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-Hercegovina "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-Hercegovina, 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-Hercegovina 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-Hercegovina; 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]

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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-Hercegovina 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).