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UNITED NATIONS EDUCATIONAL,
SCIENTIFIC AND CULTURAL ORGANIZATION

EXECUTIVE BOARD

Hundred and thirty-first Session

Item 9.4 of the agenda

APPLICATION FOR THE ADMISSION OF PALESTINE AS A MEMBER
STATE OF UNESCO, IN CONFORMITY WITH ARTICLE II,
PARAGRAPH 2, OF THE CONSTITUTION; APPLICATION
FOR THE ADMISSION OF THE STATE OF PALESTINE
TO UNESCO AS A MEMBER STATE PROPOSED BY
ALGERIA, EGYPT, INDONESIA, MAURITANIA,
NIGERIA, SENEGAL AND YEMEN

SUMMARY

By letter dated 19 May 1989 the Director-General has transmitted to the Chairman of the Executive Board copy of a letter dated 18 May 1989, together with its attachments, which he has received from the Ambassador, Permanent Delegate of Israel to Unesco, in reference to item 9.4 of the agenda. The texts of these communications are reproduced below.

26 MAI 1989



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The Director-General

reference : DG/89/199

Dear Mr Chairman,

I am in receipt of a letter dated 18 May 1989 from Mr Yakov Aviad, Ambassador, Permanent Delegate of Israel to Unesco, in reference to Item 9.4 of the Agenda of the present session of the Executive Board.

In accordance with the wish expressed by Ambassador Aviad, I am forwarding to you herewith a copy of that letter, together with its attachments, and would ask you to bring the same to the attention of the Members of the Board in connection with their consideration of the aforementioned agenda item.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Federico Mayor".

Federico Mayor

Mr José I. Vargas
Chairman of the Executive Board
Unesco House

DÉLÉGATION PERMANENTE
D'ISRAËL
AUPRÈS DE L'U.N.E.S.C.O.

Paris, May 18th., 1989

Mr. Director General,

I have been instructed to submit to you a document stating the legal case pertaining to point 9.4 of the Agenda of the 131 Executive Board Session, as seen by Israel.

This analysis "PLO/Palestine" and the criteria for statehood in International Law has previously been given to Mr. Maurice GLELE, the Legal Adviser of UNESCO.

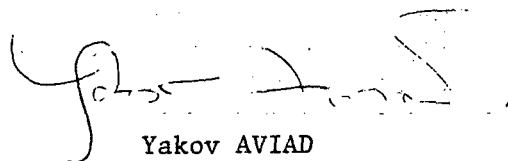
Now that the PLO's legal arguments for its case have been presented in great detail and circulated to Board members - as 131 EX/43, we wish to bring to the attention of the members of the Board Israel's point of view.

We shall be most grateful if you could circulate this analysis as a document of the current session of the Board. This should enable all concerned to view the problem of the acceptance of the PLO into UNESCO as a full member with all the relevant arguments at their disposal.

Thanking you in advance,

I am, Mr. Director General,

Yours sincerely,



Yakov AVIAD
Ambassador
Permanent Representative

Mr. Federico MAYOR
Director General
UNESCO
Paris

'PLO/PALESTINE' AND THE CRITERIA FOR STATEHOOD
IN INTERNATIONAL LAW

Various formulations have been developed in the international law literature for defining statehood. The criteria, involving factual and legal determinants, are essentially cumulative and interdependent. They share an important underlying characteristic - effectiveness.

The most widely accepted definition, reflecting customary international law, is that used in Article 1 of the 1933 Montevideo Convention on Rights and Duties of States.¹ It is:

The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States. (165 LNTS 19)

This definition has also been adopted in nearly identical form by the Restatement of the Law, Third, Foreign Relations Law of the United States, Article 201 of which states:

Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.

(vol. 1, 1987, 72)

Does the so-called 'State of Palestine', declared by the PLO's 'Palestine National Council' in Algiers 15 November 1988, fulfil the criteria for statehood in international law? By any accepted standard, the answer is no.

Following is an examination of the reasons why 'PLO/Palestine' does not satisfy the requirements of any of the criteria.

1. Defined Territory

Territory is an essential ingredient of statehood. International law does not require that exact boundaries be delimited for an entity to fulfil the territorial criterion. Yet effective control of some territory is critical.

As Brownlie expresses it:

There must be reasonably stable political community and this must be in control of a certain area.

