U-I-6/93
1 April 1994

R E S O L U T I O N

At the proposal of the Public Prosecutor of the Republic of Slovenia, represented by Franc Weindorfer, lawyer in Gornja Radgona, and initiators Dr Josip Turk, Dr Rajko Turk and Milica Turk-Abram of Ljubljana, the Constitutional Court in a procedure to assess constitutionality and legality at a session on 1 April 1994, adopted the following

resolution:

1. Those provisions of the Decree on Military Courts of 24 May 1944, which even at the time of issuing and application conflicted with the general legal principles recognised by civilised nations and which conflict with the Constitution of the Republic of Slovenia, shall not be used in the Republic of Slovenia.

Therefore, for the reasons given in the explanation of this Resolution, the following elements of the Decree in particular shall not be used: a) all those elements of the provisions which were, and insofar as they were, used in specific criminal proceedings as blunt incrimination of status and which did not refer to clearly defined acts of the accused;

b) all those elements of the provisions whose lack of clarity served, and insofar as it served, in specific criminal proceedings as grounds for arbitrary decisions by the courts of that time; c) all those elements of the provisions which enabled trials for actions carried out prior to the enactment of the Decree, and which were not punishable according to general legal principles recognised by civilised nations.

2. Point one of the Resolution shall be applied accordingly as stipulated by Article 415 of the Constitution of 1974, without the deadlines stipulated therein. In this sense this Resolution forms the basis for lodging requests to amend legally binding decrees issued on the basis of this Decree by applying accordingly the provisions on renewal of criminal proceedings.

3. The valid legal arrangement for criminal proceedings conflicts with the Constitution since it does not enable the removal of all decrees that are wrongful in a procedural and substantive sense and which were issued on the basis of regulations of the revolutionary war and postwar authorities, and removal of the consequences of these decrees by extraordinary legal remedy. The Constitutional Court appeals to the National Assembly to remove this unconstitutionality in the shortest possible period.

Reasons:

A.

1. The proposer and the initiators contested the constitutionality and legality of the Decree on Military Courts (hereinafter: Decree) on the grounds that by conflicting with the legal order of the independent state of Slovenia in its entirety it could not become a part of the Slovenian legal system and thus cannot be used as a legal source at all. The proposers also stated that the Decree was not issued by any competent body and was never proclaimed.

2. On 13 January 1993 the initiator Edita Benko lodged an initiative for assessment of the constitutionality and legality of the Decree. In the initiative she proposed, after demonstrating her legal interest, that the Constitutional Court should adopt the initiative and establish that the provisions of the Decree conflict with the legal order of the Republic of Slovenia, and retroactively annul its validity.

Edita Benko lodged the initiative at a time when a request for renewal of criminal proceedings had already been lodged. In the original criminal proceedings her grandfather Josip Benko was tried. The request was lodged at the court of the first instance, namely the basic court in Murska Sobota, which, as the corresponding court of the first instance according to the Law on Criminal Proceedings, decides whether or not to permit such renewal.

The Constitutional Court inspected the document of the basic court in Murska Sobota, Murska Sobota Unit (Nos. Ks 24/92 and K 160/93), referring to the renewal of the proceedings against the convicted Josip Benko. From document No. Ks 24/92 it is clear that the basic court in Murska Sobota, Murska Sobota Unit, granted the request by decision of 16 December 1992 and returned the matter for investigation.

From document No. K 160/93 of the basic court in Murska Sobota, Murska Sobota Unit, it is clear that the sentences of the Military Court of the Yugoslav Army for Štajerska and Prekmurje Regions and the High Military Court for Slovenia No. Sod 8/45 which convicted Josip Benko, were completely annulled, meaning that the initiator Edita Benko no longer had any legal interest in an assessment of the constitutionality and legality of the contested Decree.

3. A proposal for assessment of the constitutionality was lodged by the Public Prosecutor of the Republic of Slovenia (U-I-40/93); initiatives were lodged by Josip Turk, Rajko Turk and Milica Turk-Abram (U-I-11/93). These two matters were combined with U-I-6/93 for the purpose of joint discussion.

In his proposal of 23 February 1993, the Public Prosecutor of the Republic of Slovenia stressed that the Decree was not publicly proclaimed and dated and that only according to historians was it issued on 24 May 1944. The Public Prosecutor maintains that "the courts in the Republic of Slovenia use the Decree whenever they are dealing on the basis of extraordinary legal remedy (renewal of proceedings, request for protection of legality) with criminal cases from the postwar period that have already been legally concluded", judging the legality and correctness of old criminal judgments and proceedings and the grounds for the accusations made in accordance with the provisions of the Decree. In the opinion of the Public Prosecutor, any use of the Decree in the Republic of Slovenia after 25 June 1991 was neither legal nor in accordance with the constitutional order. The Public Prosecutor's position is that in the Kingdom of Yugoslavia, at that time the only internationally recognised legal state subject on this territory, the only body authorised to issued criminal regulations was the constitutionally defined legislative body, in the form of a law, while the contested Decree was not issued by any such body, which is why it could neither annul nor amend criminal legislation valid at the time. Furthermore, the Decree was apparently never publicly proclaimed and as an unproclaimed decree issued by the Party, political and military leader it could not be a valid law; it could only be an internal disciplinary code for members of subordinate partisan units which were part of the National Liberation Army and Partisan Units of Yugoslavia. Moreover, in the opinion of the Public Prosecutor, the Decree fails to meet the minimum legal standards on fundamental human rights, which alone is reason enough, according to the Public Prosecutor, for it not to be in accordance with the constitutional order of the Republic of Slovenia. The Public Prosecutor maintains that the Decree included all the acts "directed against the liberation struggle of the nations of Yugoslavia, against the heritage of the interest of this struggle", including "the fight for social and class liberation". In other words, this was about social revolution and takeover of authority by force by the then illegal Communist Party of Yugoslavia. To prosecute criminals in the ordinary sense of the word, the previous Yugoslav penal code would be appropriate, maintains the Public Prosecutor, while the Decree served as a weapon to crush the counter-revolution, as the judiciary itself followed the revolutionary principles and interests of the times. For this reason, the use of the Decree would not guarantee equality before the law, trial by a fair court founded by law, the right of appeal, the principle of legality and other human rights and basic freedoms. This is why the Public Prosecutor proposed that the Constitutional Court assess the legality and constitutionality of the Decree, and establish that the Decree never entered into force on the territory of the present-day Republic of Slovenia, which is why it cannot be used either as a former or as a current legal source.

