

CORRESPONDENTS' AGORA: UN MEMBERSHIP OF THE FORMER YUGOSLAVIA

Professor Yehuda Blum's Current Developments Note in the October 1992 issue of the *Journal* elicited an unusual degree of response from readers. The letters below represent the range of opinion expressed. The exchange concludes with a rebuttal by Professor Blum.

TO THE EDITOR IN CHIEF:

Professor Yehuda Z. Blum was right in concluding that Yugoslavia "continues to have its seat (with nameplate) in the General Assembly and [that] the flag [with the red star of the Communist era, I might add] continues to fly in front of the UN compound."¹ (This flag, however, is the symbol of a nonexistent state.) The foregoing facts are not in full accordance with the conclusion in the Security Council's Resolution 777 that "the State formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist."

Nevertheless, one cannot agree with the reasoning of Professor Blum that Slovenia, Croatia, Macedonia and Bosnia-Herzegovina "seceded from the Yugoslav federation" and that, in the light of the former practice of the United Nations, the Belgrade authorities have "the right to occupy the seat of Yugoslavia at the United Nations."² No legal rule has been established in this sense, even though all previous partitions of UN member states (British India, Pakistan, Malaysia and even the Soviet Union) have been so decided.

In making such a legal analysis, one should not ignore the opinions of the Arbitration Commission of the Conference for Peace in Yugoslavia, which is presided over by Robert Badinter. And in this respect not of least importance is the attitude of "the Belgrade authorities" toward that Arbitration Commission and its legal findings.

By a letter of November 20, 1991, the Serbian Foreign Minister submitted three questions via Lord Carrington, who was then chairing the conference on Yugoslavia, for the commission's "opinion." One of these questions was couched in the original English version as follows: "Is the secession of Slovenia and Croatia from Yugoslavia, carried out unilaterally and in a violent manner [*sic*], a legal act from the standpoint of the United Nations Charter and other legally relevant instruments?" Lord Carrington included this question within a larger one that he himself submitted to the commission for an "opinion or recommendation."

On November 29, 1991, the Arbitration Commission issued its Opinion No. 1, in which it stated, *inter alia*, "that the Socialist Federal Republic of Yugoslavia [SFRY] is in the process of dissolution" and "that it is up to those Republics that so wish, to work together to form a new association endowed with the democratic institutions of their choice."³ Therefore, the issue was not secession of four republics, but dissolution of the predecessor state, which was not yet complete. According to the commission, "although the SFRY has until now retained its international personality, notably inside international organizations, the Republics have expressed their desire for independence."⁴

¹ Yehuda Z. Blum, *UN Membership of the "New" Yugoslavia: Continuity or Break?*, 86 AJIL 830, 833 (1992).

² *Id.* at 830, 833.

³ Conference for Peace in Yugoslavia, Arbitration Commission Opinion No. 1, para. 3, *reprinted in* 31 ILM 1494, 1497 (1992).

⁴ *Id.*, para. 2(a), 31 ILM at 1496.

The Belgrade (Serbian) authorities totally rejected this opinion of the commission despite having requested it. They continued to pursue the political position signified by their phrasing of the question, just as if the commission had not expressed any view.

To clarify the legal situation, especially after the adoption of a new constitution by Serbian and Montenegrin representatives in the former Federal Parliament, Lord Carrington put three new questions to the Arbitration Commission on May 18, 1992. All of them related to the consequences of the dissolution of the SFRY. One of them confronted the hot issue: "In terms of international law, is the Federal Republic of Yugoslavia a new State calling for recognition by the Member States of the European Community . . . ?"⁵

In the written procedure that followed, Presidents Momir Bulatovic of Montenegro and Slobodan Milosevic of Serbia, acting on behalf of the newly established "Federal Republic of Yugoslavia," challenged the competence of the Arbitration Commission to give an opinion on the three questions submitted to it. In their second letter, Serbia and Montenegro even denied the power of the commission to pronounce on its own competence.

The commission then issued its interlocutory decision (*décision avant dire droit*) of July 4, 1992, stating "that it falls to it to give a judgment on its competence when it is so seized" and "that in this case, given the nature of the functions which have been given to it, it is competent to reply in the form of Opinions to the three Questions submitted to it on 18 May 1992 by the Chairman of the Conference for Peace in Yugoslavia."⁶

In regard to the first point, the commission quoted the International Court of Justice's Judgment on preliminary objections in the *Nottebohm* case of 1953:

since the Alabama case, it has been generally recognized that, following the earlier precedents, and in the absence of any agreements to the contrary, the international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction.⁷

The commission also pointed out that it had not been established by the Brioni agreement of July 7, 1991—as alleged by Serbia and Montenegro—but "by the joint statement on Yugoslavia adopted at an extraordinary meeting of ministers in the context of European political cooperation on 27 August 1991, for the purpose of establishing an 'arbitration procedure'."⁸ The six Yugoslav republics had accepted these arrangements at the opening of the conference for peace on September 7, 1991.

