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-Hercegovina 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) (galleys 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-Hercegovina 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-Hercegovina 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 Assembly[1] 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 Nobilo, 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.