4. The initiators Josip and Rajko Turk and Milica Turk-Abram of Ljubljana lodged the initiative to assess the constitutionality of the provisions which were the basis for the trial and conviction of their deceased father Rajko Turk, convicted on 14 July 1945 together with several others, on the basis of the Decree. This was allegedly a staged trial against innocent people who were "politically and economically a thorn in the side of the authorities". The initiators also stated that "the Supreme Court still relies on the same legal regulations as did the Military Court when it passed the judgment on 17 July 1945". The initiators are under the impression that the controversial Decree is still being used and continues to survive in practice even though it was not published in the Official Gazette of the People's Republic of Yugoslavia, published since 1944, nor the Official Gazette of the DFY (Democratic Federal

Yugoslavia), published since 1945, which was "contradictory to the established civilisational principles of every honest and democratic system".

B - I.

1. In deciding on the initiative and the proposal, the Constitutional Court first had to establish whether the procedural premises for assessing the constitutionality of the Decree existed. The basic procedural premise in a Constitutional Court procedure is the existence of the need for legal protection. In proceedings before the Constitutional Court to assess the conformity of a regulation with the Constitution, the existence of such need may be questionable if the regulation is no longer valid at the time the proceedings are begun. With regard to this issue, this Court has already adopted the position that it cannot decide on the constitutionality of laws, other regulations and general acts that ceased to be valid before the initiative or proposal which began the proceedings before the Constitutional Court was lodged.

It is not contested that the Decree on Military Courts of 24 May 1944 was not valid at the time the initiative and proposal were lodged. But this fact does not lead to the conclusion that the Constitutional Court may not assess the contested Decree, since in the case of regulations from the substantive criminal law a particular feature applies, stipulating that assessment of the constitutionality of those laws that have been formally annulled must be provided for.

Article 28, paragraph two, of the Constitution stipulates that "a criminal offence shall be tried and penalties ascribed according to the law which was in force at the time the offence in question was allegedly committed, save where a new statute which carries a lesser penalty for the offence has subsequently been enacted".

From this provision it is clear that in criminal proceedings a court is bound to apply a law that ceased to be valid when this carries a lesser penalty for the offence. At the same time, courts may not apply those provisions of the more lenient law that conflict with the valid legal order. The legal order cannot and does not allow for the use of provisions which conflict with it. There is no need for special justification of this, but with the Decree there is another reason, since it concerns the protection of human rights and freedoms. According to the Enabling Statute for the Implementation of the Constitution, for instance, all the regulations that were "in effect" on the day the Constitution was proclaimed shall "remain in effect" (Article 1, paragraph one, of the Enabling Statute for the Implementation of the Constitution) - and, if they did not interfere with human rights and basic freedoms, it was not possible to contest their constitutionality before the Constitutional Court until 31 December 1993 (paragraph two of the said Statute). Although the Enabling Statute for the Implementation of the Constitution does use terms such as "in effect" or "remain in effect", we must not overlook the fact that Article 156 of the Constitution talks about a court "applying" the law. The "application of the law" is a wider notion than that of a law being "in effect", since all laws may be applied, while - in accordance with the provisions of Article 28 of the Constitution - not necessarily in effect.1

In renewed criminal proceedings regulations are also used which were in effect at the time an alleged criminal offence took place. This use may not be not subordinated to constitutional control, since it is quite possible that regulations which may be applied in renewed criminal proceedings could clearly and seriously conflict not only with the legal order of the Republic of Slovenia itself but with the higher constitutional standards of the protection of human rights and basic freedoms, as can clearly be seen from Article 1, paragraph two, of the Enabling Statute for the Implementation of the Constitution, quoted above. Should the Constitutional Court adopt the formal position that the "regulation ceased to be in effect", meaning that it cannot be subjected to constitutional control, it would certainly be acting in explicit contradiction of the intention of the Constitution, which gives human rights, which are most seriously threatened in the area of the criminal law, more rather than less rigourous protection. If, for example, a criminal regulation that ceased to be valid stipulated punishment for an insufficiently described criminal offence (Article 28, paragraph one, of the Constitution) or if it presumed alleged guilt (Article 27 of the Constitution), the Constitutional Court would certainly not be able to avoid its competence to assess such regulation, which would be used to judge (in

A criminal offence shall be tried and penalties ascribed according to the law which was in effect (note: i.e. and is therefore no longer in effect) at the time the offence in question was allegedly committed, save where a new statute which carries a lesser penalty for the offence has subsequently been enacted." (Article 28 of the Constitution). accordance with Article 28, paragraph two) the criminal offence and penalty only because such regulation formally ceased to be in effect. The assessment of which provisions conflict with the valid legal order means a proceeding before a court or the Constitutional Court to assess regulations which formally ceased to be in effect but which are still applied.

2. In addition to the fact that formally annulled substantive criminal regulations may still be applied on the basis of the provisions of the second paragraph of Article 28 of the Constitution, an abstract judgement by the Constitutional Court is possible and required in the case of the Decree. One of the reasons for this is that only the legal effects of such a judgement by the Constitutional Court, in terms of Article 415 of the previous Constitution (in this case decreed by the Constitutional Court), enable the affected parties to request changes to legally binding convictions passed on the basis of those provisions of the Decree which shall be considered on the basis of this Resolution as conflicting with the Constitution and legal principles recognised by civilised nations. The assertion that a given substantive criminal law regulation conflicts with the Constitution may form the basis for changing legally binding convictions in a procedure in which are applied accordingly the provisions on renewal of criminal proceedings on the basis of this Resolution. Because of this specific feature, those persons that were in this way granted the possibility of requesting the quashing of criminal convictions cannot be denied their legal interest in contesting the constitutionality or in an abstract Constitutional Court judgement of such provision of the substantive criminal law.

