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Ultra Vires, International Court of Justice, Judicial Review, Jurisdiction, United Nations

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EVYATAR LEVINE

I. STRANGE "DECISIONS," STRANGER CONCLUSIONS

On December 4, 1975, the United Nations Security Council accorded to the Palestine Liberation Organization an "invitation" to participate in its debate concerning Israeli attacks directed at Palestinian refugee camps on Lebanese territory.¹ Nine members voted in favor of the resolution, three opposed (Costa Rica, the United Kingdom, and the United States), and three abstained. By a vote of eleven to one (the United States opposing), a similar "decision" was adopted on January 12, 1976. Both decisions purported to confer on the PLO "the same rights of participation as are conferred when a Member State is invited to participate under rule 37"² (of the Council's Provisional Rules of Procedure).³ But as is clear from the wording and spirit of the resolutions, the Council did not regard the PLO as a state. Nor, of course, does the PLO consider itself to be a state.⁴

Nevertheless, Dr. Anis Kassim stated in his recent article on the juridical status of the PLO that "the Council's invitation represents a

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1. 30 U.N. SCOR (1859th mtg.) 3, U.N. Doc. S/PV.1859 (1975).

2. *Id.*; 31 U.N. SCOR (1870th mtg.) 12, U.N. Doc. S/PV.1870 (1976). "Invitation" and "decision" are in quotation marks because the presidents of both meetings were wrong in declaring the resolutions adopted, in view of the fact that two permanent members (the United States and the United Kingdom) voted against the former resolution and one permanent member (the United States) voted against the latter. For this and other reasons, it will be argued, the two resolutions are null and void. See also Gross, *Voting in the Security Council and the PLO*, 70 AM. J. INT'L L. 470 (1976).

3. Rule 37 of the Provisional Rules of Procedure of the Security Council refers to the invitation of

any Member of the United Nations which is not a member of the Security Council . . . to participate without vote in the discussion of any question brought before the Security Council when the Security Council considers that the interests of that Member are specially affected, or when a Member brings a matter to the attention of the Security Council in accordance with Article 35(1) of the Charter.

4. See Kassim, *The Palestine Liberation Organization's Claim to Status: A Juridical Analysis Under International Law*, 9 DEN. J. INT'L L & POL'Y 1, 3 (1980).

landmark in establishing a controlling and authoritative precedent" and that "[i]t is an innovative decision that better served the world public order by allowing the PLO to exercise its rights by peaceful means and to reestablish faith in the world organization."⁶

Is that so? According to rule 37 only a state may be invited to participate. Hence, as pointed out by the representative of the United Kingdom, "the granting to the PLO of this exceptional status . . . constitutes an undesirable and unnecessary departure from the established practice of the Security Council. The provisional rules of procedure of the Council provide only for Member States of the Organization to enjoy such treatment."⁶ The representatives of France,⁷ Italy,⁸ and the United States⁹ made similar reservations.

The 1975 "decision" was considered by two permanent members (the United Kingdom and the United States) to be one of substance. They had voted against it, but the president, contrary to Article 27(3) of the United Nations Charter, nevertheless declared that it was adopted,¹⁰ ignoring the fact that at least its second part *was* of a substantive nature. The second part of the nearly identically 1976 "decision" also was substantive. In that instance, however, the representative of the United States, while voting and protesting against it, failed to invoke Article 27(3) of the Charter.¹¹

In a similar case, in 1959, when the question of Laos was on the agenda, it was the Soviet Union that protested such a ruling by the Council's president. The United States, the United Kingdom, and France had submitted a draft resolution calling for the appointment by the Council of a subcommittee to examine certain statements concerning Laos that had been made before the Council and to conduct inquiries as the subcommittee deemed necessary.¹² The Soviet delegate contended that the second part of the draft was substantive, but insisted that the Council first determine a preliminary question, *viz.*, whether the vote on the proposed resolution should be considered a procedural one.¹³ By a vote of ten to one the Council decided that it was of a procedural nature, and it was so declared by the president. The Soviet delegate responded by rightly claiming that the president's interpretation was illegal; that it was at variance with the Charter, with the four-Powers declaration,¹⁴ and with the practice of the Security Council; and that, for these reasons, it was null

5. *Id.* at 31.

6. U.N. Doc. S/PV.1859, *supra* note 1, at 38-40.

7. *Id.* at 6.

8. *Id.* at 11-12.

9. *Id.* at 8-10.

10. *Id.* at 41.

11. *Id.* at 51-52.

12. U.N. Doc. S/4214 (1959).

13. 14 U.N. SCOR (848th mtg.) 1, U.N. Doc. S/PV.848 (1959).