Although the arrangements were summary, it is clear from the terminology used and even the composition of the Commission that the intention was to create a body capable of resolving on the basis of law the differences which were to be submitted to it by the parties, which precisely constitutes the definition of arbitration (see ICJ, Judgment of 12 November 1991, Arbitral award of 31 July 1989, 1991 reports, p. 70).⁹

In regard to the second point, its power to issue opinions instead of decisions, the commission's finding was the following:

⁵ Interlocutory Decision (July 4, 1992), reprinted in 31 ILM at 1518, 1518–19.

⁶ *Id.*, para. 10, 31 ILM at 1521.

⁷ *Id.*, para. 3, 31 ILM at 1520 (quoting *Nottebohm* case (Liech. v. Guat.) (Preliminary Objection), 1953 ICJ REP. 111, 119 (Judgment of Nov. 18) (with minor variations from the Court's translation)).

⁸ *Id.*, para. 2, 31 ILM at 1520.

⁹ *Id.*, 31 ILM at 1520.

In November 1991, the Republic of Serbia took the initiative of submitting three questions to the Commission, of which two were transmitted by the Chairman of the Conference, who also asked a third question of his own. All the Republics took part in this procedure and none made the least mention of any incompetence on the Commission's part, demonstrating an identical interpretation of its mandate, and thereby recognizing its competence in consultative issues as well.¹⁰

This interlocutory decision, like judgments, is binding on the parties, and the ten "opinions" published so far are similar to advisory opinions of the International Court of Justice. The commission stated in this respect that, "as the arbitral body of the conference, the Commission can give a judgment only in law,¹¹ in the absence of any express authorization to the contrary from the parties, it being specified that in this case it is called upon to express opinions on the legal rules applying."¹² Although not formal judgments or decisions, these opinions are authoritative statements by an impartial body, in a contentious proceeding, on what the law is. They cannot be ignored by anybody.¹³

The findings of the commission regarding the dissolution of the former SFRY and its legal consequences are the following: In its Opinion No. 8 of July 4, 1991, it concluded "that the process of dissolution of the SFRY referred to in Opinion No. 1 of 29 November 1991 is now complete and that the SFRY no longer exists."¹⁴ In Opinion No. 9 of the same date, it stated: "New states have been created on the territory of the former SFRY and replaced it. All are successor states to the former SFRY."¹⁵ Dealing with various issues of state succession, the commission found, *inter alia*, that "the SFRY's membership of international organizations must be terminated according to their statutes and that none of the successor states may thereupon claim for itself alone the membership rights previously enjoyed by the former SFRY."¹⁶

Finally, in its Opinion No. 10, also of July 4, 1992, the commission came to the conclusion that "the FRY (Serbia and Montenegro) is a new state which cannot be considered the sole successor to the SFRY." Furthermore, "its recognition by the Member States of the European Community would be subject to its compliance with the conditions laid down by general international law for such an act and the joint statement and Guidelines of 16 December 1991."¹⁷

In the same text, the commission held that, "while recognition is not a prerequisite for the foundation of a state and is purely declaratory"¹⁸ (and the new FRY meets the criteria for a state), it is a discretionary act that other states may perform when they choose and in the manner of their choosing. The act of recognition is "subject only to compliance with the imperatives of general international law,¹⁹ and particularly those prohibiting the use of force in dealings with other

¹⁰ *Id.*, para. 6, 31 ILM at 1520.

¹¹ In the original French, "la Commission ne saurait . . . se prononcer qu'en droit."

¹² Interlocutory Decision, *supra* note 5, para. 9, 31 ILM at 1521.

¹³ Hence, "the line, as regards actual effect (although not necessarily of legal obligation), between a judgment and an advisory opinion is thin." 2 LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 66 (Hersch Lauterpacht ed., 7th ed. 1952). "Advisory opinions, though not binding, nevertheless have authority as statements of law." Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice: International Organizations and Tribunals*, 1952 BRIT. Y.B. INT'L L. 1, 54 (emphasis omitted).

¹⁴ Opinion No. 8, para. 4, *reprinted in* 31 ILM at 1521, 1523.

¹⁵ Opinion No. 9, para. 1, *reprinted in* 31 ILM at 1523, 1524.