3. The courts still apply the provisions of the Decree in proceedings based on extraordinary legal remedies (renewal and request for protection of legality). This was done by the Basic Court in Murska Sobota, Murska Sobota unit (No. K160/39), in the judgement in which Josip Benko was acquitted, referring directly to Article 14 of the Decree. The fact that the accused was acquitted in this particular retrial does take away his legal interest, but it does not also mean that he was acquitted on the basis of a constitutionally acceptable regulation. The point is not whether Slovenian courts currently apply the Decree mainly for acquittals - in the postwar period it was mainly used for convictions; both happened, as we will see, because of a lack of definition in the rules of this Decree, which obviously conflicts with the principle of the lawfulness of criminal law regulations (lex certa).

4. The extent of Constitutional Court control over substantive criminal regulations as defined by the Constitutional Court with the views expressed in this ruling, raises the question of what criteria are used to judge the constitutionality of pre-constitutional regulations. Considering the fact that, in terms of time, the possibility of assessing such regulations is virtually unlimited, they have to be assessed in view of their usefulness in proceedings based on extraordinary legal remedies from the point of view of their conformity with the constitutional and general legal principles in effect at the time and recognised by civilised nations, their applicability in new trials and their conformity with the Constitution.

5. The Constitutional Court assessed the nature of the provisions of the Decree on Military Courts. The provisions of the Decree were compared with the provisions of the London Agreement (LA)2, a composite part of which is the Charter of the International Military Tribunal (the Charter)3, which are the most relevant international legal documents in terms of content and the time they were written. Such comparison also makes sense with regard to Article 8 of the Constitution, which states: "Statutes and other legislative measures shall comply with generally accepted principle of international law and shall accord with international agreements which bind Slovenia. Ratified and proclaimed international agreements to which Slovenia adheres shall take immediate effect." With this, the Constitution gives precedence to the standards of international law over all sub-constitutional standards of domestic law.

6. A comparison between the Decree and the LA, used in the Nuremberg war criminal trials, shows that the Decree was in many ways a much more precise document than the LA. The LA was explicitly intended and used for punishing members of the Axis powers, while the Decree criminalises not only "acts by enemies of the people" but also war crimes irrespective of who they were committed by; the

LA was an act by the victor used for trying the vanquished. In that sense the Decree was more neutral; the provisions of the LA did have retrospective effect, as they were adopted on 8 August 1945 and defined as criminal those acts which took place during the war, while the Decree was in effect (also) for acts that took place after its enactment and did not explicitly stipulate retrospective effect, even though it was obviously intended for such use.

The LA did not contain any provisions on procedure; authority to adopt procedural regulations was granted to the court, and the proposal of the text for these provisions was adopted by the prosecutor. The adopted procedural provisions stipulated that the court may change the adopted rules of procedure either by general act or for an individual case. The Decree, on the other hand, contains quite extensive procedural rules.

The LA did not envisage legal remedies, while the Decree envisaged obligatory "review" by a high court in cases where capital punishment has been handed down. The LA did not contain a system of sanctions, Article 27 stipulating merely that capital punishment or punishment deemed to be appropriate by the court shall be passed, while the Decree lists all the sanctions and security measures as well certain principles on how these sanctions should be selected and passed.

A comparison between Article 13 of the Decree and the provisions of the LA shows that the provisions which define war crimes as criminal are no less precise and clear than the provisions of point b, second paragraph, of Article 6 of the Charter.

The Decree defines as criminal the actions of all persons irrespective of whose side they were active on and regardless of whether they were initiators or organisers, gave the orders, assisted in or directly executed the following crimes: mass murder, torture, forced resettlement, sending people to camps and forced labour, burning and robbing private and state property, inhuman exploitation of forced labourers by landowners in or outside Yugoslavia, work by the functionaries in the terrorist apparatus and terrorist actions by those who mobilised Yugoslav citizens into the occupying army.

The LA criminalises only the actions of people who, as members of the Axis powers, committed violations of military laws or customs such as: murder, torture, deportation of civilians to forced labour or any other reasons, murder or torture of POWs or persons in the sea, killing hostages, destruction of public and private property when not necessary for military reasons. Characteristic of the differences between the two, the LA lists the offences by examples while Article 13 of the Decree lists them exhaustively.

7. The analysis therefore shows that the Decree was in many ways more specific than the international act with which we have compared it. We ought to add here that the court in Nuremberg, despite everything said, followed Anglo-American legal tradition, which gives different legal protection to the accused, and is more procedural and elaborate than the continental system. From experience we know that no injustices were committed by the LA, while apparently there were by the Decree - and not that few for that matter, nor were they insignificant.

From the material collected by the Constitutional Court we can see huge differences between the Nuremberg trials and the trials by the military courts. The Decree on Military Courts cannot be studied without the accompanying instructions from the time on how it should be applied. These instructions, issued by the Department of Justice at the Yugoslav Supreme Headquarters and Slovenian General Headquarters, contained not only legally correct views, even though they were adapted to the ideas of that period (for instance that discussions must "wherever possible" be public and only exceptionally and for special reasons secret4, that serious mistakes by lower courts on matters where no obligatory review is required shall be corrected by repeating the proceedings5, that the severity of the act and the character of the offender must be carefully evaluated, as well as all extenuating circumstances, that all proofs must be performed and justness and humanity shown even towards enemies, etc6), but also views of a different kind. From the letter by the Military Court Department of the Supreme Headquarters of the National Liberation Army (NLA) and the Partisan Units of Yugoslavia (PUY), No. S.a. 58 /44 of 24 July 1944, it is clear that "the military court and disciplinary procedure on the basis of the Decree means revenge and protection measures against criminals, people causing harm and disorganisation". The letter explains that Article 31 of the Decree, which speaks about amnesties, has

the nature of a principle and that "in the present circumstances it can only be used rarely, in exceptional circumstances" and that "the Decree shall be applied flexibly and adapted to the conditions in Slovenia".7

The Military Court Department of the Supreme Headquarters of the NLA and the PUY wrote in its letter S.A 102/44 of 19 December 1944 that the Decree was not a definite and complete legal code, and contained only obligatory directive regulations, which gave general guidelines. It did not deal with many of the important questions, including questions concerning children and juveniles. The question of trying juveniles over 14 years of age had to be solved case by case, taking into consideration the degree of maturity, subjective and objective circumstances - all of this, of course, with the interests of the National Liberation Struggle in mind.8

