

Musical Chairs: The Dissolution of States and Membership in the United Nations

Michael P. Scharf

Follow this and additional works at: <http://scholarship.law.cornell.edu/cilj>

 Part of the [Law Commons](#)

Recommended Citation

Scharf, Michael P. (1995) "Musical Chairs: The Dissolution of States and Membership in the United Nations," *Cornell International Law Journal*: Vol. 28: Iss. 1, Article 2.

Available at: <http://scholarship.law.cornell.edu/cilj/vol28/iss1/2>

This Article is brought to you for free and open access by Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell International Law Journal by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

Musical Chairs: The Dissolution of States and Membership in the United Nations

Introduction	30
I. Background	31
A. The U.N. Charter	31
B. Historical Precedent	33
C. Legal Doctrine	41
II. When Russia Came Knocking: Succession to the Soviet Seat	43
A. History: The Empire Crumbles	43
B. Russia Assumes the Soviet Seat	46
C. Political Backdrop	47
D. Fitting Within U.N. Precedent	49
III. The Exclusion of the "New Yugoslavia"	52
A. The Dissolution of Yugoslavia and the Question of FRY Continuity	52
B. The Initial Reaction of the International Community ..	54
C. Security Council Resolution 777 and General Assembly Resolution 47/1	57
D. Making Sense of the FRY Precedent	63
E. Rebirth of the Forgotten Alternative	64
IV. The Czechoslovakia Split	65
A. The Velvet Divorce	65
B. The United Nations Response	66
Conclusion	67

* Assistant Professor of Law, New England School of Law; J.D., Duke University School of Law, 1988; A.B., Duke University, 1985. Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State, 1989-1993. From 1991-1993, the author served as the State Department lawyer with responsibility for legal issues concerning succession to membership at the United Nations. The author wishes to thank Larry Johnson, Principal Legal Officer, United Nations Office of Legal Affairs, and Robert Rosenstock, Legal Adviser, United States Mission to the United Nations, for the valuable comments they provided on an early draft of this article, and the New England School of Law for the James R. Lawton Summer Research Grant which helped make this article possible.

Introduction

In the waning days of 1991, a national headline proclaimed: "The Soviet Union, as We Long Knew It, Is Dead. What's Next?"¹ For the United Nations, faced with the sudden disintegration of one of the five permanent members of the Security Council, that question raised novel issues of international law and Charter interpretation. Ultimately, without public debate or fanfare, the Russian Federation—the largest of the former Soviet Republics—was permitted to take over the Soviet seat as the "continuation" of the Soviet Union, and the other former Republics were invited to apply for their own U.N. membership.²

Less than a year later, when four of the six republics that made up the Socialist Federal Republic of Yugoslavia (SFRY) declared their independence and applied for membership in the United Nations, the rump Federal Republic of Yugoslavia (FRY) sought to follow in Russia's footsteps and quietly inherit the Yugoslav seat at the U.N.³ Instead, the FRY's claim to automatic membership encountered stiff resistance by not only the Security Council, but also by the General Assembly,⁴ which ultimately adopted a somewhat bizarre resolution barring the FRY from participating in the General Assembly but permitting it to continue to operate a U.N. mission, to circulate documents, and to participate in other U.N. bodies.⁵

Before the dust had even begun to settle on the contentious issue of Yugoslav membership, a third U.N. member-State—Czechoslovakia—announced that it too was splitting apart.⁶ In an effort to avoid controversy within the United Nations, the two resulting States agreed that they would each apply for U.N. membership as a new member of that organization.⁷ At the same time, however, they sought to divide between themselves the seats that had been assigned to the former Czechoslovakia in a variety of U.N. subsidiary organs and Specialized Agencies.⁸ The United

1. See Michael Dobbs, *The Soviet Union, as We Long Knew It, Is Dead. What's Next?*, WASH. POST, Dec. 4, 1991, at A27. See also *Bush Hails Dissolution of Soviet Union, Offers High Praise for Former Leaders*, WASH. POST, Dec. 26, 1991, at A35; Fred Hiatt, *Soviet Union to End Dec. 31, Yeltsin Aide Says*, WASH. POST, Dec. 18, 1991, at A1; Michael Dobbs, *Reformed Out of a Job: Gorbachev Is Left Ruling Kingdom of Air*, WASH. POST, Dec. 15, 1991, at A1.

2. See Paul Lewis, *West Acts to Defer Issue of New U.N. Council Seats*, N.Y. TIMES, Jan. 3, 1992, at A6; John J. Goldman, *15 World Leaders Invited to Major U.N. Summit*, L.A. TIMES, Jan. 9, 1992, at A8.

3. See U.N. GAOR, 46th Sess., Annex, Agenda Items 20 and 68, U.N. Doc. A/46/927 (1992).

4. See *infra* notes 143-59 and accompanying text.

5. See *infra* notes 160-74 and accompanying text.

6. See Katarína Mathernová, *Federalism That Failed: Reflections on the Disintegration of Czechoslovakia*, 1 NEW EUROPE L. REV. 477 (1993) (describing the impending disintegration of Czechoslovakia).

7. Agreement on Membership in International Governmental Organizations (between the Minister of Foreign Affairs of the Czech and Slovak Federal Republic, the Minister of Foreign Affairs of the Slovak Republic, and the Minister for International Relations of the Czech Republic), Dec. 12, 1992 [hereinafter *Membership Agreement*] (unofficial translation) (on file with the *Cornell International Law Journal*).

8. *Id.*

Nations rejected this attempt, and instead required formal elections to fill the vacancies.⁹

As Attorney-Adviser for United Nations Affairs at the U.S. Department of State when these three cases arose, the author of this Article was involved in the legal analysis, policy formulation, negotiations, and compromises that shaped the results described above.¹⁰ From the contrary ways that the United Nations handled these cases, one might conclude, as one commentator long ago suggested, that the question of succession to membership in the United Nations is less a question of law than one of political judgment, and that in such matters legal principles and Charter interpretation take a back seat to political and administrative convenience.¹¹ Yet, careful analysis of these cases indicates that such a conclusion would mistakenly undervalue the important role played by legal theory and precedent in the context of succession to membership in the United Nations.

To provide a backdrop for this analysis, the Article begins with a discussion of the relevant provisions of the U.N. Charter and a detailed examination of the United Nations' first case of succession to membership, which came about in 1947 when British India split into India and Pakistan.¹² From the positions taken by the members of the Security Council and General Assembly in that case, the Article distills the principles that strongly influenced the results reached in the Russia, Yugoslavia, and Czechoslovakia cases and which are likely to guide the organization's response to questions of succession to membership in the future. In so doing, the Article explores the broader question of the role of law versus politics in the internal functioning of the United Nations.

I. Background

A. The U.N. Charter

Membership in the United Nations by new States is equivalent to affirmation of their full personality as international entities and is essential to the complete enjoyment of their newly acquired status in an increasingly interdependent world. Until a new state attains U.N. membership, it is excluded from participating in several hundred multilateral conventions

9. See Memorandum from Assad Kotaite, President of the Council of the International Civil Aviation Organization, to the Representatives of the Council 2 (Jan. 28, 1993), ICAO Doc. Pres AK/339, E 1/1.16 (summarizing U.N. Legal Counsel's opinion) (on file with the *Cornell International Law Journal*).

10. To the extent possible, consistent with State Department rules of confidentiality, this Article will chronicle these behind-the-scenes maneuvers by the United States and other members of the Security Council. The views expressed in this Article are those of the author and do not necessarily reflect the views of the Department of State.

11. See L.C. Green, *The Dissolution of States and Membership of the United Nations*, in *LAW, JUSTICE AND EQUITY* 152, 167 (R.H. Code Holland & G. Schwarzenberger eds., 1967).

12. See *infra* notes 21-58 and accompanying text.

that provide networks of international co-operation in a variety of fields.¹³ Moreover, upon admission to the United Nations, a new State is entitled to automatic membership in virtually every functional organization within the U.N. system simply by informing the Secretariat that it accepts the obligations of the constituent instruments of these organizations.¹⁴ It is small wonder, then, that the newly emerging states of the former Soviet Union, Yugoslavia, and Czechoslovakia immediately applied for U.N. membership upon declaring their independence.

Article 4(1) of the U.N. Charter sets out the criteria for eligibility for new members. It reads: "Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations."¹⁵ Article 4(2), which sets out the process for admission of new members, provides that they "will be elected by a decision of the General Assembly upon the recommendation of the Security Council."¹⁶

13. Many of the multilateral conventions administered by the United Nations provide for membership only of members of the United Nations. See Tatsuro Kunugi, *State Succession and Multilateral Treaty Relations in the Framework of International Organizations* 83 (1973) (unpublished Ph.D. thesis, Columbia University) (on file with the *Cornell International Law Journal*).

14. See *id.* at 86 n.1.

15. U.N. CHARTER art. 4, para. 1. The International Court of Justice has restated the conditions for membership as follows: "To be admitted to membership in the United Nations, 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." *Conditions of Admission of a State to the United Nations*, 1948 I.C.J. 57, 62 (May 28) [hereinafter *Conditions of Admission*]. The International Court of Justice held that the five requisite conditions "constitute an exhaustive enumeration" of the qualifications for membership. *Id.* at 62.

To be a "State" in international law, and generally for purposes of new membership in the United Nations, an entity must have "a defined territory and a permanent population, which is under the control of its own government, and the capacity to engage in formal relations with other States." D.P. O'CONNELL, *INTERNATIONAL LAW* 304-05 (1965). This traditional definition of a "State" was adopted in article 2 of the Montevideo Convention on the Rights and Duties of States, promulgated in 1933. *Id.*

16. U.N. CHARTER art. 4, para. 2. The specific procedures for application are as follows: In accordance with rules 58-60 of the Provisional Rules of Procedure of the Security Council, a State desiring U.N. membership must submit its application to the Secretary General, who places the application upon the Security Council's provisional agenda. Unless the Council decides otherwise, the application is submitted to the Committee on the Admission of New Members, comprised of a representative of each Council member, for its report. After considering the Committee's report, the Council votes on whether to recommend the applicant for membership. Votes on admitting new members are subject to the veto. See LELAND M. GOODRICH ET AL., *CHARTER OF THE UNITED NATIONS* 223 (3d ed. 1969). In evaluating the applicant, the Council may consider "any factor which it is possible reasonably and in good faith to connect with the conditions laid down" in article 4. *Conditions of Admission*, 1948 I.C.J. at 63. If the Council recommends membership, it forwards its recommendation to the General Assembly. Article 18(2) of the Charter requires that admission decisions be made by a two-thirds majority of the General Assembly members present and voting. U.N. CHARTER art. 2, para. 4.

While the Charter provisions described above governed new membership for the former republics of the Soviet Union, Yugoslavia, and Czechoslovakia, the Soviet situation also raised difficult issues related to the disposition of the Soviet Union's seat on the Security Council. Based on its status as a major power at the conclusion of the Second World War, the Soviet Union—along with the Republic of China, France, the United Kingdom of Great Britain and Northern Ireland, and the United States of America—was assigned permanent Security Council membership under article 23 of the U.N. Charter.¹⁷ With permanent membership on the Council comes the right to veto substantive decisions¹⁸—a right that would-be successors to the Soviet Union obviously desired dearly.

Surprisingly, the U.N. Charter contains no provision for succession to membership. Nor are the traditional rules on treaty succession¹⁹ controlling in the context of international organizations.²⁰ Instead, such questions are governed by principles and precedents that have developed over time. In addition, even within the U.N. system, various organizations have developed different approaches to membership succession.

B. Historical Precedent

The breakup of the Soviet Union is not the first time the United Nations has witnessed the division of a member-State. Whenever a member-State breaks apart, there are several possible ways the United Nations could respond. First, drawing upon the traditional rules of treaty succession, it could permit all of the resulting States to succeed to the former State's membership, that is, to become automatically U.N. members. Second, it could require that all of the resulting States apply for membership as new members before they are allowed to participate in the United Nations. Finally, it could allow one of the resulting States to continue the former State's membership while requiring the others to apply for new membership. For a variety of reasons detailed below, the U.N. has rejected the first option and opts to follow either the second or third options depending on the circumstances.

17. U.N. CHARTER art. 23; Stefan A. Riesenfeld & Frederick M. Abbott, *A UN Dilemma: Who Gets the Soviet Seat on the Security Council?*, CHRISTIAN SCIENCE MONITOR, Oct. 4, 1991, at 19.

18. U.N. CHARTER art. 27, para. 3; Riesenfeld & Abbott, *supra* note 17, at 19. The other ten members on the Council do not have the veto and are elected to serve a term of two years. U.N. CHARTER art. 23, para. 2.

19. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 210 (1987); Vienna Convention on Succession of States in Respect of Treaties, art. 17, U.N. Doc. A/CONF.80/31, reprinted in 17 I.L.M. 1488, 1497 (1978) [hereinafter Vienna Convention]. Article 17 of the Vienna Convention provides that a successor State may establish its status as a party to any multilateral treaty to which its predecessor State was party merely by notifying the treaty depository of the succession unless the application of the treaty in respect of the newly independent State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

20. See Edwin D. Williamson & John E. Osborn, *A U.S. Perspective on Treaty Succession and Related Issues in the Wake of the Breakup of the USSR and Yugoslavia*, 33 VA. J. INT'L L. 261, 267 (1993).

The United Nations first faced such a situation just two years after its founding, on August 15, 1947, when Great Britain granted independence to British India, an original member of the United Nations, and divided its territory into the separate Dominions of India and Pakistan.²¹ On that day, the Ministry of Foreign Affairs of Pakistan sent a cable to the United Nations Secretary-General expressing the opinion that "both the Dominions of India and Pakistan should become Members of the United Nations, automatically, with effect from 15 August."²² Because Pakistan desired to participate in the upcoming session of the General Assembly without delay, the cable indicated that if the Secretary-General were not willing to accept Pakistan's claim to automatic membership, he should construe the cable as a formal application for admission by Pakistan.²³

The Secretary-General promptly transmitted the cable as an application for admission to the Security Council, which considered the question on August 18, 1947. During the Security Council's debate, France supported Pakistan's argument for automatic membership, but most members took the position that Pakistan should be formally admitted to membership.²⁴ Consistent with the conclusions of a legal opinion drafted ten days earlier in anticipation of this situation by Dr. Ivan Kerno, the Assistant Secretary-General for Legal Affairs, there was no challenge to India's continued membership.²⁵ The Polish delegate remarked, how-

21. See Oscar Schachter, *The Development of International Law Through the Legal Opinions of the United Nations Secretariat*, 1948 BRIT. Y.B. INT'L L. 91, 101.

