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## A Response to Dr. Evyatar Levine

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## A Response to Dr. Evyatar Levine

ANIS F. KASSIM

Dr. Levine's reply is perplexing indeed.<sup>1</sup> In his title, he declares that the recognition of the PLO is a menace to world public order. However, it is the world community, which is responsible for the world order, that has accorded the PLO universal recognition. Over one hundred states have expressed their recognition of the PLO and have voted for its representative capacity as well as for its right to establish an independent state in Palestine. This is evidence of the fact that the world public order is better served by recognizing the PLO than by excluding it. Dr. Levine's alleged care for "world public order" is little more than care for "Israel's public order."

Obviously, Dr. Levine started his reply with the wrong conclusion. He concluded that the Security Council's decision to invite the PLO to attend its meetings on the basis of rule 37 of its rules of procedure, and thus bring the PLO into the realm of public order, was *ultra vires*. To support his conclusion, Dr. Levine cited arguments that stand directly against him. He quoted the representative of the United Kingdom as saying that granting the PLO exceptional status constituted an "undesirable and unnecessary" precedent. The representative, however, did not claim that the precedent was "illegal" or "unconstitutional." Further-

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1. Levine, *A Landmark on the Road to Legal Chaos: Recognition of the PLO as a Menace to World Public Order*, 10 DEN. J. INT'L L. & POL'Y 243 (1981). Some of the points raised by Dr. Levine are not discussed in this article either because they are covered in this writer's response to Dr. Friedlander or because they fall beyond the scope of this analysis. However, there are two points that deserve attention in this regard. Dr. Levine, being a presiding judge in the Military Court of the West Bank, must be fully aware of Israel's rejection of the applicability of the Geneva Conventions of 1949 to the occupied territories. Hence, his condemnation of the PLO for not conducting its warfare in accordance with the rules of combat is hypocritical. For a discussion of Israel's violations of its duties as an occupying power and a party to the Geneva Conventions, as well as of the practices of military judges, see R. SHEHADEH & J. KUTTUB, *THE WEST BANK AND THE RULE OF LAW* (1980). One might even cite the United Nations spokesman who stated that Israeli soldiers killed five Palestinian guerillas in South Lebanon, stacked their bodies, and blew them apart with explosives. *Int'l Herald Trib.*, Jan. 3, 1981 at 3, col. 8.

The second point relates to Dr. Levine's insinuation that the Mufti of Palestine had collaborated with the Nazis. As a matter of record, it was the Zionist organization and not any Palestinian leader that signed official agreements with the Nazis. The Zionist-Nazi collaboration has been carefully documented by Jewish and Zionist writers, including H. ARENT, *EICHMAN IN JERUSALEM* (1963); J. KIMCHE & D. KIMCHE, *THE SECRET ROADS: THE ILLEGAL MIGRATION OF A PEOPLE 1938-1948* (1955); B. HECHT, *PERFIDY* (1961); R. HILBERG, *THE DESTRUCTION OF THE EUROPEAN JEWS* (1961); Yisraeli, *The Third Reich and Palestine*, 7 MIDDLE EAST. STUD. 343 (1971). Yisraeli's article was based on his doctoral dissertation, entitled *The Palestine Problem in German Politics, 1889-1945*, which was submitted to the Hebrew University of Jerusalem.

more, Dr. Levine's assertion that Article 27(3) of the United Nations Charter still applies does not support his conclusion. If that article applies, why did the representatives of the United Kingdom, France, Italy, and the United States not invoke it? The invitation to the PLO was extended more than once, and if those representatives missed Article 27(3) the first time, can Dr. Levine claim that they inadvertently missed it on subsequent occasions? One may reasonably conclude that their failure to invoke that article is indicative.

On the issue of recognition, Dr. Levine contested the assertion that recognition accorded to territorial public bodies is reminiscent of recognition extended to new governments. He quoted Professor Kelsen to support his argument, citing an article published in 1941.<sup>2</sup> Professor Kelsen, contrary to the general trend adopted by international law scholars, had moved backward from declaratist to constitutivist.<sup>3</sup> Nevertheless, the quoted passage is, in substance, supportive of my assertion that states were not under any legal obligation to do so, but by doing so, those states have accepted the legal consequences of such recognition, including the admittance of the PLO in their jurisdictions and the PLO's right to bring claims before their courts.