14. 11 UNCIO Doc. 713, U.N. Doc. 852/III/1/37(1) (1945).

and void.¹⁵ Moreover, although the president at the 1975 meeting (the Soviet delegate) stated that “a decision taken by one membership of the Council is binding upon the next membership of the Council,¹⁶ earlier, in 1950, the Soviet delegate had firmly insisted that “the Security Council decides in each separate meeting whether to invite members of the Secretariat or other persons.”¹⁷

Nevertheless, Dr. Kassim alleged that the “invitation” extended by the Council to the PLO is an authoritative precedent and an innovation. Innovation it is. But one can, and indeed should, wonder what is its legal basis and validity. Although there are precedents for inviting states and even “persons” to participate in the Council’s meetings — the latter (by rule 39) only “to supply it with information or to give other assistance” — never before has an organization been invited to participate on an “as if a state” basis while not being a state at all.¹⁸

Dr. Kassim was not completely unaware of the high hurdles which lay before him, and his attempt to blindly jump over them was not successful. Although he mentioned¹⁹ that Professor Leo Gross characterized the Council’s action as null and void,²⁰ basing that determination on procedural and constitutional grounds,²¹ Dr. Kassim either found it too difficult to follow Professor Gross’ analysis or preferred to misrepresent it. Professor Gross did not say, as one would gather from Dr. Kassim’s reference, that had the Council (in abuse of its powers) “based” its earlier invitations to nonmember states and/or organizations on rule 37, or had it clearly “based” the currently debated “invitation” on that rule, then the “decision” would have been valid and constitutional. To the contrary, Professor Gross stated:

[T]here is no provision in the Charter or in the rules of procedure for ‘as if’ decisions or actions by the Council, that is for the treatment of a body as if it were a member state; it follows that the action of the Security Council was *ultra vires* the powers of the Council under the Charter as well as the procedure laid down in the rules of procedure [and that, therefore,] the action of the Council was, legally speaking, null and void.²²

Hence, relying—as Dr. Kassim did—on earlier invitations which *did not*, and indeed could not, confer the rights of a state on the invitees does not support his argument, for the earlier invitations were *intra vires* the

15. See note 13 *supra*.

16. 30 U.N. SCOR (1856th mtg.) 46, U.N. Doc. S/PV.1856 (1975).

17. Repertoire of the Practice of the Security Council 1946-1951, U.N. Doc. ST/PSCA/1, Case 93, at 131-32 (1954).

18. U.N. Doc. S/PV.1870, *supra* note 2, at 11; U.N. Doc. S/PV.1859, *supra* note 1, at 3.

19. Kassim, *supra* note 4, at 30.

20. Gross, *supra* note 2, at 479.

21. *Id.* at 477.

22. *Id.* at 479. See I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 538 (1966), for a discussion of *ultra vires* decisions of international organizations.

Council's powers. Dr. Kassim claimed that the Council's prior practice was "not homogeneous," which may be true, but he brought no example of any case in which a non-state invitee was accorded the rights of participation reserved to states. Homogeneity may be relevant in determining the precedential effect of past practice, but *ultra vires* decisions can never serve as precedents, regardless of how many times they may be repeated.

The problem of constitutionality with regard to the Council's "decision" was hardly touched upon by Dr. Kassim. Not only did he ignore the assertion put by Professor Gross that the "decision" was *ultra vires* the Council's powers, but he ignored the argument that the "decision" had, as mentioned above, two different parts: (1) a technical invitation that would normally be procedural, and (2) the portion which accorded the PLO "as if a state" powers, which was substantive. The Council's president was, therefore, acting *ultra vires* in stating that it was adopted, since the negative vote of a permanent member had been cast. Although Article 27(3) of the Charter was not expressly invoked in the second case, it still applies. Neither decision can be considered binding.

II. "RECOGNITION" V. STATUS

The "invitation" was but one link in an ostensible chain of proofs brought by Dr. Kassim to support his allegation that the PLO has gained "the status of a participant in international law."²³ "Recognition" of the PLO by states and international organizations was, he argued, also part of the chain. That "recognition," extended to the PLO as a "territorial public body" (a term specially created by him for the purpose) is, he wrote, "reminiscent of recognition accorded to a new government as traditionally characterized by international law."²⁴ He also discussed the PLO's possible status as a government-in-exile.²⁵

There was much confusion in Dr. Kassim's arguments stemming in part, it would seem, from the lack of the classical and vital distinction between the political and legal facets of recognition. According to Professor Kelsen:

The legal act of recognition must in principle be distinguished from the political act of recognition. The first act . . . is the establishment of the fact that an individual or a body of individuals is actually the government of a state. The second act is the declaration of willingness to enter into mutual relations with this government. A government, according to the norms of international law, is the individual or body of individuals which by virtue of the effective constitution of a state, represents the state in its relations with other states, *i.e.*, is competent to act on behalf of the state in its relations with the community of states. . . . A state is . . . free to enter or refuse to enter into political and other relations with a government, that is, it may grant or refuse

23. Kassim, *supra* note 4, at 32-33.

24. *Id.* at 29.

25. *Id.*

to grant the government political, but never legal, recognition.²⁶

Perhaps the basic elements of recognition should be reviewed. First, from the legal side, the act is declaratory. But, as Professor Kelsen pointed out, the decision to enter into political relations, (that is, accepting a government as the representative of a state, *not*, of the people concerned), lies solely within the discretion of the recognizing state.²⁷ The result is that while the acts of an unrecognized government may be accorded respect as sovereign acts by the courts of a non-recognizing state or an international tribunal, the unrecognized government does not enjoy a separate existence under the law of the non-recognizing state, and has often been held by courts not to enjoy the power to bring a claim.²⁸ Dr. Kassim's assertion that the PLO had an "undisputed" right to represent the Palestinian Arabs (not a state) was therefore baseless inasmuch as it is rooted in the alleged similarity between the PLO as a "territorial public body" and a government, or a state. Hence, his conclusion that decisions made by independent states without "addressing" the PLO are "non-authoritative, non-controlling" was also misguided, for there is no obligation upon states to recognize the PLO as a representative of the Palestinian Arabs.

