity of my mother, therefore I propose to the Constitutional Court to use its authority detailed in Article 161 of the Constitution of the Republic of Slovenia to set aside or modify the said judgement of the Supreme Court. The setting aside of the judgement against L. Rupnik is also a violation of my human dignity and my rights to freedom and safety. In October 1942, I was betrayed by a Rupnik loyalist to the Italian police who arrested me. I was repeatedly interrogated and then sentenced in February 1943 to 8 years of prison by the Italian Military Tribunal. I was in Italian prisons from March 1943 until February 1944 when I was transferred to the Coroneo prison in Trieste. In September 1944 the Germans transferred me to the Bernau am Chiemsee prison where I was jailed until the end of war. The said judgement of the Supreme Court is by its inevitable effects a decision of acquittal; therefore, it is a violation of my human dignity and my human rights as defined in the above cited Articles of the International Covenant.

[9] The complainants marked by asterisk (*) have lodged a separate constitutional complaint with practically identical content [editor's note].

2. **David Pollak,*** Linhartova ulica 3, Ljubljana

David Pollak testifies: German secret state police (Gestapo) has, with the aid of Home Guard police, arrested most of the then remaining Ljubljana Jews and their non-Jewish relatives in the second half of 1944, and deported them to various concentration camps. Among them were all my relatives from the Pollak family. Arrested and deported to Dachau was also Evgen Bolaffio; his wife Amalija was deported to Auschwitz. Their son Renato died two years previously as a partisan. Evgen managed to survive the war as he was not deemed Jewish in the camp. In the same year, Klara Moskovič was arrested whose husband and sons were arrested earlier, under Italian occupation. With Klara, her mother Ivana Leitner was arrested as well. In the end, the entire family was murdered, everyone died in concentration camps. On 12 and 14 September 1944 massive arrests took place in Ljubljana whereby 32 of the remaining Jews and their non-Jewish relatives were captured. Among them was also the wife to Evgen Bolaffio's brother, Marčela. Also arrested were nearly all the members of my grandfather's family, Pavel Pollak, who converted to Christianity in 1913. His wife, my grandmother, was a Slovenian Catholic, Marija Pollak b. Ješe. Arrested were also their son, i.e. my father Riko, and both daughters, my aunts Nives and Tanja. The entire family was active in the LF, while one of the sons, my uncle Fedor, twin brother to my father, joined the partisans in 1943.

Particularly tragic was the fate of three elderly Jewish merchants: Oskar Ebenspanger, Emil Hofmann and my grandfather, Pavel Pollak. They were deported from Begunje to Mauthausen as late as 1 March 1945. Walking from the Mauthausen railway station towards the camp, they were so weakened that other prisoners had to carry them, all covered in blood. In the camp, »the SS beat them to the floor, ordered the Hitlerjugend children to stone them, telling the children they were Jews guilty for all the misfortunes and war, and then ordered other prisoners to remove them. After that, nobody in the transport ever saw them again«.

3. **Branka Kastelic,*** Litijska 363, 1621 Ljubljana – Dobrunje

The undersigned Branka Kastelic, daughter to Slavka Dežman Kastelic, a partisan courier, although born after the war herewith expresses here deep distress about the Supreme Court's setting aside of the judgement against General L. Rupnik. Her mother, a LF activist, was jailed in the Urh Home Guard camp when she was 17. Slavka was monitored by the Home Guard since October 1943 when her brother Ciril, 15 years old, a courier in the Levstik Brigade, was shot in front of the Sostro school building. Slavka was arrested in her home in June 1944; she

tried to escape but failed. The mail she kept for the partisans she managed to partially burn and partially hide in the house. She was interrogated by the Home Guard who tried to extract information about other activists in the Sostro village, but she betrayed none. Then she was taken to Urh. What she survived there she described in the article »S terena v internacijo« (From the field to internment) and in the fourth book of the series Spomini na partizanska leta (Memories of partisan years, 1952). Branka's mother was often telling her about the circumstances in the Urh camp: barbed wire, traffic barriers, the bellman's house, the order of the graves that were dug up). During the interrogations, the parish priest of Sostro was also present and tried to persuade her to confess everything so they could let her go… She was telling her daughter about the torture she underwent during interrogations. Since she refused to tell them anything, they tortured her in the most horrific ways (tying a towel over her mouth, pricking with sewing needles under fingernails). She told her daughter a lot more of this all, it was overwhelming; because of the torture, the daughter was nearly suffocated at birth and the mother and child were just barely saved. Because of all that, my personal distress about the repeal of the judgement is tremendous as it defames my mother who, in her early youth, still a child, had to endure all the horrors that Rupnik committed through his Home Guard army in Urh. Her pains were never eased, they spread to the entire family, me included.

4. **Marjan Jernej Virant,*** Vinterca 30, Ljubljana

Marjan Jernej Virant and his mother were looking for his father after the war and found him in St. Urh where he was killed without trial. They recognised his body by the shirt he had been wearing. They had to dig deep to reach the corpses, as the Home Guard obeyed the then Inspector General, "President" Rupnik who issued a special circular demanding that the "terrain people" need be buried deep, for hygienic reasons. The real reasons had nothing to do with hygiene, but with the unpleasant revelations of mangled bodies of people killed in the vicinity of Ljubljana that the Home Guard used to bury in shallow graves. Farmers would chance upon them when ploughing or tidying the fields, or animals would dig them up, or the water would deposit the bodies; perhaps many were ditched in the water. Rupnik therefore knew that the "terrain people", as he put it in the circular, were killed and buried. For all their inhumane doings, the murderers would receive absolution by the priests who were present, as several also admitted at their trial: "I was merely doing what The Most Reverend Bishop Gregorij Rožman and the Holy Father Pope ordered me to do." Bishop Rožman was tried in the same trial as Rupnik. On Urh alone, aside to the father of Marjan Jernej Virant, there were hundreds of

insufferably tortured and brutally killed people, not soldiers, but civilians, “terrain people”; very few, if any, were Communists against whom the Home Guard allegedly waged war. Marjan’s father was not a Communist, nor was anyone in the family, but they were patriot Slovenians and fought the occupation as civilians. They were murdered without trial, without the possibility of defence, without lawyers and procedural processes that the Military Tribunal no doubt afforded Rupnik. Rupnik may not have personally taken the father of the complainant under arrest, did not torture and kill him personally; but all this was done by persons, Home Guard members, who were under Rupnik’s command and who carried out his executions, circulars, and orders. Rupnik also supervised the Home Guard in his position of the Inspector General of Home Guard, before he became their supreme commander in May 1945. On 9 January 1944, the Rudnik branch of the LF held a meeting in the home of the complainant’s neighbour, Škraba. Nine people gathered who had no idea that whether they were observed or betrayed. All of them knew each other well, save for one person who joined them for the first time that evening. The next day, while returning from work, the complainant’s father was stopped and identified by Home Guard on Dolenjska cesta. In the late hours of the evening, they came to the complainant’s home and ordered his father to come with them. They told him to dress warmly and take along as much money and cigarettes as possible. That was the evening when the complainant last saw his father alive. His mother soon started to inquire where her husband was; at the Belgian barracks, she overheard some women talking about things that were happening in Urh; one of the women told her they are murdering people up on the hill above her village. The uncertainty about the father’s whereabouts, and what happened to him, lasted until autumn of 1945 when the bodies of the murdered people started to be excavated. In this way, the complainant and his mother found their father and husband in a freshly dug pit where he had been thrown into a mass grave of the people who were arrested that night as the remains were still recognisable. All the bodies were badly mangled, so they were barely recognisable. For some, it was impossible to say whether they were shot to death or murdered by other means.

5. **City Municipality of Ljubljana (CML),*** Mestni trg 1, 1000 Ljubljana

The CML in its role of the manager of the Slovenian capitol deems it its duty, aside to taking care of multifarious development of the city, to nurture a distinct respect for all its numerous inhabitants that actively co-create the city’s present, and for all of those who have earned an honoured inscription into the city’s history. The time of WW II when Ljubljana was encircled

behind a barbed wire fence brought together in the common purpose of resisting the occupation, Fascism and Nazism so many courageous, solidarity-minded and committed people that they earned their city the proud title of Hero City. Numerous known and unknown Ljubljana's heroines and heroes recognised in that time the value of freedom as their highest purpose for which they were able to create do veritable resistance miracles; one of them was the conspirator Radio Kričač (Radio Yeller). Then there were courier and intelligence actions that recruited many committed, often very young women; the conspiracy organisation of health and sanitization service for wounded partisans; education in Slovenian language; engaged art events; and finally, massive recruitment into the active partisan resistance movement. On the brink of death, life was imbued with creative powers, while sacrificing your life for freedom was deemed the highest moral value. The CML with its Mayor Zoran Janković and its leadership team, its Honorary Cityizens and a majority of Ljubljanians pay their respects to this historic epopee every year on 9 May, the Liberation Day of victory over Fascism and Nazism, which coincides with the Europe day. The heroic deeds of the time thus remain the basic historic value and the ID card of Ljubljana. Contrary to that, some have chosen at that time the abject course of treason and collaboration with the occupiers. General Leon Rupnik was their leader and thus became the symbol of collaboration during WW II. The Supreme Court's setting aside of the judgement against Rupnik thus offends the patriotic feelings not only of the leadership of the CML, but also of uncountable inhabitants of the Slovenian capital.

Among the complainants are some who have been directly victimised by the violence that Leon Rupnik was the key figure in as a symbol of treason and collaboration with the Italian and German occupying forces, directing and encouraging it in his public appearances. Other complainants are those whose family members and close relatives were subjected to arrests, physical and mental violence, torture, forced relocations and deportations to death camps. Still other complainants are organisations and their membership whose testimonies on the episodes within WW II paint the picture of rebellious and national liberating movements in the occupied Ljubljana and other Slovenian lands whose courage placed Slovenia on the side of victorious Allied Forces at the end of the war.

The status of the constitutional complainants is briefly described above; additionally, the complainants are adding to the file their own statements and testimonies which detail their views on the subject matter.

4.3.3. Substantiation of the alleged violations of the Constitution

4.3.3.1. Violation of the right to human dignity (Articles 21 and 34 of the Constitution)

The complainants are convinced that the Supreme Court judgment no. I Ips 3425/2014 setting aside the judgment by which Leon Rupnik was convicted violates the human rights set out in the Constitution of the Republic of Slovenia, and ignores the generally valid principles of international law, especially those that had been formed as principles respected by civilized nations after WW II, as well as the rights enshrined in the ECHR and other international treaties that are binding on Slovenia. All the complainants are deeply hurt by the fact of setting aside the judgment against Rupnik, the person most responsible for all the grief caused to them and their families. This is why they allege, in the first place, a violation of the right to human dignity.