From instructions No. 4 of the Justice Department at the General Headquarters of the NLA and PU of Slovenia of 7 January 1944 under "7th Characterisations of the Members of Courts", it follows that when appointing members to a court, not only the character and professional ability but also political capability must be taken into account. In instructions No. 6 of 9 August 1944 (No. SD 496/44), issued by the same body, it is stated under I. that the text of the Decree should be understood as flexibly as possible and the practice of military courts be strictly in accordance with the spirit of the National Liberation Struggle and its stage of development.9

There was a huge difference in the composition of the senate of the Nuremberg tribunal and the senates of the military courts of that time, as well as in their understanding of the law. The judges at the Nuremberg tribunal were top legal experts, the court sessions were open to the public and observed by the international public. In the military courts however, the members were appointed by the headquarters, and included nonprofessionals, for whom one- or two-day courses were organised; only the secretary of the court was a lawyer by profession, whenever possible.10 The sentences passed by the military tribunals were even below the already established legal level introduced by the decree of the presidency of the Slovenian National Liberation Council (SNLC) on the temporary arrangement of national courts (Off. Gaz. P SNLC and NAS, No. 4/1944 of 11 September 1949). This decree (Article 1, paragraph four) explicitly stipulates that a court must judge only in accordance with the law. The justice official on the National Committee for the Liberation of Yugoslavia (NCLY), Dr Frane Frol, informed the presidency of the SNLC in his letter No. 15/44 of 10 October 1944 that with this decree the principle of uniform construction of judicial authority had been violated. He warned that the part of the decree stipulating that courts judge only in accordance with laws was incorrect. A court should judge in the spirit of protecting the acquisition of interests and principles on which the new authority and order were being built through the National Liberation Struggle.

This is why old laws can be applied neither partially nor temporarily. In his estimation, the decree was not in accordance with the Decree on Military Courts.11

From the report on the state of the judiciary in Slovenia, No. Csu 135/44 of 8 December 1944, prepared by the Justice Department at the presidency of the SNLC, it is clear that based on Frol's letter the Department prepared an interpretation of the controversial Article 1, paragraph four, stipulating that courts must only judge in accordance with laws. From this explanation it is clear that national judges were not "to judge in accordance with laws in effect in Yugoslavia prior to April 1941, but to understand the term "law" as an objective abstraction of every case that has an existing precedent in law or an unwritten legal standard, and taking into account legal provisions from the decrees adopted by the Antifascist People's Assembly for the Liberation of Yugoslavia (APALY) and the SNLC, popular legal conscience and common law, all in accordance with and under no condition conflicting with the acquisitions of the National Liberation Struggle", as all this was described in the decree as "the law".12

The statements from the above-mentioned documents by the then state bodies additionally clarify the comparisons between the LA and the Decree on Military Courts and enable an understanding and interpretation of controversial elements in the provisions of the Decree.

8. In connection with the statements by the proposer and the initiator that the Decree was never published as a regulation and was not issued by any competent body, the Constitutional Court established the following:

a) as far as publication in Slovenia is concerned, the Decree was published in Vestnik - the official newsletter of the General Headquarters of the NLA and PU Slovenia, which was of an internal nature.13

Here we must answer the question of why the Decree was not published in the usual manner for that time - in the Official Gazette of the DFY and the Official Gazette of the SNCL, which was then regularly published and was where all regulations issued by the APALY, its presidency and the NCLY had to be published, in accordance with a special decree passed by the APALY. Despite the fact that the Decree was not issued by any of these bodies (it was issued by the president of the NCLY and his authorised representative for national defence, although in the function of the supreme commander) it should definitely have been published in the manner described, in accordance with its significance and position in the legal system that was developing at the time (a kind of decree with the power of a law, which took the place of a criminal law). Publication in the Vestnik of the General Headquarters of the NLA and PUS and the fact that such manner of publishing a regulation that in exceptional circumstance may have retrospective effect is quite without meaning for the informing of perpetrators of offences committed in the past; it slightly reduces but not completely removes the significance of the previously established deficiency in the Decree, namely that it was not proclaimed. Only the fact that a regular legislative body - the Temporary National Assembly of the DFY - annulled the Decree in August 1945 with two laws (more about this later) means that it subsequently rehabilitated this essential formal deficiency of the Decree, recognising it as a component part of the contemporary legal order.

b) Following the 2nd congress of the APALY, only the APALY itself, and between APALY's the presidency of the APALY, were competent to issue a regulation such as the Decree, particularly with regard to the substantive law and the procedural part of the regulations, which defined criminal acts and proceedings before courts. The NCLY as the executive body was not competent, and even less so was its president. Josip Broz Tito did not actually issue the Decree in his capacity as president of the NCLY, but as the Supreme Commander of the NLA and PUY - similarly, the previous Decree on Military Courts had been issued by the Supreme Headquarters on 29 December 1942.

Even though his positions as the Supreme Commander and President of the NCLY in the emerging country, which did not yet have the function of head of state (because the question of whether it was to be a monarchy or a republic was solved only after the liberation), could to some extent be compared with the position of head of state (but only insofar as the head of state is traditionally also the supreme commander) and thus his contested Decree with legally binding decrees, such as, according to the constitution, are usually within the competence of a head of state when parliament is unable to meet due to extraordinary circumstances; but even with this comparison of comparative law the grounds for his competence to issue the Decree cannot be founded. After the 2nd congress of the APALY there existed a temporary legislative body, adapted for the specific circumstances of war - the presidency of the APALY, which met even in the circumstances of war and performed its legislative functions. The Decree was obviously issued by a body which was not competent and, as with its publication, this essential formal deficiency of the Decree was rehabilitated only after the Temporary National Assembly of the DFY annulled the Decree with two laws and thus recognised it as a valid composite part of the then valid legal order.

