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NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

Case No. IT-95-11-T

Date: 09 November 2006

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IN TRIAL CHAMBER I

Before: **Judge Bakone Justice Moloto, Presiding**
Judge Janet Nosworthy
Judge Frank Höpfel

Registrar: **Mr. Hans Holthuis**

Decision of: **09 November 2006**

PROSECUTOR

v.

MILAN MARTIĆ

DECISION ON DEFENCE'S SUBMISSION OF THE EXPERT REPORT OF PROFESSOR SMILJA AVRAMOV PURSUANT TO RULE 94 *BIS*

The Office of the Prosecutor:

Mr. Alex Whiting
Ms. Anna Richterova
Mr. Colin Black
Ms. Nisha Valabhji

Counsel for the Accused:

Mr. Predrag Milovančević
Mr. Nikola Perović

A. Procedural Background

1. **TRIAL CHAMBER I** ("Trial Chamber") of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("Tribunal") is seised of the "Defence's Submission of the Expert Report of Professor Smilja Avramov pursuant to Rule 94 *bis*" filed on 3 October 2006 ("Submission" and "Report" respectively). The *curriculum vitae* of Smilja Avramov is provided as Annex B to the Defence Submission.

2. On 11 October 2006, the Prosecution filed the "Prosecution's Motion to Exclude Certain Sections of the Expert Report of Smilja Avramov" ("Motion"). The Prosecution objects to the admission of several sections of the Report on the basis that, *inter alia*: "Professor Avramov engages in relatively little discussion of the law in her report, instead devoting much of the report to her views and opinions on disputed historical, political, and military issues of the armed conflict."[1]

3. On 25 October 2006, the Defence filed the "Defence's Response to Prosecution's Motion to Exclude Certain Sections of the Expert Report of Smilja Avramov" ("Response"). In its Response, the Defence argues that the Trial Chamber should admit the Report in its entirety as "[t]he portions of the Report that the Motion seeks to exclude provide factual context for the legal findings in the Report."[2] The Defence adds further that "[t]he facts discussed in those portions relate to general situation in the former Yugoslavia at the time relevant for the Report and, as such, are easily accessible and don't require first-hand knowledge."[3]

4. On 3 November 2006, the Prosecution filed the "Prosecution's 94*bis*(B) Notice Regarding Smilja Avramov" ("Notice") in which the Prosecution submitted that under Rule 94 *bis* (B) of the Rules of Procedure and Evidence ("Rules"), it does not accept the Report of Smilja Avramov, and wishes to cross-examine her on the parts of her Report which are *prima facie* relevant "but, in the Prosecution's view, inaccurate or misleading."[4] The Trial Chamber notes that this Notice has been filed outside of the thirty-day time limit set in Rule 94 *bis* (B), and that there has been no request for an extension of the time limit. The Trial Chamber considers the Defence to have been put on notice of the Prosecution's intentions towards this expert witness, and thus is satisfied that no prejudice has been caused to the Defence by this late filing. The Trial Chamber will therefore accept the filing of this Notice.

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[1] Motion, para. 4.
[2] Response, para. 2.
[3] Response, para. 3.
[4] Notice, para. 2.

B. Considerations when determining the admissibility of Expert Reports

5. The Trial Chamber must examine several factors in its assessment of a submission for the admission of an expert report, including whether: (1) the witness is an "expert" within the meaning of the jurisprudence of this Tribunal; (2) the report is reliable; (3) the report is relevant and of probative value; and, (4) the contents of the report fall within the accepted expertise of the witness.

6. Rule 94 *bis* of the Rules of Procedure and Evidence ("Rules") provides:

Rule 94 *bis*
Testimony of Expert Witnesses

(A) The full statement and/or report of any expert witness to be called by a party shall be disclosed within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge.

(B) Within thirty days of disclosure of the statement and/or report of the expert witness, or such other time prescribed by the Trial Chamber or pre-trial Judge, the opposing party shall file a notice indicating whether:

(i) it accepts the expert witness statement and/or report; or
(ii) it wishes to cross-examine the expert witness; and
(iii) it challenges the qualifications of the witness as an expert or the relevance of all or parts of the statement and/or report and, if so, which parts.