Constitutional law and human rights law underline that human dignity is "a fundamental requirement of exercising all other human rights and freedoms. It permeates the entire legal order, and is by this reason – be it as a starting-point as regards values or as a legal principle and right – crucial for the interpretation of the Constitution and for the functioning of the authorities in specific proceedings and in the legislative activities. It means that every individual is recognized as a legally protected being having his/her own identity, opinions, desires, decisions, and honour […]"[10] The authors emphasize the importance of respect of human dignity in its protecting role against unjustified interferences and requirements of the state and the society. It is a cornerstone value to be respected by the state authorities when interpreting and carrying out regulations.

In her Commentary to the Constitution,[11] Petra Kleindienst notes that Article 21 of the Constitution (protection of human personality and dignity) is classified among the provisions guaranteeing the protection of fundamental personal rights and safeguarding human personality. According to the author, human dignity is at "the very summit in the hierarchy of human rights". It is the core of procedural safeguards enshrined in the Constitution to be used in proceedings before national authorities as well as when it comes to interferences with personal liberty and with the individual's freedom of choice. Articles 21 and 34 of the Constitution will continue to be applied broadly in the constitutional assessment, with the aim

[10] Dr Franc Grad, Dr Igor Kaučič, Dr Saša Zagorc, Ustavno pravo (Constitutional Law), Pravna fakulteta v Ljubljani, Ljubljana, 2016, p. 740.
[11] Komentar Ustave Republike Slovenije (Commentary to the Constitution of the Republic of Slovenia), editor Dr Matej Avbelj, Nova univerza, Ljubljana, 2019, part I, p. 167 et seq.

of achieving the highest level possible of the so-called realized dignity that is based on the original dignity. With the concepts in this Article being open-ended, they will only acquire practical meaning in the constitutional assessment (pp. 169-170). From this standpoint, the present constitutional complaint offers a challenge and an opportunity to the Constitutional Court to concretize and delineate in detail the meaning of human dignity as defined by Articles 21 and 34 of the Constitution.

Jernej Letnar Černič[12] emphasizes that human dignity is "a fundamental value in a democratic state characterized by a rule of law; without it, the rule of law may not be established and may not fully flourish. The rule of law limits the arbitrariness of state authorities and strong interest groups by protecting human dignity of every single individual and the society as a whole. Human dignity does not depend on the individual's philosophical conviction but belongs to him/her by the very fact that he/she is a human being. As such, it is closely linked to human life as well as the right to life and its exercise."

Peter Svetina, the Slovene Ombudsman, notes that "dignity is a common expression and a foundation of all human rights guaranteed by the Slovene Constitution and international declarations. These rights are weakened and undermined by several events. Although we may live in times very different from the ones in which the idea of a united Europe was conceived, one has to be constantly on alert in order to prevent the values and principles deriving from the Charter of Human Rights from changing and to prevent the erosion of human rights" (Address by the Ombudsman on the occasion of the Holocaust Remembrance Day, 19 January 2020).[13]

The provisions on human dignity can be found in international treaties binding on Slovenia, e.g. in Article 3 of the Universal Declaration of Human Rights, the preamble of the International Covenant on Civil and Political Rights, the Convention for the Protection of Human Rights and Fundamental Freedoms, and Article 1 of the Charter of Fundamental Rights of the European Union. The extensive case-law on the subject of human dignity can be found in judgments of various constitutional courts across Europe and of the ECtHR in Strasbourg, as well as of the Court of Justice of the EU in Luxembourg.

[12] Jernej Letnar Černič, Človekovo dostojanstvo kot temelj vladavine prava v slovenski družbi (Human Dignity as a Cornerstone of the Rule of Law in Slovene Society), Bogoslovni vestnik, no. 78/2018.
[13] Available at: http://www.varuh-rs.si/medijsko-sredisce/sporocila-za-javnosti/novice/detajl/varuh-svetina-nagovoril-udelezence-slovesnosti-v-pocastitev-27-januarja-mednarodnega-dneva-sp/?cHash=a7f98aad485d9d22158aef861aacb0fc

Great importance of human dignity is also reflected in the Slovenian constitutional case-law. In 1995 the Constitutional Court prevented the referendum to be called on revocation of citizenship of the persons having obtained it at the time of Slovenia's independence, stating already at that occasion that allowing it would inadmissibly interfere with personal dignity and safety set out in Article 34 of the Constitution (Constitutional Court decision no. U-I-266/95, para. 10 of the reasoning). The Constitutional Court acted in the same vein regarding the referendum request against reinstalling permanent residence to the "erased" people in Slovenia [Translator's note: The "erased" refer to more than 20,000 people from the former other SFRY republics whose permanent resident status was erased, in an unconstitutional manner, from the register for failing to apply for Slovenian citizenship after independence.], since "constitutional values protected by a Constitutional Court decision need to be given precedence over the citizens' right to referendum that would entail unconstitutional consequences". (decision no. U-II-1/06)

The Constitutional Court has invoked human dignity when deciding in a range of diverse cases concerning the interference with personal integrity and liberty, police violence (Up-555/03), the amount of the awarded compensation (Up- 226/04), the information given to the defendant about the privilege against self-incrimination (Up-1293/08), a burial of a corpse (U-I-54/99), interference with privacy (U-I-216/07), the position of vulnerable minority groups (Up-1391/07), a search of a home and of an attorney's office (Up-2530/06), discrimination based on age with regard to austerity measures (U-I-146/12), religious freedom, street naming, etc.

It follows from the Constitutional Court decision no. U-I-95/14 that "pursuant to Article 34 of the Constitution everyone has the right to personal dignity and safety. In line with the settled constitutional assessment, this provision of the Constitution is related to other provisions of the Constitution. It is most closely linked to the provisions on the protection of the personality rights set out in Articles 35-38 of the Constitution; it addition, it is intertwined with non-discrimination and the equality requirement (Article 14 of the Constitution) and the provisions of Articles 17, 18, and 21(1) of the Constitution (inviolability of human life, prohibition of torture, protection of human personality and dignity in criminal proceedings). According to the view of the Constitutional Court, the human right to safety essentially means that nobody is allowed to physically or psychologically interfere in an unlawful manner with an individual's sphere, while at the same time the state has the duty to actively strive to achieve the highest possible degree of safety of its citizens that is reasonably achievable, and to guarantee a right

to personal dignity and safety. Pursuant to Article 35 of the Constitution the inviolability of the physical and mental integrity of every person and his/her privacy and personality rights shall be guaranteed. […]"

The complainants make reference to the view of the Constitutional Court which, in its decision no. **Up-563/15**, addressed the importance of personal liberty and the limits of its restrictions, stating in this regard that "human dignity is a fundamental value permeating legal order as a whole, and therefore having an objective importance in the functioning of the authority in both concrete proceedings and in adopting legislation. With respect to its subject matter, human dignity presupposes that every human being has the same and absolute inner value belonging to him/her precisely due to the fact that he/she is a human being […]. When protecting the position of particularly vulnerable groups of individuals, the respect for human dignity as a fundamental societal value is of most prominent importance. Individual features of human dignity find their realisation in concrete legal proceedings whereby the role of the courts, and of the Constitutional Court, in finding possible violations in crucial. The courts' and the Constitutional Court's decisions define, by taking into account the specific circumstances of individual cases, the borders of what is permissible in the functioning of public authorities."

The right to personal dignity and safety (Article 34 of the Constitution) belongs to the group of fundamental and cornerstone rights. What is important for the constitutional complaint at hand is the so-called primary dignity related to Article 1 of the Constitution regarding the democratic political order, connected also to the right to honour and good name/reputation. It is pointed out in the Commentary to the Constitution of the Republic of Slovenia that dignity is, in the first place, a right allowing for protection against interferences from the state and other individuals. It is a dignity that cannot be waived, lost or limited. When assessing dignity the Constitutional Court should not be scared off by the power of the authorities that have taken a particular constitutionally controversial decision, "be it the Supreme Court, the National Assembly, the Government, or the forty thousand voters" since this "could jeopardize the importance of its being, especially when it comes to protection of dignity".[14]

The Constitutional Court recognizes that dignity has a status of an independent right. Human dignity has been recognised as having especially significant weight by the Constitutional Court in its decision no. U-I-109/10 of 3 October 2011 in which the Constitutional Court set aside the

[14] A comprehensive overview in: Dr Ciril Ribičič, Človekove pravice in ustavna demokracija (Human Rights and Constitutional Democracy), Študentska založba, Ljubljana, 2010, p. 668.

ordinance of the City Municipality of Ljubljana regarding the naming of Titova cesta [a road named after the Yugoslav president Tito, translator's note]. It is important for the constitutional complaint at hand that in that case the Constitutional Court performed a thorough analysis of the issue of symbolic meaning of Tito's name which reveals basic directions and distractions of the former constitutional order and which has disturbed the opponents of naming the road after Tito. As for the complainants, they emphasize the importance of the conviction of Leon Rupnik who is a symbol of collaboration with the Fascist and Nazi occupying enemy, the collaboration which caused so much grief to themselves and their close ones. They also accentuate the importance of the dignity of the victims of the violence executed by the occupation forces and their helpers.

During WW II, the complainants have personally experienced in Ljubljana and in a broader area the misdeeds of Leon Rupnik, the symbol of national betrayal and collaboration with the Fascist and Nazi authorities, and the activities of the Home Guard Police under his command that have marked their entire lives. In this context the symbolic role of Leon Rupnik who has seen himself deprived of his rank of a general even by the royal Yugoslav government in exile is unequivocal. From this standpoint, besides the uncontested and uniform findings of historians, opinions by the Home Guard members themselves are revealing regarding his way of functioning:

"It can be said that Rupnik has unnecessarily and several times crossed the line set by international legislation as regards activities during occupation. I would only like to mention his vocabulary, especially with regard to communism as being Jewish conspiracy. Not only did he speak about that in the early phases, but also later on and even during the last months of war. In times when the German annihilation machine systematically went on exterminating Jewish population in countries under its occupation and when the number of the murdered was counted in millions, such a behaviour meant a lack of political feeling, at the very least".[15]

As already stated, Rupnik was the key symbolic figure of national betrayal and collaboration, and his posing in front of Nazi symbols is explicitly indicative of his ideological orientation that led to his criminal activities. His speeches and lectures are available on the web; among them, the most telling are the appeals to fight the Jewish conspiracy and to support the leading role of the German Reich in Europe, "in the centre of which the greatest German Volk took

[15] Tine Velikonja, Magazine "NSZ" (Nova slovenska zaveza), 1 September 1996.

over the battle against the Jewish corruption in the world". His statement regarding allies and their opponents during WW II is along the same lines:

"*We must calmly and with all the fanaticism possible lead the battle against the Jewish domination in the world, the domination that serves Stalin's and Tito's bandits and their helpers, Anglo-American gangsters, while maintaining a strong confidence in the righteousness of the European leader of the German Volk.*"[16]

In its decision no. U-I-109/1[0], in the part relating to the importance of human dignity in Slovenian constitutional order, the Constitutional Court when ruling on Article 2 of the Odlok o določitvi in spremembi imen in potekov cest in ulic na območju Mestne občine Ljubljana (Titova cesta) (Ordinance on Determining and Changing the Names and Course of the Roads and Streets in the Territory of the Ljubljana Municipality (Titova cesta)) has put human dignity on the pedestal of human rights and fundamental freedoms (paras. 6-12 of the reasoning).