c) These two laws were the Law on Establishment and Jurisdiction of Military Courts in the Yugoslav Army (Off. Gaz. DFY, No. 65/45), which came into force on 31 August 1945 and which stipulated in Article 35 that on that day those provisions of the Decree on Military Courts defining the composition and competence of military courts ceased to be valid, and the Law on Criminal Acts Against the People and the State (Off. Gaz. DFY, No. 66/45), which came into force on 1 September 1945 and Article 20 of which stipulated that on the day of its enactment all those legal regulations that conflicted with the provisions contained therein ceased to be valid. The expression "legal regulations" obviously cannot be understood only in the sense of formal laws, since in that case the legislator would use the term "laws" and not the wider expression "legal regulations". Until that time the DFY had not adopted

any formal laws defining these issues. Apart from the Law on Courts for the Protection of the Nation's Honour, it had adopted only one valid regulation - the Decree on Military Courts - or, at least, it was considered to be a valid regulation whose validity was thus withdrawn with this provision. This was also clearly stated during the debate on the adoption of the law. A representative of the Legislative Committee said: "I have to stress that the Decree on Military Courts and the regulations for the protection of the honour of the nation until recently formed our only criminal legislation." And later that this law "includes criminal acts from the Decree on Military Courts and the Law on Courts for the Protection of the Nation's Honour".14 The representative of the opposition - the minority rapporteur on the Legislative Committee - apparently saw the Decree as a valid regulation until then: "We were against this legal proposal for the reason that it included many new acts which were not envisaged by Articles 13 and 14 of the Decree on Military Courts from 1944, and which cannot be tried in the absence of a law."15 From this we can see that the Temporary People's Assembly of the DFY neither ignored the Decree nor considered it invalid or a nonexistent regulation in any of its parts, and it annulled the Decree with the two laws from August 1945, thus recognising it as having been a valid regulation until then.

9. Since it was recognised as such by the courts and all other state bodies it would be too late now, after 45 years, to deny the regular legislative body of the then state the right to rehabilitate or subsequently confirm the Decree as having been a valid regulation until then, and thus the activity of the military courts at the end of the extraordinary war and postwar circumstances and the transition of the state to a normal situation, because otherwise it would have to be completely annulled and considered illegal.

Similar to the Decree, the LA was subsequently confirmed. The LA was confirmed by the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity16, Article 1 of which states:

"Statutory limitations shall not apply to the following crimes, irrespective of when they were committed:

a) war crimes, as defined by the Charter of the International Military Tribunal in Nuremberg of 8 August 1945 and confirmed by resolutions of the General Assembly of the UN 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946, particularly "grievous crimes" listed in the Geneva Convention on Protection of Victims of War of 12 August 1949;

b) crimes against humanity, committed either during war or in peacetime, as defined by the Charter of the International Military Tribunal in Nuremberg of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946, and 95 (I) of 11 December 1946.

10. Some of the acts criminalised by the Decree (for instance genocide, war crimes) are such that they meet the criteria set by international and domestic criminal law. Therefore, at the time of issue, some of the provisions of the Decree and the court procedures were acceptable from the point of view of the criminal law, which is why they may be used by courts in the Republic of Slovenia in trials for those acts that were committed at the time the Decree was in effect, and for which the possibility of criminal prosecution has not expired due to statutory limitations and in proceedings based on extraordinary legal remedies (renewed proceeding, requests for protection of legality).

11. The Constitutional Court stressed in particular that this does not mean that all the provisions of the Decree met legal standards and that the courts may use them; quite the opposite. Some of the provisions were, even at the time of issue, clearly in conflict with the general legal principles recognised by civilised nations, and today with the Constitution, and may not be applied by the courts. This definitely applies to all those elements of the Decree which are or were used in actual criminal proceedings as a blunt incrimination of status and which did not refer to a specifically defined act by the accused, including expressions such as "war criminals", "organisers", "those giving orders", "functionaries of the terrorist apparatus", "locals serving the occupiers", "active Ustashi", "Chetniks", "spies", "informers", "couriers" "traitors to the National Liberation Struggle and those associated with the occupier", and similar. From this aspect, the most problematic provisions are contained in Article 13 and 14 of the Decree, which state the following:

"Article 13

The following persons shall be considered as war criminals, irrespective of whether they are citizens of Yugoslavia, of the occupying forces or of other countries: instigators, organisers, those giving orders, assistants and direct perpetrators of mass killings, torture, forced resettlement of population and sending to camps and forced labour, burning, destroying and robbing national and state property; all individual owners of property and companies in Yugoslavia, in the occupiers' or other countries, who inhumanely use forced labourers; functionaries in the terrorist apparatus and occupying terrorist armed formations and locals serving the occupiers; and those who carried out mobilisation of our people into the enemy's army."

"Article 14

As enemies of the nation shall be considered: all active Ustashi, Chetniks and members of other armed formations serving the occupier and their organisers and assistants; all those who served the enemy in any form - spies, informers, couriers, agitators and similar, those who forced the people to give arms to the occupier; all traitors to the National Liberation Struggle and those associated with the occupier; all those who deserted the national authorities and worked against them, all those who are subverting the national army or in any other way assisted and are assisting the occupier; all those who committed grievous cases of murder or robbery and similar."

12. Criminal law theory has clarified the question of an acceptable nomotechnically determined definition of punishability. It is clear here that the legislator cannot criminalise the unprovable status of a person as a criminal by nature. The Constitutional Court does not go any deeper into explaining this issue. As a rough generalisation, this means that legal protection in a legal system cannot tolerate such criminalisation which due to its unspecific and unprovable nature could not become the subject of focused substantiation and dispute between the state and the individual in criminal proceedings in general.

The thrust of the criminal law is not on criminalising personality but on criminalising acts by which an individual, by will or by negligence, leaves actual and specific traces in the tangible world that can be proven. Only such consequences of criminal acts can actually be subject to specific substantiation in criminal proceedings. Only on facts so defined - and not abstract and non-specific status - can a dispute be created in a criminal proceeding, where both parties have the possibility of proving guilt or innocence.