Second, statehood is contingent on the body in question's *de facto* fulfillment of the criteria for statehood, namely, a permanent population, a defined territory, a government, and independence (that is, the capacity to enter into relations with other states).²⁹ Had the PLO fulfilled each and everyone of these criteria then all states, including those which do not recognize it, would be required to respect its rights under international law as an independent state. Thus, for example, a non-recognizing state would be forbidden to threaten or use force against the territorial integrity or political independence of the non-recognized state in violation of Article 2(4) of the Charter. But the PLO does not fulfill these criteria. It is not in possession and control of a defined territory, and it does not exercise the powers and authority of an effective government. In

26. Kelsen, *Recognition in International Law: Theoretical Observations*, 35 AM. J. INT'L L. 605, 614-15 (1941).

27. See, e.g., I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 95 (2d ed. 1973); C. DEVISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 239 (Corbett trans. 1968); D. O'CONNELL, *INTERNATIONAL LAW* 135 (2d ed. 1970); Borchard, *Recognition and Non-Recognition*, 36 AM. J. INT'L L. 108, 111 (1942).

28. See, e.g., *Wulfsohn v. Russian Soc. Fed. Sov. Rep.*, 234 N.Y. 372, 138 N.E. 24 (1923); *The Tinoco Claims Arbitration (Great Britain v. Costa Rica, 1920)*, reprinted in 1 R. INT'L Arb. Awards 369 (1948), 18 AM. J. INT'L L. 147 (1924). See generally T. CHEN, *THE INTERNATIONAL LAW OF RECOGNITION* 135-39 (1951); *RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* 390-91 (1965).

29. See, e.g., *Montevideo Convention on the Rights and Duties of States*, Dec. 26, 1933, 49 Stat. 3097, T.S. No. 881, 165 U.N.T.S. 19; J. BRIERLY, *THE LAW OF NATIONS* 137 (6th ed. H. Waldock 1963); I. BROWNLIE, *supra* note 27, at 74-77; The PLO lacks at least two of the prerequisites upon which there is virtual unanimity among commentators: control over territory and effective government. There is also considerable controversy as to whether the PLO could establish a sufficient connection to a permanent population.

view of the maverick support of the West Bank population that constantly moves from Jordan to the PLO and back (often under threats and violence, including murders committed by the PLO against dissidents or pro-Jordanian West Bankers), and in view of the fact that most of this population hold Jordanian passports and willingly give allegiance to King Hussein, it is at least dubious whether the PLO fulfills the criterion of "permanent population." Finally, "independence" is also lacking, not only because of what has just been said, but also because Israel has exercised full and exclusive control over the West Bank and the Gaza Strip since 1967.

III. A TWIST OF INTERNATIONAL LAW: THE "TERRITORIAL PUBLIC BODY"

Dr. Kassim resorted to an "institution" especially created by him for the occasion: the "territorial public body." Such entities, according to Dr. Kassim, "include territorial units the elites of which are in the process of consolidating their respective nation state units."³⁰ This brought to mind the United Nations resolutions he cited, but he extended the concept much further by contending that "[t]he "target authority . . . of an irredentist elite [constituting a 'territorial public body' . . . may be either a national or a foreign (colonial or occupying) government."³¹ He ignored the well known fact that the United Nations General Assembly has consistently limited its resolutions to "alien," "foreign," or "colonial" domination, insisting on excluding national governments like Israel's.³² Dr. Kassim, however, included them, thus being directly at odds with the general rule of international law, repeatedly reaffirmed by such resolutions, that states must refrain from intervention in international conflicts within other states.³³ What makes these bodies territorial, according to Dr. Kassim, is the fact that "the revolutionary elite draws its major powers from the territorial population it claims to represent."³⁴ And he brought evidence to corroborate the argument, namely, that some such institutions and communities have received various degrees of recognition as subjects of international law. However—and this is the major flaw in his thesis—he brought no evidence to support his implicit converse pro-

30. Kassim, *supra* note 4, at 9.

31. *Id.*

32. *See, e.g.*, G.A. Res. 2649, 25 U.N. GAOR, Supp. (No. 28) 73, U.N. Doc. A/8028 (1970); G.A. Res. 2787, 26 U.N. GAOR, Supp. (No. 29) 82, U.N. Doc. A/8429 (1971); G.A. Res. 3246, 29 U.N. GAOR, Supp. (No. 31) 87, U.N. Doc. A/9631 (1974); G.A. Res. 31/91, 31 U.N. GAOR, Supp. (No. 39) 42, U.N. Doc. A/31/39 (1976).

33. *See, e.g.*, Essentials of Peace, G.A. Res. 290, U.N. Doc. Res. A/1251, at 13 (1949); Peace through Deeds, G.A. Res. 380, 5 U.N. GAOR, Supp. (No. 20) 13-14, U.N. Doc. A/1775 (1950); Declaration on Inadmissibility of Intervention, G.A. Res. 2131, 20 U.N. GAOR, Supp. (No. 14) 11-12, U.N. Doc. A/6014 (1965); Declaration of Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc. A/8028 (1970); Definition of Aggression, G.A. Res. 3314, 29 U.N. GAOR, Supp. (No. 31) 142, U.N. Doc. A/9631 (1974).