The understanding that human dignity is the highest ethical value, along with the fact that its respect must be used as a criterion and a restriction for the state authorities' functioning has gained importance over the centuries. On a constitutional level, human dignity gained its first recognition as a universal value belonging to all people at the end of the 18th century, with the adoption of the key constitutional documents in the period of creation of the independent United States of America and the French revolution. After some stalemate in the human rights development in the Continental Europe in the 19th and in the beginning of the 20th century, the principle of respecting human dignity has developed after WW II as a special universal principle, first within some of the most important international acts, and later on as a fundamental constitutional principle in the constitutions of new democracies which, by codifying human rights, installed the human being in the centre of their constitutional orders.

Unlike the former Socialist Federal Republic of Yugoslavia (SFRY), the Republic of Slovenia is a state of a rule of law, with its constitutional order based on the principle of respect of human rights and fundamental freedoms, as is evident from its fundamental constitutional documents. It is clear from the Basic Constitutional Charter, the preamble of the Constitution, and numerous provisions of the Constitution that human dignity is a fundamental value permeating legal order

[16] https://sl.wikipedia.org/wiki/Leon_Rupnik; https://www.slovenska-biografija.si/oseba/sbi527688/

as a whole, and therefore having an objective importance for the functioning of the authorities in both concrete proceedings and in adopting legislation.

As a fundamental value, human dignity finds its normative expression in numerous provisions of the Constitution, and is notably given expression in the provisions guaranteeing individual human rights and fundamental freedoms, these rights and freedoms being aimed precisely at securing different aspects of human dignity. Attention can be drawn to some of them – to those that are especially connected to human beings as persons enjoying their own absolute inner value: non-discrimination (Article 14(1)), inviolability of human life (Article 17), prohibition of torture (Article 18), protection of personal liberty (Article 19), protection of human personality and dignity in legal proceedings (Article 21), legal guarantees in criminal proceedings (Article 29), right to personal dignity and safety (Article 34), freedom of expression (Article 39), and freedom of conscience (Article 41).

As a special constitutional principle, the respect for human dignity finds its direct foundation in Article 1 of the Constitution which defines Slovenia as a democratic republic. The principle of democracy (to which other constitutional principles are closely linked, e.g. the principle of the rule of law (Article 2 of the Constitution) and the principle of the separation of powers (Article 3 of the Constitution)), in its purport and meaning, exceeds the definition of the organization of the state as being merely a formal democracy in which acts and regulations are adopted in accordance with the principle of majority of votes. In contrast, the principle of democracy in its purport defines the Republic of Slovenia as a constitutional democracy, i.e. a state in which functioning of public authorities is limited by constitutional principles and by human rights and fundamental freedom, this being so precisely because human beings and their dignity are at the very centre of the state's existence and functioning.

The courts' and the Constitutional Court's decisions define, by taking into account the specific circumstances of individual cases, the borders of what is permissible in the functioning of public authorities. In this way an abstract albeit key constitutional value becomes living law.

The complainants fully agree with these starting points of human dignity exercise that were further elaborated by individual Constitutional Court judges (separate opinions to decision U-I-109/10-17 of 3 October 2010) in their consenting separate opinions. However, one simple question arises: is the protection of personal dignity not guaranteed to everyone, and especially denied to the victims of the Fascist and Nazi terror during WW II? Since the complainants

believe that the question should be answered in the negative, they believe that this will be dully taken into account when deciding on this constitutional complaint. By delivering the cited decision, the Constitutional Court decided to set a high threshold the state authorities have to cross in order to assure the respect of human dignity in legal acts of general application and in individual legal acts.

It is not difficult to understand that the Supreme Court judgment against which this constitutional complaint is filed fails to respect the standards deriving from the said decision and the case-law of the Constitutional Court in general, as well as the case-law of international courts. The complainants believe that the present case is characterised by an abuse of a procedure since the latter was not intended for cases like Leon Rupnik's conviction but for the ones redressing the wrong caused after WW II and awarding compensation to victims of such wrong.

Leon Rupnik was among those who had caused such wrong and had devotedly served the occupying authorities by spreading and legitimating the Fascist and Nazi ideologies. He was the initiator and supporter of the pledge of allegiance to the German occupying forces and their leader Adolf Hitler, to whom he toasted for his birthday with his right arm extended in the Nazi salute. In addition, he was a consistent antisemite who in his speeches incited persecution of Jews, in that period the most vulnerable minority group in Slovenia and globally.

According to historic assessments, all Rupnik's actions were "a multifaceted assistance to the occupying forces in trying to destroy the National Liberation Fight and in the endeavour to unite the destiny of a revolutionary nation fighting desperately for freedom with the destiny of Fascism and Nazism that were doomed to downfall".[17] His end was in line with the role he had played, and is described by Boris Mlakar[18] as follows:

> *"[…] the collaborating Home Guard members from the Province of Ljubljana and from the Upper Carniola region were retreating from their homeland fearing the punishment of the Slovenian nation, following the sad path of immigration that General Leon Rupnik had taken before them"*.

[17] Metod Mikuž: Rupnik, Leon (1880-1946), Slovenska biografija, Znanstvenoraziskovalni center SAZU (Research Center of the Slovenian Academy of Sciences and Arts (SASA)), 2013.
[18] Boris Mlakar, General Rupnik in slovensko domobranstvo (General Rupnik and Slovenian Home Guard), Zgodovinski časopis no. 3/1981, p. 287.

One cannot overlook these and other commonly known facts about Leon Rupnik's activities, the large amount of archive documents connected to the process against L. Rupnik and supplemented by the complainants' testimonies when assessing the legality and legitimacy of the trial against him and analysing whether or not the Military Tribunal has adequately taken into consideration the principles recognized by civilized nations in order to help prevent a new bloodshed similar to that committed during WW II.

The European Court of Human Rights has examined human dignity in connection with almost all rights stemming from the ECHR which, under Article 8 of the Constitution, is applicable directly in Slovenia; the minimal standards of protection of rights enshrined in the Convention are binding on Slovenia and its authorities. The ECHR distinguishes itself from other international instruments governing the protection of human rights by the fact that it is backed by the most important international court which can efficiently sanction, both in a moral and material way, the states violating the Convention. Slovenian courts are not allowed to wait for the ECtHR to rule on a Convention violation but are obliged to know Convention and the extensive body of the ECtHR case-law enabling that court to progressively interpret the Convention. They must rule not only based on the Constitution but also based on, and in accordance with, the Convention. Generally, the ECtHR has examined human dignity in cases where it found a breach of Article 3 of the ECHR (Prohibition of torture), e.g. in case Bouyid v. Belgium, and rather seldom where it found violations of the right to life set out in Article 2 of the ECHR (e.g. in case Valentin Campeanu v. Romania) or in Article 5 of the ECHR (Right to liberty and security) (Khlaifia v. Italy), a violation of right to a fair trial set out in Article 6 of the ECHR (Baka v. Hungary) or of freedom of expression set out in Article 10 of the ECHR (Kyprianou v. Cyprus and Perincek v. Switzerland), violations of Article 8 of the ECHR (Right to respect for privacy) e.g. in case Folgero v. Norway, of Article 3 of Protocol no. 1 (Right to free elections) (Hirst v. the United Kingdom and Sejdić and Finci v. Bosnia and Herzegovina) or of the right to an effective remedy from Article 13 of the ECHR (Desouza Ribeiro v. France) etc.

It is clear from how human dignity is addressed in international agreements that the notion of human dignity is an independent category which at the same time is superior to notions of human rights and freedoms. In other terms, every breach of individual human rights or freedoms is at the same time a breach of human dignity; however, human dignity may be violated without there being a breach of one of the rights and freedoms included

in the abovementioned international agreements. The setting aside of the Military Tribunal judgment is an example that illustrates above findings because this setting aside by itself equals a violation of human dignity of all the defendant's direct and indirect victims since his acts in every single case amounted to a violation of the rights to life, to physical and mental integrity (prohibition of torture, and similar), to freedom and safety, etc.

The ECtHR has addressed the interpretation of Article 7(2) of the ECHR several times (Vasiliauskas v. Lithuania, Maktouf and Damjanović v. Bosnia and Herzegovina, Naletelić v. Croatia, Korbeli v. Hungary). This is a provision that has enabled a derogation from the principle that a criminal offence has to be set out by law before it was committed (*nullum crimen, nulla poena sine lege praevia*). Para. 2 enables criminal proceedings to be carried out also for criminal offences that were not defined as such at the time when they were committed, provided however that those acts were "criminal according to the general principles of law recognised by civilised nations". Although a too broad interpretation and application of this exception to other cases of armed disputes after WWII may be controversial for European judges,[19] the application of the exception in the case at hand is undisputable as the abovementioned principles came into existence precisely in order to enable punishment of war crimes in Germany and the ones committed by the Nazi regime authorities in the occupied territories.