The Decree talks about "war criminals", "functionaries of the terrorist apparatus and terrorist formations of the occupier" and "locals serving the occupier" (Article 13). The Decree also talks about "enemies of the people" "active Ustashi and Chetniks", "members of other armed groups in the service of the occupier", "spies, informers, couriers and agitators". It continues this labelling with "and similar". This analogy, which in ordinary criminal law nomotechnics would seem to be analogie inter legem, which was sometimes acceptable in the criminal law but under very restrictive explanation, while in the wording of Article 14 (".....such as spies, informers, couriers, agitators and similar"; "all those who commit grievous cases of murder and robbery and similar") it goes far beyond such acceptable analogy. Terms such as "spy", "informer", "courier", "agitator" as such are insufficiently specific even by modern specific criminal law definitions because, as far as spying is concerned, for instance, the question of what is a military or state secret and what not appears only subsequently. The above list is a series of such undefined status labels without the elements of criminal acts that would form such status. These types of label are insufficiently specific as they are, yet to top it all the general clause "and similar" was added at the end.

The Decree was unspecific about "traitors to the National Liberation Struggle and those associated with the occupier, and similar" (Article 14 of the Decree).

This is incompatible with Article 28, first paragraph, of the Constitution of the Republic of Slovenia, which states: "No person may be punished for an offence which was unknown to the criminal law, or which attracted no penalty, at the time the offence was allegedly committed." The specific definition of a criminal offence (lex certa) was one of the fundamental guarantees in the substantive criminal law

which originated in the more widely formulated principle of legality, according to which there is no crime unless it was previously defined as an offence which attracted a penalty (nullum crimen sine lege praevia).

A comparative analysis of Constitutional Court judgments shows that this Court annuls all insufficiently specific criminal laws, since stricter, more specific and more restrictive explanations apply to the criminal law than is common for non-criminal regulations.

The problem with status labels in the criminal law is not that "war criminals" and similar should not be punished. But the principle of definition, which is one of the sub-principles of the principle of legality in criminal proceedings, can be met only after the general status definition of a criminal offence has been specifically and concisely defined by individual objective and subjective elements of behaviour, circumstances and (sometimes) the consequences of actions, giving the status definition such content as to enable an actual dispute based on an actual and provable historical event. We can see that the problem of criminalising status is similar to the problem of lack of definition.

The purpose of the principle of legality and consequently of the definition of the substantive criminal law (lex certa) is to prevent arbitrary use of power in the application of criminal sanctions by the state in circumstances that were not sufficiently clearly defined in advance.

Article 14 of the Decree tries to specify and define "enemy of the people", which in itself is only an unspecific status label, but it only manages to further dilute it with labels such as "active Ustashi, Chetniks and members of other armed formations in the service of the occupier, informers", etc. Expressions such as "traitor to the National Struggle" or "desert the national authorities and work against them" or "subvert the national army" are only hybrid labels somewhere between completely derogatory status definitions (Ustashi, Chetnik) on the one hand and normal criminal analytically elaborated criminalisations in accordance with the principle of legality on the other.

We cannot make an a priori assertion, as maintained by the Public Prosecutor of the Republic of Slovenia in his proposal, that these provisions were mainly or even entirely the result of vengeance on the part of the issuer of the Decree. Irrespective of the intentions of the issuer of the Decree, it is true that the standards are not sufficiently defined, which in specific cases leads to at least arbitrary and also wrongful use of the regulation.

13. Contrary to the Constitution are all those elements of the Decree which serve or have served in actual criminal proceedings due to their insufficient definition - for example "and similar", "associated with the occupier" etc - as grounds for arbitrary application by the courts of the day (for instance: confiscation of property).

14. This assumption is even further substantiated if we examine the word association "shall be considered", which appears in Articles 13 and 14 of the Decree. This word association leads to the idea that the person who wrote the Decree started from the premise that in matters which are allegedly related to a criminal act, guilt should be presumed, since the court has to presume (shall be considered) that, for instance, "functionaries of the terrorist apparatus and terrorist armed formations and locals serving the occupiers", are war criminals irrespective of whether they were actually guilty of a war crime. Such formulation infringes the basic principle of the criminal trial law, which is that the onus is on the plaintiff to prove guilt, known in legal doctrine as "presumption of innocence". This presumption also means that when in doubt the person judging must decide in favour of innocence of the accused and not "presume" anything to the disadvantage of the accused.

15. According to Article 27 of the Constitution, anyone "charged with a criminal offence shall be presumed innocent until proven guilty by due process of law". This is an example of presumption of innocence. The presumption of innocence means (1) that the defendant is presumed innocent until proven guilty, (2) that guilt must be proven by the state prosecutor and not the defendant (burden of proof) and (3), which is the most important, that when in doubt, if guilt is not uncontestably proven, the court must acquit the defendant.

16. If, during renewed proceedings or request for protection of legality, it becomes clear that the court which originally judged the case in accordance with the Decree did not take into account these basic procedural guarantees and when in doubt it convicted instead of acquitting the defendant, then such judgement, in accordance with the sentence of this Resolution, conflicts with the general legal principles recognised by civilised nations. The Constitutional Court stressed in particular that the consequences of such procedural mistakes conflict with the valid legal order of the Republic of Slovenia, which means, to be more precise, that the court judging in a request for renewed proceedings or protection of legality must itself correct the mistakes made in the past. Those affected who believe that their rights were unconstitutionally violated in such proceedings are entitled to lodge a constitutional complaint.

17. Modern history research shows that in some cases criminal proceedings on the basis of the Decree were abused with the confiscation of property, even though there was no legal or actual basis for the adoption of such measure.17 The same research shows that the majority of the abuses did not take place on the basis of the Decree, but by-passed it (arbitrary settlements, non-judicial executions or liquidations).18 The Decree was perhaps not the main basis for settling scores with the enemy and could even be seen as an attempt to prevent or at least limit arbitrariness and non-judicial liquidations. The decision as to whether and to what degree the provisions of the Decree were abused in actual criminal proceedings cannot be general but only specific for an actual criminal procedure or procedure of constitutional complaint.

18. Even at the time of issue, the insufficiently defined or nondefined standards of the Decree conflicted with the principle of legality (nullum crimen, nulla poena sine lege praevia), recognised by civilised nations. The only exception applies to acts and omissions which at the time they were committed were punishable in accordance with general legal principles recognised by civilised nations.

19. Courts may apply those provisions of the Decree which are sufficiently clear and precisely criminalise punishable acts and participation in such acts (for instance perpetrators or accomplices in mass murder, torture, forced resettlement of populations, burning, destroying and robbing state and national property, etc).