¹⁶ *Id.*, para. 4, 31 ILM at 1525.

¹⁷ Opinion No. 10, para. 5, *reprinted in* 31 ILM at 1525, 1526.

¹⁸ *Id.*, para. 4, 31 ILM at 1526.

¹⁹ In the original French, "normes impératives du droit international général."

states or guaranteeing the rights of ethnic, religious or linguistic minorities.”²⁰ In the commission’s view, neither Serbia and Montenegro nor their newly created federation met these requirements. They are now subject to sanctions imposed by the Security Council under chapter VII of the UN Charter.

The special requirements for recognition by member states of the European Community promulgated on December 16, 1991, include:

- respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights;
- guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE;
- respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement;
- acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability;
- commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning state succession and regional disputes.²¹

As a special condition, the Community required acceptance of “the provisions laid down in the draft Convention—especially those in Chapter II on human rights and rights of national or ethnic groups—under consideration by the Conference on Yugoslavia.”²²

Bosnia-Herzegovina, Croatia, Macedonia and Slovenia have accepted all of these legal obligations.²³ Montenegro at one time adopted the draft convention. But Serbia has persisted in rejecting these undertakings. Moreover, in establishing the new “FRY” and claiming to retain the identity of, and continuity with, the former SFRY, Serbia and Montenegro tried to evade these obligations, especially as regards rights of national or ethnic groups on their territory.

To be sure, there are no general legal rules on state succession in respect of membership in international organizations. The rules concerning acquisition of membership laid down in the statutes and other relevant rules of each organization are paramount.²⁴ The final decision, however, depends on the political will of a majority of the member states, as represented in the political organs of the organization competent to deal with the admission of new members.

Most likely, a few states will continue to recognize the existence of the SFRY and thus deny its dismemberment. They will accordingly recognize the continuity of truncated Yugoslavia under its new name and flag in all respects. But the sanctions imposed on Serbia and Montenegro under chapter VII for their encouragement of ethnic cleansing in Bosnia-Herzegovina and Croatia, other grave breaches of the Geneva Conventions including war crimes, and the war for territorial aggrandizement at the expense of these two UN member states will certainly

²⁰ Opinion No. 10, para. 4, 31 ILM at 1526.

²¹ Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, European Political Cooperation Press Release 129/91, *reprinted in* 31 ILM at 1486, 1487.

²² Declaration on Yugoslavia, *id.*, 31 ILM at 1485, 1486.

²³ The Arbitration Commission was asked to advise the European Community on the fulfillment by each applicant state of these conditions. The views of the commission were expressed in the following opinions: No. 4 on Bosnia-Herzegovina; No. 5 on Croatia; No. 6 on Macedonia; and No. 7 on Slovenia. All these opinions were issued on January 11, 1992, and are *reprinted in* 31 ILM at 1501–17.

²⁴ *See* Vienna Convention on Succession of States in respect of Treaties, Aug. 22, 1978, Art. 4(1), *reprinted in* 17 ILM 1488 (1978).

dissuade the majority of other states from following this line of reasoning. The Socialist Federal Republic of Yugoslavia is therefore the first clear case of the dissolution and disappearance of a UN member.

If it subsists as a federation and becomes willing to enter the United Nations, the newly established "Federal Republic of Yugoslavia (Serbia and Montenegro)" will be bound to satisfy the requirements for membership under Article 4(1) of the Charter. In *Admission of a State to Membership in the United Nations*, the World Court identified these conditions as follows: "an applicant must (1) be a State; (2) be peace-loving; (3) accept the obligations of the Charter; (4) be able to carry out these obligations; and (5) be willing to do so."²⁵

VLADIMIR-DJURO DEGAN*

TO THE EDITOR IN CHIEF:

It is a well-known fact that international lawyers tend to disagree among themselves. After reading Professor Yehuda Z. Blum's piece on UN membership of the former Yugoslavia,¹ I find that I am not in a position to share many of his views.

Professor Blum questions the compatibility of the position taken by the United Nations vis-à-vis the states of former Yugoslavia with earlier UN practice on admission of new states.

While Croatia, Slovenia, Bosnia-Herzegovina and (most significantly) Serbia-Montenegro have all been treated as new states that must apply for UN membership, this was not the case with India after Pakistan broke away from it in 1947. India was then regarded as an old state (an original member of the Organization) whose treaty rights and UN membership were not affected, while Pakistan as a seceding state was treated as a new state and thus as a nonmember of the United Nations. Similarly, when Bangladesh seceded from Pakistan in 1971, the latter's UN membership was not in question, while Bangladesh had to apply as a new state. And most recently, as Blum points out, Russia took over the UN seat of the former Soviet Union, while Kazakhstan, Uzbekistan and others were admitted as new members. From this history one is supposed to draw the conclusion that rump Yugoslavia should at least be treated analogously to the India/Pakistan situations and be recognized as a continuing member state of the United Nations.