It is interesting that much later [to be read correctly: later], in 1997, the ECtHR when addressing the application of the newspaper "Forum" against Austria (Oberschlick v. Austria (2)) showed no tolerance towards the Carinthian governor Heider who in a public speech had claimed that all soldiers in WW II, including the ones serving in Hitler's army, had been fighting for peace and freedom and had been participating in the creation of a democratic society. European judges agreed with the Forum's journalist Oberschlick who had been condemned for having criticized fiercely this speech in an article entitled "Idiot (*Trottel*), but not a Nazi", and found that the Austrian courts had violated the journalist's right to freedom of expression provided for in Article 10 of the ECHR giving a journalist a right (as well as a duty) to react in a very critical,

[19] In its case Maktouf and Damjanović v. Bosnia and Herzegovina (of 18 July 2013), the ECtHR had to rule on the application of two Iraqi nationals [actually two individuals of whom one was an Iraqi national and the other citizen of Bosnia and Herzegovina] condemned for war crimes against civilians since the legislation valid at the time of commission of the criminal offences had not been used in the criminal proceedings. The ECtHR afforded to the two just satisfaction while pointing out that the sentence imposed was not necessarily too strict but the legislation underlying its imposition was not the correct one.

and even offensive, manner to a politician's provocative speech.[20] The European judges have also shown no understanding and tolerance towards those denying the crimes of holocaust and other atrocities of WW II, referring in this context to the freedom of expression (Article 10 of the ECHR).

In its judgments the ECtHR has frequently examined human dignity, particularly in connection with violations of prohibition of torture, right to life, right to liberty and security, right to a fair trial, freedom of expression, and right to privacy. European democratic traditions and the traditions of the all-European Council of Europe within the framework of which the ECtHR operates cannot be reconciled with any attempt of apology and rehabilitation of Fascism and Nazism against which fought the complainants. This is why the complainants have been deeply hurt by the judgment of the Supreme Court in the latter's capacity as the highest court of general jurisdiction in the state; the honour and personal dignity of every one of them has been hurt.

Similarly, but more seriously, the right to human dignity of the complainants from the Jewish Community of Slovenia was violated. More seriously because Rupnik's activities directed towards destroying and extermination of Jews were carried out without taking into account whether or not the Jews were participants of the liberations forces, but due to the mere fact that they were Jews. This is the most evident example of a violation of personal dignity of each one of them. Antisemitism was a permanent feature of his functioning in cooperation first with the Fascist and later on with the Nazi occupying forces. The Military Tribunal unquestionably established General Rupnik's guilt and he himself had pleaded guilty, describing his actions as a fight against the global Jewish conspiracy. This was highlighted by the protest of the Jewish Cultural Centre pointing out that Rupnik's police, in 1943 and 1944, had arrested and deported Jews from Slovenia into death camps; only a handful survived.

For the complainants, the Supreme Court judgment has opened the wounds not yet fully healed, and they perceive it as an apology aimed at rehabilitation of the perpetrators and at revising the history in a way that would present Slovenia as a part of the forces that were defeated in WW II, and especially at relativizing the guilt of all those who, with the help of occupying forces, weakened the liberation movement and who now strive for the rehabilitation of the ones who had inflicted so much harm on the complainants and their families. When the Constitutional Court, in the name of human dignity of those who had suffered injustice, prevented a road from

[20] For a broader presentation, see Dr Rok Čeferin, Meje svobode tiska (Freedom of Speech Limits), GV Založba, Ljubljana, 2013, pp. 202-203.

being named Titova cesta (Tito's street), it stressed that it was unacceptable for actions of state authorities to reflect the values and symbols incompatible with the applicable constitutional order. This is why the question arises: what values does the setting aside of the judgment against Leon Rupnik symbolize, even more so as it was delivered in the proceedings and in a manner preventing the victims and the injured parties to present their point of view and to indicate what such a decision means for them and their dignity? Or is it that in Slovenia, human dignity is a monopoly of the opponents of the liberation movement, of the ones who had collaborated with the occupying forces and who had, like Leon Rupnik, approved of, and implemented, the Fascist, Nazi, and antisemitic ideology?

4.3.3.2. Violation of human dignity deriving from the violation of the legislation

The Republic of Slovenia and all its authorities are under constitutional duty to assure, by way of criminal law, the protection of human personality and dignity, inviolability of human life, prohibition of torture, protection of human personality, and other constitutional rights. In its decision no. Up-1082/12-11 of 29 May 2014, the Constitutional Court stated:

> *Although the powers and duties of the state relating to suppressing criminal offences are in the public interest, the public interest in itself does not exclude the importance of the duty of the state in relation to the victim due to his/her (personal) desire to feel safe. In instances of serious violence against an individual, it is not even possible for these two aspects of the duty of the state to be considered completely separately. In instances where intentional criminal offences against life and limb are at issue which represent a serious threat to the life, health, and liberty of individuals […] there is an utterly manifest connection between the public interest and the interests of the victim (para. 13 of the reasoning).*

As pointed out by the Constitutional Court, this duty is also incumbent upon courts and, if breached, leads to a violation of the procedural branch of the rights guaranteed under Articles 34 and 35 of the Constitution. In the continuation of the decision referred to, the Constitutional Court also points out: *"In this respect it is clear that the positive obligations of the state increase in accordance with the importance of the affected value protected under criminal law of the victim of a criminal offence.*" (para. 14 of the reasoning)

Building on the logic outlined above, transferred to the case at hand giving rise to the present constitutional complaint, the positive obligations of the state – i.e. of the Supreme Court, to be more exact – would encompass protecting the victims' constitutional rights on the highest level possible since the court dealt with serious criminal offences, i.e. crimes against humanity and war crimes.

As will be explained below, the Supreme Court has breached this duty in the case at hand and can therefore be reproached for having violated precisely the procedural branch of the rights set out in Articles 34 and 35 of the Constitution. In this respect the complainants – victims of Rupnik's crimes – point out that their constitutional rights have been gravely injured precisely at the point in time where Slovenia transferred into its legal order a series of provisions guaranteeing a higher level of protection of rights of criminal offence victims.[21] These rights were, in accordance with Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, introduced in its legal order by the amendment to the ZKP, the ZKP-N.[22]

The Supreme Court has violated the above mentioned rights by adopting incorrect legal assessment of several issues and unconstitutional decisions stemming from that assessment. These violations can be summarized into the following findings: (i) the Supreme Court's interpretation of procedural law is in contradiction with the *tempus regit actum* rule and the rules of international criminal law; (ii) lack of application of the possibility of partial setting aside is unconstitutional; (iii) the Supreme Court allowed an abuse of a procedural right.

Each of the abovementioned violations by itself results in a breach of constitutional rights alleged by the complainants; moreover, the violations are intertwined and relate one to another. Each of the abovementioned violations of the Supreme Court is substantiated by the complainants in detail below.

[21] For a detailed presentation, see Gorkič, P., and Plesec, P. (2019) *Uvodna pojasnila k ZKP-N (Preliminary Remarks to the ZKP-N)*, Uradni list RS; Zgaga Markelj, S. (2019) *Uvodna pojasnila k ZKP-N (Preliminary Remarks to the ZKP-N)*, Ljubljana: Lexpera.
[22] Official Gazette of the Republic of Slovenia, no. 22/19.

4.3.3.3. The Supreme Court's interpretation of procedural law is in contradiction with the *tempus regit actum* rule and the rules of international criminal law

The main violations of procedural criminal law in the first-instance judgment against Leon Rupnik are discussed by the Supreme Court in paras. 33-35. In this part, the Supreme Court states:

> *It is impossible to agree with the person filing the request for the protection of legality that the judgment lacks reasoning. However, she is right in asserting that the offences described in the operative part of the judgment under points 1, 3 and partly 7, 9, and 10 are not substantiated and that the judgment has no reasons as regards these offences […] (para. 34 of the reasoning).*

It then goes on to explain:

> *In assessing the judgment the procedural standards valid during the trial have to be taken into account. The assessment is possible as regards the defendant's key procedural safeguards. These safeguards, however, did not meet the then procedural standards and were also not taken into account sufficiently as the judgment has to be substantiated in all its parts.*

In giving reasons for these views, the Supreme Court is totally wrong, first in identifying **(a) the legal base determining the then applicable procedural rules, and then also in conducting (b) the substantive assessment of the procedural standards of the judgment's reasoning.**

a) Procedural law applicable at the time of Rupnik's trial

The courts, the Supreme Court included, must when interpreting law do that in a way rendering judicial decisions compliant with the Constitution,[23] as has been also emphasized on numerous occasions by the Constitutional Court. This means also taking into account the *tempus regit actum* rule, which in the case at hand implies applying the rules of criminal law valid at the moment when the Fourth Army Military Tribunal judgment was delivered. In the case at hand, in assessing the alleged violations the Supreme Court invokes erroneously and without any

[23] Cf. Pavčnik, M., p. 73, in: Pavčnik, Novak (ed.) (2013) (*Ustavno)sodno odločanje ((Constitutional) Judicial Decision-Making),* Ljubljana: GV Založba.

support the provisions of the Zakonik o sodnem kazenskem postopanju za Kraljevino Jugoslavijo (Judicial Criminal Procedure Code of the Kingdom of Yugoslavia, hereinafter: the ZSKP).[24] In para. 12 of the reasoning, the Supreme Court states:

> *The courts could use the ZSKP based on the provisions of the Odlok o odpravi in razveljavljenju vseh pravnih predpisov, izdanih med okupacijo po okupatorjih in njihovih pomagačih; o veljavnosti odločb, izdanih v tej dobi; o odpravi pravnih predpisov, ki so veljali v trenutku okupacije po sovražniku (Ordinance on Annulment and Setting of All Legal Regulations Adopted by the Occupying Forces and Their Helpers during the Occupation; on Applicability of Decisions Adopted during this Period; on Annulment of Legal Regulations Applicable at the Moment of the Occupation by the Enemy; Official Gazette of the Democratic Federal Yugoslavia, no. 4-51/45 of 13 February 1945); the ordinance was confirmed by the Zakon o potrditvi in spremembah Odloka o odpravi in razveljavljenju […] (Act on Confirmation of, and Amendments to, the Ordinance on Annulment and Revocation of […], Official Gazette of the FLRJ [Federal People's Republic of Yugoslavia], no. 86/46 of 25 October 1946).*

Relying by the Supreme Court on the ZSKP in incorrect. In this context the Supreme Court totally overlooked the fact that Rupnik was tried by a *military tribunal*. The ZSKP was valid in the then already non-existent state, the Kingdom of Yugoslavia (and its predecessors). However, even in the Kingdom of Yugoslavia, the said act was not a source of procedural law for the proceeding before military tribunals, and even less so during and after the war. In the Kingdom of Yugoslavia already military tribunals used the Zakonik o postopanju vojnih sodišč v kazenskih stvareh (Code of Military Tribunals Procedure in Criminal Matters). In the ZSKP itself as well as in the commentary of the same Act by the then two leading criminal law academics, professors Dr Metod Dolenc and Aleksander Maklecov (see, e.g., Articles 8, 21, 27, 120, 277 of ZSKP and the corresponding commentary),[25] several references are made to the separation of competences under the ZSKP and the Code of Military Tribunals Procedure in Criminal Matters.