The courts may not use those provisions in particular that only criminalise status (without other specifically defined elements of criminal offences) or are so vague as to conflict with the valid legal order (for instance "and similar", "associated with the occupier", "desert the national authorities", etc).

20. The same applies for those provisions which could serve as the basis for criminalising acts that were committed prior to the enactment of the Decree, and which do not attract a penalty by the general legal principles recognised by civilised nations. The Constitutional Court applied here the provision of Article 15, paragraph 2, of the ratified International Treaty on Civil and Political Rights (Official Gazette of the SFRY, No. 7/71), according to which the ban on retroactive effect of penal regulations, as stipulated in the first paragraph of the Article does not apply for "acts or omissions which at the time they were committed were considered criminal offences in accordance with the general legal principles recognised by all nations" (official translation of the Convention, published in the Official Gazette of the SFRY), and "... recognised by the community of nations" (Slovenian translation published in the "Human Rights" collection, Society for United Nations, Ljubljana, 1988). Due to a certain lack of clarity in the translation of the ratified convention, the Constitutional Court applied in this Resolution an appropriate formulation of the provisions of Article 7, paragraph 2, of the European Convention for the Protection of Human Rights, which has not yet been ratified by Slovenia, and which contains similar contents. The provision from the above-mentioned ratified international treaty, which is binding on Slovenia in accordance with Article 8 of the Constitution, and the general legal principles to which the ratified provision refers, therefore ban the retroactive criminalisation of all other acts.

Therefore, the courts may not use in proceedings based on extraordinary legal remedies and in new judgements, those provisions of the Decree that at the time of its issue conflicted with the general legal principles recognised by civilised nations as well as with the Constitution of the Republic of Slovenia.

21. The courts must be specifically informed that the Constitutional Court did not exhaustively list in this case all the elements of the Decree that may not be used, giving only examples. This means that in actual criminal proceedings it may be established that some other similar element of the Decree may not be used.

22. Such decisions by the Constitutional Court enable court protection of individuals who believe that the court applied a provision that should not have been used according to this Resolution of the Constitutional Court, and will be able to lodge a constitutional complaint and seek a ruling by the Constitutional Court on an actual issue of contention.

B-II.

1. The Constitutional Court decided that point one of the Resolution shall have the effect stipulated by Article 415 of the Constitution of 1974, without the deadlines stipulated therein, and form the basis for lodging requests to amend legally binding convictions passed on the basis of the Decree, and by applying accordingly the provisions on renewal of criminal proceedings.

2. This Resolution was adopted by the Constitutional Court on the basis of Article 7 of the Enabling Statute for the Implementation of the Constitution and by applying accordingly Article 415 of the Constitution of 1974 and in connection with Article 411 of the Law on Criminal Proceedings.

Article 7 of the Enabling Statute for the Implementation of the Constitution stipulates that in connection with the legal consequences of decrees which are not defined by the Constitution, the Constitutional Court shall apply accordingly the current constitutional and legal provisions. This authorisation by the Enabling Statute for the Implementation of the Constitution enabled the Constitutional Court to order, with regard to the legal consequences of this Resolution, the use of Article 415 of the Constitution of 1974 in connection with Article 411 of the Law on Criminal Proceedings.

3. From Article 411 of the Law on Criminal Proceedings it follows too that the provisions on renewal of proceedings apply accordingly when a request is lodged to amend a legally valid conviction, in the sense of Article 388, paragraph three, of the Constitution of the SFRY or the relevant republic constitutions, and therefore also in the sense of the third paragraph of Article 415 of the Constitution of the SR Slovenia from 1974. According to this provision of the Constitution, if a court with a legally valid decree declines the use of a regulation or a general act because it is not in accordance with the Constitutions or law, but the Constitutional Court later established that no such conflict existed, everyone whose right was infringed may request amendment of the legally valid decree by the court. Considering the fact that such a situation could be caused by a legally valid decree in a criminal proceeding, the Law on Criminal Proceedings stipulates that in such cases the provisions on renewal of criminal proceedings shall be applied accordingly, including the provision determining those entitled to lodge a request for renewal of the proceeding and the provision on the time of lodging the request (Article 405, paragraphs one and three).

4. The provision from Point 2 of this Resolution stating that it may serve as the basis for lodging a "request for amendment of legally binding decrees issued on the basis of the Decree, by applying accordingly the legal provisions on renewal of criminal proceedings" means that this is - just like Article 411 of the Law on Criminal Proceedings - an extraordinary legal remedy whose use is enabled by this Resolution directly on the basis of Article 415, paragraph one, of the previous Constitution, and by applying accordingly the provision of the Law on Criminal Proceedings on renewal of a criminal proceeding - as is already stipulated by Article 411 of the Law on Criminal Proceedings for any potential cases on the basis of the third paragraph of Article 415 of the previous Constitution. Why Article 411 of the Law on Criminal Proceedings explicitly defined the procedure only for such extremely rare cases from Article 415, paragraph three, of the previous Constitution, and not also for the relatively more frequent cases from the first paragraph of the same article, cannot be established for certain, but it is more than obvious that there was no reason which would counter the use of the same approach for cases from the first paragraph of the article such as - accompanied by the appropriate use of these provisions - include cases of legally binding convictions passed on the basis of those provisions of the Decree that are discussed by the ruling of this Resolution. This is why the Constitutional Court ordered that the provisions of the Law on Criminal Proceedings on the renewal of

criminal proceedings shall be applied accordingly for such cases, and based this order on its authorisation from Article 36, paragraph two, of the Law on Proceedings Before the Constitutional Court of the SRS (Official Gazette of the SRS, Nos. 39/74 and 28/76), stipulating that when so required by the nature of a decision, it may stipulate other manners in which to enact the decision. An analogous provision is contained in Article 40, paragraph two, of the new Law on the Constitutional Court, which had already been adopted and proclaimed in the Official Gazette of the RS (No. 15/94 of 18 March 1994) on the day this Resolution was passed but which has not yet entered into force.

B - III.