(C) If the opposing party accepts the statement and/or report of the expert witness, the statement and/or report may be admitted into evidence by the Trial Chamber without calling the witness to testify in person.

1. Whether the witness may be classified as an "expert"

7. Although Rule 94 *bis* does not contain any definition of the term "expert", in the jurisprudence of the Tribunal an expert witness has been defined as "a person whom by virtue of some specialized knowledge, skill or training can assist the trier of fact to understand or determine

an issue in dispute".[5] That is, an issue or allegation upon which the Trial Chamber must make a determination or finding.[6]

8. The Prosecution has not challenged the qualifications of Smilja Avramov as an expert witness and accept Smilja Avramov as "an expert in Yugoslav law and perhaps also in international law".[7] Having examined the *curriculum vitae* of Smilja Avramov, the Trial Chamber is satisfied that she has expertise in the fields of the law of the former Yugoslavia and international law.[8] Therefore, this witness may be classified as a person who has "specialised knowledge, skill or training" in these two fields.

2. Whether the Report is reliable

9. The Trial Chamber in *Galić* held:

> an expert witness is expected to give his or her expert opinion in full transparency of the established or assumed facts he or she relies upon, which supposes that the sources used in support of any expert witness statement be clearly indicated and easily accessible. A minimum degree of reliability is also required at the stage of admission with respect to the sources used, and opportunity should be given, whenever possible, to the other party to test or challenge the factual basis on which the expert reached his/her conclusions.[9]

It must be determined whether a report submitted as an expert report meets the minimum standards of reliability; in that regard there must be sufficient information in an expert report as to the sources used. In the Trial Chamber's opinion, this would require that: (1) the facts and statements upon which the expert bases his or her opinion include references to the sources of such facts or statements; (2) the underlying sources must *prima facie* show indicia of reliability or the Trial Chamber must be able to test the reliability of such sources. In the absence of references to each fact or statement made, the Trial Chamber will treat such information as the opinion of the witness, and weigh the evidence accordingly.

10. It has also been held that experts may express their opinion, within the confines of their expertise, on the facts established in evidence if that opinion is relevant to the case, although the

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[5] *Prosecutor v. Stanislav Galić,* Decision Concerning the Expert Witnesses Ewa Tabeau and Richard Philipps, 3 July 2002. *See also Prosecutor v. Blagojević and Jokić* Decision on Prosecution's Motions for Admission of Expert Statements, 7 November 2003, para. 19. The Trial Chamber in *Čelebići* held that "[e]xpert opinion is only necessary and required where the expert can furnish the Trial Chamber with scientific, technical or such knowledge or information that is ordinarily outside the experience and knowledge of the judges of facts" *Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić and Esad Landžo, a.k.a. "Zenga"* Decision on the Motion by the Prosecution to Allow the Investigators to Follow the Trial During the Testimonies of the Witnesses, 20 March 1997, para. 10.

[6] *Prosecutor v. Blagojević and Jokić,* Decision on Prosecution's Motions for Admission of Expert Statements, 7 November 2003, para. 19.

[7] Motion, para. 3.

[8] Motion, Annex B.

[9] *Prosecutor v. Stanislav Galić* Decision on the Prosecution Motion for Reconsideration of the Admission of the Expert Report of Prof. Radinovij, 21 February 2003, para. 9.

Trial Chamber is not bound to accept that opinion.[10] Furthermore, "if the Trial Chamber does not accept that the facts upon which the opinion is based have been established, that opinion has no probative value and it is inadmissible for that reason".[11] This specific task also implies a certain amount of objectivity and impartiality on the part of an expert.

3. Whether the Report is relevant and of probative value

11. Rule 89 (C), which sets out the standard for the admissibility of evidence, is applicable to the admissibility of expert evidence under Rule 94 *bis*.[12] Rule 89 (C) permits the Trial Chamber to admit any relevant evidence which it deems to have probative value. This relevancy is to the issues in trial.[13] A determination of the relevancy and probative value of the Report will be carried out below through an examination of the contents of the Report.

4. Whether the contents of the Report are within the scope of expertise of the Expert

12. An expert report contains the expert's opinions and conclusions on the specific areas which fall within his or her expertise. Statements on matters outside of this expertise will not be considered by the Trial Chamber as expert opinions, and, therefore, may not be included in such an expert report. In order for the Trial Chamber to assess this factor, it is necessary to examine the contents of the Report.