In addition, in referring to the well-established procedural standards, the Supreme Court also invokes the Uredba o vojaških sodiščih (Decree on Military Tribunals) of 24 May 1944

[24] Official Gazette, no. 432/109 of 31 October 1929.
[25] Dolenc, M., and Maklecov, A. (1938) *Zakonik o sodnem kazenskem postopanju s kratkimi pojasnili (Judicial Criminal Procedure Code with Explanatory Notes)*. Ljubljana: Društvo Pravnik.

(hereinafter: the Decree). The Constitutional Court has presented its detailed opinion on the validity of the Decree in its decision no. U-I-6/93 of 1 April 1994. In that decision, the Constitutional Court found and clearly substantiated that the procedural norms the proceeding of military tribunals were only set out in the Decree (and not, e.g., in the ZSKP). It was later on that two Acts were adopted to replace the Decree. Those were the Zakon o ureditvi in pristojnosti vojaških sodišč v Jugoslovanski vojski (Act on Regulation and Competences of Military Tribunals in the Yugoslav Army)[26] that entered into force on 31 August 1945 and the Zakon o kaznivih dejanjih zoper ljudstvo in državo (Act on Criminal Offences against the People and the State)[27] that entered into force on 1 September 1945. In the same decision the Constitutional Court explicitly pointed out and explained that until then, the Decree on military tribunals had been *the only* source of criminal law for military tribunals; later on, in addition to the two abovementioned Acts, the London Agreement had been confirmed and thereby the norms of international criminal law were formally established.

> *It clearly follows from the above that the Temporary People's Assembly of the DFY neither ignored the Decree nor considered it an invalid or a non-existent regulation in any of its parts, and that it annulled the Decree by adopting the abovementioned Act from August 1945, thus recognising it as having been a valid regulation until then (para. 8 of the reasoning, decision of the Constitutional Court no. U-I-6/93 of 1 April 1994).*

It may be summarized from the above that the applicable procedural law for the proceeding of military tribunals was determined, in chronological order, by the following pieces of legislation: in the Kingdom of Yugoslavia and its predecessors, the Code of Military Tribunals Procedure in Criminal Matters; since 24 May 1944, the Decree on Military Tribunals, and since 31 August 1945, the Act on Regulation and Competences of Military Tribunals in the Yugoslav Army. The indictment against Rupnik was issued on 10 August 1946; thus, in addition to the rules of international criminal law (as will be explained below), the criminal proceedings at hand were governed by the only applicable national procedural regulation, the Act on Regulation and Competences of Military Tribunals in the Yugoslav Army. This is also evident from the act of indictment issued against Rupnik that explicitly refers only to the Act on Regulation and Competences of Military Tribunals in the Yugoslav Army and the Act on Criminal Offences against the People and the State (see p. 1 of the indictment). This means that the Supreme

[26] Official Gazette of the DFY, no. 66/45.
[27] Official Gazette of the DFY (Democratic Socialist Yugoslavia), no. 65/45.

Court's relying on, as regards the procedural standards at the time of Rupnik's process, the ZSKP and the Decree – already repealed at that time – is incorrect.

It has to be emphasized that the then applicable Act on Regulation and Competences of Military Tribunals in the Yugoslav Army and the Act on Criminal Offences against the People and the State entailed no provision defining the reasoning of the judgment. Thus, with regard to that issue there was a legal lacuna in the applicable national criminal law that needed to be filled by the rules of international criminal law. It is crucial that the crimes for which Rupnik was tried fall, as regards their subject matter, under the scope of international criminal law. In this respect the complainants point out that the crimes were committed during the war (in times of armed conflicts), in occupied areas, and, formally speaking, on the territories of three countries (the Kingdom of Yugoslavia, the Fascist Italy and the Nazi Third Reich).[28] This is why the key sources of international criminal law that the Supreme Court should have taken into account to discern the then procedural standards were the conventional and customary international criminal law.[29]

As regards the first source the Supreme Court should have based itself on the rules of the London Agreement of 8 August 1945 (also known under the name "the Nuremberg Statute") that was a legal basis for the (future) Nuremberg trials against the political, military, and economic leaders of the Nazi Germany. The Democratic Federal Yugoslavia acceded to the London Agreement on 29 September 1945 which means that at the time of Rupnik's process, the London Agreement was already a binding legal source.

The procedural rules of the London Agreement did see to some of the key safeguards of a fair trial, e.g. publicity of the trial, right to the assistance of counsel, right to present evidence in support of one's own defence and to examine the witnesses (see Article 16 of the London Agreement); however, they did by no means meet all modern procedural standards.[30] For example, no right to a legal remedy was provided for, and trial *in absentia* was allowed.[31] In

[28] Cf. Bavcon, L., Korošec, D., Sancin, V., pp. 149–283, in: Ambrož M. et al. (2011) *Mednarodno kazensko parvo (International Criminal Law)*, Ljubljana: Uradni list.
[29] See Škrk, M., pp. 53–65, in: Ambrož M. et al. (2011) *Mednarodno kazensko parvo (International Criminal Law)*, Ljubljana: Uradni list.
[30] See Škrk, M., ibid., p. 345.
[31] For a more detailed presentation, see also: Heller, K. J, (2011) *The Nuremberg Military Tribunals and the Origins of International Criminal Law*, Oxford: Oxford University Press, pp. 159–178.

this regard Rupnik's trial in which the appeal proceedings were provided for, and carried out, was characterized by higher procedural safeguards.

As regards the reasoning of the judgment, it can be noted that the Nuremberg Tribunal by no means achieved the standards required today by the Supreme Court, retrospectively, from the Fourth Army Military Tribunal. The London Agreement satisfies itself with the rather limited provision of Article 26 stating that the judgment shall give the reasons,[32] without further defining the standards of reasoning. In order to establish the standards as regards the reasoning of a judgment, one has to base oneself on the case-law of the Nuremberg Tribunal as a source of customary international criminal law.[33] It is evident from this case-law that the level of reasoning in Nuremberg trials was relatively low compared to modern standards. Thus, the Nuremberg Tribunal did not, in principle, state the concrete evidence and reasons relating to every single offence and/or point in the operative part of the judgment but contented itself with a relatively general and succinct reasoning. This is particularly obvious in the Nuremberg Tribunal's meagre reasoning in the judgment against Hermann Göring, the man deemed to be the second most powerful man in the Nazi Germany, closely following Hitler. In this context *Dr Rok Lampe concluded, in his constitutional complaint, that the Nuremberg standards were respected in the Leon Rupnik trial:* "Just like the Nuremberg judgment, the judgment of the Fourth Army Military Tribunal no. I Sod 117/46 is a cornerstone of Slovenian statehood, Slovenian existence, liberation of a nation condemned to death from the occupation, and a legal epilogue of the genocide against the Slovenian people executed under the command of Ervin Rösener, one of the persons indicted and condemned in this judgment. It was precisely Rösener who was the SS commander in the Province of Ljubljana; an integral part of the SS were the auxiliary SS units.

It has already been emphasized that the Nuremberg Tribunal found guilty the SS in its capacity of a criminal organization. Therefore it is unacceptable that – contrary to the generally recognized principles of international law and contrary to the Constitution of the Republic of Slovenia – the Supreme Court set aside the Fourth Army Military Tribunal judgment no. I Sod 117/46 for its supposedly not having taken into account the

[32] The original English text of Article 26 of the London Agreement reads as follows: *"The judgment of the Tribunal as to the guilt or the innocence of any Defendant shall give the reasons on which it is based, and shall be final and not subject to review."*
[33] Cf. Škrk, M., op. cit., pp. 59–62.

then procedural standards and safeguards. The Fourth Army Military Tribunal judgment is convergent with the Nuremberg Tribunal judgment […].”

In order to avoid repeating themselves, the complainants refer in the context of this viewpoint to a precise argumentation and evidence from the cited constitutional complaint by Dr Rok Lampe (Maribor, 31 January 2020) filed against the same Supreme Court judgment. Despite lower procedural standards of the international criminal law as well as lower requirements as regards the reasoning of the judgment, the legality, let alone the legitimacy, of the Nuremberg trials has never been called into question in any civilized democratic state.[34] It can be concluded that the level of reasoning in the Rupnik judgment was comparable to the reasoning in the Nuremberg trials judgments and was thus in line with the principles of law recognized by civilized nations at the time of the Rupnik trial.

Consequently, by using the procedural norms set out in legal sources, i.e. the ZSKP and the Decree, that were inapplicable at the time, **the Supreme Court breached the *tempus regit actum* rule**. The assessment of the procedural violations under more stringent criteria that the ones recognized by civilized nations at the time of the Rupnik trial would in itself not necessarily be unconstitutional. However, in the case at hand the higher standards were requested retrospectively by the Supreme Court 73 years after the original judgment had been delivered, and in doing so that court irreversibly harmed the dignity of numerous victims as well as caused an irresponsible interference with legal safety on which every other person, besides the victims, had relied.

b) Substantive assessment of the reasoning of the judgment

It follows clearly from the statements under a) above that when assessing substantively the procedural standards at the time of delivery of the Fourth Army Military Tribunal judgment the standard emanating from the Nuremberg Trials must be used as a basis and taken into account. Nevertheless, the complainants would like to draw attention to the fact that in the contested judgment the Supreme Court made its erroneous findings as regards the substantive assessment of the reasoning of the judgment even by assuming higher procedural standards. In this connection three important factors have to be taken into account that had been overlooked by the Supreme Court, evidencing that the judgment should have been deemed sufficiently

[34] In the same vein Bavcon, L., p. 98, in: Ambrož, M., et al. (2011) Mednarodno kazensko parvo (International Criminal Law), Ljubljana: Uradni list.

reasoned also with regard to higher requirements according to which such assessment was made by the Supreme Court. **First**, the reasoning of the judgment in all points of the operative part is based on a valid formal piece of evidence – the defendant's explicit confession that he had committed the criminal offences. **Second**, the reasoning of the judgment must be understood together with the large body of evidence and the statements in the case-file. And **third**, the judgment is based on evident and widely known facts (common knowledge) that need not be proven and explained but have to be taken into account. All these circumstances are thoroughly explained by the complainants below.