1. The Constitutional Court established that the valid legal arrangement of criminal proceedings conflicts with the Constitution since it does not enable the overturning of all convictions issued on the basis of the regulations by the revolutionary war and postwar authorities that were wrongful from a procedural and substantive aspect, or the removal of the consequences of these decrees by extraordinary legal remedy. The Constitutional Court calls upon the National Assembly to remove the established unconstitutionality in the shortest possible period.

2. According to the provisions of Article 2 of the Constitution, Slovenia is a state governed by the rule of law. The process of transforming the previous legal system into a new legal system, based on the Constitution of December 1991, is currently underway. In this period, the basic element of the idea of a state governed by the rule of law undoubtedly includes legislation that would directly exclude from the legal system those regulations which conflict with the basic constitutional definition of Slovenia being a democratic state (Article 1), a state of parliamentary democracy based on division of power (Article 3), and protection of human rights and basic freedoms (Article 5). The idea of a state governed by the rule of law includes regulations which either directly exclude from the legal system the consequences of previous regulations or enable the removal of the legal consequences of the use of regulations of the previous non-democratic social order.

3. However, the Constitutional Court established that in the Republic of Slovenia no law (or group of laws) was adopted to enable the removal of all legal consequences of those regulations of the previous non-democratic system whose application in the personal or property field led to violations of basic human rights and freedoms. This would be a regulation that would enable legal revision of all legally binding criminal judgements passed during the war and after the war issued on the basis of other regulations (not only the Decree) which were not in accordance with the general legal principles recognised by civilised nations, nor in accordance with the current constitutional order in the Republic of Slovenia.

4. The current Law on Criminal Proceedings does not enable complete repeal of all legally binding convictions and thus fails to enable the removal of their consequences. The renewal of proceedings may be proposed chiefly because of new facts and new evidence unknown at the time of the original trial which are so important that they might lead to a lesser penalty for conviction, while a request for the protection of legality for reasons of infringement of the law may be lodged only by the Public Prosecutor. An amendment to or overturning of convictions passed on the basis of regulations which were not in accordance with the then generally accepted rules cannot be achieved only on the basis of these extraordinary legal remedies; this can only be possible in the cases of convictions on the basis of the Decree, whose partial conflict with these principles was established by this Resolution, which is now the basis for extraordinary legal remedies on the basis of Article 415 of the previous Constitution (by applying accordingly the provisions of the Law on Criminal Proceedings on renewal of proceedings).

5. In order to ensure that other abstract adjudications by the Constitutional Court of regulations from that period, which also conflict with the generally accepted legal principles of civilised nations and which enabled the then authorities to intolerably use criminal repression for political purposes, are needed again before the victims are able to contest convictions on the basis of such regulations, the Constitutional Court appeals to the legislator to create either a special extraordinary legal remedy or enable the use of existing extraordinary legal remedies for such purpose.

C.

The Constitutional Court adopted this Resolution on the basis of Article 161, first paragraph, of the Constitution, Article 7 of the Enabling Statute for the Implementation of the Constitution, and Article 25, paragraph three, second clause, of the Law on Proceedings Before the Constitutional Court of the SRS (Official Gazette of the SRS, Nos. 39/74 and 28/76) at a session composed as follows: chairman Dr Peter Jambrek and judges Dr Tone Jerovšek, Matevž Krivic M.Law, Janez Snoj M.Law, Dr Janez Šinkovec, Dr Lovro Šturm, Franc Testen, Dr Lojze Ude and Dr Boštjan M. Zupančič. The Resolution was adopted unanimously. Confirmative separate opinions were given by judges Jambrek, Jerovšek, Krivic, Šinkovec, Šturm and Ude.

Chairman
Dr Peter Jambrek

1 "No person may be punished for an offence which was unknown to the criminal law, or which attracted no penalty, at the time the offence was allegedly committed."
2 London Agreement of 8 August 1945, published in "Trial of the Major War Criminals Before the International Military Tribunal", Nuremberg, Germany, 1947.
3 Charter of the International Military Tribunal of 8 August 1945, published in "Trial of the Major War Criminals Before the International Military Tribunal", Nuremberg, Germany, 1947.
4 Instructions by the Military Court Department at the SH NLA and PUY, S.A. No. 70/44 of 7 September 1944, point 10 (documents from the Institute for Contemporary History (Doc. ICH) - fascicle 117, folder 4).
5 Letter by the Military Court Department at the SH NLA and PUY, S.A. No. 90/44 of 13 October 1944 (Doc. ICH, fasc. 117, folder 3).
6 Document "Military Courts" of 4 November 1944 (Doc. ICH, fasc. 117, folder 3).
7 Doc. ICH, fasc. 117, folder 3.
8 Doc. ICH. fasc 117, folder 3.

9 Doc. ICH. fasc 117, folder 5.
10 Report of 8 December 1944 by the P SNCL about the situation in the judiciary in Slovenia (Doc. ICH, fasc. 488, folder 5).
11 Doc. ICH, fasc. 487, folder 5.
12 Doc. ICH, fasc. 488, folder 5.
13 Vestnik - the official gazette of the General Headquarters of the NAL and PUS, year I, No. 6 of 20 October 1944.
14 Treće zasedanje AVNOJ i zasedanje Privremene narodne skup tine DFJ, 7-26 August 1945, shorthand notes. Belgrade 1945, pp 348-349.
15 Ibid, p 350.
16 The Convention was adopted by the General Assembly of the UN on 26 November 1968 in New York. The Convention was ratified by Yugoslavia and was published in the Official Gazette of the SFRY - International Treaties No. 50/70. With the Act on Notification of Succession, published in the Official Gazette of the RS - International treaties No. 9/92, the Republic of Slovenia became a contracting party to this Convention.
17 See: Mikola, M: "Activity of Partisan Military Courts in the Celje Region in 1944 and 1945", Celje Code 1993, Celje, Assembly of the Municipality of Celje, 1993, p. 319; Vodu ek-Stari , J: "The Background to the Court Trials in Slovenia in the First Year After the War, articles for Modern History XXXII, Ljubljana, Institute for Modern History, 1992, p 139-153.
18 See: Mikola, M: work listed under note 6, pp. 284-291; Vodu ek-Stari , J, work listed under note 6, p. 141.