C. Discussion on the contents of the Report

13. The Report of Smilja Avramov is entitled "Yugoslavia and international law" and is divided into five sections, with a conclusion. The Prosecution objects to the admission of pages 5-6 and 12-18 of the Report as being, *inter alia*, "beyond the scope of expertise of Professor Avramov."[14] It does not object to the sections from pages 1-4 and 7-11 as they discuss Yugoslav and International law.[15]

14. "Yugoslavia and International Law" (pages 1-2): The Defence has raised some of the points contained in this section as part of its defence case, therefore the Trial Chamber considers that it may be helpful to it to receive further elucidation on this topic.

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[10] *Ibid.*, para. 4. *See also Prosecutor v. Blagojević and Jokić* Decision on Prosecution's Motions for Admission of Expert Statements, 7 November 2003, para. 19.
[11] *Ibid.*
[12] *Prosecutor v. Radoslav Brđanin,* Decision on Prosecution's Submission of Statement of Expert Witness Ewan Brown, 3 June 2003.
[13] *Ibid.*, p. 4. *See also Prosecutor v. Kunarac, Kovač and Vuković*, Decision on Prosecution's Motion for Exclusion of Evidence and Limitation of Testimony, 3 July 2000, para. 3.
[14] Motion, para. 6.
[15] Motion, para. 6.

15. "The secession of Slovenia and Croatia from the point of view of international and domestic law" (pages 3-7): The Prosecution objects to pages 5-6 of this section, which it states are "non-expert view and opinion of the historical record" and therefore inadmissible under Rules 89 (C) and 94 *bis*.[16] These pages to which the Prosecution objects relate to Smilja Avramov's opinion on the military preparations of Croatia and on the allegation of criminal behaviour by the leaders of Croatia and Slovenia. In the view of the Trial Chamber these topics clearly fall outside of the scope of Smilja Avramov's expertise. This section also contains some statements and comments which are entirely inappropriate, as well as being outside the scope of an expert report, such as:

> Their secession was carried out violently through a series of terrorist acts that would turn into a civil war with help from abroad.[17]
>
> It is incomprehensible that the Tribunal in its deliberation raised the legacy of revolution to the level of law ignoring international agreements as fundamental legal enactments.[18]

In relation to an alleged joint Croatian-Slovenian plan of approach Smilja Avramov states "[t]his represents a crime of association planned to destroy a state"[19]. The Report also states the leaders of the two Republics as belonging "to the category of major war criminals". [20]

16. "The EC mediation" (pages 7-9): In the view of the Trial Chamber the relevancy of this section to the charges against Milan Martić in the indictment is questionable. Furthermore, this section deals with topics concerning which the Trial Chamber has already informed the Defence that it does not need to hear further evidence.[21] The Trial Chamber also notes that, once again, this section contains language which is not appropriate in an expert report, for example:

> Although the SFRY was not a member of the EC and this organisation did not have a mandate to meddle in the internal affairs of Yugoslavia, the EC became deeply involved in the crisis and the violent destruction of Yugoslavia.[22]
>
> The EC took the view that was completely unprincipled. Self-determination was allowed only to those peoples who had chosen to destroy a state, but not to those who wanted to preserve their common state.[23]
>
> The Badinter Committee was merely a manipulation intended to salvage the Carrington Paper and obscure the crime of the destruction of a European state. The EC mediation mission was turned into a destructive mission that reached its pinnacle when the secessionist republics were recognised.[24]

[16] Motion, para. 6.a.
[17] Report, p. 5.
[18] Report, p. 5.
[19] Report, p. 6.
[20] Report, p. 6.
[21] Hearing, 01 November 2006, T. 10472.
[22] Report, p. 7.
[23] Report, p. 9
[24] Report, p. 9.