Blum, paradoxically, neglects to take into consideration at this point (1) the axiom he himself quotes from a 1947 statement of the Sixth Committee of the General Assembly, namely, that "each case must be judged on its own merits"; and (2) the legal policy character of the principle establishing a distinction between continuity of statehood and state succession. Whenever there is a finding of continuity (and identity), the legal personality and relevant treaty rights and obligations of the state in question remain the same; and whenever there is a finding of state succession, the state in question, as a new state, must go through a process of legal adaptation vis-à-vis other states. As a matter of law, there is no operative principle for determining when there is continuity and when succession. This matter is to be settled through state practice and an evolving *opinio juris*.

In a manner familiar not only to proponents of the New Haven School, old and new states advance claims as to their legal status, and these claims are accepted, rejected or modified by other state actors in accordance with the merits of each

²⁵ Admission of a State to the United Nations (Charter, Art. 4), 1948 ICJ REP. 57, 62 (Advisory Opinion of May 28).

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¹ Yehuda Z. Blum, *UN Membership of the "New" Yugoslavia: Continuity or Break?*, 86 AJIL 830 (1992).

case and the prevailing opinions within the international community. The actors concerned may be criticized for inconsistencies, but from a legal point of view there is not much point in criticizing the outcome of the process as such, since the absence of mandatory legal norms during the process legitimizes the result.

Russia was recognized as a continuing state in relation to the former Soviet Union because of factors relating to territory, population, political representativeness and nuclear bargaining power. Serbia-Montenegro has not been recognized as a continuation of the former Yugoslavia, *inter alia*, because it lacks historical and territorial representativeness. In 1917 a "Yugoslav Committee" in London drew up a pact proclaiming that all South Slavs ("Yugoslavs") would unite to form a state of their own. The different peoples had previously developed separately. The Kingdom of Serbs, Croats and Slovenes was proclaimed in 1918. In 1929 the name was changed to Yugoslavia. The Federal Constitution of 1946 declared the Federal Republic to be composed of six republics: Serbia, Croatia, Slovenia, Bosnia-Herzegovina, Montenegro and Macedonia. Thus, before the secession of Slovenia and Croatia in October 1991, the government in Belgrade represented a state, whose very essence was a "joint venture" of the different ethnic groups and regions in the area. Today Belgrade represents only two out of the six republics.

Against this background, it is not very surprising that the Security Council in its Resolution 777 of September 19, 1992, held "that the state formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist." It was only logical for the Council, after reaching this conclusion, to state that Serbia-Montenegro "cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations." The Council's recommendation to the General Assembly was just as logical; namely, (1) that Serbia-Montenegro should apply for membership in the United Nations, and (2) "that it shall not participate in the work of the General Assembly." The old Yugoslavia *could* not participate in any work of the United Nations, since that state had ceased to exist; and Serbia-Montenegro *should* not participate since it was not a member state.

At this point in the events, Professor Blum finds another "glaring inconsistency." If Serbia-Montenegro (the Federal Republic of Yugoslavia) is required to apply for membership in the United Nations (as was decided by the General Assembly on September 22, 1992, in its Resolution 47/1), why is the delegation representing the government in Belgrade allowed to occupy the seat of former Yugoslavia at UN meetings? The "allegedly nonexistent Yugoslavia continues to have its seat (with nameplate) in the General Assembly and the flag continues to fly in front of the UN compound, alongside those of other member states," to quote Professor Blum.² But there is a simple answer to this alleged inconsistency. The nameplate and flag are no longer the plate and flag of a member state (since that state has ceased to exist) but of another, so far undefined, subject of international law whose representatives are tolerated on the UN premises. It is not unheard of, of course, for different *de facto* subjects of international law, without being members of the United Nations, to be represented in the Organization as observers or otherwise. The cases of the PLO/Palestine and the African National Congress of South Africa are obvious examples, neither having attained statehood but both having been established (at one time or another) as actors in the international arena and as legal personalities (subjects of international law). These and other examples of legal personality (the Sovereign Order of Malta, Taiwan) all tend to be unique in character and background, and in that sense the case of the Federal Republic of Yugoslavia conforms to the pattern. There is no doubt, however, that Serbia-Montenegro is a state, though it is not exactly the state Belgrade purports it to be and it is not a member state of the United Nations.