34. Kassim, *supra* note 4, at 9.

position, that any body which he characterizes as a "territorial public body" is entitled to such recognition. Moreover, there is hardly any resemblance between the bodies Dr. Kassim used as examples and the PLO. The movements mentioned by him all controlled parts of the relevant territory.³⁵ Dr. Kassim asserted that the Vietcong were in full control of the South Vietnamese population while United States forces were in full control of the territory of South Vietnam. He also cited the examples of the Algerian Liberation Front and the French forces.³⁶ But he was mistaken here too. Each of the movements had effective control of large parts of the territory in which and for which it fought. In the case of Algeria there was even an official map, issued by the French Government, that showed the zones which were controlled by the "Front."³⁷ The cases of the American Civil War and the American, Cuban and Iranian Revolutions³⁸ are also completely different from that of the PLO.

Hence, Dr. Kassim's claim that the PLO is entitled to recognition, despite the fact that it does not control any part of Palestine, is without precedent.

IV. THE ALTERNATIVE UNFOUNDED PROPOSITION: DE FACTO RECOGNITION

Whether one considers states, international organizations, governments-in-exile, or belligerent communities as bodies sometimes entitled to *de facto* recognition, the PLO simply lacks the prerequisites.³⁹ As discussed earlier, the PLO is not a state and does not claim to be one. International organizations are composed of states; by distinguishing "territorial" from "non-territorial public bodies" and rightly placing international organizations in the latter category, Dr. Kassim implicitly acknowledged that the PLO is not entitled to personality as such an organization.

The status of a government-in-exile depends on the "legal condition of the community it claims to represent, which may be a state, a belligerent community, or a non-self-governing people."⁴⁰ In and of itself a government-in-exile enjoys no legal status.⁴¹ The Palestinians are spread all over the Middle East—including approximately one million in the independent state of Jordan, which is also part of Palestine. What is the legal

35. *Id.* at 9 n.36.

36. Meyrowitz, *The Law of War in the Vietnamese Conflict*, in 2 THE VIETNAM WAR AND INTERNATIONAL LAW 516, 530 (R. Falk ed. 1969).

37. M. BEDJAOU, LAW AND THE ALGERIAN REVOLUTION 38-45, 78, 40-41 (Map) (1961).

38. Kassim, *supra* note 4, at 9 n.36.

39. There are also other recognized or asserted subjects of international law which need not be considered here, for Dr. Kassim neither explicitly nor implicitly argues that the PLO should be so classified. These include self-governing territories, trust territories, and particularly in recent years, individuals. See generally, MANUAL OF PUBLIC INTERNATIONAL LAW 249-66 (M. Sorensen ed. 1968) [hereinafter cited as Sorensen]; Lauterpacht, *The Subjects of the Law of Nations*, 63 L.Q. REV. 438 (1947), 64 L.Q. REV. 97 (1948).

40. I. BROWNLEE, *supra* note 27, at 68.

41. Sorensen, *supra* note 39, at 290.

condition of this community? This need not be discussed in this article because all the governments-in-exile offered by Dr. Kassim as examples⁴² represented occupied countries as absentee sovereigns, and their acts had no force or effect inside their home countries.⁴³

Who is the sovereign of the West Bank? It is enough for the purposes of this article to say that the question is debatable. Jordan claims to be that sovereign, and for nineteen years, from the establishment of Israel in 1948 until the Six-Day War of 1967, Jordan exercised effective control under a claim of annexation. The vast majority of the population of the West Bank held Jordanian passports during this time, unlike the inhabitants of the Gaza Strip who were denied Egyptian passports while Egypt occupied that land. Security Council Resolutions 242 and 338 as well as the Camp David Accords refer to Jordan as a potential party to a peace agreement with Israel without making any reference to the PLO. Israel, on the other hand, claims that she has a better title to the West Bank than does Jordan, and some prominent scholars support this view.⁴⁴ But all this is practically immaterial. The PLO has decided not to claim the status of a government-in-exile. In view of that decision, Dr. Kassim's proposition that the PLO be treated as a quasi-government-in-exile is both legally meaningless and factually foundless.

Nor does the last possibility, that of a belligerent community, solve Dr. Kassim's problem. He referred to "anticolonial liberation movements," apparently assuming that all such institutions are subjects of international law.⁴⁵ Dr. Kassim did not employ the term "national liberation movement" at all; rather, he discussed "insurgents recognized as belligerents" or belligerent communities.⁴⁶

According to international law the following are the criteria for attaining the status of a belligerent community: (1) the belligerents must control a substantial portion of territory; (2) they must conduct hostilities in accordance with the laws of war; and (3) there must exist an armed conflict of a general nature.⁴⁷ The PLO satisfies none of these criteria. First, as was already pointed out, the PLO has never controlled any por-

42. Kassim, *supra* note 4, at 10, 28.

43. W. BISHOP, *INTERNATIONAL LAW* 834 (2d ed. 1962).

44. J. STONE, *NO PEACE, NO WAR IN THE MIDDLE EAST* (1969); Rostow, *Palestinian Self-Determination*, 5 *YALE STUD. WORLD PUB. ORDER* 147 (1979).