17. "The recognition" (pages 10-11): This section contains historical and political commentary which is both outside the stated expertise of this witness and irrelevant to the charges in this case. It also contains many biased and partial statements on historical events, such as:

> Hence, the responsibility for the destruction of Yugoslavia must be borne both by the EC and the Secessionist republics. [25]
>
> The protagonists of the recognition in 1991 were the same powers as in 1941: Germany and the Vatican. [26]
>
> The Arbitration Committee served as a façade for a dirty political game. The German Intelligence Service had worked on the destabilisation of Yugoslavia in cooperation with the extremist Ustasha organisation for years. A parallel action was conducted by the Vatican. [27]

The Trial Chamber finds that the contents of this section are of no assistance to its determination of the issues in dispute, and furthermore, fall outside the expertise of an international law expert.

18. "The characteristics of combat operations" (pages 12-17): The contents of this section are historical and political commentary, and rhetoric. These are of no relevance to the charges in the Indictment and fall outside of the expertise of an international law expert. Furthermore, the Trial Chamber notes that this section again includes unfounded and accusatory statements, such as:

> The Vatican also took part in the financing of Slovenia and Croatia's illegal arming. In 1991, for example, the Vatican Bank made a payment for an arms shipment from Lebanon to the Dutch International Handel Bank. The Croatian companies *Astra* and *Pliva* were involved in the deal.[28]

1. Lack of references

19. The Report is poorly cited throughout, and for some of its propositions refers to newspapers or books rather than to primary sources. For large portions of the Report there are no references at all. The Prosecution objects to the "lack of citations and source material" in the Report,[29] although it does not request the exclusion of the Report on this basis. The Trial Chamber finds that the lack of references makes it difficult to assess the probative value of the contents of this Report as the statements contained therein are accordingly impossible to verify. The Trial Chamber finds that it is possible, however, that this failure may be rectified by the witness testifying in person before this Tribunal.

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[25] Report, p. 10.
[26] Report, p. 11.
[27] Report, p.11.
[28] Report, pp. 12.
[29] Motion, para. 5.

D. Conclusion

20. This Report, presented to the Trial Chamber as an expert report on international law and the law of the former Yugoslavia, is instead, for the most part, entirely devoid of impartiality or objectivity. It is a partial political commentary on the events in the former Yugoslavia. It contains numerous accusatory and unfounded statements and comments which often pertain to members of the international community. Furthermore, it is entirely unclear as to how large parts of this Report can assist the Trial Chamber in understanding or determining an issue or dispute upon which the Trial Chamber must make a determination or finding in light of the Indictment. The obvious bias of the author, in large parts of this Report, makes it impossible for the Trial Chamber to distinguish between her personal opinion and expert opinion. Such partiality affects the probative value of those parts as the objectivity is so impaired concerning the foundation and basis of the expert opinion that it is of little value to the Tribunal. The Trial Chamber regrets that it was not presented with a more professional report.

21. The Prosecution argues that the contents of the Report to which it objects are inadmissible under Rule 89 (C) because Smilja Avramov "has no first-hand knowledge of most of the 'facts' she describes in her Report."[30] The Trial Chamber finds, as a preliminary point, that there is no requirement in the jurisprudence or the Rules that an expert can only present evidence as to facts of which the expert has "first-hand knowledge". The Prosecution further argues that the portions of the Report which fall outside her expertise should be excluded.[31] While lack of expertise in relation to portions of the document is one factor which the Trial Chamber takes into consideration, the lack of *relevancy* of certain parts of the Report to the charges in the Indictment would seem to be a more pertinent reason for not admitting the Report in its entirety.

22. In this regard, the Trial Chamber recalls the finding of the Trial Chamber in *Milošević*:

> The Report is, however, ostensibly a reverse indictment for crimes alleged to have been committed by Croats against the Serbs in Croatia. The Report contains nothing of direct relevance to the alleged criminal responsibility of the Accused. It does not, in fact, address issues raised by the Prosecution, such as "Greater Serbia" or Serbia's territorial ambitions, but instead is about a "Greater Croatia" policy, Croatian territorial ambitions and persecution of the Serbs by the Croats dating back to the mid-19th century and during World War II. The Report, while briefly touching upon the dissolution of the SFRY, proceeds merely to make conclusions that are properly findings which the Trial Chamber would have to make on the basis of evidence of what occurred. The Report could really only be of relevance were *tu quoque* a defence open to the Accused. The Trial Chamber is of the view that the content of the Report, in light of the stage the proceedings have

[30] Motion, para. 5.
[31] Motion, para. 5.