22. U.N. SCOR, 2d Sess., 186th mtg. at 2027, U.N. Doc. S/496, A/CN.4/149 (1947).

23. U.N. SCOR, 2d Sess., 186th mtg. at 2027-28, U.N. Doc. S/496, A/CN.4/149 (1947). See also Green, *supra* note 11, at 160; K.P. Misra, *Succession of States: Pakistan's Membership in the United Nations*, 1965 CANADIAN Y.B. INT'L L. 281, 288.

24. See D.P. O'CONNELL, STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW 186 (1967) [hereinafter STATE SUCCESSION].

25. The text of the legal opinion is as follows:

The Indian Independence Act provides that on the fifteenth day of August, 1947, two Independent Dominions shall be set up in India to be known respectively as India and Pakistan. Under this act, the new Dominion of India will consist of all the territories of British India except certain designated territories which will constitute Pakistan.

What is the effect of this development on membership and representation of India in the United Nations?

From the legal standpoint, the Indian Independence Act may be analysed as effecting two separate and distinct changes:

1. From the viewpoint of international law, the situation is one in which a part of an existing state breaks off and becomes a new state. On this analysis, there is no change in the international status of India; it continues as a state with all treaty rights and obligations, and consequently, with all the rights and obligations of membership in the United Nations. The territory which breaks off, Pakistan, will be a new state; it will not have the treaty rights and obligations of the old state, and it will not, of course, have membership in the United Nations.

In international law, the situation is analogous to the separation of the Irish Free State from Great Britain, and of Belgium from the Netherlands. In these cases, the portion which separated was considered a new State; the remaining portion continued as an existing state with all of the rights and duties which it had before.

ever, that "this precedent cannot be cited in the future as a justification in the event another State should split up into several States and all of those should ask for automatic admission, thereby depriving the Security Council of the privilege of making recommendations with regard to new Members."²⁶ Notwithstanding this statement, the India/Pakistan case became the primary precedent against which the cases of the Soviet Union, Yugoslavia, and Czechoslovakia would be gauged nearly fifty years later.

When the Security Council transmitted the resolution to admit Pakistan to the General Assembly, it was referred to the First Committee, where the representative of Argentina expressed the opinion that both India and Pakistan were either members by inheritance or they both had to be formally admitted.²⁷ Although there was substantial support for Argentina's position, it was agreed that Pakistan's participation should not be delayed.²⁸ Accordingly, the First Committee voted to recommend to the General Assembly that it admit Pakistan while simultaneously referring the legal question of succession to the Sixth (Legal) Committee.²⁹ The question addressed to the Sixth Committee was framed as follows: "What are the legal rules to which, in the future, a State or States entering into international life through the division of a Member State of the United Nations should be subject?"³⁰

In response to this question, the Sixth Committee adopted and transmitted the following principles to the First Committee as general guidance for future cases:

1. That, as a general rule, it is in conformity with legal principles to presume that a State which is a Member of the Organization of the United Nations does not cease to be a Member simply because its Constitution or its frontier have been subjected to changes, and that the extinction of the State as a legal personality recognized in the international order must be shown before its rights and obligations can be considered thereby to have ceased to exist.
2. That when a new State is created, whatever may be the territory and the populations which it comprises and whether or not they formed part of a State Member of the United Nations, it cannot under the system of the Charter claim the status of a Member of the United Nations unless it has been formally admitted as such in conformity with the provisions of the Charter.

2. Apart from the question of separation, the Independence Act has effected a basic constitutional change in India. The existing State of India has become a Dominion and, consequently, has a new status in the British Commonwealth of Nations, independence in external affairs, and a new form of government. It is clear, however, that this basic constitutional change does not affect the international personality of India, or its status in the United Nations.

U.N. GAOR, International Law Comm., 15th Sess., at 2-4, U.N. Doc. A/CN.4/149 (1962).

26. U.N. SCOR, 2d Sess., 186th mtg. at 2055, U.N. Doc. S/496, A/CN.4/149 (1947).

27. STATE SUCCESSION, *supra* note 24, at 186.

28. *Id.*

29. Green, *supra* note 11, at 160.

30. U.N. GAOR, 6th Comm., 2d Sess., 42d and 43d mtgs. at 37, U.N. Doc. A/CN.4/149 (1947).

3. Beyond that, each case must be judged according to its merits.³¹

In the context of the India/Pakistan case, the first of these principles suggests that there is a presumption against treating a State's U.N. membership as extinguished despite the division or dismemberment of that State. The second principle, analogous to the rule of primogeniture,³² suggests that no more than one State can claim to be the continuation of a U.N. member-State that has undergone such changes; all other States formed in the division or dismemberment must formally apply for new membership. The third principle seeks to limit the importance of precedent and to preserve the political flexibility of the United Nations in responding to future membership questions.

Before describing how the India/Pakistan precedent and the principles propounded by the Sixth Committee influenced the disposition of the Soviet, Yugoslav, and Czech seats in the United Nations, it is worthwhile first to examine the validity of the legal position taken by the Assistant Secretary-General for Legal Affairs, the Security Council, and the General Assembly on the question of Pakistan's membership.³³ As described below, there are three troubling aspects of the case that undermine its value as precedent.

The primary problem with the U.N.'s handling of the India/Pakistan case was that it treated Pakistan as having broken away from India rather than treating both India and Pakistan as simultaneously emerging as independent States from the United Kingdom. According to the records of the Parliamentary debate on the partition of British India,³⁴ the United Kingdom intended to set up in British India two co-successor States as stipulated in the Indian Independence Act of 1947.³⁵ In this regard, Dr.

31. U.N. GAOR, 1st Comm., Annex 14g, at 582-83, U.N. Doc. A/C.1/212 (1947) (letter from Chairman of the Sixth Committee to the Chairman of the First Committee).

32. Under the common law rule of primogeniture prevailing in England until 1925, a single issue (the oldest son, if living) inherited the land. JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 366 (1981).

33. See, e.g., Misra, *supra* note 23, at 289; Green, *supra* note 11, at 159-62; J.E.S. FAWCETT, THE BRITISH COMMONWEALTH IN INTERNATIONAL LAW 224 (1963).

34. One member of the House of Commons (Brigadier Low) pointed out that some members of Parliament were suspicious that "the use of the word 'India' in the Bill is a proof that His Majesty's Government take the view that Pakistan has seceded from the whole of India. I have always taken the view, which I believe is right, that there has been no secession but that this is the result of an agreement which has been approved by His Majesty's Government, and that the Government do not favour one State or the other in partition of India;" he asked for "confirmation of his view." Prime Minister Attlee's reply was unambiguous: "The names are not meant to make any difference between them. They are two successor States. They are separate and both of them will be Dominions in the full effect of the term." Misra, *supra* note 23, at 286 (citing 440 PARL. DEB., H.C. (5th ser.) 41, 44 (1947)).

35. *Id.* Misra notes that based on the description of the territories in the Indian Independence Act of 1947 (that the new Dominion of India would consist of all the territories of British India except certain designated territories which would constitute Pakistan), Dr. Kerno concluded that this was a case where a certain part of the territory of an existing international entity had separated or broken away from the parent State. Misra suggests the inference was unfounded because the Act did not discriminate

Kerno's analogy between the separation of Pakistan from India and the Irish Free State from the United Kingdom and Belgium from the Netherlands³⁶ is of doubtful historical accuracy. As one commentator noted, "all these were cases of secession, separation, or defection rather than division, partition or dismemberment."³⁷ If the United Kingdom rather than British India is viewed as the predecessor State, there is no legal reason why the two Dominions should not have been dealt with as co-successors, in which case they should have either both been given automatic membership or both been required to apply for membership.

Second, the devolution agreement between India and Pakistan, which provided that membership in all international organizations would devolve solely upon the Dominion of India,³⁸ should have been discounted by the United Nations for a variety of reasons. Due to the coercive circumstances surrounding the negotiations in the Partition Council, Pakistan had little choice but to accept the provision.³⁹ In addition, the provision runs counter to the intention and contents of the Indian Independence Act of 1947.⁴⁰ Moreover, since the only parties to the devolution agreement were India and Pakistan, it could not have any automatic effect on the United Nations without the consent and acceptance of the members of that organization.⁴¹ Finally, Pakistan itself treated the agreement as a nullity when it claimed to have the same right as India to membership in the United Nations.⁴²

between the two Dominions; the way the territories of the two Dominions had been defined was simply considered the most convenient one by Parliament. *Id.*

36. *See supra* note 25.

37. Misra, *supra* note 23, at 288.

38. Indian Independence (International Agreements) Order, *quoted in* U.N. GAOR, 6th Comm., 2d Sess., Annex 6c, at 308-10, U.N. Doc. A/C.6/161 (1947).

39. One commentator asserts that Pakistan only reluctantly agreed to the devolution agreement in the face of pressure from the British Foreign Office, which, notwithstanding Prime Minister Attlee's clarification in the House of Commons had taken the position that India's membership in the United Nations continued and Pakistan was to be treated as a new State. *See* Misra, *supra* note 23, at 288. Misra opines that one of the reasons for the Foreign Office's position was that it feared such a precedent might allow a country to borrow money much in excess of its needs then go through a formal partition and claim that neither part of the divided country was responsible for the debts incurred. *Id.* at 288 n.28.

40. *See supra* note 35 and accompanying text.

41. *See* Green, *supra* note 11, at 161.

42. Pakistan repeated its claim when it adhered to the U.N. Charter after being admitted by the General Assembly. In its statement, Pakistan said:

In one sense, the admission of Pakistan to the United Nations is not the admission of a new Member. Until 15 August of [1947], Pakistan and India constituted one State. On 15th August they agreed to constitute themselves into two separate sovereign States. One chose to continue to call itself by the old name of India, which had applied to the whole of the country, and the other elected to call itself by the name of Pakistan. Inasmuch as Pakistan had been a part of India, it was, in effect, under the latter name, a signatory to the Treaty of Versailles and an original Member of the League of Nations. . . . In the same sense, Pakistan, as a part of India, participated in the San Francisco Conference in 1945 and became a signatory to the United Nations Charter.

A third problem is that the precedent was not initially applied uniformly throughout the U.N. system. The International Telecommunications Union (ITU),⁴³ for example, consciously departed from the General Assembly's approach to the question of Pakistan's membership. At the International Telecommunications Conference on September 4, 1947, the Argentine Delegation made the following Statement:

The fact we must face is this: a member of the International Telecommunications Union, British India, has been divided into two neighboring States which today form part of the "Commonwealth" of British nations under conditions of absolute legal equality. One of these dominions, India, retains its old constitutional and political name; the other acquires a new designation: Pakistan. But the two States, are, in reality, the legitimate successors to the rights and commitments acquired by British India within the International Telecommunication Union when it signed the Madrid Convention. Therefore, it is not fitting to bring up the question of an "admission" On the contrary, what is fitting, purely and simply, is to "recognize" that both these new States are equally the lawful successors of the old Member of the Union which was called British India, and nothing more.⁴⁴

Accordingly, Argentina proposed that the ITU "recognize" India and Pakistan as members "in their capacity as successors of the British India, without subjecting them to any process of admission."⁴⁵ The chairman of the conference observed that the opinion expressed by the Argentine delegation had given rise to no objection, and that Pakistan should be considered admitted to the ITU.⁴⁶ Pakistan participated in the balance of the conference and signed the International Telecommunications Convention of Atlantic City in 1947.⁴⁷

Moreover, in 1961, the United Nations appeared to depart without reason from the precedent and the principles adopted by the Sixth Committee in handling the dissolution of the United Arab Republic.⁴⁸ Just three years after uniting with Egypt to form the United Arab Republic,

Therefore Pakistan is not a new Member of the United Nations, but a co-successor to a Member State which was one of the founders of the Organization. U.N. GAOR, 2d Sess., 92d plen. mtg. at 311, U.N. Doc. A/CN.4/149 (1947) (quoted in STATE SUCCESSION, *supra* note 24, at 187).

43. The International Telecommunications Union (ITU) facilitates international cooperation for the improvement and rational use of telecommunications of all kinds and provides technical assistance to developing countries in the field of communications. A plenipotentiary conference of the members of the ITU is convened every five years. See NEW ZEALAND MINISTRY OF EXTERNAL RELATIONS AND TRADE, 1992 UNITED NATIONS HANDBOOK 214-15 (1992).

44. Documents of the International Telecommunications Conference at Atlantic City (1947) 216-17 (1948) (on file with the *Cornell International Law Journal*).

45. *Id.*

46. *Id.*

47. Telecommunication Convention, T.I.A.S. No. 1901.

48. See FAWCETT, *supra* note 33, at 224-25; STATE SUCCESSION, *supra* note 24, at 198 ("Rousseau describes the United Nations practice as a 'flagrant contradiction' of the principles concerning identity and succession of States") (quoting Charles E. Rousseau, *Chronique des Faits Internationaux*, 66 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 371, 413 (1962)).

Syria broke away from the nascent Union by revolution on September 28, 1961, and claimed its independence under a new name—the Syrian Arab Republic.⁴⁹ A week after achieving independence, Syria sent the following note to the President of the General Assembly:

It may be recalled that the Syrian Republic was an original member of the United Nations under Article Three of the Charter and continued its membership in the form of joint association with Egypt under the name of United Arab Republic. In resuming her formal status as an independent State the Government of the Syrian Arab Republic has the honour to request that the United Nations take note of the resumed membership in the United Nations of the Syrian Arab Republic.⁵⁰

Syria's request appears to contravene the India/Pakistan precedent and the Sixth Committee's second principle, which states that

when a new State is created, whatever may be the territory and the population which it comprises and whether or not they formed part of a State Member of the United Nations, it cannot under the system of the Charter claim the status of a Member of the United Nations unless it has been formally admitted as such in conformity with the provisions of the Charter.⁵¹

The situation of a State, which has surrendered its independence and its U.N. seat to join a Union and then breaks away from that Union and asserts its independence, is little different than that of a territory like Pakistan becoming independent as an entirely new State by secession.⁵²

The President of the General Assembly consulted a number of delegations and announced that "the consensus seemed to be that, in view of the special circumstances of this matter, Syria, an original member of the United Nations, may be authorized to be represented in the General Assembly as it has specifically requested."⁵³ No objection was made and Syria resumed its U.N. membership without having to go through the application process. Egypt, for its part, continued its membership in the U.N. under the name UAR until it notified the Secretary-General on September 2, 1971, that it had changed its name to the Arab Republic of Egypt.⁵⁴ The Syria/UAR case can perhaps be distinguished from the

49. Green, *supra* note 11, at 164. Previous to its merger with Egypt, the name of the State had been just "Syria."

50. U.N. GAOR, International Law Comm., 15th Sess., at 10-11, U.N. Doc. A/4914, A/CN.4/149.

51. U.N. GAOR, 1st Comm., Annex 14g, at 582, 583, U.N. Doc. A/C.1/212 (1947) (letter from Chairman of the Sixth Committee to the Chairman of the First Committee).