² *Id.* at 833.

The fact that Yugoslav delegates can still attend General Assembly meetings, but not participate in them, is taken by Blum to mean that "in effect, Yugoslavia has been *suspended* from the General Assembly . . . in a manner not foreseen by the Charter and in disregard of its Article 5."³ This statement is again not correct since (1) the former Yugoslavia has ceased to exist; and (2) the Yugoslav delegates at the United Nations cannot represent a nonexistent state, but only a new subject of international law. That legal subject (Serbia-Montenegro or the Federal Republic of Yugoslavia) is a potential new member state of the Organization. In contrast to what Professor Blum thinks, no suspension in disregard of Article 5 has taken place, since that article deals only with existing member states; at any rate, it is impossible to exclude or suspend states that do not even exist.

OVE E. BRING*

TO THE EDITOR IN CHIEF:

In the October 1992 issue of this *Journal*, Yehuda Z. Blum takes the Security Council to task for rejecting Serbia and Montenegro's claim to the UN seat of the former Yugoslavia, "[n]otwithstanding the facts, Charter law, and past UN practice."¹ Citing the precedents of Pakistan-India, Bangladesh-Pakistan, and the former Soviet Union, Professor Blum observes that the membership of a parent state in the United Nations survives a partition of its territory. Moreover, "from the legal point of view, the Yugoslav situation closely resembles the India-Pakistan and Pakistan-Bangladesh situations."² He further comments that "[i]n contradistinction to the case of Russia, it cannot be reasonably maintained that, as a result of the events that unfolded in Yugoslavia after June 1991, that country ceased to exist as a subject of international law."³ These statements lead to his conclusion that Serbia-Montenegro legitimately constitutes a rump Yugoslavia whose UN membership survived the recent territorial breakup. The entire analysis, however, rests on the unsupported proposition that four of the former Yugoslav republics "have *seceded* from the Yugoslav federation," which still exists as a subject of international law.⁴

Slovenia, Croatia and Bosnia-Herzegovina never "seceded" from the Socialist Federal Republic of Yugoslavia (SFRY). Rather, these newly formed democracies emerged from a process of dissolution after their federal government ceased to exercise control through a constitutionally recognized authority.⁵ Put differently, the republics of the SFRY *replaced* their parent state. As part of the European Community's Conference for Peace in Yugoslavia, an international arbitration panel confirmed this view of events when it concluded that "[t]he composition and workings of the essential organs of the Federation . . . no longer meet the criteria of participation and representativeness inherent in a federal State."⁶ Security Council Resolution 777 reaffirmed this thesis of dissolution when it declared that "the State formerly known as the Socialist Federal Republic of Yugoslavia has *ceased to exist*."⁷ A secession, therefore, could not have occurred because the

³ *Id.*

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¹ Yehuda Z. Blum, *UN Membership of the "New" Yugoslavia: Continuity or Break?*, 86 AJIL 830, 833 (1992).

² *Id.* at 832.

³ *Id.* at 833.

⁴ *Id.* at 830 (emphasis added).

⁵ See M. Kelly Malone, Comment, *The Rights of Newly Emerging Democratic States Prior to International Recognition and the Serbo-Croatian Conflict*, 6 TEMP. INT'L & COMP. L.J. (1992) (galley at 722-25 nn.124-36) (discussing the events that led to the dissolution of Yugoslavia).

⁶ Conference for Peace in Yugoslavia, Arbitration Commission Opinion No. 1, para. 2(b), *reprinted* in 31 ILM 1494, 1496 (1992).

⁷ SC Res. 777 (Sept. 19, 1992) (emphasis added).

parent state (i.e., the Yugoslav federal union) had disappeared during the territorial breakup. The federal government's authority to assert a preemptive sovereign right to the territory of the SFRY's republics evaporated with the Yugoslav structure.

It follows that the established UN practice of preserving the parent state's membership status during a territorial partition has no application to the circumstances in the former Yugoslavia. Two of the three cases that precipitated this practice—India (1947) and Pakistan (1971)—involved territorial partitions through secession. Unlike the SFRY, however, India and Pakistan retained their legal personality even after territories within them obtained independence. Therefore, their rights and obligations as UN members also carried forward without interruption.

The third case—the former Soviet Union—materially differed from the territorial partitions of India and Pakistan. As Professor Blum observes, eleven of its twelve constituent republics terminated the Soviet Union as a subject of international law by formal agreement.⁸ Thus, the emerging states *replaced* their parent state. The republics also provided for a successor to the former Soviet seat in the United Nations by declaring that “[t]he States of the Commonwealth support Russia’s continuance of the membership of the Union of Soviet Socialist Republics in the United Nations, including permanent membership of the Security Council, and other international organizations.”⁹ This agreement—made contemporaneously with the declaration that dissolved the Soviet Union—provided the legal basis for Russia automatically to continue membership in the Organization despite the inexistence of the Soviet Union.