> now reached, is of such little relevance, if any, that it should not be admitted into evidence and Professor Krestic should not be called as a witness in the Accused's case.[32]

23. The Trial Chamber considers that the present Report is a "reverse indictment" and finds that large parts of this Report could only be of relevance if a *tu quoque* defence were open to the Accused. The Trial Chamber recalls that it has repeatedly reminded the Defence that this is not a valid defence before this Tribunal.

24. Considering that only a limited part of the Report has been found to meet the standard of Rule 94 *bis,* the Trial Chamber has therefore proceeded to redact the Report in line with the above considerations and findings, and will only admit the Report in this redacted format.

[32] *Milošević,* Decision on Admissibility of Expert Report of Vasilije Krestic, 7 December 2005, p.4. The Trial Chamber in *Kunarac* refused the admission of portions of an expert report on the grounds that "[t]he historical background of the conflict is not relevant to the charges against the three accused, as the innocence or guilt of the three accused does not turn on any historical reasons for the armed conflict" *Prosecutor v. Kunarac, Kovač and Vuković*, Decision on Prosecution's Motion for Exclusion of Evidence and Limitation of Testimony, 3 July 2000, para. 6.

E. Disposition

PURSUANT TO Rules 89 (C) and 94 *bis* of the Rules, the Trial Chamber,

GRANTS IN PART the Prosecution Motion.

ADMITS IN PART the Expert Report of Smilja Avramov as redacted and appended as Annex A.

ORDERS the Defence to bring Smilja Avramov to appear before the Trial Chamber for cross-examination.

Done in English and French, the English version being authoritative.

Judge Bakone Justice Moloto
Presiding

Dated this ninth day of November 2006
At The Hague
The Netherlands

[Seal of the Tribunal]

ANNEX A

Yugoslavia and International Law

Yugoslavia became a sovereign state in 1918 as part of the Versailles agreement because of the military and political victories of the Kingdom of Serbia, the only sovereign state in this area and the only ally of the Entente Powers. It became a federal state after the Second World War as a result of the socialist revolution led by the KPJ /Communist Party of Yugoslavia/.

Based on Article 1 of the Constitution valid at the time the Yugoslav crisis started, adopted on 21 February 1974, the SFRY /Socialist Federative Republic of Yugoslavia/ was defined as a "federal state ... and a socialist self-managing community of working people and citizens and equal nations and nationalities". Self-management was a new form of social relationship created by individuals through their employment and involved in the decision-making process on the level of work organisations, municipalities, communes, federal units and the federation. The goal of self-management was to secure a leading political and economic status for the working class.

In terms of foreign affairs, the SFRY was a unified state and a classic type of federation. Three basic attributes of sovereignty are reserved solely for federation, i.e. the federal government: *jus belli* or as we call it today, the right to make decisions about war and peace; *jus legationis*, the right to represent a state before the international community and *jus tractatum*, the right to enter into international agreements. Therefore, the Constitution clearly separated the policy-creating process into which it built self-management structures through the sequential linking of political forces from the decision-making process in the sphere of foreign affairs which was the exclusive purview of the federation. In other words, for the international community, Yugoslavia was the only legal entity of international law. Yugoslavia was no exception in this respect, since modern international law doctrine, without exception, views a federation, not its federal units, as the sole subject of international law. This is a deeply rooted principle formulated by the Supreme Court of the USA already in 1890 as follows: "From the point of view of our local interests, there are many states making up the Union, but viewed through the prism of our national interests, which include our relations with foreign states, we are one people, one force and one state."[1] This principle has been confirmed by modern judicial and diplomatic practice. In a dispute between the USA and Venezuela (De Vrissel case), the arbitration court took the view that only the USA is a sovereign state and not the units that it comprises.[2] The Appellate Court in Paris (Ville de Genève v. Consorts de Civry case) took the view that only the Swiss federation is sovereign in international relations and not its cantons. The Appellate Court in Brussels (Feldmann v. État de Bavaria) stated the following: "From the point of view of international law, absolute and complete sovereignty belongs only to the united states of Brazil."[3]

[1] Chinese Exec. Case.
[2] Moore: International Arbitration, p. 2,971.
[3] American Journal of International Law, 1932, p. 484.