Every offence in the operative part of the Fourth Army Military Tribunal judgment is substantiated in the reasoning of the judgment by Rupnik's explicit, clear, and full confession of guilt. Paragraph 2 on p. 6 of the reasoning of the Fourth Army Military Tribunal judgment states: "The accused Rupnik confesses having committed the criminal offences in points 1-10 of the operative part of the judgment, however, in some points he is trying to diminish his guilt." In line with the then, and the present, legal writing on criminal procedure the defendant's confession of guilt at the hearing is not only a sufficient formal proof assessed by the court in line with the principle of free assessment of evidence but also one of the strongest proofs. This rule has already applied before the introduction of the institute of formal confession of guilt which, according to the present legislation, absolves the court from further evidence-taking.[35] Even though the defendant's confession did not absolve the tribunal from its obligation of collecting other pieces of evidence, this duty in no way diminishes the informative and probative value of the defendant's confession.[36]

However, the complainants point out that the rules on evidence-taking in the London Agreement, according to which procedural rules in Rupnik's trial have to be assessed, explicitly set out in Article 19 that the tribunal shall not be bound by technical rules of evidence and shall admit *any* evidence which it considers to have probative value.[37] According to the then applicable standards a reasoning based only on the defendant's full confession would already

[35] See Šugman Stubbs, K., and Gorkič, P. (2011) *Dokazovanje v kazenskem postopku (Evidence in Criminal Proceedings)*, Ljubljana: GV Založba, pp. 259–263.
[36] Finally, the probative power of the confession derives also from the wording of Article 28(2) of the Decree on Military Tribunals on which the Supreme Court (erroneously) bases itself in para. 34 of the reasoning and according to which the defendant's confession is explicitly mentioned by way of example as a piece of evidence on which a judgment must be based.
[37] The original English text of Article 19 of the London Agreement reads as follows: "*The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value.*"

suffice to meet the required procedural safeguards. Yet, the complainants point out that the Fourth Army Military Tribunal did not content itself with the confession but took into account other pieces of evidence (documents, witness examination, co-defendants' examination, etc.).

Rupnik's explicit confession of the criminal offences presented in the indictment may therefore not be assessed only in the light of the confession as if the latter was the only piece of evidence but must be analysed in conjunction with the fact that this piece of evidence forms a whole with the complete body of evidence in the case file and with all the statements in the judgment also relating to other co-defendants. To be more precise, the facts, evidence, and statements in the judgment form an indivisible substantive whole which in assessing whether the indictment is well-founded may not be divided into individual elements and assessed separately. In this connection the complainants emphasize the extreme size of the case-file in Rupnik's trial, this witnessing in itself that the evidence-taking procedure had been carried out thoroughly. As is evident from the archival documents preserved in the Arhiv Republike Slovenije (Archives of the Republic of Slovenia), the case-file consists of more than 2,000 pages of material (proof: inspection of the archival folder of the Archives of the Republic of Slovenia entitled "Proces proti Rupniku in soobtožencem" (The Trial against Rupnik and the Co-defendants)). By way of example, the complainants state that the criminal offence under point 1 of the operative part of the Fourth Army Military Tribunal judgment – which the Supreme Court erroneously considers to be lacking reasoning – is supported, besides the confession, by, at the very least, three pages of the minutes containing Rupnik's examination (pages A.1/I.-A.3/I. of the case-file) in which numerous circumstances of the offence are described in detail.

Further, in assessing the whether the reasoning of the judgment was adequate the Supreme Court fails to take into account a whole range of evident and widely known facts which according to general principles of criminal procedure need not to be proven. Dežman and Erbežnik explain, on p. 527, as follows: "Widely known facts are the facts that are generally known and are as such a direct source of knowledge".[38] Such a rule has also been inserted into the London Agreement stating in its Article 21 that the tribunal would not require for generally known facts (in the English original "common knowledge") to be proven. The Fourth Army Military Tribunal explicitly emphasized the widely known facts in some parts of the reasoning of the judgment. On page 7, para. 2, of the reasoning of the judgment is states, in particular:

[38] Dežman, Z., and Erbežnik, A. (2003) *Kazensko procesno pravo Republike Slovenije (Procedural Criminal Law of the Republic of Slovenia)*, Ljubljana: GV Založba, p. 527.

"However, the terrorist acts of the police in Ljubljana were common knowledge". In that connection the complainants especially want to point out that at the time of the trial, one year only after the war, several acts, facts, and consequences of Rupnik's activities were still vividly present in the conscience of the general public. Several facts that that tribunal did not mention in the reasoning of the judgment had been, as it is, generally known to the tribunal, the public, and the defendants in 1946 and so self-evident that their particular substantiation in the judgment was redundant. The common knowledge of the facts of those times is consequently far less obvious from today's perspective and with a time-lapse of 74 years.

A more detailed analysis of the judgment and the case-file of the Fourth Army Military Tribunal hence clearly shows that the Supreme Court's assessment of the reasoning of specific points of the operative part of the Rupnik judgment as being insufficient may in no way be upheld. All statements in the judgment's operative part must be, besides the conclusive explicit and thorough defendant's confession, assessed in conjunction with the whole body of other facts, evidence, and statements present in the judgment and the case-file, and together with the plethora of facts generally and widely known at that time which that tribunal was not obliged to explain.

4.3.3.4. Lack of taking into account partial finality

The complainants are therefore convinced, based on the above grounds, that the Supreme Court's assessment regarding the procedural and substantive violations of law is incorrect and that the Fourth Army Military Tribunal judgment is correct and legal. However, in this part, for the sake of argument only, they follow the presumption of the Supreme Court that procedural violations have been committed, and argue that even if one accepted this presumption was true the Supreme Court decision to set aside the whole part of the judgment relating to Rupnik would be unconstitutional. In this context the complainants emphasize once again that they disagree with this presumption.

So even under the assumption that the Supreme Court's assessment that there was a procedural violation in the judgment at hand is correct, the decision of the Supreme Court to set aside the first-instance judgment against the condemned Rupnik as a whole, instead of only as regards those points or those criminal offences with regard to which the Supreme Court found procedural violations, is unconstitutional and illogical. What is more, such a surprising decision to set aside the judgment as a whole is not explained by the Supreme Court in any of the 84

paragraphs of the reasoning at all although a partial setting aside of a judgement is a well-established solution in the case-law of the Supreme Court and is also in line with the principle of the rule of law set out in Article 2 of the Constitution.

In accordance with the *iura novit curia* principle, the Supreme Court knew (or should have known) that setting aside the judgment and remitting it for a retrial to the court of first instance almost 75 years after the defendant's death may only result in the discontinuation of the proceedings in the first instance court. Such is the explicit wording of the provision of Article 139 of the ZKP, supported by the prevailing view of legal commentators, national case-law, and the European Court of Human rights case-law, as was already explained above. A retrial against a deceased defendant for the events that had happened eight decades ago, alongside with the absolute unavailability of practically all witnesses and the prevailing part of material evidence, is conceptually unthinkable in terms of modern standards of procedural criminal law.[39]

So, in association with the *iura novit curia* principle, the Supreme Court decision on remitting the case for a retrial is misleading and in contradiction with the institute of the request for the protection of legality. As it is, by this decision the Supreme Court has in fact (indirectly) also decided on the discontinuation of the proceedings against the accused Rupnik and on his rehabilitation. Such a decision is a highly disproportionate interference with the institute of the finality of a judgment the latter being the key element of a state governed by the rule of law set out in Article 2 of the Constitution, and with the right to effective judicial protection set out in Article 23(1) of the Constitution. By not respecting the authority of the finality, the Supreme Court inadmissibly interfered with both constitutional safeguards.

In its decision no. Up-2530/06-26 of 15 April 2010, the Constitutional Court explained:

> *The binding power of court decisions is an element of a state governed by the rule of law determined by Article 2 of the Constitution, and an element of the right to effective judicial protection set out in Article 23(1) of the Constitution. It can be stripped of this binding power only in highly exceptional cases due to which this power should be considered "invalid" (para. 13 of the reasoning).*

[39] An exception being the extraordinary legal remedy of the retrial the aim of which is totally different and where the outcome of the repeated proceedings may never be to the defendant's detriment.

The Fourth Army Military Tribunal judgment in which Rupnik was found guilty of the most serious war crimes and crimes against humanity is even *prima facie* not a kind of a decision to which the Constitutional Court makes reference in the above decision. This is admitted even by the Supreme Court itself which dismissed on substantive grounds most of the objections relating to legal violations and by doing so, as regards these parts, confirmed the substantive and procedural legality and the correctness of the judgment. This is why the decision of the Supreme Court to set aside the judgment as a whole is totally illogical and inconsistent in itself as the Supreme Court must strive, in line with the constitutional requirements mentioned above, to only interfere with a final judgment in extreme cases of "un-law", and even then, to the least possible extent.

The unconstitutionality of such a decision is even more evident due to the fact that the Supreme Court, even under presumption that there were procedural breaches, had at its hand a legal solution that would be constitutionally acceptable. When deciding the court is obliged to always use the interpretation which is the most consistent with the Constitution.[40] As finds Dr Marijan Pavčnik: "If in a concrete case which is the object of deciding there is only one interpretation of an Act that is consistent with the Constitution, then it is this interpretation that has to be adopted".[41] In the case at hand, the Supreme Court should have adopted the only interpretation consistent with the Constitution, and set aside the judgment against the accused Rupnik only partially, if at all, whereas in the other part (relating to the criminal offences described in points 4, 5, 6, and 8) the judgment should have remained final. A partial setting aside of the judgment, that is legally based on Article 426(1) of the ZKP,[42] is a well-established solution in similar procedural circumstances within the Supreme Court case-law on requests for the protection of legality[43] and is, moreover, undisputed within the theory of criminal procedural law,[44] this being so precisely due to the above constitutional requirements. Such a decision would have been, as

[40] As regards the obligation of interpreting an Act in line with the Constitution, whereby this interpretation always needs to be in accordance with human rights, see the above mentioned Constitutional Court decision no. Up-879/14 of 20 April 2015.

[41] Pavčnik, in: Pavčnik, Novak (ed.) (2013) (Ustavno)sodno odločanje ((Constitutional) Judicial Decision-Making), Ljubljana: GV Založba, pp. 75–76.

[42] "If the Supreme Court finds that the request for the protection of legality is well-founded it shall deliver a ruling by which, given the nature of the violation, it shall: modify the final decision; or, wholly *or partially* set aside the decision of the court of first instance and the higher court or only the decision of the higher court, and remit the case for a new decision or retrial to the court of first instance or the higher court; or limit itself to finding a violation of law" (Article 426(1) of the ZKP; emphasis added).