45. Kassim, *supra* note 4, at 11.

46. The difference between belligerency and unrecognized belligerency, or insurgency, has been characterized as the distinction between the "recognition of war in a material sense and the existence of war in a legal sense." *The Three Friends*, 166 U.S. 1 (1897). Lauterpacht, cited by Dr. Kassim at 11 n.48, has acknowledged that insurgency "does not confer a formal status" and that its "recognition" does not go beyond what has actually and expressly been conceded. H. LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 275 (1947). See also Sorensen, *supra* note 39, at 288-89.

47. Sorensen, *supra* note 39, at 264; Kelsen, *supra* note 26, at 616; G. VON GLAHN, *LAW AMONG NATIONS* 552 (2d ed. 1965); H. WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 34 n.15 (8th ed. Dana 1866).

tion of the territory which constituted "Palestine." It is apparently for this reason that Dr. Kassim's analysis of the juridical status of the PLO was based on *lex ferende* rather than *lex lata*. To avoid acknowledging the legal consequences of the PLO's inability to establish itself on a piece of territory, Dr. Kassim invented the term "territorial public body." Rather than employ the accepted international law test of effective control, he characterized a public body as "territorial" when it "claims to represent" a "territorial population."⁴⁸ By that standard, virtually any "revolutionary elite" which identifies with a given population could qualify for "territorial public body" status. Examples would include the United States-based Estonian government-in-exile; the government of Taiwan *vis-à-vis* its claims to mainland China; or the relatives and associates of the former Shah of Iran. Were the law as Dr. Kassim would like it to be, with states being required to accord legal status to any self-declared group which claims territory but exercises no effective control, the consequences for the international legal order would be far-reaching and potentially devastating.

Second, the PLO has repeatedly failed to conduct itself in accordance with even the most basic principles of the laws of war. Its units have engaged in airplace hijackings, the taking of non-combatants as hostages, the indiscriminate murder of non-combatants, and innumerable terrorist bombings of civilian installations such as open marketplaces.⁴⁹ Such actions violate, *inter alia*, principles established by the Geneva Conventions of 1949 and the Hague Regulations of 1907.⁵⁰ There is no need to explain why the third criterion of belligerent community status is also not met by the PLO.

The PLO thus enjoys no greater claim to belligerent community status than it does to statehood, Dr. Kassim notwithstanding. The organization has not satisfied the requirements for entitlement to *de facto* status as a subject of international law, and it does not enjoy any rights other than those which states voluntarily elect to accord it under municipal law. States which choose not to accord recognition to the PLO are not violating any international obligation, and their decision not to deal with the organization, either because of its terrorist activities or for other reasons, has no effect on their other international obligations.

It should be emphasized that those states which have chosen not to accord the PLO any recognition are following a practice long accepted with respect to the recognition of new governments. Recognition is frequently withheld until the government to be recognized has shown a will-

48. Kassim, *supra* note 4, at 9.

49. See generally J. LAFFIN, *FEDAYEEN: THE ARAB-ISRAELI DILEMMA* (1973); Z. SCHIFF & R. ROTHSTEIN, *FEDAYEEN* (1972).

50. (Fourth) Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, arts. 3, 34; Regulations Respecting the Laws and Customs of War on Land, Annex to the Hague Convention (No. IV), Oct. 18, 1907, 36 Stat. 2277, arts. 25, 46.

ingness to comply with the obligations imposed upon states by international law.⁵¹ The PLO has not done this; rather, it has repeatedly advocated the resort to violence, as shown by Article 9 of its National Covenant: "Armed struggle is the only way to liberate Palestine. Thus it is the overall strategy, not merely a tactical phase" The leaders of the PLO speak of the destruction of the occupying country [Israel],⁵² of "raising the flag of the revolution by means of the rifle" only,⁵³ and of "machine guns and rifle bullets" as "the only way to reach understanding with the Zionist enemy."⁵⁴ This is perhaps why Dr. Kassim found it necessary to engage in an uphill struggle to convince the reader that the PLO, although not claiming to be a government, should be treated as such. It has, so he argued, "governmental authority" which expresses itself in war situations, in extradition powers, and in taxation authority.⁵⁵

As to the exercise of "sovereign" powers over Palestinians in war situations, Dr. Kassim referred to two irrelevant agreements: the 1969 Cairo agreement between the PLO and Lebanon and the 1970 agreement between the PLO and Jordan.⁵⁶ There is nothing in these agreements to prove that the PLO really exercises powers over Palestinians—certainly not "sovereign" powers. Lebanon never surrendered its sovereignty over any part of its territory to the PLO. It is no wonder that Dr. Kassim, in order to support his proposition, felt required to omit any reference to Article 13 of the Cairo Agreement. That provision read: "Lebanese authorities will continue to exercise their complete prerogatives and responsibilities in all regions of Lebanon and under all circumstances." To assume that Jordan had waived any of its rights in favor of the PLO is simply absurd. Dr. Kassim informed the reader the "PLO institutions" were granted "complete freedom," that "the civil and military sources of Jordan were to be utilized to save the cause of the Palestinian liberation," and that "no authority would intervene against any member of the Palestine Revolutionary Forces or interfere in their affairs under any circumstances." He then concludes "the PLO achieved the exercise of nearly all governmental powers."⁵⁷ Perhaps he is simply unaware of the fact that the PLO units which were forcibly evicted from Jordan during the 1970-1971 fighting were not permitted to return in the years that follows. Palestinian operations from Jordan into Israel have been virtually non-existent for the past decade, notwithstanding the paper commitments which may have been made. King Hussein did not even meet with Yasser Arafat

51. D. O'CONNELL, *supra* note 27, at 140; C. FENWICK, INTERNATIONAL LAW 161-62 (3rd ed. 1948).

52. Rafik Natasha, PLO representative in Saudi Arabia, *quoted by* Saudi Arabian News Agency, June 9, 1980.

53. Yassir Arafat, *quoted by* The Voice of Palestine (Beirut), June 16, 1980.

54. Abu Jihad, *id.*, May 3, 1980.

55. Kassim, *supra* note 4, at 22-25.

56. *Id.* at 23. On the PLO's status in Jordan in 1970-1971, see E. O'BALLANCE, ARAB GUERRILLA POWER 161-90 (1973).