In this respect, the Constitution of the SFRY is a continuation of firmly established practice.

Article 164, paragraph 9 of the SFRY Constitution from 1974 gives the authority to the Federal Assembly, as the highest organ in the federation, to make decisions on war and peace, proclaim a state of war and if the Assembly is unable to convene, Article 217 authorises the SFRY Presidency to proclaim a state of war.

The Constitution views resistance against an aggressor not only as the problem of the professional army, but a problem of the whole society, obliging every citizen to protect the territorial integrity and independence of the country. Furthermore, Article 240 of the Constitution states that the armed forces are made up of the following: a) the Yugoslav People's Army, and b) the Territorial Defence, as the highest form of organised all-people's defence. According to paragraph 3 of the same article, "Every citizen, whether armed or not, who takes part in resistance against an attacker is a member of the Armed Forces of the SFRY."

Yugoslavia was represented before the international community by a unified diplomatic and consular service.

The SFRY Constitution, in Article 281, item 7, and the Law on Entering into and Implementing International Agreements, in Articles 1 and 2, entrusts the federation with the right to enter into international agreements. These two enactments make it absolutely clear that the agreements signed by Yugoslavia are entered into by the country as a whole and their validity extends over the whole territory of Yugoslavia (Article 270). As in many federal states, i.e. the USA, Switzerland and Canada, the SFRY Constitution in Article 271, paragraph 2, enables republics and autonomous provinces "to cooperate with organs and organisations of other states and international organisations," but only within the framework of established foreign policies of the SFRY and international agreements that it signed". These same rights, under the same conditions, in paragraph 2, are granted to municipalities, organisations of associated labour and other self-management organisations and communities. In this, the supremacy of the federation is an absolute principle. The SFRY Constitution does not provide for competitive authority in the sphere of foreign affairs, but grants limited authority to the federal units, provinces, municipalities and organisations of associated labour in this sphere. There is not a single federal state in the world that allows independent action by its federal units without the consent of the federal government. As Sir Gerald FITZMAURICE lucidly summed it up, even when federal units are authorised to enter into contractual agreements with other states, even if they do it on their own behalf, they are only agents of the union to which they belong, while it is the only legal entity in international law.[4]

[4] Yearbook of International Law Comm. 1958, p.24.

THE SECESSION OF SLOVENIA AND CROATIA FROM THE POINT OF VIEW OF INTERNATIONAL AND DOMESTIC LAW

In its introductory section, the SFRY Constitution, which has a declarative character, mentions the right to self-determination including the right to self-determination as the basic right of the people. Article 1, item 2 of the UN Charter includes the right to self-determination, without any mention of secession, as part of its fundamental purposes "to strengthen universal peace". Article 55 of the Charter stipulates that the right to self-determination is one of the conditions of stability and prosperity in the world. However, self-determination may not be understood in its absolute sense in either the first or the second case, or outside the context of the whole of the SFRY Constitution, or rather the UN Charter, but only as their constitutive part.

Article 5 of the operational part of the Constitution specifically states that "the borders of the SFRY may not be changed without agreement from all republics and autonomous provinces that make up Yugoslavia." This means that in order to implement the right to secession, it is necessary to go through the assembly procedure in which the views would be expressed of all federal units and the two provinces. It is extremely important for the resolution of this problem that the 1974 Constitution recognises the right to self-determination of Yugoslav peoples, but not republics and the right to secession as an enactment /agreed on by/ many parties and not a unilateral move, which means that federal units have to agree.

The UN Charter recognises the right to self-determination, but guarantees territorial integrity to all its members at the same time. In Article 2, paragraph 4, the members are obliged to refrain in their international relations "from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." On the other hand, the UN system does not provide for a mechanism for the implementation of self-determination so that this principle remains a defective rule, which resulted in a series of difficulties in practice and often led to armed conflicts. The UN General Assembly tried to repair this problem by adopting additional resolutions.

In a declaration on independence granted to colonial peoples (Resolution 1514/XV, 14 December 1960), the right to self-determination was confirmed in the sense that they could freely determine their political status and freely pursue their economic, social and cultural development, but it was also stressed that it could not be used as an excuse for a partial or total disruption of national unity and the territorial integrity of a sovereign country.

