To THE EDITOR-IN-CHIEF March 27, 1977

Professor Murphy, in his letter to the Editor-in-Chief, published in the January 1977 issue of the *Journal*, has argued against the position taken by Professor Gross about the illegality of the PLO's participation in the UN Security Council's deliberations.[1]

I find fault with Professor Murphy's criticism on two grounds. In the first place, I do not believe he meant to say that Israel has refused "to recognize the Palestinians." He, like me, was undoubtedly constrained by the format of a letter and was unable to be as explicit as possible. But from the argument as published, two inferences may be drawn: (1) Israel has refused to accept the concept of a Palestinian nationality or (2) Israel has refused to recognize the PLO. Statements have indeed been issued, formally and informally, regarding the existence of a Palestinian people or nation, and Israeli officials have formally announced a policy of rejection of the authority of the PLO to represent the Palestinian interests in any political settlement that may take place among the parties to the conflict. Second, while one may agree with Professor Murphy's statements that "all parties in interest should be brought before [Courts of Equity] in order that a matter in controversy may be finally settled," and that "the Middle East controversy is not solvable without a representative of the interests of the Palestinian people," [2] it is fallacious to accept the PLO as the *only* representative, now or at the time that organization was invited to speak before the Council. The source of the representative authority of the PLO within the Occupied Territories has been indirect—the election of local officials who support the PLO. It is also too early to write off the Jordanian Government as a possible representative of the Palestinians.

I am greatly concerned about the PLO's participation in the United Nations because of the significance of the precedents set.[3] The PLO represents no state, government, government-in-exile, or even demarcated territory; it is a nonstate political representative at best, seeking a negotiating status equal to that of a state.

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To THE EDITOR-IN-CHIEF April 8, 1977

Max Tardu's comparative analysis of "Co-Existing" human rights petition procedures within the UN and regional OAS legal systems provides useful insight into possible areas of conflict between the two systems and approaches to solution.[1] Within his commentary one can also glean awareness of an ultimate clash between: (1) the interests of certain states and organizations in "unification," [2] "a minimum of juridical order," [3] "res judicata," [4] and a hierarchic stability or control, and (2) the interests of individuals in obtaining effective remedies to human right deprivations imposed upon them by control-oriented state actors or private groups and individuals who, for one reason or another, are insufficiently restrained by state actors and domestic legal systems.

[1] Gross, *Voting in the Security Council and the PLO*, 60 AJIL 470 (1976).

[2] Stated earlier by Professor Murphy in a slightly different context in *The Middle East*, 44 ST. JOHN'S L. REV. 390, 396 (1970).

[3] *See* Silverburg, *The Palestine Liberation Organization in the United Nations: Implications for International Law and Relations*, ISRAEL L. REV. (forthcoming).

[1] 70 AJIL 778 (1976).

[2] *See id.* at 793.

[3] *See id.* at 795.

[4] *See id.* at 786 and 799.

As if to intensify the clash, Tardu argues the need for "balance" between "order" and "repetitive complaints" [5] and the "excessive freedom" [6] of individuals to seek redress for violations of their human rights. To pose such a dichotomy seems to demonstrate a bias which actually favors violator states and an order not of law and authority but of state-oriented stability and control, especially in an era when deprivations of human rights and human dignity are widespread. At a minimum it underlies the potential clash between state-dominated structures and the complaining individual—a clash that underscores the serious problems inherent in any present international effort to implement human rights.[7]

My own preference is to open more widely the avenues to effective implementation of human rights, however repetitious, until they *are* effective. Beyond this apparent difference in preference, however, it is necessary to address an apparent difference in interpretation of the law (*ferenda, lata,* or *opinio juris*) concerning recognition of "res judicata" in cases where state or regional entities apply international law. Mr. Tardu argues that "international responsibility of states under customary law and several conventions may be involved if they violate the rule of res judicata," [8] and "res judicata may possibly be regarded as a universally accepted principle of law." [9] Although his thoughts are not fully developed and no authority for the transnational "rule" of res judicata exists in his commentary, it is important to stress a counterpoint—that decisions of one state entity applying international law are *not* "binding" on another state, regional organization, or international entity.