57. *Id.*

from 1971 until 1977, must less permit him to direct any Palestinian exercise of "governmental authority."

As for the 1978 accord between the PLO and Jordan cited by Dr. Kassim,⁵⁸ more recent events, particularly the appointment of a special government minister for Palestinian Affairs, have indicated that the Jordanian Government still views itself, against the vehement protests of the PLO, as the authority responsible for Palestinians on the West Bank.⁵⁹ Thus Jordan rescinded, for all practical purposes, its consent to have the Palestinians represented solely by the PLO. Jordan's actions indicate that, as former occupier of the West Bank, it continues to assert the power to give the PLO a power of attorney or to withdraw it at will.

However, let us suppose that both Lebanon and Jordan were to grant certain powers to the PLO. This would still not meet the requirement that the "government" seeking legal status enjoy the habitual obedience of the bulk of the population. Not only must the "government" itself be the source of power, but the population referred to must also be that of the relevant territory, namely, the West Bank and the Gaza Strip—not Lebanon and not Jordan.

As to taxation, it is hard to understand how the fact that a certain government agrees to collect taxes for the PLO can be asserted as proof that the latter enjoys "governmental authority." Dr. Kassim's extradition argument is likewise faulty. It amounts merely to stating that while there was no extradition treaty between the PLO and the Arab states to which he referred, those states decided *ex gratia* to answer two isolated extradition requests made by the PLO.

V. A SUCCESSOR TO TERRORISM?

It is no wonder, in view of the analysis hitherto made, that Dr. Kassim found himself compelled to resort to another argument: "The PLO" he wrote, "is the legitimate successor to the Arab Higher Committee and subsequently to the Government of All Palestine."⁶⁰ He explains that the Arab Higher Committee (AHC) "was a self-proclaimed entity claiming the authority of representing a well defined territorial community: the Palestinian People. . . . The Committee thus met all the juridical requirements necessary for qualifying it as a territorial public body."⁶¹

Let us begin with the facts. The AHC was the organization of the Palestinian-Arab leadership in 1936. It was outlawed for terrorist activities by the British Mandatory Authorities in 1937 but continued to operate in exile until it dissolved in 1939. In 1945 a *new* AHC was formed, in

58. Kassim, *supra* note 4, at 23.

59. Since 1967, Jordanian ministries—not the PLO—have continued to take responsibility for the administration of various government services in the West Bank, within the framework of Israel's administration. See generally A. GERSON, *ISRAEL, THE WEST BANK AND INTERNATIONAL LAW* 110-35 (1978).

60. Kassim, *supra* note 4, at 30.

61. *Id.* at 26.

the *absence* of local agreement, through the good offices of Arab League representatives. In 1946, rivalry within the AHC led to the formation by its dissidents of a rival Arab Higher Front. In the summer of 1946 the Arab League dissolved the two rival committees and appointed a new AHC which still retains its formal existence.⁶² The Arab League, as is well known, was established in 1945 by the seven Arab states then independent or on the threshold of independence. The Palestinian Arabs were represented by a notable with observer status. According to the Pact of the Arab League, member states are bound only by those resolutions of its Council for which they vote affirmatively.⁶³

Dr. Kassim was correct in saying that the AHC appeared before the British Royal Commission in 1937.⁶⁴ It was not, however, invited as such, certainly not as the sole "indisputable" representative of the Palestinian Arab community. Although its members were invited to participate, an invitation was also extended to the Nashashibi opposition.⁶⁵ It is true that the British Government invited the *new* AHC to participate in the second London Conference of 1946. But it is untrue that it "was received as the representative of the Palestine Arabs,"⁶⁶ if this is what Dr. Kassim was hinting at by the words "a similar [to the one inviting participation at the 1939 Conference] *invitation* was extended . . . to the Second London Conference."⁶⁷ Moreover, the AHC did *not* actually participate in the Conference at all "because Britain would not allow the Mufti [a religious leader of Palestinian Arabs and head of the first AHC who has associated himself with Nazi Germany during World War II] to participate."⁶⁸ Dr. Kassim was correct in stating that in 1947 the United Nations Special Committee on Palestine asked the new AHC to present the view of the Arab Palestinians.⁶⁹

What he failed to mention was that the Arab Higher Committee was not at all times the same body. While sometimes it was the recognized spokesman for the Palestinian Arabs, at other times it was not. This recognition was entirely dependent on the recognizing body, which was at complete liberty to recognize and to withdraw recognition at its own discretion. The new AHC had been formed by the Arab League, and the League approved the limited presence and powers of an unelected Pales-

62. Levine & Shimoni, *Arab Higher Committee*, in *POLITICAL DICTIONARY OF THE MIDDLE EAST IN THE 20TH CENTURY* 26-27 (2d ed. 1974) [hereinafter cited as *POLITICAL DICTIONARY*]; F. KHOURI, *THE ARAB-ISRAELI DILEMMA* 24-25 (1968).