(supra, 75)

1. See for example: I. Brownlie, Principles of Public International Law 3rd ed. 1979, 74-5; D.P. O'Connell, International Law vol. 1, 1970, 284; M. Sorenson, Manual of Public International Law, 1968, 250; M. Whiteman, Digest of International Law vol. 1, 1963, 230. L. Oppenheim in his classic treatise International Law provides a definition that is substantially the same as the later Montevideo formula (see H. Lauterpacht Oppenheim's International Law vol. 1, 8th ed. 1955, 118-119). H. Kelsen, whose definition is also very similar to the Montevideo formula, indicates the cumulative nature of the criteria when he writes, '.... a state ceases to exist when it loses one of its essential elements - its population, its territory, or its independent effective government' (Principles of International Law, 1956, 258-9).

Crawford, stressing the dependence of the territorial criterion on other criteria, states:

The only requirement is that the State must consist of a certain coherent territory effectively governed - a formula which demonstrates that the requirement of territory is rather a constituent of government and independence than a separate criterion of its own.

(J. Crawford, The Creation of States in International Law, 1979, 40)

Elsewhere he adds:

... international law defines 'territory' not by adopting private law analogies of real property, but by reference to the extent of government power exercised, or capable of being exercised with respect to some area and population.

(supra, 42)

'PLO/Palestine' controls no territory, let alone exercises government power with respect to area and population. It plainly fails to meet the territorial requirement for statehood.

2. Permanent Population

A permanent population is another essential element of statehood. The criterion does not stand on its own, but is tied to territory and, in a sense, also to effective government and independence.

Brownlie writes:

This criterion is intended to be used in association with that of territory and connotes a stable community. Evidentially it is important, since in the absence of the physical basis for an organized community, it will be difficult to establish the existence of a State.

(supra, 75)

Moreover, one could argue - along the lines of Crawford regarding territory - that population too is 'rather a constituent of government and independence than a separate criterion of its own'.

'PLO/Palestine' fails to meet the permanent population criterion. First, it is wholly unclear what is intended to compose the permanent population of 'PLO/Palestine'. Second and more significantly, it is clear that neither a 'stable community' nor the 'physical basis for an organized community' - to use Brownlie's terms - exists.

3. Effective Government

Government is the nucleus of the criteria for statehood. It is the common thread uniting the various elements; and effectiveness is the vital characteristic of that nucleus.

(a) A reasonable test for effective government, cited in the Encyclopaedia of Public International Law, requires:

... firstly that the government must be in a position to enact and enforce legal rules inside the State; secondly, it must possess sufficient power to accomplish its duties under international law.

(K. Doehring, 'State' in Encyclopaedia of Public International Law, vol. 10, 1987, 426)

The latter principle, it should be noted, finds indirect expression in Article 4(1) of the United Nations Charter. The provision requires, as a condition for admission to membership, that States be 'able and willing to carry out' obligations under the Charter.

Can 'PLO/Palestine' stand the test of effective government? The evidence is overwhelmingly in the negative.

First, it exercises no actual control over any claimed territory. It does not have the power to legislate or enforce law in any part of the said territory. Moreover, only Israel is authorized under international law to exercise authority in the Administered Areas, including the issuing of legislative measures.

Second, a 'PLO/Palestine' government would be incapable of fulfilling international obligations. One can hardly posit an international obligation applicable within the claimed territory, which such a government can presume to meet (e.g. duty to protect foreign nationals, to prevent the territory from use as a base of attack against States; aviation, maritime, trade, customs, currency obligations, etc.).

(b) Some writers contend that the principle of self-determination, where applicable, mitigates the requirement for effective government. Yet even proponents of that view do not argue that the principle of self-determination can erase the requirement (see: R. Higgins, The Development of International Law through the Political Organs of the United Nations, 1963, 24).

Moreover, where the statehood of the entity is opposed under title of international law, the requirement for effectiveness would be, of necessity, more strictly applied (see: Crawford, *supra*, 46).

In the case of 'PLO/Palestine', not only is there no element of effective government, there is also an opposing claim of title.

(c) A government-in-exile, having no effective control in the territory and not having had previous control, provides no exception to the requirement for effective government.¹ It is noteworthy that even the Algerian Provisional Government (GPRA), established in 1958, asserted its right to recognition 'on the basis of actual control and administration of part of the territory of Algeria' (A. Fraleigh, 'The Algerian Revolution as a Case Study in International Law' in Falk, The International Law of Civil War, 1971, 211).