52. See Green, *supra* note 11, at 165.

53. *Id.* In the International Law Commission, the Syrian expert representing the UAR was replaced by the Egyptian expert who had earlier resigned from the Commission when the UAR was formed. It is worth noting that, even though no more than one expert from a State may be a member of the International Law Commission at one time, the Commission members are elected as individual experts based on their recognized competence in international law, not as representatives of a State which can be freely substituted for one another. *Id.*

54. See U.N. GAOR, International Law Comm., 15th Sess., U.N. Doc. A/CN.4/149 and Add. 1; *United Nations Conference on Succession of States in Respect of Treaties*, 1979 Sess.

India/Pakistan case in that the old Syria had been an original member of the United Nations, and the new Syria was, in effect, reasserting a temporarily suspended personality, the emphasis being on continuity rather than disruption.⁵⁵

The U.N. decision to follow the third of the possible options listed above for dealing with succession to the British India seat was likely motivated by practical concerns. If Pakistan had been treated as the co-successor to the British India seat, the United Nations would have had to accept an automatic increase in the number of its original members. This would not, however, have been the case with Syria's secession from the UAR, since Syria had been one of the original members in its own right. As the above quoted statement by the Polish delegate to the Security Council indicates,⁵⁶ the members of the Council jealously guarded their right to approve new members. This was particularly true during the early years of the United Nations, when membership was not viewed as "universal" and admission decisions were often held hostage to Cold War politics.⁵⁷ Technical organizations like the ITU, on the other hand, were less encumbered by such political strife. Moreover, given the Soviet Union's demand when the United Nations was founded to include all fifteen of its republics as original members of the United Nations,⁵⁸ there may have been legitimate concerns that member-States might attempt to reconfigure themselves into smaller units in an effort to increase their voting strength in the General Assembly. Finally, if India had been required to apply for membership as was Pakistan, this would have meant the disappearance of an

and Resumed Sess. 1978, at 90, U.N. Doc. A/CONF.80/16/Add.2 (Official Records of the United Nations Conference on Succession of States in Respect of Treaties, Official Records Volume III).

55. See STATE SUCCESSION, *supra* note 24, at 197. One commentator describes Syria as having been in a three-year "state of suspended animation." Green, *supra* note 11, at 166. See also MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 204-05 (1968); Richard Young, *The State of Syria: Old or New?*, 56 AM. J. INT'L L. 482 (1962). If Yemen, which was created when two U.N. member-States (North Yemen and South Yemen) united in 1990, were to break apart as appears increasingly likely, the two resulting States should be able to assert the UAR precedent for the proposition that both should be permitted to resume their previous membership in the United Nations. See Marguerite Michaels, *Splitting at the Seam: A Two-Man Rivalry Escalates into War, Threatening the Four-Year-Old Union Between the North and South*, TIME, May 23, 1994, at 43 (discussing the current situation in Yemen).

56. See *supra* note 26 and accompanying text.

57. Despite a large number of pending applications, only nine States were admitted to the United Nations from 1945 to 1951, and from 1951 through 1954, no States were admitted. The deadlock in admissions was finally broken and sixteen new members were admitted in 1955. By 1966, 34 additional States had become members. FAWCETT, *supra* note 33, at 225.

58. The Soviet Union initially insisted that each of its fifteen republics be made a separate member of the United Nations. When the United States countered by proposing that each of the then forty-eight U.S. States should become separate members, the Soviet Union reduced its demand to membership for the U.S.S.R. and just two of its republics, Ukraine and Byelorussia. See RUTH B. RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER 361, 434, 535, 539, 597-98 (1958).

original member at a time when, due to East-West tensions, there was no guarantee that new membership for India would be swiftly forthcoming.

C. Legal Doctrine

While it may have been motivated by political factors, the U.N. decision on the issue of India's membership can also be justified on legal grounds. It is said that membership in an international organization like the United Nations creates "a multiplicity of obligations, all of which are strictly personal in character," and therefore "the contractual relationship of the member to the organization is dependent on the former's continued personality."⁵⁹ Under this "continuity theory," membership may still pass to States that have lost extensive portions of their territories and/or have undergone radical changes in government as long as they are considered to have inherited the essential "legal identity" of the former member.⁶⁰ In this regard, a distinction must be made between the concepts of "continuity" and "state succession." In the former, the same State is deemed to continue to exist, while in the latter, one or more successor States are deemed to have replaced the former State.⁶¹

Under the continuity theory, there can be only two ways to view the division of a U.N. member-State: (1) as a "breakaway," in which one of the divisions represents the continuing existence of the State while the others represent States that have seceded from it; or (2) as a complete "dissolution," in which the State has been dissolved and none of the resulting States represent its continuity. Thus, the determination of whether the changes in a State constitute an extinction of its legal personality is critical to the disposition of its U.N. membership. The legal identity of a State might be destroyed if, for example, through division, it lost certain essential portions of its territory such as its seat of government, its original territorial nucleus, or areas from which it obtained extensive revenues necessary for the carrying out of its obligations of membership in international organizations.⁶² Moreover, the case for continuity might vary from organization to organization depending on the nature and functions of the organization and the obligations of its members.⁶³

While most commentators accept the continuity-succession dichot-

59. D.P. O'CONNELL, *THE LAW OF STATE SUCCESSION* 65 (1956).

60. See Schachter, *supra* note 21, at 105.

61. See JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 400 (1979).

62. See Schachter, *supra* note 21, at 105.

63. For example, some organizations may be related to a particular commodity that is not produced in sufficient quantities in the "continuing" portion of the former member-State to justify continuing membership. Such organizations may include the International Jute Organization, the International Lead and Zinc Study Group, the International Natural Rubber Organization, the International Office of the Vine and Wine, the International Rubber Study Group, the International Sugar Organization, and the International Wheat Council. The continuation approach might also be incompatible with membership in organizations, such as INTELSAT and the European Bank of Reconstruction and Development, whose membership is associated with financial rights and assets.

omy,⁶⁴ there is little practical basis for the distinction with respect to membership in the United Nations. The distinction is said to be justified because "membership of any international organization has as its essence a willingness to co-operate in the furtherance of schemes of international solidarity. Such a willingness cannot be assumed on the part of a new State whose territory falls within the ambit of these schemes."⁶⁵ This rationale for not allowing a successor State to inherit its predecessor's U.N. membership, however, would seem to be equally applicable to situations in which a continuing State has undergone a radical change of government. The schemes of the organization may well be just as inimical to a new government as to a new State. Yet, unlike a new State, a continuing State in which a democratic government is replaced by a totalitarian or communist regime retains its U.N. membership under the continuity theory. Furthermore, there is little practical difference between the obligation of a U.N. member-State and the obligation of a non-member-State to comply with the binding decisions of the Security Council—sanctions can be imposed on either for non-compliance.⁶⁶ Therefore, willingness to cooperate in furthering U.N. schemes would not provide a legitimate basis for treating successor States differently than continuing States. Indeed, the rationale for the distinction actually turns logic on its head, since it is not a question of the United Nations imposing obligations on the successor State; rather, it is the successor State which desires to inherit its predecessor's U.N. membership with all the attendant obligations.⁶⁷ Yet, despite the dubious origins of the India/Pakistan precedent and the questionable nature of the legal doctrine supporting it, there is no doubt it greatly influenced the U.N.'s response to the breakups of the Soviet Union, Yugoslavia, and Czechoslovakia.

64. See, e.g., STATE SUCCESSION, *supra* note 24, at 183 ("Generally speaking, rights and obligations of voting, with specific quotas of votes, and obligations of contributing to the organizations' expenses, with fixed quotas of contributions, make it impossible to accept a successor State as a successor in membership."); F.A. Vallat, *Some Aspects of the Law of State Succession*, 41 TRANSACTIONS OF THE GROTIUS SOC'Y 123, 134 (1956) ("We can say with some confidence that the new State does not inherit a right of membership in international organization . . . [M]embership depends upon the continuing personality of the pre-existing State."); C. Wilfred Jenks, *State Succession in Respect of Law-making Treaties*, 1952 BRIT. Y.B. INT'L L. 105, 133-34

(membership in international organizations and the obligations incidental thereto do not pass to a successor State. . . . The membership of an international organization has a personal quality and it is both reasonable and psychologically sound and wise that a new member of the international community should be required to apply for membership, particularly in the case of the general international organization for the maintenance of peace and security.).

65. O'CONNELL, *supra* note 59, at 65.

66. See U.N. CHARTER art. 2, para. 6.

67. The only situation in the U.N. context which might justify a continuity theory is with respect to permanent membership in the Security Council, if one assumes the number of permanent members cannot be increased or decreased without amending the U.N. Charter.

II. When Russia Came Knocking: Succession to the Soviet Seat

A. History: The Empire Crumbles

During the seventy years since its birth in 1917, the Soviet state, comprised of fifteen republics in a federal union, gradually expanded to occupy one-sixth of the earth's land surface.⁶⁸ By 1991, its population had swelled to over 290 million,⁶⁹ its armed forces numbered over 3.7 million members, it possessed some 27,000 nuclear weapons,⁷⁰ its gross national product was over \$2.5 trillion, and it had concluded over 15,000 international agreements.⁷¹ The precise moment of this superpower's collapse may be subject to debate, but there is little doubt that the failed coup by hard-line Communists on August 19-21, 1991 provided the fatal blow to the central government's struggle to maintain its eroding power.⁷²

Following the attempted coup, the central government immediately allowed the former republics of Estonia, Latvia, and Lithuania to secede from the Union, while Soviet President Mikhail Gorbachev labored unsuccessfully for three months to convince other independence-minded republics to remain in some form of modified union.⁷³ Gorbachev's proposed "Union of Sovereign States" envisaged a hybrid half-federation, half-confederation in which the Union would act in international relations in the capacity of a sovereign State and an entity in international law, while each republic party to the Union would also be a sovereign State and a full member of the international community.⁷⁴ Consequently, the "center"

68. See David Hoffman, *Soviet Union as We've Known It' Is Gone, Baker Says*, WASH. POST, Dec. 9, 1991, at A16; THE WORLD ALMANAC AND BOOK OF FACTS 1991, at 760 (1991) (reporting that the Soviet Union was the largest country in the world, almost three times the size of the United States).

69. James Rupert, *Ex-Soviet Republics Sign Charter*, WASH. POST, Dec. 22, 1991, at A41.

70. Michael Dobbs, *Shifting of Power Speeds Up in Moscow*, WASH. POST, Dec. 13, 1991, at A1.

71. Michael Dobbs, *Yeltsin Asserts Full Control Over Kremlin*, WASH. POST, Dec. 20, 1991, at A1, A36; see also THE WORLD ALMANAC AND BOOK OF FACTS 1991 760 (1991).

72. See Michael Dobbs, *The Soviet Union, as We Long Knew It, Is Dead. What's Next?*, WASH. POST, Dec. 4, 1991, at A27. Some date the beginning of the Soviet empire's collapse with the death of Joseph Stalin in March of 1953. Ironically (but not unintentionally), the August coup came on the very day the republics were slated to sign Gorbachev's new Union Treaty, which might have breathed new life into the decaying Union. See, e.g., Melor Sturua, *The Real Coup*, FOREIGN POL'Y, Winter 1991-92, at 63.

73. The central government formally recognized the independence of Estonia, Latvia, and Lithuania on September 6, 1991, and the United Nations admitted them as sovereign States two weeks later, on September 17. The dates (in 1991) on which the other republics declared their independence are as follows: Georgia (April 9), Ukraine (August 24), Byelorussia (now Belarus) (August 25), Moldavia (now Moldova) (August 27), Azerbaijan (August 30), Uzbekistan (August 31), Kirghizia (now Kirgistan) (August 31), Tajikistan (September 9), Armenia (September 23), and Turkmenistan (October 27). Kazakhstan and Russia never declared independence, but Russia did declare its laws to be sovereign. Ralph Gaillard, Jr., *Steps Toward Independence from the Former Soviet Union*, WASH. POST, Dec. 3, 1991, at A14.

74. See Union Treaty: 23 July "Agreed" Text (unpublished draft, on file with the *Cornell International Law Journal*). See also 'A Historic Chance . . . to Speed Up Reform', WASH. POST, Sept. 3, 1991, at A16 (containing excerpts of a joint statement by President Mikhail Gorbachev and leaders of 10 of the 15 republics outlining proposals for a reformed Union). By November, the revised proposed Union Treaty would have left

would retain the Soviet seat at the United Nations and would "support applications of the union republics to the United Nations to recognize them as subjects of international law."⁷⁵

Notwithstanding apparent progress in Gorbachev's efforts to preserve the Union, on December 1, 1991, ninety percent of Ukrainian voters voted for independence.⁷⁶ The surprising outcome of the Ukrainian vote persuaded the other republics that Gorbachev's attempts to negotiate a new Union treaty were doomed.⁷⁷ Summing up the resulting situation, then C.I.A. Director Robert M. Gates stated that "the center is evaporating before our eyes."⁷⁸ A week after the Ukrainian vote, the leaders of Russia, Ukraine, and Byelorussia formally announced the dissolution of the Soviet Union and said they had agreed to establish a "Commonwealth of Independent States" in its place.⁷⁹ Shortly after this announcement, eleven of the twelve remaining former republics signed a Commonwealth Accord.⁸⁰

the central government with the role of coordinating foreign affairs, economic matters, and nuclear arms policy, with all other powers turned over to the republics. See Margaret Shapiro, *7 Republics Balk at Union Pact*, WASH. POST, Nov. 26, 1991, at A17.

75. 'A Historic Chance . . . to Speed Up Reform', *supra* note 74, at A16. Gorbachev's proposal would have in effect given the Soviet Union double representation in the United Nations, since both the "center" and its constituent parts could not simultaneously be States. If the republics had retained the attributes of statehood, the center would have qualified as an international organization but not as a State. Gorbachev's plan may have been inspired by a proposal then under consideration by the Food and Agriculture Organization (FAO), one of the bodies within the U.N. system, to accept the European Community (EC) (now European Union) as a full member of the United Nations while at the same time allowing the EC's constituent States to continue to retain their individual memberships. See European Community Press Release (Nov. 26, 1991) (on file with the *Cornell International Law Journal*).