[43] See, e.g., SCRS judgments: I Ips 40425/2010 of 26 September 2019, I Ips 67355/2010-165 of 22 March 2012, and I Ips 45162/2011-698 of 13 November 2014; regarding a similar partial setting aside of a first-instance judgment, see also SCRS judgments I Ips 276/2006 of 17 May 2007 and I Ips 43/2007 of 12 July 2007.

[44] See, e.g., Dežman and Erbežnik (2003) Kazensko procesno pravo Republike Slovenije (Procedural Criminal Law of the Republic of Slovenia), Ljubljana: GV Založba, p. 501.

opposed to the decision setting aside the whole judgment, the only decision consistent with the Constitution. The Supreme Court should have been conscious of the fact that by such a disproportionate interference with the finality, it will also interfere with legal safety on which the victims of Rupnik's crimes relied, and thereby interfere with the personal dignity of numerous victims of his crimes.

Again, the complainants point out in this respect that the Supreme Court, in an extensive and convincing argumentation, dismissed on substantive grounds the majority of the complaints in the request for the protection of legality and thereby confirmed the legality and correctness of the judgment as regards all other criminal offences. Thus the Supreme Court found, as regards the modalities of commission of the offences, described in the operative part of the judgment under 4, 5, 6, and 8, that the first-instance judgment was correct and in accordance with law, and thereby confirmed that Rupnik's guilt had undisputedly been proven in these points, substantively as well as formally.

In this context it has to be emphasized in particular that the points where the Supreme Court found violations of substantive and procedural law could have been taken out of the judgment without any harm with regard to the correct adjudication on the remaining points that should have been kept valid.[45] The criminal offence set out in Article 3 of the Zakon o kaznivih dejanjih zoper ljudstvo in državo (Act on Criminal Offences against the People and the State, hereinafter: the ZKLD)[46] is defined by using several alternative modalities of commission. In the currently applicable Slovenian and international substantive criminal law, these offences are defined as a whole range of different criminal offences. Their being joined in the same Article within the ZKLD is merely a nomotechnical particularity of that Act. It would thus suffice, for a criminal offence under Article 3 of the ZKLD to be committed, for the defendant to fulfil the constituent elements of only one (any one) of the modalities of commission under one of the indents of Article 3 of the ZKLD. Moreover, the Supreme Court has confirmed that criminal offences under points 4, 5, 6, and 8 of the operative part of the judgment were legally correctly proven, i.e. the offences that present different modalities of commission of a criminal offence under indents 3, 4, and 7 of Article 3 of the ZKLD. The same criminal law sanction is

[45] Cf. indent 6 of Article 392 of the ZKP: "The court of second instance may set aside the court of first instance judgment in part only, if separate parts of the judgment may be singled out without prejudice to a correct adjudication. In such a case, the court of second instance may impose a criminal law sanction for the criminal offences from the part of the judgment that was not set aside."
[46] Zakon o kaznivih dejanjih zoper ljudstvo in državo (Act on Criminal Offences against the People and the State, the ZKLD), Official Gazette of the DFY, no. 66/45, and the Official Gazette of the FPRY, no. 59/46.

set out in Article 4 of the ZKLD for all modalities of commission of Article 3 of the same act,[47] and according to the Supreme Court assessment, the sanction was correctly imposed in the judgment; therefore, the Supreme Court should have set aside the singled out part of the judgment, and confirm the judgment in the remaining part, also as regards the sanction that had been legally correctly imposed and executed.

The fact that in Rupnik's trial there were five other co-defendants tried due to objective connexity of proceedings (i.e. several defendants were tried for the same offences) is not an obstacle to a partial setting aside of the judgment. If the Supreme Court found that it can set aside the whole judgment as regards Rupnik, there seems to be no reasonable ground not to set it aside only in the points that were, according to the Supreme Court, unsubstantiated.

By setting aside the whole first-instance court judgment – especially while knowing that such a decision would eventually lead to the proceedings being discontinued and to the presumption of innocence being established – the Supreme Court **interfered in an unjustified manner with the formally and materially final case and established a new legal situation thereby interfering with the injured parties' rights to an effective legal remedy and to personal dignity**. Such a radical measure leading to the rehabilitation of the defendant whose guilt had been established on the merits is even *prima facie* a totally disproportionate procedural sanction for the violations found in particular points of the judgment. As shown above, it is also a violation of several constitutional rights and safeguards.

It follows from all of the above, if one presumes that the Supreme Court was correct in establishing procedural breaches in the case at hand, that that court had two options available under the ZKP: first, it could have, in line with the Constitution, set aside the judgment only in the part within which it had established violations, and find that the remaining parts of the judgment under appeal were final; and second, it could have set aside the whole judgment, which is contrary to the Constitution. Without offering any reasons, the Supreme Court decided to adopt the second, unconstitutional approach. On all 34 pages of its judgment, the Supreme Court is silent as regards the option of a partial setting aside. In addition of having the duty to protect legal safety as set out in Article 2 of the Constitution and the right to effective judicial protection (under criminal law) as set out in Article 23(1) of the Constitution, the Supreme

[47] Under Article 4 of the ZKLD the exception is set out for the offences under indent 14 of Article 3 of the ZKLD for which a milder sanction is laid down. However, none of the defendant's criminal offences were qualified as offences under indent 14 of Article 3 of the ZKLD.

Court is under constitutional obligation to protect by way of criminal law the dignity of the victims enshrined in Article 34 of the Constitution, and has therefore by deciding to set aside the whole judgment violated this constitutional duty.

The complainants would, moreover, like to add that the Supreme Court, by adopting a decision leading to unavoidable Rupnik's rehabilitation, paved the way to deep interferences with other constitutional rights, in particular those of pecuniary nature (requests for returning the confiscated property and actions for damages).

4.3.3.5. Abuse of a procedural right

By setting aside the Fourth Army Military Tribunal judgment no. I Sod 117/46 of 30 August 1946 in conjunction with the Supreme Court of the Yugoslav Army order no. II Sod 882/46 of 1 September 1946, the Supreme Court **violated the right to the victims' personal dignity** also due to the fact that it allowed the person filing the request for the protection of legality to abuse their procedural rights. The Supreme Court should have identified every attempt to abuse a right, and to render such attempts impossible on the basis of general principles of law, while being also obliged to do so under Article 15 of the ZKP.

The right to file a request for the protection of legality against criminal decisions delivered during and after WW II has been explicitly laid down in the amendment to the ZKP, the ZKP-G,[48] while the amendment ZKP-I[49] later extended the time-limit for filing the request until the end of the year 2012. The intention of the abovementioned right was to eliminate the injustices caused by abuse of criminal law for political, ideological, and other similar purposes. That intention has repeatedly been emphasized also by the Constitutional Court.[50] The intention of this institute was in particular to make good for the injustice caused to the defendants and their relatives by judgments of conviction for acts defined as criminal offences by the legislation adopted during and after the war that were not punishable under general principles of law recognized by civilized nations. The Constitutional Court has explicitly examined the constitutionality of the ZKLD provisions and ruled that at the time of their adoption they had

[48] ZKP-G, Official Gazette of the Republic of Slovenia, no. 101/05.
[49] ZKP-I, Official Gazette of the Republic of Slovenia, no. 68/08.
[50] See, e.g., the Constitutional Court decisions no. U-I-24/04-24 of 20 April 2007 and U-I-247/96 of 22 October 1998; cf. also the Constitutional Court decision no. U-I-6/93 of 1 April 1994.

not contrary to the general principles recognized by civilized nations;[51] however, in individual cases there was an abuse of criminal law present based on that act.

By setting aside the Rupnik judgment, the Supreme Court allowed for an abuse of the right to file the request for the protection of legality by the person filing the request, since the right had been used contrary to its purpose and since by filing it the applicant exceeded the boundaries of the entitlement provided by this extraordinary legal remedy. In line with the well-established view of legal commentators[52] adopted also by the Constitutional Court, an abuse of a right is present whenever the holder of a right does enjoy an abstract entitlement that is legally admissible, but in actually exercising it, his actions exceed the boundaries of the entitlement. This results in a conflict of two mutually exclusive rights. The clash is a result of the conflict of two rights where one of them has been exercised in a way partially or fully preventing the other right from being exercised. In such cases, the Constitutional Court has already taken the view that in such situations the court has to deny legal relevance to procedural steps taken by subjects abusing the right. In the decision no. U-I-289/95 of 4 December 1997 it stated:

> *The circumstance that an entitlement is exercised in a way that is harming the other party or "making his/her position more complex", is indicative of an abuse of the right. In conformity with the provisions of Article 22 of the Constitution, where parties in proceedings abuse their procedural rights the court must deny legal relevance to acts exceeding the entitlement and hence representing its abuse (para. 10 of the reasoning).*

As already explained, the purpose of the right to file a request for the protection of legality in these cases is to redress the injustices caused by the after-WW II courts by abusing criminal-law provisions. When examining the case, it was already *prima faci*e clear to the Supreme Court that in Leon Rupnik's conviction there was no abuse of the then applicable criminal law and that he was a defendant who had been lawfully convicted of crimes defined as most serious crimes based already on the general principles of law recognised by civilised nations, and for the crimes that are, also according to present legal standards, considered as the most serious criminal offences pursuant to national and international criminal law, including crimes against humanity and war crimes. Such a view is after all evident from the reasoning of the Supreme Court judgment where the majority of the applicant's arguments is dismissed on substantive grounds and the legality of the judgment is confirmed in a great part and as regards the most

[51] Constitutional Court decision no. U-I-247/96 of 22 October 1998.
[52] See Pavčnik, M. (1986) *Zloraba pravice (Abuse of a Right)*, Ljubljana: Časopisni zavod Uradni list SR Slovenije.

serious criminal offences, whereas violations of legal provision have been found in only a handful of the lengthy judicial decision's paragraphs.

After all, the legitimacy of Rupnik's conviction is not based on the extremely voluminous body of evidence in the case file but is also on the unanimous view of history scholars. It cannot be overlooked that Leon Rupnik was one of the most researched and versatilely documented personalities of the period between WW I and WW II of this region studied by history scholars and that in the eyes of the historians, he is an undisputed symbol of collaboration and antisemitism on Slovenian territory.[53] This has been recognized, among others, by the President of the Republic of Slovenia Borut Pahor who when the judgment against Leon Rupnik was set aside emphasized "that generations to come will remember as shameful acts General Leon Rupnik's pledge of allegiance to Hitler, his cooperation with the occupying forces, and his fervent antisemitism."[54] The Supreme Court decision, for its part, was met with indignation on international level.[55] All of the above leaves absolutely no room for a reasonable doubt that in Rupnik's criminal trial there could have been an abuse of the then applicable criminal law, an abuse leading the legislator in enacting the right to file a request for the protection of legality with a view of remedying the injustice sustained.