In another resolution (Resolution 2160/XXI, 30 November 1966), the principle of self-determination is related to the prohibition of the use of force and in yet another (Resolution 2625/XXV, 24 October 1970), to refraining from external influence on the process of self-determination. In the Declaration on the illegality of intervention and interference in the internal affairs of other states adopted by the General Assembly in 1981, the right to self-determination is limited to the peoples under colonial domination, racist regimes and foreign occupation. The resolutions of the General Assembly, strictly speaking, are not legally binding, but illustrate the views of the majority of the states in the world.

In international law, there is not a single enactment based on which the right to self-determination could be understood in such a way that it automatically includes the right to secession. The League of Nations, deciding in a dispute about Åland

Islands, opposed the argument that self-determination automatically included the right to secession. Although the majority of the population voted for secession, a committee of the League of Nations in a report to its Council stated that secession is not exclusively an internal problem and that "it destroys the order and stability of states and brings anarchy to international life."[5] This was also confirmed by the International Court of Justice in a Western Sahara case when it stated that "the right to self-determination does not necessarily mean the creation of a new state."[6]

The USA, in a debate in the General Assembly during the adoption of the agreements on the rights of man, took a firm view that self-determination and secession were two separate categories and one did not include the other.[7] It continued to support firmly this principle until the collapse of the Eastern Bloc.

The United Nations took a categorically negative view of secession except in the case of decolonisation. In this regard, it was stated that petty nationalism, wherever it appears, in Northern Ireland, southern Tyrol, Sri Lanka or the Philippines equally threatens the world order and encourages terrorism and drug trafficking that as a rule finances them. More than half the local wars waged after 1945 were the result of secession and were also the bloodiest. The UN Secretary General said on the occasion of Katanga seceding from Congo that the UN had spent 500 million dollars to prevent secession and added, "As an international organisation, the UN has never accepted, does not accept now and, I believe, never will accept the principle of secession of a part of the territory of its member states."[8]

The most prominent world theorists reject secession as a legal category. Joseph NYE, a professor at Harvard University, firmly rejects the argument that the right to self-determination includes the right to secession. According to him, these are two separate categories that have to be considered separately. He severely criticises CLINTON administration's "policies of new tribalism" and "unqualified support for national self-determination that could result in enormous disorder in the world." According to him, "secession is not a legal category, or a rule of international law."[9]

Aware that they could not find the basis for secession in law, Slovenia's Assembly and Croatia's *Sabor* adopted decisions on secession that euphemistically called it "disassociation". [redacted]

[5] Denys P. Myers: Handbook of the League of Nations, 1935, p.298-299.
[6] ICJ, Western Sahara (Advisory Opinion) 1975, p. 12.
[7] Department of State Bulleting 27 (1952), pp.917-919.
[8] UN Monthly Chronicle, February 1970, p 36.
[9] Joseph S Nye: The Self Determination, Washington Post, December 15, 1992, p.17-23.

[redacted]

In addition, Croatia and Slovenia's acts of secession are based on the erroneous argument that federal units represent states with original rights. Article 1 of the 1974 Constitution defines the SFRY as a federal state and Article 3 defines socialist republics as states within Yugoslavia. This play on words can lead to a wrong conclusion. The federal units do not have any of the above-mentioned attributes of sovereignty such as: *jus belli*, *jus legationis* and *jus tractatum*, without which a state cannot exist. The federal units did not have any legitimacy in international law, but they did have an ideological one stemming from the socialist revolution. In this respect, one must bear in mind that legal legitimacy is not identical to ideological /legitimacy/. For a state as a subject of international law, international legitimacy is of decisive importance. Yugoslavia was created in 1918 on the foundations of the Kingdom of Serbia and its legitimacy rests on international agreements signed after the First World War and confirmed after the Second World War. In other words, Yugoslavia's original legitimacy as a state was based on international agreements and not on its federal units, as the secessionist republics claimed. The revolutionary legitimacy of eastern European countries was collectively rejected after the fall of the Berlin wall. [redacted]

The Assembly of the Republic of Slovenia adopted the Declaration on Sovereignty of " the Republic of Slovenia" on 2 July 1990 and proclaimed the primacy of republican over federal laws.[10] A referendum was held six months later on 23 December 1990 and 86% of the electorate voted for secession. This process was completed by the Assembly's adoption of the Charter on the Independence of the Republic of Slovenia on 25 June 1991.[11]

Croatia followed the same path. The *Sabor* of the Republic of Croatia adopted a constitution stating that "the Republic of Croatia is established as a national state of the Croatian people."[12] The referendum was held on 19 May and 94% of the electorate voted for secession. The *Sabor* adopted a constitutional decision on the sovereignty and independence of the Republic of Croatia.[13] In both cases, these unilateral enactments of identical content represented a flagrant violation of the SFRY Constitution and the UN Charter.