To assume the existence of a world juridic order that could form an adequate basis for the adoption of a principle of transnational res judicata when such "a minimum of juridical order" does not exist and when human right deprivations are far too numerous and widespread would beg a fundamental question in a way that, as Mr. Tardu seems to recognize, could result in a cruel irony for the complaining individual.[10] Just as long as there is no effective global governmental system there should be no state or regional act which precludes further action by the international community directed toward the application of international law. International legal norms have a common or universal character and value content; they cannot be thwarted by the actions of one state alone [11] or, by analogy, one region. To illustrate the counterpoint further, it is useful to recall that, in the case of international criminal activity, no state has the authority to grant immunity and there is no recognition of double jeopardy [12] so as to allow an escape of criminal sanction.

No authority to grant immunity for international crime exists and such would be inconsistent with the fact that universal crimes are crimes against

[5] *See id.* at 795.

[6] *Ibid.*

[7] Such a recognition is commonplace; *see, e.g.* W. Korey, *The Key to Human Rights—Implementation* (CEIP pam. No. 570, 1968); J. Carey, UN Protection of Civil and Political Rights (1970); and J. Paust, *An International Structure for Implementation of the 1949 Geneva Conventions: Needs and Function Analysis,* 1 Yale Studies in World Pub. Order 148 (1974).

[8] Tardu, *supra* note 1, at 799.

[9] *Id.* at 786. *See also id.* concerning double jeopardy.

[10] *See id.* at 794 (the tortured political prisoner).

[11] *See, e.g. The Paquete Habana,* 175 U.S. 677, 711 (1900), quoting Justice Strong, *The Scotia,* 81 U.S. (14 Wall.) 170, 187–88 (1871). *See also* 11 Ops. Atty. Gen. 297, 299–300 (1865).

[12] *Cf.* Tardu, *supra* note 1, at 786.

humankind, not merely against a particular state or region,[13] and that implementation of sanctions should ultimately be governed by universal standards. There are many evidences of the principle that domestic laws or juridical acts cannot dissipate international criminal responsibility. For example, the Allied Control Law No. 10 (January 31, 1946) provided in Article II.5 that no statute of limitation, pardon, grant of immunity, or amnesty under the Nazi regime would be admitted as a bar to trial or punishment.[14] More recently the UN General Assembly stated that no statutory limitation would apply to war crimes, crimes against humanity, or genocide.[15] The General Assembly has also recognized the expectation that "States shall not grant asylum to any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity." [16]

The Principles of the Nuremberg Charter and Judgment recognized that governmental orders cannot free a person from criminal responsibility (so governmental acts could hardly do the same) and that even though domestic law "does not impose a penalty for an act which constitutes a crime under international law, it does not relieve the person who committed the act from responsibility under international law." [17] In 1919 the Commission on the Responsibility of the Authors of the War and on Enforcement and Penalties took note of the rule that "no trial or sentence by a court of the enemy country shall bar trial and sentence by the tribunal or by a national court belonging to one of the Allied or Associated States." [18] An example of the same reasoning can be found in the French case of *Abetz*,[19] where it was held that diplomatic immunity was not relevant to a war crimes prosecution since the legal basis of prosecution rests with offenses against the community of nations and as such any domestic interference through grants of immunity would "subordinate the prosecution to the authorization of the country to which the guilty person belongs."

A local grant of immunity could well be no more in conformity with

[13] *See also* UN Secretary-General Report, *Respect for Human Rights in Armed Conflict*, 24 GAOR, UN Doc. A/7720 (1969), stating that these are obligations owing to humankind rather than parties to a particular conflict; 4 PICTET, COMMENTARY, GENEVA CONVENTIONS RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, 15–61, 587, 592, 593 (1958); Q. Wright, *The Law of the Nuremberg Trial*, 41 AJIL 38, 59 n. 74 (1947).

[14] *See* 15 TRIALS OF THE WAR CRIMINALS 25 (1949).

[15] G.A. Res. 2391 adopting the Convention on the Non-Applicability of Statutes of Limitation to War Crimes and Crimes Against Humanity, Art. 1, 23 GAOR, Supp. (No. 18) 40, UN Doc. A/7218 (1968) (vote: 58-7-36; against were United States, United Kingdom, South Africa, Portugal, Honduras, El Salvador, Australia). *See also* HUDSON, INTERNATIONAL TRIBUNALS 85 (1944), stating: "No statute of limitations exists in international law to bar the presentation of disputes or claims . . ."; G.A. Res. 2840, 26 GAOR, Supp. (No. 29) 88, UN Doc. A/8429 (1971); G.A. Res. 3074, 28 GAOR, Supp. (No. 30) 78, UN Doc. A/9030 (1973).

[16] G.A. Res. 3074, *supra* note 15 (vote: 94-0-29).