The FAO arrangement is, however, distinguishable from Gorbachev's proposal in that the FAO accepted EC membership on the understanding that the EC could only exercise membership rights in areas within its competence and only when its member-States would not exercise their rights. See *United Nations Food and Agriculture Organization, Report of Plenary Conference*, U.N. FAO, 26th Sess., Agenda Item 24, para 9, U.N. Doc. C.91/Rep/1 (1991).

76. Michael Dobbs, *Slavic Republics Declare Soviet Union Liquidated*, WASH. POST, Dec. 9, 1991, at A1, A16.

77. *Id.*

78. George Lardner, Jr., *CIA Director Warns of Civil Disorder This Winter in Soviet Union*, WASH. POST, Dec. 11, 1991, at A31.

79. Dobbs, *supra* note 76, at A1. The three republics claimed the right to dissolve the Soviet Union as co-signatories of the 1922 treaty that established it. See *Accord on Creation of Commonwealth*, WASH. POST, Dec. 10, 1991, at A32. Gorbachev immediately responded that the three republics did not have authority to dissolve the Union, which still consisted of nine other republics. Margaret Shapiro, *Gorbachev Rejects Commonwealth: Declaration by Slavic Republics Is Called Illegitimate, Dangerous*, WASH. POST, Dec. 10, 1991, at A1.

80. *Text of Accords by Former Soviet Republics Setting Up a Commonwealth*, N.Y. TIMES, Dec. 23, 1991, at A10 [hereinafter *Commonwealth Accords*], reprinted in U.N. GAOR, 47th Sess., Annex V, U.N. Doc. A/47/60, S/23329 (1991), and in 31 I.L.M. 148 (1992). Georgia did not sign the pact but sent a delegation of observers to the Alma-Ata meeting. James Rupert, *Ex-Soviet Republics Sign Charter: Yeltsin to Control Most Nuclear Arms*, WASH. POST, Dec. 22, 1991, at A1, A41.

The Commonwealth Accord contemplates a conference of heads of state and government based in the Byelorussian capital of Minsk as the main political institution of the Commonwealth, with the chairmanship rotating among the member-States.⁸¹ Although the Commonwealth would coordinate foreign affairs, defense, economics, and transportation, Russian President Boris Yeltsin made clear that, in contrast to the approach embodied in the Union Treaty proposed by Gorbachev, "the Commonwealth is not a State."⁸² With respect to the Soviet seat in the United Nations, in a display of George Orwell's maxim that "all animals are equal, but some animals are more equal than others,"⁸³ the Commonwealth leaders underscored the pre-eminence of Russia in the new grouping by voting unanimously for Russia to assume the seat.⁸⁴ Under the Commonwealth Accord, the other members of the Commonwealth (except Byelorussia and Ukraine, which were already U.N. members) would insist on their rights as independent States to apply for their own membership in the United Nations.⁸⁵

A sweeping series of decrees by Russian President Boris Yeltsin and action by the Russian parliament followed, transferring to Russia many of the central government's agencies and institutions, including the Soviet parliament, the Soviet Central Bank, the Soviet Foreign Ministry, and all

81. Rupert, *supra* note 80, at A1, A41.

82. *Id.* As of the time of this writing, the shape of the Commonwealth is still being decided. Differing visions of the new arrangement in areas ranging from foreign policy to national currency, and from economic coordination to national defense, have not yet been reconciled. Ukraine, for example, has said it will issue a separate currency and assert command over conventional forces stationed in the republic (about one-fourth of the former Soviet army). Additionally, when the Ukrainian legislature ratified its participation in the Commonwealth of Independent States, it changed language in the founding pact to accept only "consultation" in foreign policy rather than "coordination." Chrystia Freeland, *Ukraine's Leader Takes Command of Soviet Forces in Region*, WASH. POST, Jan. 13, 1991, at A41; Rupert, *supra* note 80.

83. GEORGE ORWELL, *ANIMAL FARM* 87 (1945).

84. See *Commonwealth Accords*, *supra* note 80, at A10. The Alma-Ata text contained the following provision on U.N. membership:

PROCEEDING from the intention of each of the states to fulfill its duties stipulated by the U.N. Charter and to take part in the work of that organization as equal members;

TAKING into account that previously the Republic of Byelorussia, the U.S.S.R. and Ukraine were members of the United Nations organization;

EXPRESSING satisfaction that the Republic of Byelorussia and Ukraine continue to be U.N. members as sovereign independent States;

BEING full of resolve to promote the consolidation of world peace and security on the basis of the U.N. Charter in the interests of their nations and the whole of the world community;

HAVE DECIDED:

1. Member states of the commonwealth support Russia in taking over the U.S.S.R. membership in the U.N., including permanent membership in the Security Council and other international organizations.

2. The Republic of Byelorussia, the Russian Federation and Ukraine will help other member States of the commonwealth settle problems connected with their full membership in the U.N. and other international organizations.

Id.

85. See Rupert, *supra* note 80, at A1.

Soviet embassies abroad.⁸⁶ As one commentator noted, "Yeltsin's decree assuming direct control over the Kremlin, a walled city of palaces and cathedrals adjoining Red Square, is the equivalent of a takeover of the White House and Capitol Hill rolled into one."⁸⁷ In the end, President Gorbachev, left ruling nothing but "a kingdom of air,"⁸⁸ agreed to step down and end the Soviet Union on December 31, 1991.⁸⁹

B. Russia Assumes the Soviet Seat

Russia's quest to inherit the U.S.S.R.'s U.N. seat took some U.S. officials by surprise. Yeltsin's suggestion to Secretary of State James Baker during their meeting in Moscow on December 16, 1991, that Russia would seek the Soviet seat drew a noncommittal response. Baker said only that the question would have to be taken to the United Nations, at which point the United States would offer a view.⁹⁰ As late as December 22, U.S. officials were still publicly stating that for Russia to replace the Soviet Union on the Security Council, it must "first apply for the seat, after which the matter would be debated by the General Assembly and Security Council."⁹¹ Meanwhile, Russian President Yeltsin sent a letter to the U.N. Secretary-General suggesting a far less cumbersome process. His letter proposed that Russia would simply "continue" the membership of the Soviet Union in the United Nations and requested that the United Nations use the name "The Russian Federation" in place of the name "The Union of Soviet Socialist Republics."⁹²

86. See Dobbs, *supra* note 71, at A1, A36.

87. *Id.*

88. Michael Dobbs, *Reformed Out of a Job: Gorbachev is Left Ruling Kingdom of Air*, WASH. POST, Dec. 15, 1991, at A1.

89. See Fred Hiatt, *Soviet Union to End Dec. 31, Yeltsin Aide Says*, WASH. POST, Dec. 18, 1991, at A1; David Hoffman, *Yeltsin Declares New Commonwealth Will Take Control of Soviet Military*, WASH. POST, Dec. 17, 1991, at A1.

90. See Hoffman, *supra* note 89, at A1. Baker's response may be explained by the fact that a few days earlier, President Nursultan Nazarbayev of Kazakhstan reportedly told him that Kazakhstan and the other Central Asian republics did not support Russia's automatic assumption of the Soviet seat at the United Nations. See Richard N. Gardner & Toby Trister Gati, *Russia Deserves the Soviet Seat*, N.Y. TIMES, Dec. 19, 1991, at A31.

91. Rupert, *supra* note 80, at A1.

92. The full text of the letter from President Yeltsin to the U.N. Secretary-General follows:

I have the honour to inform you that the membership of the Union of Soviet Socialist Republics in the United Nations, including the Security Council, and in all other organs and organizations of the United Nations system is continued, with the support of the States of the Commonwealth of Independent States, by the Russian Federation (the RSFSR). In this connection, please, use in the United Nations the name "The Russian Federation" in the place of the name "The Union of Soviet Socialist Republics."

The Russian Federation remains responsible in full for all the rights and obligations of the USSR under the UN Charter, including the financial obligations.

Please, accept this letter as constituting credentials to represent the Russian Federation in the U.N. organs for all those currently possessing the credentials of the representatives of the USSR to the UN.

Finally, during a Christmas Eve televised speech to the American people, President Bush announced that the United States would “support Russia’s [automatic] assumption of the U.S.S.R.’s seat as a permanent member of the United Nations’ Security Council.”⁹³ A week later, the former Soviet representative, sitting behind a shiny new nameplate emblazoned with the words “The Russian Federation,” took part in the first Security Council meeting of the new year without challenge.⁹⁴ Within twelve months, the United Nations approved the applications for membership of the other former Soviet republics without dissent.⁹⁵

C. Political Backdrop

In retrospect, given the swiftness and apparent ease with which the Soviet seat was passed to Russia, this result might seem the only sensible solution. During the period of transition, however, the United States and other members of the Security Council seriously considered a variety of other proposals. One option was to treat the Soviet seat as having expired. This would have been consistent with the declaration made by the leaders of the former Soviet republics in December that “the U.S.S.R. is ceasing its existence as a subject of international law and a geopolitical reality.”⁹⁶ Another proposal would have allowed the Commonwealth of Independent States to take the Soviet U.N. seat.⁹⁷ To understand the choice ultimately made, one must begin by examining the motivations of the members of the Security Council.

The question of the disposition of the Soviet Union’s seat came against a backdrop of efforts to seek amendment of the U.N. Charter to provide for greater representation on the Security Council and to abolish or modify the veto. As mentioned above, the U.N. Charter specifically names the Soviet Union as one of the five permanent members of the Security Council with veto power (the “Perm Five”). The other members of the Perm Five worried that any change to the Soviet seat would set off a

Letter from Boris Yeltsin, President of the Russian Soviet Socialist Republic, to Javier Peres de Cuellar, Secretary-General of the United Nations (Dec. 24, 1991), U.N. Doc. 1991/RUSSIA (1991) [hereinafter Yeltsin U.N. Letter] (on file with the *Cornell International Law Journal*).

93. *We Stand . . . Before a New World of Hope and Possibilities for Our Children*, WASH. POST, Dec. 26, 1991, at A35 (speech of President George Bush).

94. Paul Lewis, *West Acts to Defer Issue of New U.N. Council Seats*, N.Y. TIMES, Jan. 3, 1992, at A6.

95. See, e.g., U.N. GAOR, 46th Sess., Agenda Item 20, U.N. Doc. A/46/859 (1992) (Admission of Armenia); U.N. GAOR, 46th Sess., Agenda Item 20, U.N. Doc. A/46/860 (1992) (Admission of Kyrgystan); U.N. GAOR, 46th Sess., Agenda Item 20, U.N. Doc. A/46/862 (1992) (Admission of Tajikstan); U.N. GAOR, 46th Sess., Agenda Item 20, U.N. Doc. A/46/861 (1992) (Admission of Uzbekistan).

96. Dobbs, *supra* note 76, at A1. Indeed, this would have been the likely outcome if the Soviet U.N. seat did not come with the special privilege of permanent membership in the Security Council.

97. See Peter Gumbel, *Russia’s Foreign Minister Seeks to Unite Republics on Key Issues*, WALL ST. J., Nov. 8, 1991, at A11.

scramble by other countries for Security Council reform.⁹⁸

Since 1966, when the members of the United Nations amended the U.N. Charter to enlarge the Security Council from eleven to fifteen members, proposals have been made to make other States permanent members of the Security Council (with or without the veto) in addition to or instead of some of the Perm Five.⁹⁹ In recognition of their role as economic superpowers paying a rising share of U.N. bills, Japan and Germany have been pressing for permanent Security Council seats,¹⁰⁰ and India, Brazil, and Nigeria have been mentioned as possible candidates for permanent membership without a veto.¹⁰¹ A proposal gaining increasing support among many countries would merge the British and French permanent seats and give this new single seat to the European Community, with the leftover seat going to Japan.¹⁰²

The permanent members of the Security Council thus had an interest in ensuring that changes to Soviet membership in the United Nations would not produce challenges to other features of the Security Council, such as the permanent five/rotating ten number and composition, the inseparability of the veto from a permanent seat, and the non-rotation of permanent members. Although amendments cannot be made to the U.N. Charter without the consent of the permanent members of the Security Council,¹⁰³ other members of the United Nations are free to propose such changes and have ample opportunities to pressure the Security Council and the General Assembly to adopt such proposals. As one commentator noted, "The one thing the United States, Britain and France want to avoid at all costs is anything that would open up the Pandora's box of a Charter amendment altering the present membership of the Security Council and possibly ending the right of veto."¹⁰⁴

In particular, the permanent members reportedly feared that leaving the Soviet seat vacant would be seen as an open invitation to other members to push their proposals for expanding or altering the composition of the Perm Five.¹⁰⁵ Similarly, they were said to have been worried that allowing the Commonwealth of Independent States to replace the Soviet Union would further fuel proposals to replace Britain and France with the European Community on the Council.¹⁰⁶ According to press reports, they

98. See Lewis, *supra* note 94, at A6 ("The collapse of the Soviet Union was a logical moment to reopen the United Nations founding Charter and review the Security Council's composition, many nations contend."); see also Sam Jameson, *Japan to Seek Seat on U.N. Security Council*, L.A. TIMES, Jan. 29, 1992, at A9.

99. SYDNEY D. BAILEY, *THE PROCEDURE OF THE UN SECURITY COUNCIL* 157 (1988).

100. Paul Lewis, *3 Western Powers Favor Russian Takeover of Soviet U.N. Seat*, N.Y. TIMES, Dec. 24, 1991, at A8; Jameson, *supra* note 98, at A9.

101. Trevor Rowe, *Switch of Soviet Security Council Seat Could Spur Reform Ideas*, WASH. POST, Dec. 26, 1991, at A25.

102. Lewis, *supra* note 100, at A8.

103. U.N. CHARTER art. 108.

104. Lewis, *supra* note 100, at A8 (quoting Richard N. Gardner, former U.S. Ambassador to Italy, currently Professor of International Law at Columbia University).