63. Levine & Shimoni, *Arab League*, in *POLITICAL DICTIONARY*, *supra* note 62, at 40-41. Khouri also writes: "The Arab League Pact had a special section which allowed Palestinians to participate, to some extent, in League meetings . . ." F. KHOURI, *supra* note 62, at 31. As to voting in the League Council, see the Arab League Pact, article 7.

64. Kassim, *supra* note 4, at 16.

65. F. KHOURI, *supra* note 62, at 26.

66. Kassim, *supra* note 4, at 16.

67. *Id.* [Emphasis added.]

68. F. KHOURI, *supra* note 62, at 36.

69. Kassim, *supra* note 4, at 16.

tinian Arab appointed by it.

Dr. Kassim was also mistaken in asserting that the AHC was declared to be the Government of All Palestine in 1948.⁷⁰ That "government was established by the Arab League under Egypt's leadership,"⁷¹ and although Dr. Kassim rightly mentioned that five Arab states and Afghanistan accorded it full recognition,⁷² he neglected to mention that neither Jordan nor any other state in the world community recognized it and that, in protest, (Trans)Jordanian King Abdullah's response was "to assemble some Palestinian Arab Leaders . . . and to obtain a resolution . . . which called for the annexation of Arab Palestine by (Trans)Jordan."⁷³ This "annexation" was effected in 1950, making Jordan an indispensable party to any steps relevant to the Palestine question both as de facto, though illegal, occupier of parts of Palestine and as "trustee" (until 1967). As is known but conveniently omitted by Dr. Kassim, the Arab League, after having objected to the "annexation" and threatening Jordan (one of its members) with expulsion, came to terms with the situation. The League decided that Jordan should hold the Area "on trust until a final settlement of the Palestine question was reached."⁷⁴ This decision was never, before 1967, expressly or impliedly revoked or changed.

It is not exactly clear what Dr. Kassim's purpose was in contrasting the Jewish Agency with the Arab Higher Committee. He was correct in arguing that the AHC was a self-proclaimed entity while the agency was constituted under the League of Nations Mandate granted to Britain.⁷⁵ It is also true that the agency was, and still is, an international public body as it was, and is, a body representing Jewish (at first only Zionist) parties and organizations from all over the world, Palestine included. But the Agency's locus standi was, as was the AHC's, "subject always to the control of the Administration" and its recognition as such an agency was for "as long as its organization and constitution [were] in the opinion of the Mandatory appropriate"⁷⁶ The difference, in this respect, between the Agency and the AHC lay in the fact that the former derived its legal standing from an international document under the auspices of the League of Nations with a view to assisting the Mandatory in fulfilling the international Mandate with which it had been entrusted, namely, the establishment of a "Jewish National Home" in Palestine. The Agency was entitled to its standing so long as its organization and constitution remained "appropriate." The authority conferred upon Britain to deter-

70. *Id.* at 17. The year was incorrectly stated to be 1947.

71. F. KHOURI, *supra* note 62, at 83.

72. Kassim, *supra* note 4, at 18.

73. F. KHOURI, *supra* note 62, at 106.

74. H. HASSOUNA, *THE LEAGUE OF ARAB STATES AND REGIONAL DISPUTES* 40 (1975).

75. Kassim, *supra* note 4, at 14, 26.

76. *Id.* at 14, quoting from the Mandate for Palestine Confirmed by the Council of the League of Nations on July 24, 1922.

mine "appropriateness" could not, of course, be used arbitrarily and was subject to judicial review by the Permanent Court of International Justice. The AHC, on the other hand, had no such rights and could, as at times it was, be deprived of its "legal" standing at Britain's will.

Dr. Kassim asserted that the PLO was the legitimate successor to the AHC. If this is so, then its rights and obligations as a result of such status must be identical to those of the AHC. The AHC had no independent rights and was subject to occasional and limited "recognition." Recognition may be accorded and withdrawn at will. Dr. Kassim's entire argument as to succession is without foundation. There is no general succession in international law,⁷⁷ only a qualified succession that may occur, subject to limitations, with respect to states or international organizations.⁷⁸ Neither the AHC nor the PLO was or is such an organization. The AHC was composed of the leaders of six Palestinian Arab parties, and the PLO—following the recommendation of the Arab Summit Conference in Cairo in January 1964—was established by some 400 Palestinians headed by Ahmed Shukairi. These Palestinians claimed, as Dr. Kassim put it, to be representative authorities of their respective communities,⁷⁹ but none of them was formally a representative of a state. The PLO remains an organization composed of several terrorist groups sponsored by one Arab state or another. For the same reasons, the PLO did not, and could not, succeed the Government of All Palestine, which, as was already pointed out, did not replace the AHC. The Government of All Palestine has never been formally dissolved.

Of equal importance is the fact that in 1964, when the PLO was founded, "remnants of the old AHC, still led by the Mufti, denounced Shukairi for seeking a 'fake entity' [i.e. the PLO], arguing that [the 400] delegates to the Congress [which established the PLO] had been hand picked."⁸⁰ Further, the AHC still formally exists and, until recently, had its own representative in the United Nations alongside the PLO representative.