The continuation of UN membership diverged widely in the Soviet and Yugoslav cases. In both cases, constituent republics collectively replaced their sovereign predecessor (by contrast, Pakistan coexisted with India after 1947 and Bangladesh coexisted with Pakistan after 1971); but any similarity between them stops here. Unlike Russia, Serbia-Montenegro lacked a legal basis to claim automatic continuation of the former SFRY’s UN membership. The constituent republics of the SFRY—each with a former relationship to the SFRY in *parity* with the other republics through the federal constitution—never agreed to extend to Serbia-Montenegro the opportunity to continue the SFRY’s membership status. Absent an agreement, Serbia-Montenegro has no basis to claim a right superior to that of its sibling states. This includes the right automatically to continue the UN membership of their former parent state. The fact that Serbia inherited most of the SFRY’s military armament and used it to its own territorial advantage does not change this conclusion.

Interestingly, the UN Secretariat seems to have adopted the position that Serbia-Montenegro currently enjoys a *sui generis* category of membership in the United Nations. On September 25, 1992, the governments of Croatia and Bosnia-Herzegovina requested that the Secretary-General provide a legal basis for allowing the SFRY’s flag and nameplate to remain at the United Nations in view of General Assembly Resolution 47/1.¹⁰ The Secretariat responded as follows:

General Assembly resolution 47/1 deals with a membership issue *which is not foreseen* in the Charter of the United Nations, namely, the consequences for purposes of membership in the United Nations of the *disintegration of a*

⁸ Blum, *supra* note 1, at 832 (citing fifth operative paragraph of the first Alma-Ata declaration, reprinted in 31 ILM at 148, 149).

⁹ Decision by the Council of Heads of State of the Commonwealth of Independent States, para. 1 (Dec. 21, 1991), reprinted in 31 ILM at 151, 151.

¹⁰ UN Doc. A/47/474 (Sept. 25, 1992) (letter from Republic of Bosnia-Herzegovina and the Republic of Croatia to Boutros Boutros-Ghali, Secretary-General of the United Nations).

member State on which there is no agreement among the immediate successors of that State or among the membership of the Organization at large.

. . . .

. . . [T]he resolution neither terminates nor suspends Yugoslavia's membership in the Organization. Consequently, the seat and nameplate remain as before. . . . At Headquarters, the Secretariat will continue to fly the flag of the old Yugoslavia The resolution does not take away the right of Yugoslavia to participate in the work of the organs other than Assembly bodies. The admission to the United Nations of a new Yugoslavia [Serbia-Montenegro] under Article 4 of the Charter will terminate the situation created by resolution 47/1.¹¹

The comment that the continuity of the SFRY's membership "is not foreseen in the Charter" indicates that Serbia-Montenegro belongs to a *sui generis* category of membership. Even in this case, however, Serbia-Montenegro has no legal basis for participating in the Organization, even in non-Assembly bodies. Past practice suggests that only the General Assembly and the Security Council have the capacity to generate a sufficient consensual regime to legitimize participation by a *sui generis* member in the United Nations.¹² Moreover, this determination falls outside the scope of the inferred and express powers of the Secretary-General set forth in chapter XV of the Charter. The Security Council and the General Assembly have failed to sanction *any* participation in the United Nations by Serbia-Montenegro.

Yugoslavia's membership in the United Nations was discontinued when that state ceased to exist as a subject of international law.¹³ The *de facto* termination of the Yugoslav federal structure produced the same legal effect as the formal agreement between the constituent republics of the Soviet Union. That is, they both extinguished the legal personality of an internationally recognized entity.

M. KELLY MALONE*

Professor Blum replies:

Messrs. Degan, Bring and Malone take me to task for having asserted in this *Journal* that the recent barring of Yugoslavia from participating in the work of the General Assembly¹ was tantamount to a *de facto* suspension of a member state in a

¹¹ UN Doc. A/47/485 (Sept. 29, 1992) (letter from Carl-August Fleischhauer, UN Under Secretary-General for Legal Affairs, to Mario Nobile, Permanent Representative of the Republic of Croatia to the United Nations) (emphasis added).