Needless to say, 'PLO/Palestine' has no 'actual control and administration' in any part of the claimed territory.

4. Independence

The fourth qualification of the Montevideo definition is considered by many to be expressive of a broader concept - independence. The classic definition of independence is generally viewed to be the one given by Judge

1. By contrast, the doctrine of effective control would not apply to governments which had already existed in their territories as effective governments and were then forced to establish themselves temporarily in a country other than their national territory in a time of crisis (e.g. during World War II several States set up governments-in-exile in London, among them: Belgium, Greece, Norway and Poland) (see Kelsen, *supra*, 288).

Anzilotti in the Austro-German Customs Union case (PCIJ Rep Ser A/B No. 41, 1931, 578). As analysed by Crawford, the definition is composed of two elements:

... the separate existence of an entity within reasonably coherent frontiers; and the fact that the entity is 'not subject to the authority of any other State or group of States', which is to say, that it has over it 'no other authority than that of international law'.

(supra, 51-2)

The first condition is apparently dependent on the criteria of territory, government and population. In Crawford's words, it would seem to be dependent '... upon the exercise of substantial government authority with respect to some territory and people'.

(supra, 52)

Thus, since 'PLO/Palestine' fails to fulfil the first three criteria of statehood, it a fortiori fails to meet the independence criterion.

5. Recognition

Recognition is not included among the classic criteria for statehood and the prevailing view is that it is not a criterion. Some authorities argue, however, that recognition is constitutive of statehood.

It is submitted that even if one adopts the view that recognition is a criterion for statehood, 'PLO/Palestine' cannot fulfil the requirement.

First, international recognition has been far from universal. Western States in particular have withheld acceptance, and the acknowledgement by many States has been deliberately ambiguous because of their knowledge that 'PLO/Palestine' does not meet the requirements for recognition (e.g. recognition of the declaration of independence - the position adopted, for instance, by the USSR, Czechoslovakia and Hungary).¹

Second, if recognition is a criterion, then logically it must be predicated on the existence of the other criteria. The significance of the physical foundation is stressed by Lauterpacht. Viewing recognition as declaratory of facts, while constitutive of rights, he remarks:

It is declaratory in the meaning that its object is to ascertain the existence of the requirements of statehood and the consequent right of the new state to be treated henceforth as a normal subject of international law.

(H. Lauterpacht, 'Recognition of States in International Law', 53 The Yale Law Journal June 1944, No. 3, 455)

It follows therefore, that where the physical criteria for statehood are not present, recognition cannot remedy the situation.

As Kelsen has written:

In deciding the question whether a community which claims to be a State is actually a State in the sense of international law, the governments

1. It is noteworthy that United Nations General Assembly resolution 177/43, while acknowledging the PLO proclamation and changing the designation 'Palestine Liberation Organization' to 'Palestine', specifically did not change its status as an observer organization.

of the other States are by no means free. It may be doubted whether the existing States are legally obliged to recognize a community as a State if this community fulfils - according to the opinion of the former - the requirements of international law. But there can be no doubt that, if a State does recognize another community as a State, it is bound by international law, which determines, in a general way, the essential elements of a State. A State violates international law and thus infringes upon the rights of other States if it recognizes as a State a community which does not fulfil the requirements of international law.

(emphasis added)
(supra, 270)

Thus even if 'PLO/Palestine' were to achieve meaningful, widespread recognition, this would not constitute a criterion for statehood, as the other requirements would be lacking.

Moreover, it follows that for recognition to succeed as a legitimate criterion, it must be invoked bona fide.¹ Otherwise, it will be the subject of abuse and be of doubtful probative value.

Conclusion

Statehood is determined in international law by well-established, cumulative and interdependent criteria. 'PLO/Palestine' meets none of the requirements.

To ignore the clear evidence and treat such an entity as a State, would undermine international law and call into question the credibility of the international agency coerced into so acting.

1. As has been written in the Encyclopaedia of Public International Law: Where the procedure of recognition is used bona fide by all members of the international community it will have no detrimental effects. However, where ideological and political motives influence the decision whether or not to recognize a State, a government or a territorial situation, abuse is quite possible.
(J.A. Frowein, 'Recognition', supra, 347)