[17] Principles II and IV, Principles of the Nuremberg Charter and Judgment, [1950] 2 Y.B. INT. LAW COMM. 374, UN Doc. A/1316 (1950); adopted by G.A. Res. 488, 5 GAOR, Supp. (No. 20) 77, UN Doc. A/1775 (1950).

[18] *Report Presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of the War and on Enforcement and Penalties* 9 (1919). Members were: the United States, British Empire, France, Italy, Japan, Belgium, Greece, Poland, Romania, Serbia.

[19] 46 AJIL 161, 162 (1952) (French Cour de Cassation, 1950). *See also* 3 MANUAL OF MILITARY LAW, *The Law of War on Land*, 95, n. 2 (British War Office 1958), stating that *no refuge* is possible in a state which is bound by the Conventions and that a state *cannot exonerate* itself or others for violations.

community expectations than a refusal to prosecute for some other reason. A more serious problem would involve "fake" prosecutions which were designed to result in lesser crime convictions or in an acquittal where it is known that more serious charges could not be proven but the decision is made to prosecute unprovable higher offenses so that the defendant ultimately avoids conviction for the commission of other offenses. Furthermore, a refusal to prosecute can be a violation of the international obligations under the 1949 Geneva Conventions (1) to bring to trial *all* persons alleged to have committed or ordered to be committed "grave breaches" of the Conventions, (2) to take such measures necessary for the suppression of all acts contrary to the provisions of the Convention other than grave breaches, and (3) to *respect* and to *ensure* respect for the Conventions in all circumstances. In supplementation of the principle that domestic laws and governmental acts cannot dissipate international criminal responsibility and the concomitant obligation of the states to prosecute violations of the laws of war [20] is the recent UN General Assembly declaration that "States shall not take any legislative or other measures" that thwart obligations to detect, arrest and prosecute, or extradite persons accused of war crimes and crimes against humanity.[21] Also supplementing these principles and obligations is the prohibition in the Geneva Convention of state grants of waiver or immunity with respect to "any liability incurred" by itself or any other state." [22]

Additionally, there is no acceptance of double jeopardy, a common law notion, as a bar to international sanction against international crime for many of the same reasons that apply to attempts to grant immunity.[23] However, there is recognition of the right to avoid double jeopardy with respect to domestic penal violations;[24] but, as Mr. Tardu states, this right applies to double jeopardy "before municipal courts" [25] and apparently only with regard to domestic crime.

Finally, I agree that there is a "need for a systematic and thorough review of *all* problems of competing international procedures" (emphasis added), including the impact of domestic actions.

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[20] *See, e.g.* U.S. DEP'T. OF ARMY, LAW OF LAND WARFARE, para. 506(b) (Field Manual 27-10, 1956); U.S. DEP'T. OF NAVY, LAW OF NAVAL WARFARE, para. 330(a) (Change 2) (1955). *See also* Respublica v. DeLongchamps, 1 U.S. (1 Dall.) 111, 116 (1784); Henfield's Case, 11 F. Cas. 1099, 1107–1108 (No. 6, 360) (CCD Pa. 1793); 2 GROTIUS, DE JURE BELLI AC PACIS 253 (CEIP ed., Kelsey trans. 1925); E. DE VATTEL, LE DROIT DES GENS, OU PRINCIPLES DE LA LOI NATURELLE 163 (CEIP ed., Fenwick trans. 1916); and 4 PICTET, *supra* note 13, at 602 ("absolute" obligation).

[21] G.A. Res. 3074, *supra* note 15.

[22] *See, e.g.*, Art. 131, Geneva Convention Relative to the Treatment of Prisoners of War, 12 Aug. 1949 (1956) 6 UST 3316, 75 UNTS 135 [hereinafter cited as GPW].

[23] *See, e.g., Commission Report, supra* note 18, at 9, stating, "but no trial or sentence by a court of an enemy country shall bar trial and sentence by the tribunal or by a national court belonging to one of the Allied or Associated States." *See also* Art. 86, GPW, which does not allow double *punishment* of a prisoner of war for the same act or offense. This does not necessarily preclude double jeopardy, and the provision is not one of the enumerated procedural guarantees for a "grave breach" prosecution. *See, e.g.*, Art. 129, GPW.

[24] *See* 1966 Covenant on Civil and Political Rights, Art. 14 (7), in 61 AJIL 861 (1967). No provision of a similar nature appears in the 1948 Universal Declaration of Human Rights, the 1950 European Convention on Human Rights, or the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

[25] See Tardu, *supra* note 1, at 786.