VI. STATUS V. REPRESENTATIVENESS

It follows from what has been said so far that the PLO is not an international body and has no status according to contemporary international law. Although some states may have granted it permission to open offices or accorded its employees quasi-diplomatic immunities, no state is under any obligation to recognize the PLO either *de jure* or *de facto*. Nevertheless, Dr. Kassim argued that the PLO has an "undisputed right" to serve as the sole representative of the Palestinian people. "No authority," he stated, "can legally address the Palestinian community without first addressing" the PLO.⁸¹

77. 1 L. OPPENHEIM, *INTERNATIONAL LAW* (8th ed. H. Lauterpacht 1955).

78. *Id.* at 21, 166-69, 370-80.

79. Kassim, *supra* note 4, at 18.

80. R. WARD, D. PERETZ, & E. WILSON, *THE PALESTINE STATE* 41 (1970).

81. Kassim, *supra* note 4, at 33.

Without regard to Security Council Resolutions 242 and 338 and the Camp David Accords, Dr. Kassim's argument seems to conceal a latent threat on the one hand and a prophecy of total failure on the other. While there is always the possibility that the peace process agreed upon at Camp David will not succeed, the question we are dealing with is that of law, not of politics. Let us, therefore, examine the assertion of representativeness, which can very simply be dismissed because there is no necessary connection between political recognition and representativeness. By recognizing the Republic of China (Taiwan), the United States did not necessarily "recognize" its government as the representative of the Chinese people. Even if the United States had so declared, this alone would not have made the Taiwanese government representative as long as, in fact, it was not. Likewise, the United States may accord political recognition to a military government which comes to power in Latin America or elsewhere as a consequence of a coup d'état, although such a government may at best represent the will of a small militant group. And the fact that the United States refuses to grant recognition to a duly elected government will not, of course, make it nonrepresentative.

Recognition is a political act. Representativeness is a material fact. The political act of recognition means only that the government recognized is accepted as "enjoying the habitual obedience of the bulk of the population with a reasonable expectancy of permanence" and, therefore, as representing the state, not necessarily the people governed.⁸² As such it has rights and responsibilities towards its citizens. The statements and declarations mentioned in Dr. Kassim's article as having been made by governments and international organizations as regards the "representativeness" of the PLO may not, therefore, establish representativeness in fact but may, at most, serve as an explanation or excuse for the political act of "recognition" that followed.

Moreover, despite the risk of being threatened or even assassinated by PLO terrorists for "disobedience," considerable segments of the Palestinian population in southern Lebanon, to say nothing of the population in Jordan, neither acknowledge nor obey the PLO with a reasonable expectancy of permanence. Several of the terrorist organizations which comprise the PLO have withdrawn, claiming that the PLO does not adequately represent the Palestinian Arabs. An example is George Habash's Popular Front for the Liberation of Palestine. When withdrawing, such organizations typically proclaim that they will not accept any settlement which may be agreed upon by the PLO and will continue their armed struggle against Israel until the Palestine question is "satisfactorily" solved, that is, when Israel is exterminated.

VII. CONCLUSIONS

For nineteen years (1948-1967) the Palestinian Arabs, through Jordan as their "trustee," were in full control of the West Bank, while Egypt

82. 1 L. OPPENHEIM, *supra* note 77, at 131.

occupied the Gaza Strip. For reasons known to the governments of these two states and the rest of the Arab world it was decided not to establish a Palestinian state. Nonetheless, since its birth in 1964, the PLO has "officially" struggled against Israel, and evidently also against Jordan, with the stated goal of establishing a "secular" independent state in "Palestine." This state would encompass Israel, the territory occupied by Israel in 1967, and the territory occupied by Jordan before 1969. Establishing this state under the leadership of the PLO—an international terrorist organization officially encouraged and supported by the Soviet Union—may lead to the forcible extermination of Israel, a state recognized by the international community and a member of the United Nations. The largest and most important terrorist member of the PLO, Al-Fatah, approved a political program at its fourth Congress held in Damascus on May 23-31, 1980, which bluntly stated: "[Fatah's] aim is to liberate Palestine completely and liquidate the Zionist entity politically, economically, militarily, culturally and ideologically."

In view of the above, Dr. Kassim's statement that, with the Security Council's "decision," the PLO now can exercise its "rights" by "peaceful means" seems more than hypocritical. Had the PLO really resorted to peaceful means after the adoption of the Security Council's "decision," and stopped its terrorist attacks against Israeli women and children, Israel would probably have negotiated with it as a relevant factor in the Arab-Israeli conflict. Under the circumstances, Israel, contrary to Dr. Kassim's view, is under no legal obligation to recognize the PLO as a "territorial public body," either on the basis of that organization's own characteristics or its role as a successor to the Arab Higher Committee and the Government of All Palestine. Nor is Israel under any obligation to negotiate with the PLO, Dr. Kassim's latent threats notwithstanding.

The Security Council's "decision" to grant the PLO rights "as if" it were a state is null and void as *ultra vires*. Moreover, it amounts to an attempt to acknowledge an organization which openly declares its intention—contrary to the United Nations Charter and international law—to be the forcible exterminator of a member state. Anyone who joins in such an attempt should be aware that it is but a landmark on the road to legal chaos, and indeed to the total destruction of world order and of the human values most of us take for granted.