105. Gardner & Gati, *supra* note 90, at A31.

106. Rowe, *supra* note 101, at A25.

were also concerned that giving the seat to the Commonwealth would bestow permanent member status upon an entity with little real authority which, because it must constantly seek consensus among the republics, would at best produce delays in Security Council action and at worst paralyze the Council altogether on particular questions such as those relating to Middle East issues.¹⁰⁷

The permanent members therefore desired the disposition to be undertaken smoothly without requiring or inviting Charter amendment and in a manner that would not undermine the effectiveness of the Council.¹⁰⁸ In light of the precedent discussed in the next section of this article, allowing Russia to take the seat in place of the Soviet Union seemed the most orderly way to accomplish this goal.¹⁰⁹

D. Fitting Within U.N. Precedent

During the month of December 1991, Russia's characterization of the breakup of the Soviet Union underwent a radical change. At the beginning of the month, Russia, along with the leaders of Ukraine and Byelorussia, declared that the Soviet Union had "ceas[ed to exist] as a subject of international law and a geopolitical reality."¹¹⁰ The Commonwealth Accord signed later in the month by eleven of the former republics similarly states that "with the formation of the Commonwealth of Independent States, the Union of Soviet Socialist Republics ceases to exist."¹¹¹ A letter from Boris Yeltsin to President Bush stated, "the end of existence of the USSR as a subject of international law require that . . . the question of the Security Council permanent member's seat be urgently addressed Russia would be a State-successor to the USSR with respect to its seat in the UN and the Security council [sic]."¹¹²

In contrast, Yeltsin's December 26 letter to the Secretary-General made no such references to the extinction of the Soviet Union and did not use the term "State-successor." Rather, Yeltsin asserted that the Soviet Union's U.N. membership "is continued" by the Russian Federation.¹¹³ The change in the way Yeltsin described the Soviet situation was not mere happenstance. Instead, it clearly reflects the Russian leadership's growing

107. Lewis, *supra* note 100, at A8.

108. Rowe, *supra* note 101, at A25.

109. *Id.* U.N. membership issues were not considered in a vacuum. While the United Nations can be deemed a "special case," treating Russia as the continuation of the Soviet Union for U.N. purposes would suggest that treaty relations with the Soviet Union continue for Russia but not for the other republics that have "broken away." If the case were characterized as a dissolution, a stronger argument would exist that all the republics continue to be bound by the former Soviet Union's treaty obligations, including those regarding destruction of nuclear weapons and payment of official Soviet debt.

110. See Dobbs, *supra* note 76, at A1.

111. See *Commonwealth Accords*, *supra* note 80, at A10.

112. Letter from Boris N. Yeltsin, President of the Russian Soviet Federative Socialist Republic, to George Bush, President of the United States of America (Dec. 20, 1991) (on file with the *Cornell International Law Journal*).

113. Yeltsin U.N. Letter, *supra* note 92.

understanding of the U.N. precedent regarding succession to membership. To better reflect the legal strength of its claim to the Soviet seat, Russia recast the Soviet situation in terms that would more closely follow that precedent. To be consistent with that precedent, Russia would have to argue that it would occupy the Soviet seat not as an entirely new State succeeding to the rights of the Soviet Union (a "Successor State") after the Soviet Union had ceased to exist, but as that part of the Soviet Union that has survived the breakaway of the other republics.¹¹⁴

In many ways, the India/Pakistan precedent and Russia's succession to the Soviet seat present factually similar cases. India could easily be characterized as the continuation of British India because it retained seventy-five percent of the territory and eighty percent of the population of British India, it kept the name India, and it kept the seat of the government and virtually the same governmental machinery.¹¹⁵ Moreover, on its face, the devolution agreement between India and Pakistan seemed to clarify that the two States regarded India as solely entitled to succeed to the British India seat.¹¹⁶

Similarly, Russia—which had three-fourths of the former Soviet Union's land area, more than half of the Soviet Union's population of 280 million, most of the Soviet Union's resources, nuclear weapons, nuclear assembly plants, and its army, whose territory contained the seat of the former Soviet Government, which had taken over most of the former Soviet Government institutions and agencies, and which had obtained the formal agreement of the other republics that it should take over the Soviet seat in the United Nations¹¹⁷—could make a compelling case that it should be treated as the continuation of the Soviet Union just as India was treated as the continuation of British India. Moreover, Russia could argue that, because two of the larger republics—Byelorussia and Ukraine¹¹⁸—had been independent members of the United Nations since its inception, the residual Soviet Union, for purposes of U.N. membership, has always consisted overwhelmingly of Russia.¹¹⁹ Even history could be used to bolster Russia's position: when Czarist Russia became the Soviet Union after

114. The importance of Russia's characterization of itself as the continuity of the U.S.S.R. cannot be overstated. When, in the case of a substantial change in the State concerned, there are doubts as to the continued existence of the State, the position of the State itself on the issue can be the determining factor. See Rein Mullerson, *New Developments in the Former USSR and Yugoslavia*, 33 VA. J. INT'L L. 299, 303 (1993).

115. See Kunugi, *supra* note 13, at 65.

116. See Section 2 of the Schedule to Indian Independence (International Arrangements) Order, 1947, reprinted in part in Misra, *supra* note 23, at 283-84.

117. See Rupert, *supra* note 80, at A41; Dimitri Simes, *Russia Reborn*, FOREIGN POL'Y, Winter 1991-92, at 41, 42.

118. Ukraine, with an area about the size of Texas, is the second most populous republic with 52 million people and accounted for about a quarter of the Soviet Union's agricultural and industrial might. It has an army of 450,000 and produced 56% of the Soviet Union's corn and 25% of its wheat. In addition, it mined 47% of all Soviet iron ore and 25% of its coal. Ralph Gaillard, Jr., *Ukraine at a Glance*, WASH. POST, Dec. 3, 1991, at A14. Byelorussia is a heavily industrialized country of 10.2 million people. See *The New Slavic Commonwealth*, WASH. POST, Dec. 9, 1991, at A16.

119. See Riesenfeld & Abbott, *supra* note 17, at 19.

the revolution of October 1917, the international community insisted that the Soviet Union was not a new State, but simply a new regime.¹²⁰

Obviously, the case would have been different if there had been no dominant entity remaining which could be considered to possess the political, economic, and military power of the entity to which it sought to succeed, especially with respect to a State that had permanent Security Council membership. Indeed, despite Soviet Foreign Minister Alexander Bessmertnykh's protestations that "Russia will remain a great power,"¹²¹ if not for the political concerns described earlier, proposals may well have been made to allow the Soviet Security Council seat simply to expire on the ground that this special status was accorded the Soviet Union based upon unique historical circumstances and its superpower status. After all, a superpower is more than "a central Eurasian arsenal that used to be a country."¹²²

Assertions by the leaders of Russia and the other former republics that the Soviet Union ceased to exist initially placed the logic and legal basis of Russian succession to the Soviet seat in serious doubt.¹²³ Clearly, the India/Pakistan precedent turned on this point. As characterized by

120. The Soviet Union had insisted it was a new State and was therefore not responsible for the debts assumed by Czarist Russia. The international community universally rejected this argument and continued to call on the Soviet Union to carry out the obligations of the previous regime. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 208 reporter's note 2 (1987).

121. David Remnick, *In New Commonwealth of Equals, Russia Remains the Dominant Force: Historical Status, Space-Age Arms Ensure Regional Primacy*, WASH. POST, Dec. 22, 1991, at A39.

122. Lardner, *supra* note 78, at A31 (quoting Robert Gates, Director of the Central Intelligence Agency). Russia's swift assumption of the Soviet Security Council seat may turn out to be a mixed blessing, especially if, as some former Soviet officials have warned, "The disintegration of the [Soviet] Union will be followed by the disintegration of the Russian [Republic]." Fred Hiatt, *Russia, Ukraine See Commonwealth Differently*, WASH. POST, Dec. 13, 1991, at A40. Autonomous Russian republics like Siberia, and autonomous territories such as Bashkortistan, Chechnya, Dagestan, and Tatarstan are already agitating for secession. See Stephan Kux, *Confederalism and Stability in the Commonwealth of Independent States*, 1 NEW EUR. L. REV. 387, 395 (1993). Simultaneously, Russia has begun to pursue aggressively the forcible reabsorption of several of the former Soviet republics. In particular, Russian troops have been active in supporting secessionist movements in Azerbaijan, Georgia, and Moldova. According to Paul Goble, a former State Department specialist on ethnic minorities in the U.S.S.R.,

[t]he key development of the last six months was the destruction of Georgian independence by the Russian army . . . The failure of the international community to say anything about this has been taken by the leaders of several other republics as a sign that the world would be totally unprepared to help them, regardless of what Moscow does.

Paul Quinn-Judge, *US is Said to Favor a Russian Sphere: Backing of Role in Ex-Republics*, BOSTON GLOBE, Jan. 14, 1994, at 1, 13. As a permanent member of the Security Council, Russia is in a position to implement such a policy with impunity, since it can veto any efforts by the Council to halt such action. For example, after the Soviet Union invaded Afghanistan in December of 1979, it vetoed a Security Council resolution that would have condemned the invasion. See BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 63 (1991).

123. See *Commonwealth Accords*, *supra* note 80; see also *supra* notes 111-12 and accompanying text.

the United Nations, while India's sovereignty had changed, at no time did it become legally extinct as a State. By the same logic, the Russian letter to the Secretary-General asserting that Russia was the continuation of the Soviet Union fortified Russia's case.¹²⁴

The timing of Russia's effort to inherit the Soviet seat may have also been important. Russia made its bid at a time when only the Security Council was in session and when the next session of the General Assembly was months away. Having participated in the Security Council for several months without objection, Russia minimized the possibility that members of the General Assembly would be able to challenge its assumption of the Soviet seat. As one involved diplomat remarked, "Frankly, we were lucky the General Assembly wasn't in session Otherwise we might have had howls of fury to contend with."¹²⁵

III. The Exclusion of the "New Yugoslavia"

A. The Dissolution of Yugoslavia and the Question of FRY Continuity

Prior to its fragmentation, the Socialist Federal Republic of Yugoslavia had an overall population of 23.7 million people and the third largest army in Europe.¹²⁶ Yugoslavia consisted of six republics: Serbia (with a population of 9.8 million people), Croatia (4.7 million), Bosnia-Herzegovina (4.1 million), Macedonia (2.1 million), Slovenia (1.9 million), and Montenegro (0.5 million).¹²⁷ The death of the great Yugoslav leader Joseph Broz Tito and the collapse of the Soviet Union unleashed the centrifugal forces which led to the country's disintegration beginning in June 1991.¹²⁸ Over the course of the next ten months, four of the six Yugoslav republics—Slovenia, Croatia, Macedonia, and Bosnia-Herzegovina—declared their independence and were formally recognized as sovereign States by the international community.¹²⁹ In response, Serbia sent the former Yugoslavia National Army (JNA) into Slovenia, Croatia, and Bosnia, setting off a conflict which by 1993 had claimed over 200,000 lives.¹³⁰ Together with local insurgent forces, the JNA quickly seized control of one-third of the territory of Croatia and two-thirds of Bosnia.¹³¹

On April 27, 1992, a joint session of the Parliamentary Assembly of the former Socialist Federal Republic of Yugoslavia, the National Assembly of the Republic of Serbia, and the Assembly of the Republic of Montenegro adopted a declaration expressing the will of the citizens of Serbia and

124. See Yeltsin U.N. Letter, *supra* notes 92, 113 and accompanying text.

125. See Lewis, *supra* note 94, at A6.

126. Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L L. 569 (1992).

127. *Id.*

128. See VIRGINIA MORRIS & MICHAEL SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 18 (1995).

129. See Weller, *supra* note 126, at 586-98.

130. *Id.*

131. *Id.*

Montenegro to "stay in the common State of Yugoslavia . . ." ¹³² At the time of this declaration, the U.N. Security Council was considering imposing economic sanctions against Serbia for its involvement in the hostilities in Croatia, Slovenia, and Bosnia. ¹³³ In this context, the Security Council was unlikely to approve an application by Serbia-Montenegro for new membership in the United Nations. Consequently, it was critically important to Serbia-Montenegro that it be viewed as the continuation of the former Yugoslavia so that it could circumvent the application process. Thus, the April 27 declaration proclaimed that the "Federal Republic of Yugoslavia (FRY) continu[es] the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia." ¹³⁴ To justify the treatment of the FRY as the continuation of the former Yugoslavia, Serb officials asserted that the FRY had "all the physical and material as well as legal conditions for Yugoslavia's uninterrupted identity and existence." ¹³⁵ A comparison between the Yugoslavian situation and the Russian and Indian precedents provides a framework for assessing that claim.

Several factors support the FRY's claim to be the continuation of the former Yugoslavia. First, the other former Yugoslav republics split off from Yugoslavia at different times. ¹³⁶ Second, the FRY never claimed to be a new State but rather maintained that it continued the legal personality of the former Yugoslavia after the breakaway of the other republics. Third, the FRY, like Russia, has the most land mass and largest population of all the Yugoslav republics. Serbia and Montenegro's combined territory of 102,000 square kilometers comprises forty percent of the territory of the former Yugoslavia, and its population of 10.3 million is forty-five percent of that of the former Yugoslavia. ¹³⁷ Just as Russia formed the historic hub of the Soviet Union, Serbia and Montenegro formed the historic nucleus of Yugoslavia, including the federal capital of Belgrade. ¹³⁸ The FRY retained most of the former Yugoslavia's central government institutions and control of a majority of the former Yugoslavia's federal armed

132. U.N. SCOR, 47th Sess., Annex, at 2, U.N. Doc. S/23877 (1992).

133. The Security Council ultimately adopted Resolution 757 on May 30, 1992, imposing sweeping sanctions on the Federal Republic of Yugoslavia (Serbia and Montenegro). S.C. Res. 757, U.N. SCOR, 47th Sess., 3082d mtg. at 1, U.N. Doc. S/RES/757 (1992).

134. U.N. SCOR, 47th Sess., Annex, U.N. Doc. S/23877 (1992).

135. Weller, *supra* note 126, at 595 (quoting *Statement of Vladislav Jovanović, Serbian Minister for Foreign Affairs at the Conference on Yugoslavia*, 1992 REV. INT'L AFF., No. IV, at 14, 15).

136. Croatia and Slovenia declared independence in June 1991, Macedonia declared independence in November 1991, and Bosnia-Herzegovina declared independence in March 1992. THE WORLD ALMANAC AND BOOK OF FACTS 1993, at 736, 815 (1992).