By referring to the criteria for statehood, as Dr. Levine suggested, the PLO earns at least equal marks with Israel. The first two elements of "permanent population" and "defined territory" are better fulfilled by the PLO than by the state of Israel. Article 5 of the PLO Charter defines the PLO's population as being those Palestinians "who were living normally in Palestine up to 1947, whether they remained or were expelled. Every child who was born to a Palestinian after this date whether in Palestine or outside is a Palestinian." Article 2 of the Charter defines the PLO's territory as being Mandatory Palestine. The state of Israel on the other hand has defined neither of these elements. Israel does not accept the concept that the Israelis living within Israel are its defined "people"; it repeatedly declares that it is the sovereign state of the entire "Jewish people" regardless of their present location or citizenship.<sup>4</sup> Israel's Nationality Law<sup>5</sup> and its Law of Return<sup>6</sup> (and the respective amendments) are two good examples. Likewise, Israel officially declares that its "present frontiers" do not derogate from its title to the alleged historical "Eretz Israel." No one can define either the "present" borders (see, for example, the U.N. partition plan, the Armistice lines, the 1950's expansions, and the 1967 borders) or the "Eretz Israel" geographical boundaries.<sup>7</sup>

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2. Levine, *supra* note 1, at 247 n.26.

3. See Kelsen, *Théorie générale du droit international public: problèmes choisis*, in 42 *RECUEIL DES COURS* 117, 260 (1932).

4. Atty.-Gen. of Israel v. Eichman, Case No 40/61 (Dist. Ct. Jerusalem), App. No. 336/61 (S. Ct. Israel, May 29, 1962).

5. 6 L.S.I. 50 (1952) (amended 1958, 1968, and 1971).

6. 4 L.S.I. 114 (1950) (amended 1954 and 1970).

7. See Kassim, *A Response to Professor Robert Friedlander*, 10 *DEN. J. INT'L L. & POL'Y* 237 n.13 and accompanying text.

As to the element of "government," the PLO, while deliberately shying away from such a label, exercises a wide range of governmental authority, and this has been universally recognized. The absence of the fourth element of statehood, namely independence, does not detract from the PLO's status for the reason that an independent Palestine has been suppressed by the Israeli occupation. It is significant that repeated U.N. General Assembly resolutions have called for Israel's evacuation of the West Bank and Gaza in order to enable the PLO to establish its independent state.<sup>8</sup>

Dr. Levine's comment<sup>9</sup> on the concept of devising an "institution" called the "territorial public body" to accommodate the PLO is complementary rather than critical. Lawyers, in general, resort to establishing a legal framework within which they can fit in their "cases." My PLO study was not an exception. The study, having monitored certain developments that have taken place on the international plane—the American Revolution and Civil War,<sup>10</sup> the European Governments-in-Exile, and the Algerian, Vietnamese and African movements—showed that the PLO falls squarely within the basic pattern of formulation and recognition shared by its predecessors. Dr. Levine further criticized the concept of a "territorial public body" as lacking the necessary parameters. In all examples cited in the PLO study, an empirical test was employed to determine the public body status of the entities discussed. Professor Lauterpacht suggested these empirical criteria: "[I]n each particular case the question whether a person or a body is a subject of international law must be actual experience and to the reason of the law as distinguished from a preconceived notion as to who can be subjects of international law."<sup>11</sup>

Dr. Levine's contention that since the PLO controls no territory, it would be erroneous to compare it with the Algerian or the Vietnamese Fronts, is unfounded. Forcefully preventing the PLO from establishing normal control over its claimed territory by the occupying power is no different from the French and the Americans forcefully depriving the Algerian and Vietnamese Fronts of their claims. Superiority in military occupation neither gives legal title to the occupying power nor deprives the population under occupation from their rights.

Finally, Dr. Levine should reconsider the facts he presented with respect to the Arab Higher Committee (AHC). The AHC remained the de facto representative body of the Palestinian people in spite of the fact

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8. The latest resolution adopted by the U.N. General Assembly was Resolution 35/207 of December 16, 1980, and was carried by a vote of 101 to 13, with 30 abstentions. See U.N. CHRON., Mar. 1981, at 13.

9. Levine, *supra* note 1, at 248.

10. During the Civil War, President Abraham Lincoln treated the Confederacy as an entity of international status rather than as a group of traitors or terrorists. He emphasized this fact by the issuance of General Order No. 100 (1863), which was a precursor of the present laws of war as finally codified in the four Geneva Conventions of 1949.

11. H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 12 (1950).

that the mandatory authorities outlawed it in 1937. The AHC was the entity that represented the Palestinian people at the London Conference of 1939 and before the U.N. Special Committee on Palestine in 1947. Dr. Levine's statement that the AHC was appointed by the Arab League in 1946 is incorrect. The fact is that the AHC was in existence in spite of pressure exerted by the Arab governments which tried at the time to play an intermediary role between the AHC and the mandatory power. Furthermore, the allegation that the Nashashibi faction injured the representative capacity of the AHC is not correct, as the AHC was widely regarded as the sole authoritative representative of the Palestinian community. The authorities cited by Dr. Levine to support these claimed "facts" do not in fact lend such support.<sup>12</sup>

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12. Dr. Levine cites F. KHOURI, *THE ARAB-ISRAELI DILEMMA* (1968). Nothing in the pages he cites supports his "facts."