¹² See, e.g., GA Res. 3237 (Nov. 22, 1974) (General Assembly invites Palestine Liberation Organization to participate as observer in the Assembly and international conferences even though Charter provides for admission only of "State" entities under Article 4); UN Doc. S/PV/1859, at 3-41 (1974) (Security Council permits PLO to present its case despite its nonstate status).

¹³ According to the Sixth (Legal) Committee of the General Assembly:

As a general rule, it is in accordance with principle to assume that a . . . Member of the United Nations does not cease to be a Member from the mere fact that its constitution or frontiers have been modified, and to consider the rights and obligations which that State possesses as a Member of the United Nations as ceasing to exist *only with its extinction as a legal person* internationally recognized as such.

UN GAOR 6th Comm., 2d Sess., 43d mtg. at 38 (1947) (emphasis added).

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¹ By General Assembly Resolution 47/1 of September 22, 1992, adopted on the recommendation of the Security Council, under Resolution 777 of September 19, 1992.

manner incompatible with the relevant provisions of the Charter. They all claim that the former Socialist Federal Republic of Yugoslavia having disintegrated, "Yugoslavia" has ceased to exist as a subject of international law and, consequently, that its membership in the United Nations has also been extinguished.

If this construction were indeed correct, the juridical disappearance of Yugoslavia would have occurred in June 1991, at which time Croatia and Slovenia declared their independence. Yet at the forty-sixth session of the General Assembly, which began three months later—in September 1991—the delegation of Yugoslavia was seated without objection and the Credentials Committee unanimously recommended approval of its credentials.² Accordingly, Yugoslavia fully participated in the work of the forty-sixth session of the Assembly when, in the view of Bring and Malone, it had already been reduced to a political and legal corpse. Professor Degan takes a more moderate view on this question: in his opinion, the "old" Yugoslavia was at that time only *in the process* of disintegration.

The main weakness of these arguments lies, in my view, in a failure to distinguish between the disintegration of the domestic *constitutional* structure of the Yugoslav federation in June 1991 (which is an undeniable fact) and the continuation of Yugoslavia's existence (albeit in a changed and shrunken form) as a subject of *international* law. That continued existence was not questioned by the international community, *as represented in the United Nations*, between June 1991 and the spring of 1992.³ For, as was pointed out by the Sixth Committee in 1947 in connection with the UN membership problem of India that had arisen as a result of its partitioning into India and Pakistan, "a State which is a Member of the United Nations does not cease to be a Member from the mere fact that its *constitution or frontiers* have been modified."⁴

However, when the level of atrocities perpetrated in various parts of the territory of pre-June 1991 Yugoslavia sharply escalated following Bosnia-Herzegovina's declaration of independence (March 1992), the resulting international revulsion triggered widespread demands for appropriate measures against rump Yugoslavia (consisting of Serbia and Montenegro), whose leaders were held to be mainly responsible for that carnage. The United States sought the activation against Yugoslavia of the suspension procedure laid down in Article 5 of the Charter but encountered Russian and Chinese opposition. The compromise that resulted was Security Council Resolution 777 and General Assembly Resolution 47/1.⁵ That compromise was rightly criticized, on legal grounds, at the United Nations, both privately (even before its adoption) and publicly, as being incompatible with the relevant Charter provisions and past practice.⁶

Malone and Bring seek to explain away the continued presence of Yugoslavia's nameplate in the Assembly hall and its flag in front of UN headquarters by claiming that this represents a "so far undefined[] subject of international law whose representatives are tolerated on the UN premises" (Bring) or "a *sui generis* category of membership in the United Nations" (Malone), comparable to the UN status of the PLO (Bring and Malone). Professor Degan, in a more cautious vein, contents himself with stating that the Yugoslav flag flown in front of the UN compound is "the symbol of a nonexistent state." With respect, I find all these contentions legally untenable.

² UN Doc. A/46/563 (Oct. 11, 1991).

³ See Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AJIL 569, 577–86 (1992).

⁴ UN GAOR 6th Comm., 2d Sess., 43d mtg. at 38 (1947) (emphasis added).

⁵ See the statement by Russian Ambassador Vorontsov, UN Doc. S/PV.3116, at 3 (1992).

⁶ See the statements of Russia (*id.*); India (*id.* at 7); Zimbabwe (*id.* at 9); Ghana (UN Doc. A/47/PV.7, at 158 (1992)); Kenya (*id.* at 166); Zambia (*id.* at 172); Tanzania (*id.* at 177); Mexico (*id.* at 188); Brazil (*id.* at 190); Jamaica (*id.* at 193); and Guyana (*id.* at 194).

First, the Charter does not recognize *sui generis* membership; nor does UN practice. It is doubtful if such membership could be reconciled with the principle of sovereign *equality* of member states, enshrined in Article 2(1) of the Charter.