137. Yehuda Z. Blum, *U.N. Membership of the New Yugoslavia: Continuity or Break*, 86 AM. J. INT'L L. 830, 833 (1992).

138. THE WORLD ALMANAC AND BOOK OF FACTS 1993, at 815 (1992). Before the formation of the Kingdom of the Serbs, Croats, and Slovenes (which became Yugoslavia), only Serbia and Montenegro existed as independent States. The other Yugoslavian republics were former provinces of the Austro-Hungarian empire that never had independent status. *Id.*

forces.¹³⁹

The Yugoslavia situation and the earlier precedents, however, proved far from a perfect match. In contrast to Russia and India, Serbia and Montenegro together do not comprise a majority, let alone a substantial majority, of Yugoslavia's land, population, or resources.¹⁴⁰ Moreover, unlike Russia and India, no devolution agreement existed between the republics of the former Yugoslavia providing that the FRY shall continue the former Yugoslavia's membership in the United Nations. Indeed, the other former republics were quick to assert that Yugoslavia had dissolved and that the FRY should not be entitled to the former Yugoslavia's seat at the United Nations.¹⁴¹ Finally, by undertaking and supporting aggressive actions in Croatia, Slovenia, and Bosnia, the FRY provided the members of the United Nations with a strong political reason to block the FRY's effort to assume the Yugoslavia seat.¹⁴²

B. The Initial Reaction of the International Community

The United States, Canada, Japan, and most of the members of the European Community (EC) boycotted the April 27 ceremony inaugurating the FRY, and an EC spokesman declared that the disposition of the former Yugoslavia's seat at the United Nations was a matter that all the former members of the Yugoslav Federation had to decide together.¹⁴³ Later that week, when the FRY circulated a copy of the April 27 Declaration to the members of the Security Council,¹⁴⁴ Australia, Canada, the EC, and the United States responded by sending communications to the Presidents of the Security Council and the General Assembly expressly reserving their position as to whether the FRY should be treated as the continuation of the former Yugoslavia for purposes of membership in the United Nations.¹⁴⁵ Austria went even farther in its communication, stating that

139. See STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 102D CONG., 2D SESS., THE ETHNIC CLEANSING OF BOSNIA-HERZEGOVINA app. 1 at 37 (Comm. Print 1992) (on file with the *Cornell International Law Journal*).

140. See *supra* note 127 and accompanying text.

141. See, e.g., Letter from the Permanent Representative of Croatia to the United Nations (June 30, 1992)

(The Government of the Republic of Croatia considers that no state or other entity can automatically succeed the rights and obligations of former Socialist Federal Republic of Yugoslavia nor inherit its [sic] membership in the United Nations. It is therefore unacceptable that the so-called Federal Republic of Yugoslavia, consisting only of Serbia and Montenegro, assumes the seat of former Socialist Federal Republic of Yugoslavia to the United Nations.) (on file with the *Cornell International Law Journal*).

142. According to Edwin Williamson, the Legal Adviser of the U.S. Department of State at the time the issue of the FRY's membership in the United Nations first arose, treating the FRY as the continuation of the former Yugoslavia would have been "politically unpalatable." Williamson & Osborn, *supra* note 20, at 270.

143. Tony Barber, *West Cool on Serbia's 'New Yugoslavia'*, INDEPENDENT, Apr. 28, 1992, at 11; Dessa Trevison & Tim Judah, *Nations Boycott Ceremony Marking Birth of a Third Yugoslavia*, THE TIMES, Apr. 28, 1992, at 9.

144. U.N. SCOR, 47th Sess., Annex, U.N. Doc. S/23877 (1992).

145. U.N. GAOR, 46th Sess., Agenda Item 68, U.N. Doc. A/46/907 (1992) ("Australia wishes to place on record its view that the current participation of representatives of

“there is no legal basis for an automatic continuation of the legal existence of the former Socialist Federal Republic of Yugoslavia by the Federal Republic of Yugoslavia, which therefore cannot be considered to continue the Yugoslav membership in the United Nations.”¹⁴⁶

The issue next arose on May 22, 1992, when the Security Council and General Assembly voted to admit three of the other former Yugoslav republics as new members of the United Nations. The FRY circulated a document in the General Assembly, which stated:

the fact that the Republic of Slovenia, the Republic of Croatia, and the Republic of Bosnia and Herzegovina have become Member States of the United Nations in no way challenges the international legal personality and continuity of membership of the Federal Republic of Yugoslavia in the United Nations and its specialized agencies.¹⁴⁷

The United States responded in a statement to the General Assembly that “if Serbia and Montenegro desire to sit in the U.N., they should be required to apply for membership and be held to the same standards as all other applicants.”¹⁴⁸ According to the then Legal Adviser of the U.S. Department of State, “the U.S. position was very simple in this regard: because the SFRY no longer exists, and Serbia-Montenegro is not the continuation of, or the sole successor to, the former Yugoslavia, Serbia-Montenegro is not entitled to assume the seat of the former Yugoslavia in international organizations.”¹⁴⁹

Despite these statements, no immediate action was taken to prevent the FRY from participating in U.N. meetings. During the next several months, the United States consulted with foreign ministries around the world to enlist their support for the American strategy to oust the FRY from the United Nations.¹⁵⁰ There were several possible ways to accomplish the task consistent with the U.S. view that the FRY was not the contin-

the Federal Republic of Yugoslavia in meetings of international organizations is without prejudice to the eventual resolution of the question of the status of the Federal Republic of Yugoslavia.”); U.N. GAOR, 46th Sess., Annex, Agenda Item 68, U.N. Doc. A/46/905 (1992) (“The European Community and its member States have not accepted the automatic continuity of the Federal Republic of Yugoslavia in international organizations including the United Nations. At this stage, they reserve their position on this question.”); U.N. GAOR, 46th Sess., Agenda Item 68, U.N. Doc. A/46/906 (1992) (similar statement by the United States); U.N. GAOR, 46th Sess., Agenda Item 68, U.N. Doc. A/46/909, S/23883 (1992) (similar statement by Canada).

146. U.N. GAOR, 47th Sess., Annex, Agenda Item 69, U.N. Doc. A/47/201, S/23876 (1992).

147. U.N. GAOR, 46th Sess., Annex, Agenda Items 20 and 68, U.N. Doc. A/46/927 (1992).

148. Statement of Ambassador Edward J. Perkins, United States Permanent Representative to the United Nations, in the General Assembly, on the Admission of Bosnia and Herzegovina, Croatia, and Slovenia (May 22, 1992), Press Release USUN 35-(92) (May 22, 1992) (on file with the *Cornell International Law Journal*).

149. Williamson & Osborn, *supra* note 20, at 272.

150. See Frank J. Prial, *U.S. Quietly at Work to Oust New Yugoslavia from the U.N.*, N.Y. TIMES, June 14, 1992, at 25.

uation of the former Yugoslavia.¹⁵¹ One possibility was to mount a credentials challenge, as against South Africa in 1974.¹⁵² Another option was for the General Assembly to pass a resolution rejecting the FRY's claim to be the continuation of the former Yugoslavia, much as the General Assembly had unseated the delegation of the Nationalist Government as the representative of China in the United Nations in 1971.¹⁵³ A third option was for the General Assembly to act upon the recommendation of the Security Council, following the Charter's formula for other membership questions by analogy.¹⁵⁴

The permanent members of the Security Council found the last of these options the most attractive because, by requiring the approval of the Security Council as a prerequisite for General Assembly action, their ability unilaterally to block this type of action against other members in the future was preserved. During the last week of May 1992, the United States sought to implement its proposal as part of Resolution 757, which imposed economic sanctions on the FRY. The other permanent members of the Council, however, were not ready to take such action, and the language ultimately adopted in the resolution merely noted that the FRY's claim to the U.N. seat "has not been generally accepted."¹⁵⁵

One month later, a decision by the Arbitration Commission of the International Conference on the Former Yugoslavia¹⁵⁶ breathed new life

151. The Security Council and General Assembly could have acted to expel or suspend the FRY under articles 5 and 6 of the U.N. Charter, but that would have meant recognizing that the FRY was a member of the United Nations. Article 5 provides that "[a] Member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council." Article 6 similarly states that "[a] Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council."

152. See Alden Abbott et al., *The General Assembly, 29th Session: The Decredentialization of South Africa*, 16 HARV. INT'L L.J. 576 (1975). The United States, France, and the United Kingdom opposed the South Africa credentials challenge as a violation of the U.N. Charter. Since the South Africa delegation's credentials were technically in order, they argued that the credentials challenge was really a unilateral act by the General Assembly to suspend a member-State in violation of the requirements of article 5 of the U.N. Charter. See U.N. GAOR, 29th Sess., 2281st mtg. at 76-81, U.N. Doc. A/PV.2281 (1974); U.N. GAOR, 29th Sess., 2248th mtg. paras. 86-107, U.N. Doc. A/PV.2248 (1974).

153. See FOREIGN AFFAIRS AND NATIONAL DEFENSE DIVISION, LIBRARY OF CONGRESS, 98TH CONG., 1ST SESS., CREDENTIALS CONSIDERATIONS IN THE UNITED NATIONS GENERAL ASSEMBLY: THE PROCESS AND ITS ROLE 8 (Comm. Print 1983) [hereinafter CREDENTIALS CONSIDERATIONS].

154. See U.N. CHARTER art. 4 (admission of members), art. 5 (suspension of members), and art. 6 (expulsion of members).

155. John Goshko, *U.N. Votes Curbs on Yugoslavia*, WASH. POST, May 31, 1992, at A28.

156. The Conference for Peace in Yugoslavia was jointly created by the United Nations and the EC. Under its auspices, an arbitration commission was established with the consent of the parties to the conflict in the former Yugoslavia to rule on specific questions relating to the secession of the former Yugoslav republics. See Vladimir Djuro Degan, *Correspondents' Agora: U.N. Membership of the Former Yugoslavia*, 87 AM. J. INT'L L. 240 (1993).

into the U.S. proposal. On July 4, 1992, the Commission issued three opinions stating that the former Yugoslavia has been dissolved and that it "no longer exists"; that the FRY "is a new State"; and that none of the successor States, including the FRY, can claim sole entitlement to "the membership rights previously enjoyed by the Socialist Federal Republic of Yugoslavia."¹⁵⁷ While the FRY responded that the Commission's opinions went beyond the scope of the Arbitration Agreement and were therefore "null and void and non-binding,"¹⁵⁸ the EC decided that it would support proposals to bar the FRY from participating as the continuation of the former Yugoslavia in international bodies.¹⁵⁹

C. Security Council Resolution 777 and General Assembly Resolution 47/1

With the EC finally on board and the opening session of the General Assembly approaching, the United States felt the time was right to press the issue in the Security Council. The United States circulated a draft resolution that would have

[r]ecommend[ed] to the General Assembly that it deny the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations and that it confirm that Yugoslavia's membership in the United Nations has been extinguished.¹⁶⁰

In order to obtain Russian support, however, the resolution, as finally adopted, was substantially weakened¹⁶¹ to read:

Considering that the State formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist,

Recalling in particular resolution 757 (1992) which notes that "the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted",

1. *Considers* that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore *recommends* to the General Assembly that it decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for member-

157. Arbitration Commission of the International Conference on the Former Yugoslavia, Opinion Nos. 8, 9, and 10, *reprinted in* U.N. GAOR, 48th Sess., Annex, Agenda Item 8, U.N. Doc. A/48/874, S/1994/189 (1994).

158. U.N. SCOR, 49th Sess., at 3, U.N. S/1994/398 (1994).

159. *See* EC Declaration of 20 July 1992: Participation of Yugoslavia in International Bodies (on file with the *Cornell International Law Journal*).

160. *Id.* Annex 1 (reproducing U.S. draft resolution).

161. *See* Andrew Katell, *U.N. Council Urges Ouster of Yugoslavia*, WASH. POST, Sept. 24, 1992, at 1 ("The Resolution was watered down in private meetings over the past week largely to satisfy Russian objections, diplomats said. Russia, which has the power to veto resolutions, worried that excluding Yugoslavia entirely from the United Nations would isolate it and hinder peace talks.").

ship in the United Nations and that it shall not participate in the work of the General Assembly;

2. *Decides* to consider the matter again before the end of the main part of the forty-seventh session of the General Assembly.¹⁶²

As adopted, Resolution 777 contains language that is ambiguous and internally inconsistent. On the one hand, the resolution appears to reflect the U.S. view that Yugoslavia has ceased to exist and that the FRY must apply for membership in the United Nations. On the other, the only consequence that the resolution draws is that the FRY shall not participate in the work of the General Assembly. Normally, one would turn to the Security Council's record of debate to illuminate an ambiguously worded text. In this case, however, the statements made by the members of the Council at the time of voting on the resolution were as inconsistent as the language of the resolution itself.¹⁶³

To enable the reader to appreciate these contradictions fully, the statements of Russia and the United States are quoted at some length below. Before voting on the resolution, Russia stated:

The delegation of the Russian Federation is ready to support the draft resolution agreed upon by members of the Security Council in the course of their consultations, on the basis of the fact that the prevailing view in the international community is that none of the republics that have emerged in the place of the former Socialist Federal Republic of Yugoslavia can claim automatic continued membership in the United Nations. We agree that the Federal Republic of Yugoslavia, like other former Yugoslav republics, will have to apply for membership in the United Nations, and we will support such an application.

At the same time, we were unable to agree with the proposal, put forward by some States, that the Federal Republic of Yugoslavia should be excluded formally or de facto from membership in the United Nations

The compromise that has been reached—that the Federal Republic of Yugoslavia should not participate in the work of the General Assembly—may seem unsatisfactory to some At the same time, the decision to suspend the participation of the Federal Republic of Yugoslavia in the work of the General Assembly will in no way affect the possibility of participation by the Federal Republic of Yugoslavia in the work of other organs of the United Nations, in particular the Security Council, nor will it affect the issuance of documents to it, the functioning of the Permanent Mission of the Federal Republic of Yugoslavia to the United Nations or the keeping of the nameplate with the name Yugoslavia in the General Assembly Hall and the rooms in which the Assembly's organs meet.¹⁶⁴

The United States, on the other hand, made the following statement:

For the first time, the United Nations is facing the dissolution of one of its Members without agreement by the successor States on the status of the original United Nations seat. Moreover, none of the former republics of

162. S.C. Res. 777, U.N. SCOR, 47th Sess., 3116th mtg. at 1, U.N. Doc. S/RES/777 (1992).

163. See U.N. SCOR, 47th Sess., 3116th mtg. at 1-17, U.N. Doc. S/PV.3116 (1992).

164. *Id.* at 2-4.

the former Yugoslavia is so clearly a predominant portion of the original State as to be entitled to be treated as the continuation of that State. For these reasons, and in the absence of agreement among the former republics on this issue, my Government has made it clear all along that we cannot accept Serbia and Montenegro's claim to the former Yugoslavia's United Nations seat.

We are gratified that the current resolution endorses this view and recommends that the General Assembly take action to confirm that the membership of the Socialist Federal Republic of Yugoslavia has expired and because Serbia and Montenegro is not the continuation of the Socialist Federal Republic of Yugoslavia it must apply for membership if it wishes to participate in the United Nations.