[redacted]

Based on the authentic report of the Federal Secretary for National Defence of 11 December 1990 on the illegal establishment of paramilitary units

[10] *Official Gazette of the Republic of Slovenia*, no. 26/1990.
[11] Op. cit. no. 1/1991.
[12] *Official Gazette*, no. 56/1990.
[13] Op. cit. no. 31/1991.

in Slovenia and Croatia, the SFRY Presidency issued an order disbanding all unlawful forces. Among other things, the Order stated that the arming of paramilitary forces and importing of weapons was being done "with direct involvement of some organisations in foreign countries and with the knowledge of their governments." As a response to the Presidency's view, an eight-point agreement was made and signed by KUČAN and TUĐMAN on 20 January 1991 on joint defence in case of a JNA intervention. MESIĆ, the then president of the Croatian Government stated, "Croatia has chosen to defend and arm itself."[14] At a meeting held on 20 January 1991, Slovenia and Croatia's ministers of Defence and the Interior signed a plan of joint approach and strategy in the struggle against the JNA, that is, before an armed conflict had ever broken out. [redacted]

The Constitutional Court of Yugoslavia annulled the provisions (Articles 2, 3 and 4) of the Declaration on Sovereignty and the Constitutional Charter on the Independence of the Republic of Slovenia as illegal enactments in violation of the SFRY Constitution.[15] For the same reasons, it annulled the Constitutional /?Decree/ on the Sovereignty and Independence of the Republic of Croatia and their accompanying enactments.[16] The Constitutional Court based its views on the Constitution according to which the territory of the SFRY is "unified and is made up of the territories of the socialist republics" and the SFRY borders may not be changed without agreement from all republics and provinces. The Constitutional Court denied, based on Article 270 of the Constitution, the primacy of the republican laws. Although the SFRY Constitution in Article 394 clearly determines that the "decisions of the Constitutional Court of Yugoslavia are obligatory and executive", they were not implemented.

The secession of Croatia and Slovenia was the decisive moment when the Yugoslav crisis turned into civil war and the central point around which the situation at hand can be legally qualified. It was an attack against the sovereignty of an internationally recognised legal entity - the state of Yugoslavia, an original member of the UN, signatory of the Atlantic Charter of 1 January 1942 and co-founding member of the UN. [redacted]

Based on a comparative study of similar situations in the world, well-known American theorist HOROWITZ proved that ethnic and national conflicts turned into the worst conflicts "if one or both sides received international support."[17]

That is exactly what happened in this case. [redacted]. The Advisory Assembly of the European Council adopted Resolution no. 969 on 21 September 1991, whose Article 6 reads as follows: "The Assembly believes that in accordance with the Yugoslav Constitution of 1974, republics have the right to secede from the federation" and asked member states

[14] *Politika*, 20 January 1991.
[15] *Official Gazette of the SFRY*, no. 29/1991.
[16] *Official Gazette of the SFRY*, no. 83/1991.
[17] Donald L. Horowitz, "Ethnic and Nationalist Conflict", *World Security*, edited by Michael T. Klare, Daniel B. Thomas. New York, 1991, p. 225.

to recognise the republics that proclaimed their independence. With this enactment, the Assembly violated a basic right of international law based on which secession may not be carried out at the expense of the whole. It also violated the SFRY Constitution according to which borders may only be changed based on the agreement of all federal units. This encouraged paramilitary forces and terrorist groups in Croatia and Slovenia and opened up the possibility for the spreading of the armed conflict.

[redacted]

[redacted]

[redacted]

- [redacted]
- [redacted]
- [redacted]

[redacted]

[18] [redacted]