Second, the United Nations has never in its history included among its members "undefined subjects of international law." It is an organization of states (Articles 3 and 4 of the Charter) that belong to it either because they were original members (like Yugoslavia) or because they were subsequently admitted to it. The idea that the United Nations "tolerates" on its premises certain "undefined subjects" that neither participated in its founding nor were admitted to membership, and even assigns them seats with nameplates and flagpoles among those of its members (Bring), is highly original; regrettably, it has no basis in either fact or law.

Third, the reference to the PLO as evidence of the alleged existence of *sui generis* membership in the United Nations is, at best, puzzling. The PLO, of course, is *not* a member, *sui generis* or otherwise, and does not represent any state at the United Nations. It was accorded a certain status at the Organization, which, in my view, is in violation of the relevant requirements of the Charter and UN practice;⁷ but it was never assigned a seat with a nameplate among the delegations of member states (or, for that matter, among the observers of non-member states) and no PLO flag is flown anywhere at the UN compound. The PLO's status at the United Nations is that of an *observer* representing a "national liberation movement" and it is seated separately, with organizations granted similar status, at the side of the Assembly hall.⁸ By contrast, the allegedly nonexistent Yugoslavia continues to be seated among other member states (between Yemen and Zaire). The only thing that is truly *sui generis* about this membership is that a state whose membership has been neither suspended nor terminated under the relevant Charter procedures has been barred from participating in the General Assembly's work. There lies the serious legal flaw in the compromise solution reflected in Security Council Resolution 777 and General Assembly Resolution 47/1.

Fourth, at the time of the adoption of Resolution 777, it was emphasized by the representatives of two permanent members of the Security Council that Yugoslavia's UN membership status remained unaffected beyond its nonparticipation in the work of the General Assembly.⁹ This position was confirmed by the UN Legal Counsel, in response to a demand by the representatives of Bosnia-Herzegovina and Croatia that Yugoslavia's nameplate and flag be removed,¹⁰ when he stated that "the only practical consequence that the [General Assembly's] resolution [47/1] draws is that the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not *participate* in the work of the General Assembly [T]he resolution neither terminates nor suspends Yugoslavia's *membership* in the Organization."¹¹

Professor Degan, in referring to Article 4(1) of the 1978 Vienna Convention on Succession of States in respect of Treaties,¹² rightly states that "[t]he rules concerning acquisition of membership laid down in the statutes and other relevant rules of each organization are paramount." By extension, the same rule must logically apply to loss of membership (including its termination or suspension), which must also be effected in accordance with the Charter. As the UN Legal

⁷ See YEHUDA Z. BLUM, *ERODING THE UNITED NATIONS CHARTER* 59-102 (1993).

⁸ Its attempt in 1988 to have its seat moved, under the name of "Palestine," to the area reserved for observers of *states* (Switzerland, the Holy See, etc.) was rebuffed.

⁹ See the statements of the representatives of Russia, UN Doc. S/PV.3116, *supra* note 5, at 4, and China, *id.* at 14.

¹⁰ See UN Doc. A/47/474 (Sept. 27, 1992).

¹¹ UN Doc. A/47/485, Annex (Sept. 30, 1992) (emphasis in original).

¹² Vienna Convention on Succession of States in respect of Treaties, Aug. 22, 1978, Art. 4(1), reprinted in 17 ILM 1488 (1978). The Convention is not yet in force.

Counsel attested, nothing that has been done so far by the United Nations has either terminated or suspended Yugoslavia's membership. It is therefore illogical to suggest to such a state that it apply for admission as a new member; yet precisely this was done in the above-mentioned Security Council and General Assembly resolutions. Such absurdities are apparently the price of brushing aside the law for the sake of perceived short-term political benefits.

It is my belief that the various UN organs must respect the Charter and the rules validly adopted under it at all times and that any attempt to subject the Charter and those rules to majority manipulation (which is what obviously happened in the instant case) constitutes, in the final analysis, a great disservice to the United Nations itself and to the international community in general. It is this conviction—and it alone—that has guided me in my juridical evaluation of the procedure followed with regard to the questions under consideration here.

Space constraints preclude a detailed comparison with the situation created by the extinction of the former Soviet Union as a subject of international law beyond restating that, while Russia's takeover of the former Soviet UN seat was the only politically practical and desirable result, it was not effected in compliance with the relevant requirements of the Charter and UN practice.¹³

¹³ See Yehuda Z. Blum, *Russia Takes over the Soviet Union's Seat at the United Nations*, 3 EUR. J. INT'L L. 354 (1992).



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