I would like to comment on the provision of the resolution that Serbia and Montenegro shall not participate in the work of the General Assembly. This provision flows inevitably from the determination by the Council and the General Assembly that Serbia and Montenegro is not the continuation of the former Yugoslavia and must apply for membership in the United Nations. To state the obvious, a country which is not a member of the United Nations cannot participate in the work of the General Assembly.¹⁶⁵

Russia thus maintained that the resolution merely "suspended" the FRY from the work of the General Assembly and permitted the FRY to continue to participate in all other respects as a member of the United Nations. The United States, on the other hand, asserted that the action confirmed that Yugoslavia's membership had "expired" and that the FRY could not participate in the work of the General Assembly because it was not a member of the United Nations. The United Kingdom attempted to clarify the matter when it introduced General Assembly Resolution 47/1,¹⁶⁶ implementing the Security Council's recommendation:

The text before us does two things. First, the Assembly would decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not participate in the work of the General Assembly: this means in particular that no representative of the Federal Republic of Yugoslavia will sit in the seat of Yugoslavia in any organ of the Assembly. Second, the Assembly would decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) would apply for membership in the United Nations. In other words, as regards the need to submit an application for membership, the Federal Republic of Yugoslavia (Serbia and Montenegro) is in precisely the same position as other components of the former Socialist Federal Republic of Yugoslavia. . . .

In no sense is this draft resolution a punitive measure, nor one designed to undermine the peace process. Quite the contrary. It is a measure that we have been forced to take by the completely unjustified claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to represent

165. *Id.* at 12-13. France similarly stated, "In this respect, [the resolution] confirms and translates into reality the international community's rejection of the automatic continuation in the United Nations of the former Socialist Federal Republic of Yugoslavia by the Federal Republic of Yugoslavia." *Id.* at 12.

166. G.A. Res. 47/1, 47th Sess., Agenda Item 8, U.N. Doc. A/RES/47/1 (1992). The General Assembly resolution repeats the same language contained in Security Council Resolution 777.

the continuity of the Socialist Federal Republic of Yugoslavia.¹⁶⁷

Yet, the United Kingdom's statement served only to muddle the issue further. By stating that the resolution was not designed as a "punitive measure" but was necessary because of the FRY's "completely unjustified claim" to be the continuity of the former Yugoslavia, it seemed to support the U.S. view as opposed to Russia's characterization of the measure as a "suspension." On the other hand, by stating that the FRY representatives "may not sit in the seat of Yugoslavia in any organ of the Assembly," it gave support to the position that the action was not intended to limit the FRY's continuing participation in other U.N. bodies.

Understandably, some members of the U.N. Secretariat were initially confused about the meaning of this resolution. The morning after Resolution 47/1 was adopted, the flag of Yugoslavia was not raised with those of the other members of the United Nations.¹⁶⁸ When asked at a press briefing if that meant Yugoslavia's membership in the organization had expired as the United States had asserted, the spokesman for the President of the General Assembly responded that "a misunderstanding of a technical nature had occurred and that the flag would be hoisted within the next 30 minutes."¹⁶⁹ He added "that there were still 179 Member States of the United Nations."¹⁷⁰ In an attempt to settle the matter, Croatia and Bosnia transmitted a letter to the Secretary-General requesting a legal opinion as to the FRY's status in the United Nations.¹⁷¹ The FRY, in turn, sent a letter to the Secretary-General arguing for a narrow interpretation of Security Council Resolution 777 and General Assembly Resolution 47/1.¹⁷²

On September 29, then Under-Secretary-General for Legal Affairs of the United Nations, Carl-August Fleischhauer, circulated a legal opinion on the meaning of the resolutions, which stated as follows:

The following sets forth the understanding of the United Nations Secretariat regarding the practical consequences of the resolution.

1. While the General Assembly has stated unequivocally that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot automatically con-

167. U.N. GAOR, 47th Sess., Agenda Item 8, at 141-44, U.N. Doc. A/47/PV.7 (1992).

168. DPI Daily Press Briefing, Sept. 23, 1992 (statement of Alexander Taukatch, spokesman for the President of the General Assembly) (on file with the *Cornell International Law Journal*).

169. *Id.*

170. *Id.*

171. If a country has to apply for membership in the United Nations—as stated in paragraph 1 of General Assembly resolution 47/1—it is our understanding that the country in question is not a member until and when the application has been accepted by the General Assembly, upon the recommendation of the Security Council.

U.N. GAOR, 47th Sess., Agenda Item 8, at 2, U.N. Doc. A/47/474 (1992).

172. "Resolution 47/1 stipulates Yugoslavia's non-participation in the work of the General Assembly. This decision does not affect its membership in the United Nations and therefore the question of the flag and the name-plate of Yugoslavia in the General Assembly should not be brought up." U.N. GAOR, 47th Sess., Annex, Agenda Item 8, para. 1, U.N. Doc. A/47/478, S/24599 (1992).

tinue the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations and that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations, the only practical consequence that the resolution draws is that the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not *participate* in the work of the General Assembly.

2. Representatives of the Federal Republic of Yugoslavia can no longer *participate* in the work of the General Assembly, its subsidiary organs, nor conferences and meetings convened by it.

3. The resolution neither terminates nor suspends Yugoslavia's *membership* in the Organization. Consequently,

a) The seat and nameplate remain as before, but in Assembly bodies representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot sit behind the sign "Yugoslavia." In addition, Yugoslav missions at United Nations Headquarters and offices may continue to function and may receive and circulate documents. At Headquarters, the Secretariat continues to fly the flag of the old Yugoslavia as it is the last flag of Yugoslavia used by the Secretariat.

b) The resolution does not take away the right of Yugoslavia to participate in the work of organs other than Assembly bodies.

c) The admission to the United Nations of a new Yugoslavia under Article 4 of the Charter will terminate this situation.

4. Resolution 47/1 applies directly only to the United Nations and is not legally binding on the specialized and related agencies.¹⁷³

The members of the United Nations were generally taken aback by the spin the U.N. Legal Counsel had given the resolutions. By a vote of 109 in favor and 57 opposed, the General Assembly adopted a resolution "urg[ing] Member States and the Secretariat in fulfilling the spirit of resolution 47/1, to end the de facto working status of Serbia and Montenegro."¹⁷⁴ Under pressure from the Islamic countries in particular, the Security Council adopted Resolution 821, which "*recommend[ed]* to the General Assembly that, further to the decisions taken in resolution 47/1, it decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not participate in the work of the Economic and Social Council,"¹⁷⁵ the other major organ of the United Nations.¹⁷⁶ At the same time, efforts were launched to exclude the FRY from participating in U.N. specialized

173. Letter from Carl-August Fleischhauer, Under-Secretary-General for Legal Affairs, to Kenneth Dadzie, Under-Secretary-General, United Nations Conference on Trade and Development (UNCTAD) (Sept. 29, 1992) [hereinafter Fleischhauer Letter] (on file with the *Cornell International Law Journal*). Identical letters were sent to all United Nations Organs and the specialized and related agencies.

174. G.A. Res. 48/88, U.N. GAOR, 48th Sess., Agenda Item 42, para. 19, U.N. Doc. A/RES/48/88 (1993).

175. S.C. Res. 821, U.N. SCOR, 47th Sess., 3204th mtg. at 1, U.N. Doc. S/RES/821 (1993). The General Assembly implemented the Security Council's recommendation through G.A. Res. 47/229, U.N. GAOR, 47th Sess., Agenda Item 8, U.N. Doc. A/RES/47/229 (1993).

176. The FRY does not have a seat on the Security Council or the Trusteeship Council, and there is no FRY Judge on the International Court of Justice. Thus, this action effectively excluded the FRY from participating as a member in all of the United Nations organs and their subsidiary bodies.

and related agencies. While the U.N. Legal Counsel's opinion had said that the resolutions were not legally binding on the specialized and related agencies, this was not viewed as precluding action on their part to exclude the FRY through their own resolutions.¹⁷⁷ During the next few months, the International Civil Aviation Organization,¹⁷⁸ the International Fund for Agricultural Development,¹⁷⁹ the International Maritime Organization,¹⁸⁰ the United Nations Industrial Development Organization,¹⁸¹ the World Health Organization,¹⁸² and several other organiza-

177. Technically, with respect to membership issues, the main organs of the United Nations and the specialized agencies are autonomous and thus the General Assembly could not impose its will upon them. Nevertheless, in 1950, in response to the dispute over whether the People's Republic of China or the Republic of China should represent China in the United Nations, the General Assembly adopted Resolution 396 (V), which provided that the position of the General Assembly on membership questions should be taken into account in other bodies of the U.N. system. The purpose of this resolution was to ensure that "a Member State [w]ould not be represented in a different manner in various organs of the United Nations." 1 REPERTORY OF PRACTICE OF UNITED NATIONS ORGANS 286 (1955). This precedent suggests that, with respect to the question of the FRY's membership, the specialized agencies should be guided by the position taken by the General Assembly.

178. *Second Report of the ICAO Credentials Committee*, U.N. ICAO, 29th Sess., U.N. Doc. A29-WP/125 (Sept. 24, 1992). By a vote of 101 in favor to 3 opposed, with 35 abstentions, the Assembly decided "that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in ICAO pursuant to chapter 21 of the Chicago Convention on International Civil Aviation and that it shall not participate in the work of ICAO." (on file with the *Cornell International Law Journal*).

179. "The Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in IFAD, in accordance with the provisions of the Agreement Establishing IFAD; and that, in the meantime, the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not participate in the work of the governing bodies of IFAD." *Member Status of Yugoslavia*, U.N. IFAD, 16th Sess., U.N. Doc. GC 16/INF.4 (Dec. 17, 1992) (on file with the *Cornell International Law Journal*).

180. Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in IMO; and decides that the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not participate in the work of IMO until its membership in the Organization has been accomplished.

Report of the Status of the Convention and Membership of the Organization, U.N. IMO, 70th Sess., Agenda Item 3, Annex, U.N. Doc. C 70/3/1 (Mar. 17, 1993) (on file with the *Cornell International Law Journal*).

181. [D]ecides that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in UNIDO pursuant to article 3 of the Constitution of the United Nations Industrial Development Organization and that it shall not participate in the work of the Programme and Budget Committee, the Industrial Development Board and the General Conference of UNIDO.

Participation of the Federal Republic of Yugoslavia (Serbia and Montenegro) in the Principal and Subsidiary Organs of the United Nations Industrial Development Organization, U.N. UNIDO, 2d plen. mtg., U.N. Doc. GC/S.1/Res.1 (Mar. 30, 1993).

182. Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in WHO pursuant to the relevant provisions of the Constitution of the World Health Organization and that it shall not participate in the work of the principal and subsidiary organs of WHO, including the Forty-sixth World Health Assembly.

Participation of the Federal Republic of Yugoslavia (Serbia and Montenegro) in the Principal and Subsidiary Organs of WHO, U.N. WHO, 46th Sess., 1st plen. mtg., Supp. Agenda Item 1, U.N. Doc. WHA46.1 (May 3, 1993).

tions adopted resolutions modeled after General Assembly Resolution 47/1.

D. Making Sense of the FRY Precedent

Commentators have argued over the meaning of Security Council Resolution 777 and General Assembly Resolution 47/1,¹⁸³ and even the International Court of Justice has stated that the solution adopted through those resolutions "is not free from legal difficulty."¹⁸⁴ Clearly, the resolutions did not achieve the specific result the United States had sought, namely the complete exclusion of the FRY from the United Nations until such time as it is formally admitted on the legal ground that it was not the continuation of the former Yugoslavia. At the same time, the U.N. action cannot be viewed as merely a disguised suspension as the Russian delegation characterized it. First, the primary sponsor of Resolution 47/1 explicitly stated when introducing the resolution that this was not a punitive measure but was the legally compelled result of the FRY's unjustified claim to be the continuation of the former Yugoslavia. Second, the relevant resolutions all make clear that the only way the FRY can participate again in the General Assembly, Economic and Social Council, and various specialized agencies is to apply and be admitted as a new member. The resolutions, in effect, placed the FRY's membership in a sort of twilight zone pending its admission into the organization as a new member. This interim arrangement allowed the FRY to operate a U.N. mission and circulate documents but excluded the FRY from participating as a member in the vast majority of bodies within the U.N. system.

The solution crafted by the Security Council was obviously motivated by political factors, most importantly (1) the desire to preserve the Council's control over this type of membership question rather than allow the General Assembly to act unilaterally on the issue, and (2) the desire to maintain continuing contacts with FRY authorities at the United Nations to facilitate a peace settlement. In reaching this decision, however, the United Nations did not simply disregard the U.N. Charter and U.N. precedent. Rather, the decision was guided by the principles adopted by the Sixth Committee in 1947, which suggested that a State would cease to be a member of the United Nations if "the extinction of the State as a legal personality" could be shown.¹⁸⁵ Nor were the India and Russia precedents overlooked in deciding to exclude the FRY from participation. Rather, the distinctions between the FRY situation and those precedents formed

183. See, e.g., Blum, *supra* note 137; Degan, *supra* note 156; Ove E. Bring, *Correspondents' Agora: UN Membership of the Former Yugoslavia*, 87 AM. J. INT'L L. 244 (1993); M. Kelly Malone, *Correspondents' Agora: UN Membership of the Former Yugoslavia*, 87 AM. J. INT'L L. 246 (1993); Yehuda Z. Blum, *Correspondents' Agora: UN Membership of the Former Yugoslavia*, 87 AM. J. INT'L L. 248 (1993).

184. Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugo. (Serbia and Montenegro)*), 1993 I.C.J. 14 (Apr. 8).