Quite on the contrary, the Supreme Court allowed by taking its decision that in the case at hand the right to file a request for the protection of legality was transformed to its opposite – an abuse of the right, and a tragic farce that numerous victims of Rupnik's crimes feel as a deep insult to their personal dignity. Thus, the complainants emphasize that every interpretation of the right to file a request for the protection of legality with a view of remedying the injustice that fails to follow the purpose of remedying the *injustice caused by abuse of criminal law*, is unconstitutional. Since the Supreme Court failed to recognize this fact it is now on the

[53] A large number of scientific and professional historical works is available, therefore only the most significant works are cited: Vojinović, A. (1988) *Leon Rupnik*, Zagreb: Centar za informacije i publicitet; Mlakar, B. General Rupnik in slovensko domobranstvo (General Rupnik and the Slovenian Home Guard), *Zgodovinski časopis*, vol. 35, no. 3 (1981), pp. 287-305; Kranjc, G. J. (2013) *To Walk with the Devil: Slovene Collaboration and Axis Occupation, 1941-1945*, Toronto: University of Toronto Press; Željeznov, D. (1980) *Rupnikov proces (The Rupnik Process)*, Ljubljana: Cankarjeva založba; Mlakar, B. General Leon Rupnik. *Studia Historica Slovenica*, vol. 11, no. 2/3 (2011), pp. 483-500; Repe, B. (2015) *S puško in knjigo: narodnoosvobodilni boj slovenskega naroda 1941-1945 (A Gun and a Book in the Hand: National Liberation Fight of the Slovenian People 1941-1945)*, Ljubljana: Cankarjeva založba; Ravnikar-Podbevšek, Š. (1977) *Sv. Urh: kronika dogodkov iz narodnoosvobodilne vojne (Sv. Urh: A Chronicle of the Events from the National Liberation War)*, Ljubljana: Borec.

[54] Office of the President of the Republic, press releases, 23 January 2020, available at: http://www.up-rs.si/up-rs/uprs.nsf/objave/C75C78FCE1966248C12584F80063110E?OpenDocument .

[55] See the Simon Wiesenthal Center statement above.

Constitutional Court, in its role of the final guardian of constitutionality in the Republic of Slovenia, to rule on this issue.

To avoid repeating themselves, the complainants refer again at this point to the entire argumentation as regards the partial setting aside of the judgment, if one were to assume that in Rupnik's judgment there was been a breach of law in some points. By partially setting aside the judgment, the Supreme Court could have mitigated, at least in part, the abuse of the right by the person filing the request for the protection of legality.

5. OTHER STATEMENTS

5.1. As to temporary suspension and priority treatment of the case

The complainants suggest that the Constitutional Court, in accordance with Article 58 of the ZUstS, temporarily suspend the execution of the Supreme Court judgment no. I Ips 3425/2014 of 8 October 2019 until the decision on the constitutional complaint, and also allow priority treatment.

The complainants note that with its judgment the Supreme Court set aside the Fourth Army Military Tribunal judgment no. I Sod 117/46 of 30 August 1946 in conjunction with the Supreme Court of the Yugoslav Army order no. II Sod 882/46 of 1 September 1946 and remitted the case for a retrial to the Okrožno sodišče v Ljubljani (Ljubljana District Court). Formally, this does not mean that the exhaustion of legal remedies has occurred as the aforementioned court of first instance will still have to rule on the case; however, in the complainants' view, waiting for a formal exhaustion of legal remedies in the retrial proceedings would obviously result for them in consequences that would be impossible to remedy. This follows from the clear-cut provisions of the Zakon o kazenskem postopku (Criminal Procedure Act, the ZKP) providing in such a case for a discontinuation of criminal proceedings. In the present case the defendant died and Article 139 of the ZKP provides that the proceeding shall be discontinued in such circumstances. This is the prevailing point of view by legal commentators and in the case-law: "The defendant's death is a procedural bar preventing the conduct of criminal proceedings. This provision applies to all phases of criminal proceedings, i.e. from its commencement until the moment the decision becomes final" (SCRS decision no. Kp 7/2007 of 1 June 2007).[56] Conducting criminal proceedings against a deceased defendant is in evident

[56] Cf. also the SCRS judgment no. I Ips 11/2006 of 26 January 2006.

breach with the principle of equality of arms and the long established safeguards regarding the right to a fair trial enshrined in Article 6 of the European Convention on Human rights as further developed in the European Court of Human Rights (the ECtHR) case-law. Such was the express view of the ECtHR in cases Magnitsky and Others v. Russia of 27 August 2019 and Grădinar v. Moldova of 8 April 2008. For that reason the complainants believe that the proceedings will be, once the case is remitted to the first instance, discontinued, and this is why the motion for a temporary suspension is well-founded.

Since the decision on discontinuation of the proceedings in the retrial proceedings would in itself be lawful it would be impossible to challenge it successfully with either ordinary or extraordinary legal remedies. By discontinuing the proceedings against the defendant by way of a final judgment, the defendant would irreversibly be presumed innocent (Article 27 of the Constitution). This would lead to the complainants' constitutional rights they assert being irreparably breached. It goes without saying that by executing the SCRS judgment against which the constitutional complaint has been lodged would cause irreparable consequences to the complainants. The complainants in their capacity of victims could not participate in the proceedings before the Supreme Court regarding the request for the protection of legality nor could they take part in the proceedings having taken place before that, since they could not know the proceedings were pending, nor will they be able to assert those rights in the retrial proceedings at the first instance which will be discontinued. Should the Constitutional Court not accept this constitutional complaint for consideration the victims would be denied the right to an effective remedy as set out in Article 23(1) of the Constitution. In the light of the above, the complainants believe that the Constitutional Court should accept the constitutional complaint for consideration under Article 51(2) of the ZUstS based on the fact that no legal remedy would be available to them if/once the retrial proceedings will have been discontinued. For the same reasons, it should suspend the execution of the Supreme Court judgment no. I Ips 3425/2014 of 8 October 2019 until the decision in the present case is taken.

Moreover, the constitutional complainants suggest the case be granted priority treatment.

In the case at hand, what is at stake is a resolution of an important legal issue and a case in which, for the complainants, the time of the decision is important in view of their age and of their being exposed to the violence they had suffered. Many of the complainants and other persons who in person lived through the atrocities of WW II for which Leon Rupnik was responsible are of advanced age and in poor health. This is why it is of utmost importance to prevent the proceedings from lagging, in particular since filing an application with the ECtHR

is also considered an option. Time is not the complainants' ally; accordingly, a decision to grant priority treatment of the case pursuant to Article 46 of the Rules of Procedure of the Constitutional Court is appropriate. Postponing the decision would also further undermine the international reputation of Slovenia which, owing to the National Liberation Fight (NOB), was on the side of the winning allies in their battle against Fascism and Nazism. Besides, the Supreme Court judgment was faced with protest not only by Slovenian politics, the wider public, and the Jewish Community of Slovenia but also by the international public what negatively affected the international reputation of Slovenia. For this reason, postponing the decision in the case at hand would be especially detrimental with respect to the affected victims as well as the public interest; therefore it is necessary to grant the motion for priority treatment.

6. DOCUMENTS ENCLOSED

- Power of attorney, 8x
- Supreme Court judgment no. I Ips 3425/2014 of 8 October 2019
- Statement by the AJC Global Jewish Advocacy of 3 March 2020
- Lovšin, P. (8 January 2020) Razveljavljena obsodba domobranskega generala Rupnika, in: *Dnevnik*, available at: https://www.dnevnik.si/1042918961
- Statement by the Simon Wiesenthal Center of 14 January 2020
- Extract from the Agency of the Republic of Slovenia for Public Legal Records and Related Services register for the Zveza združenj borcev za vrednote NOB Slovenije (Associations of the National Liberation Movement of Slovenia)
- Extract from the Agency of the Republic of Slovenia for Public Legal Records and Related Services register for the Judovska skupnost Slovenije (Jewish Community of Slovenia)
- All the judicial decisions cited have been made public and are available either on the ECHR case-law portal, HUDOC,www.echr.coe.int, or on the portals of the Constitutional Court of the Republic of Slovenia and the Supreme Court of the Republic of Slovenia and are for this reason not enclosed by the complainants.

In light of the above considerations the complainants

Suggest that the Constitutional Court

1. accept the constitutional complaint for consideration and order, pursuant to Article 46 of the Rules of Procedure of the Constitutional Court, priority treatment of the case;
2. suspend temporarily the execution of the Supreme Court judgment no. I Ips 3425/2014 of 8 October 2019 until the decision on this constitutional complaint is delivered, in accordance with Article 58 of the ZUstS;
3. examine the constitutional complaint at a public hearing, pursuant to Article 35(2) of the ZUstS;
4. after the hearing, grant the constitutional complaint and set aside, based on Article 60(1) of the ZUstS, the Supreme Court judgment no. I Ips 3425/2014 and reject on its own on substantive grounds, based on the data in the case-file, the request for the protection of legality filed against the Fourth Army Military Tribunal judgment no. I Sod 117/46 of 30 August 1946 in conjunction with the Supreme Court of the Yugoslav Army order no. II Sod 882/46 of 1 September 1946 since this is required by the special nature of human dignity and other complainants' rights;

   or, in the alternative, grant the constitutional complaint in accordance with Article 59 of the ZUstS and set aside the Supreme Court judgment no. I Ips 3425/2014 and remit the case for a retrial to the Supreme Court, in which the latter should respect the the Constitutional Court's viewpoint.

Ljubljana, 4 March 2020

Complainants:

Terezika Bučar Omahen
Zadnikar Jožefa
Magda Lovec Trtnik
Tomaž Zajc
Staša Briški Bailey
Jože Hartman
Judovska skupnost Slovenije
Zveza združenj borcev za vrednote narodnoosvobodilnega boja Slovenije

Acting by power of attorney, Odvetniška družba Završek & Šnajder, o.p., d.o.o., Roman Završek, attorney

Dr Ljubo Bavcon*[57]
David Pollak*
Branka Kastelic*
Marjan Jernej Virant*
City Municipality of Ljubljana*

Acting by power of attorney. Miha Kozinc, attorney

[57] The complainants marked by asterisk (*) have lodged a separate constitutional complaint with practically identical content [editor's note].