185. See *supra* note 31 and accompanying text.

the basis of the decision. Thus, the U.N. Legal Counsel's opinion stresses that 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 Member State on which there is no agreement among the immediate successors of that State or among the membership of the Organization at large.¹⁸⁶

E. Rebirth of the Forgotten Alternative

For nearly fifty years, the United Nations has approached succession to membership as a question of continuity. Since deciding in 1947 that both India and Pakistan could not succeed to the British India seat, it has never looked back. One U.N. specialized agency, however, has recently departed from the continuity theory and the India/Pakistan precedent. While the United Nations was wrestling with the question of whether the FRY could be deemed the continuity of Yugoslavia, the International Monetary Fund (IMF) decided to allow Bosnia, Croatia, Slovenia, Macedonia, and the FRY all to succeed to the membership of the former Yugoslavia.¹⁸⁷ Under this approach, "the successor will be considered to have been a member without interruption since the dissolution of the SFRY and to have continued, for its share, the membership of the SFRY in the IMF."¹⁸⁸

The IMF's solution to the problem stands in stark contrast to the conventional view that, because of the personal nature of membership in an organization, the only way membership can be retained after the breakup of a member-State is through a finding of continuity.¹⁸⁹ The IMF plainly selected the one alternative that the United Nations decided to forego in determining succession to membership. The United Nations would soon be presented with a case—the breakup of Czechoslovakia—in which the IMF's approach would better serve its political interests than strict adher-

186. Fleischhauer Letter, *supra* note 173, at 1.

187. International Monetary Fund, Press Release No. 92/92, at 1 (Dec. 15, 1992) (on file with the *Cornell International Law Journal*). The IMF required only that each republic agree to the division of the former Yugoslavia's assets and liabilities arrived at by the IMF, namely: Bosnia—13.20%; Croatia—28.49%; Macedonia—5.40%; Slovenia—16.39%; and FRY—36.52%. *Id.*

188. *Id.* at 2. The IMF established the following conditions as a prerequisite to succession: (1) notification to the IMF that the State agrees to the allocation of its share in the assets and liabilities of Yugoslavia; (2) notification to the IMF that the State agrees to succeed to the membership in accordance with the terms and conditions specified by the IMF and has taken all necessary steps to enable it to succeed to such membership and carry out all of its obligations under the IMF Articles of Agreement; (3) a determination has been made by the IMF that the State is able to meet its obligations under the Articles; and (4) the State has no overdue financial obligations to the IMF. See Paul R. Williams, *State Succession and the International Financial Institutions: Political Criteria v. Protection of Outstanding Financial Obligations*, 43 INT'L & COMP. L.Q. 776, 803 (1994). Pursuant to these conditions, the IMF allowed Slovenia, Croatia, Bosnia-Herzegovina, and Macedonia to succeed to membership but denied Serbia-Montenegro's request for succession on the basis that it would not be able to meet the third condition while under U.N.-imposed economic sanctions. *Id.*

189. See *supra* note 64 and accompanying text.

ence to the continuity theory. The U.N. response to the Czechoslovakia case would therefore test the value placed on precedent in deciding membership issues.

IV. The Czechoslovakia Split

A. The Velvet Divorce

On January 1, 1993, in what has become known as the "velvet divorce," the country of Czechoslovakia divided into the newly independent Czech Republic and Slovak Republic.¹⁹⁰ Following the India and Russia precedents, the Czech Republic—which made up a substantial majority of the territory, population, and resources of the former Czechoslovakia—had a strong case for continuing Czechoslovakia's U.N. membership.¹⁹¹ Two weeks before the division, however, Czechoslovakia's Ministry of Foreign Affairs informed the United Nations that "the Czech and Slovak Federal Republic [CSFR] as well as the CSFR membership of the United Nations will cease to exist on December 31, 1992. Both successor States—the Czech Republic and the Slovak Republic—are determined to apply for the U.N. membership in the very first days of 1993."¹⁹²

Like India and Russia, the Czech and Slovak republics had entered into a devolution agreement.¹⁹³ Their agreement, however, did not provide for Czechoslovakia's membership in the United Nations and related bodies to devolve on one of the two new States. Rather, it purported to divide up Czechoslovakia's membership between the two.¹⁹⁴

190. See Mathernová, *supra* note 6.

191. Mary Battiata, *Czechs, Slovaks Set 'Velvet Divorce'*, WASH. POST, Aug. 28, 1992, at A25. The former Czechoslovakia had a territory of 49,365 square miles, a population of 16 million, and a gross domestic product of \$120 billion. After the split, the Czech Republic's territory was 30,500 square miles, its population was 10.5 million, and its gross domestic product was \$75.3 billion; the Slovak Republic's territory was only 19,000 square miles, its population was 5.5 million, and its gross domestic product was \$32.1 billion. See THE WORLD ALMANAC AND BOOK OF FACTS 1993, at 747 (1992); THE WORLD ALMANAC AND BOOK OF FACTS 1995, at 760, 818 (1994).

192. Department of State Cable No. Prague 10971 (Dec. 17, 1992) (captioned "Text of Czechoslovak Diplomatic Note on UN Membership for Czech and Slovak Republics") (on file with the *Cornell International Law Journal*).

193. See Membership Agreement, *supra* note 7.

194. The Czech Republic would have inherited Czechoslovakia's membership in the U.N. Committee on the Peaceful Uses of Outer Space, the U.N. Committee on Decolonization, the Special Committee on the Charter of the United Nations, the U.N. Statistical Commission, the U.N. Commission on Narcotic Drugs, the UNICEF Executive Board, and the U.N. Commission on Human Rights, among others. *Id.* at 2.

The Slovak Republic would have assumed the Czechoslovakia seat in the United Nations Industrial Development Organization, the United Nations Development Program, the United Nations Environmental Program, the United Nations Committee on the Effects of Atomic Radiation, the United Nations Commission on International Trade Law, the U.N. Committee on Information, the U.N. Commission on the Status of Women, and the U.N. Conference on Disarmament, among others. *Id.*

B. The United Nations Response

The U.N. Legal Counsel circulated an opinion stating that "Czechoslovakia has ceased to exist as of 1 January 1993; there was no continuity by an entity under the same or different name. The membership of the United Nations was reduced to 178 as of that date."¹⁹⁵ As a consequence, the United Nations took the position that the seats that had been occupied by the former Czechoslovakia in U.N. subsidiary organs became vacant as of January 1, 1993.¹⁹⁶

On January 19, 1993, the General Assembly, acting on the recommendation of the Security Council,¹⁹⁷ approved the admission of the Slovak Republic and the Czech Republic as new members of the United Nations.¹⁹⁸ The United Nations did not, however, allow the Czech Republic and Slovak Republic automatically to fill the vacancies created by the extinction of Czechoslovakia's membership. Instead, it required that the vacancies be filled through the method appropriate to each body, namely by appointment of the President of the General Assembly, by nomination of the President of the General Assembly and agreement of the members of the General Assembly, or by formal elections.¹⁹⁹ Similarly, the U.N. Specialized Agencies took the position "that neither one nor both of the newly formed republics can automatically continue the membership of Czechoslovakia in the agency concerned. Consequently the new republics will be admitted as new members according to the procedures established in the constitution of the respective agencies."²⁰⁰

The Czechoslovakia case confirmed a number of points concerning succession to membership in the United Nations. First, only one State can be the continuation of a former member. The Czech and Slovak republics' effort to divide the former Czechoslovakia's seat in U.N. subsidiary

195. Memorandum from the President of the Council of the International Civil Aviation Organization to the Representatives of the Council, ICAO Doc. Pres AK/339, E 1/1.16, at 2 (Jan. 28, 1993) (summarizing U.N. Legal Counsel's opinion) (on file with the *Cornell International Law Journal*).

196. U.N. GAOR, 47th Sess., Agenda Item 8, at 1, U.N. Doc. A/47/861 (1993). The IMF, in contrast, consistent with its decision concerning the dissolution of Yugoslavia, permitted the Czech Republic and Slovakia to succeed to the membership of the former Czechoslovakia without going through the admissions process. See Williams, *supra* note 188, at 806.

197. See S.C. Res. 800, U.N. SCOR, 47th Sess., 3157th mtg., U.N. Doc. S/RES/800 (1993) (recommending admission of the Slovak Republic); S.C. Res. 801, U.N. SCOR, 47th Sess., 3158th mtg., U.N. Doc. S/RES/801 (1993) (recommending admission of the Czech Republic).

198. G.A. Res. 47/221, U.N. GAOR, 47th Sess., Supp. No. 49, at 5, U.N. Doc. A/47/49 (1993) (admitting the Slovak Republic); G.A. Res. 47/222, U.N. GAOR, 47th Sess., Supp. No. 49, at 5-6, U.N. Doc. A/42/49 (1993) (admitting the Czech Republic).

199. See Department of State Cable No. State 35419 (Feb. 5, 1993) (captioned "U.S. Views on Czech and Slovak Membership in U.N. Specialized Agencies") (on file with the *Cornell International Law Journal*).

200. Memorandum from the President of the Council of the International Civil Aviation Organization to the Representatives of the Council, ICAO Doc. Pres AK/339, E 1/1.16, at 2 (Jan. 28, 1993) (summarizing U.N. Legal Counsel's opinion) (on file with the *Cornell International Law Journal*).

bodies and specialized agencies was viewed as incompatible with this principle. Second, the case indicates that, notwithstanding the strength of the factors counseling for a finding of continuity, a would-be successor foregoes the continuity option if it applies for and is admitted into the United Nations as a new member. In other words, a State cannot simultaneously be a new member and a continuing member of the United Nations.

Conclusion

In the aftermath of the Cold War, the State system has become increasingly fluid, with the centrifugal forces of nationalism perpetually eroding the glue that binds federal States. Across the globe, the recent spate of secessions and dissolutions shows no sign of abating. For example, Canada may soon lose the province of Quebec to secession, North and South Yemen may soon (again) split into two countries, Iraq, Somalia, and Ethiopia totter toward disintegration, and a recent U.S. Defense Department report concluded that "China fares a 50-50 chance of breaking up Soviet-style after the death of leader Deng Xiaoping."²⁰¹ As Professor Oscar Schachter recently observed, "these events are not only the stuff of history; they foreshadow the future."²⁰²

Before 1991, U.N. decisions on membership succession were largely governed by a single precedent, the India/Pakistan split, and the general principles propounded by the U.N. Legal Committee in 1947 in response to that case. With the recent breakup of the U.S.S.R., Yugoslavia, and Czechoslovakia, there now exists a sufficient range of precedent to map with some precision the contours of U.N. law of succession to membership.

Under the generally accepted legal theory of succession to membership in international organizations, succession is possible only if the successor can establish sufficient legal identity with the former member. The India, U.S.S.R., Yugoslavia, and Czechoslovakia cases suggest that in determining whether a potential successor is the continuation of the member or whether the member's international personality has been extinguished, the relevant factors include whether the potential successor has: (a) a substantial majority of the former member's territory (including the historic territorial hub), (b) a majority of its population, (c) a majority of its resources, (d) a majority of its armed forces, (e) the seat of the government and control of most central government institutions, and (f) entered into a devolution agreement on U.N. membership with the other components of the former State.

201. See Fred Langan, *Quebec Separatists Grow in Confidence*, BOSTON GLOBE, Dec. 29, 1993, at 11; Marguerite Michaels, *Yemen: Splitting at the Seam*, TIME, May 23, 1994, at 43; Jim Hoagland, *New World Disorder*, WASH. POST, Apr. 23, 1992, at A23; *Study Says China Faces Disarray After Deng Dies*, USA TODAY, Jan. 31, 1995, at 2.

202. Oscar Schachter, *State Succession: The Once and Future Law*, 33 VA. J. INT'L L. 243 (1993).

There were two main reasons why India and Russia were treated as continuation cases and Yugoslavia and Czechoslovakia were treated as dissolutions. First, the United Nations placed great emphasis on the existence of devolution agreements which provided that Russia would be entitled to the Soviet Union's membership in international organizations and that India would be entitled to British India's membership in international organizations. No such agreement existed between the components of the former Yugoslavia, and the agreement between the Czech and Slovak Republics purported to divide up seats within U.N. subsidiary bodies and specialized agencies—something which is not compatible with the all-or-nothing nature of continuity. Second, both Russia and India constituted a substantial majority of the former State's territory and had a majority of its population and resources. The FRY, in contrast, occupied only forty percent of the former Yugoslavia's territory and possessed only forty-five percent of the former Yugoslavia's population and significantly less of its resources. The Czech Republic, on the other hand, could have made a compelling case for continuity based on its size, population, and resources, but it forfeited the option when it applied for U.N. membership as a new State.

Given the political nature of the United Nations, it would have come as no real surprise if it handled the question of succession to membership in a completely ad hoc basis without any passing reference to precedent or legal doctrine. While one might still be able to explain the disposition of the U.S.S.R., Yugoslavia, and Czechoslovakia seats as a function of politics, the results were in fact enunciated in the context of previously established principles and precedent. There are a variety of reasons why this should be so. First, the development of, and adherence to, generally applicable rules of succession to membership has the practical benefit of predictability and fairness in future cases. Second, the appeal to the authority of law in deciding membership questions reflects an acknowledgment that the U.N. Charter is ultimately a multinational treaty whose interpretation and application should be based on legal principles. Third, in light of the biting criticism the United Nations endured during the twelve years it refused without legal justification to allow the government of the People's Republic of China to represent China in the Security Council and General Assembly, U.N. members are now especially sensitive to the public perception of the United Nations as an organization whose membership questions are governed by the rule of law.²⁰³ Even today's most powerful countries desire to avoid what may appear to be acts of arbitrary discretion in deciding such questions, especially in the very public forum of the U.N. General Assembly. This is not to suggest that the rules governing succession to membership have not been, or cannot be, manipulated for political reasons; what is significant is that the members of the United Nations have found it in their interests to act (or at least to depict their actions)

203. See CREDENTIALS CONSIDERATIONS, *supra* note 153.

concerning membership succession in conformity with legal principles and precedent.

On the other hand, it makes little sense for the United Nations to continue to follow a rule simply because it was promulgated in the early years of its existence. It makes still less sense "if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."²⁰⁴ While the continuity approach may have made sense during the Cold War, in an era in which U.N. membership is said to be "universal,"²⁰⁵ there is no compelling reason why all of the successor States should not be permitted to inherit the predecessor State's membership in the same way new States succeed to multilateral treaties.²⁰⁶ To the extent a successor State, such as the FRY, persists in violating the principles contained in the U.N. Charter, rather than reject its claim to membership based on a theory of discontinuity, the better approach might be to expel or suspend the member under articles 5 and 6 of the Charter. Now that the International Monetary Fund has departed from the continuity approach in dealing with succession to Yugoslavia's and Czechoslovakia's membership,²⁰⁷ the time seems ripe for the United Nations to revisit the continuing logic of the India/Pakistan precedent in a manner that does not disrupt its commitment to the rule of law, perhaps by requesting the International Law Commission²⁰⁸ to undertake a thorough study of the question of succession to membership in the United Nations.

204. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

205. There are few countries that have not become full members of the United Nations. Notable holdouts include Switzerland, which believes U.N. membership might interfere with its tradition of neutrality, and Taiwan, which has not yet relinquished its claim to be the legitimate government of China.

206. See Vienna Convention, *supra* note 19. With respect to States that are members of the Security Council, the successors to such a State would be permitted to inherit its general membership in the United Nations, but only one successor State could inherit its seat in the Council, since the number of members of the Security Council is expressly limited by the U.N. Charter. U.N. CHARTER art. 23, para. 1.

207. See *supra* part III.E.

208. The International Law Commission is a group of 34 distinguished international legal experts elected by the General Assembly to serve five-year terms with a mandate to encourage "the progressive development of the international law and its codification." NEW ZEALAND MINISTRY OF EXTERNAL RELATIONS AND TRADE, *supra* note 43, at 25.

