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Remarks of Professor John F. Murphy

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I'm delighted to be here. Unfortunately I arrived last night so I've not had the kind of tour that Tom Franck enjoyed, and I'm going to have to leave this evening, so I'll not have an opportunity to really explore Nashville.

This is my first visit to Vanderbilt, although I have been aware of the fine international law program that Professors Maier and Charney have run here. I've also been long aware of the excellent *Journal*, and you are to be congratulated on how well this conference has been organized.

It's also a great pleasure to be among old friends. Those of us who have labored in this field for some time are occassionally referred to as the "antiterrorist industry;" indeed, some might accuse us of trying to make the world safe for terrorism. Tom Franck has been sort of in and out of this field. It's good to have his wisdom brought to bear on these problems, and I'm going to refer to Tom's interesting and provocative speech in my remarks this morning.

I have been asked to address the topic of legal responses to state sponsored terrorism. As has been mentioned, I am chairing an American Society of International Law Committee on Responses to State Sponsored Terrorism. You may be interested to know that the mandate from the president of the American Society of International Law, Keith Highet, said that we should focus our attention on responses other than the use of armed force. I think that was wise, because the members of that particular committee would never agree in any way on the subject of military responses to terrorism. I will discuss military responses to terrorism very briefly in my remarks.

Let me tell you what I intend to do in the time that is allotted to me. I will first distinguish between private acts of international terrorism that have no state involvement, much less state sponsorship, and state spon-

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* Remarks delivered to the Symposium on State Sponsored International Terrorism, held at the Vanderbilt University School of Law on March 27, 1987. Professor Murphy teaches at Villanova University School of Law. He is an active member of the American Society of International Law, having served as co-director of the Panel on Legal Aspects of International Terrorism from 1975 to 1980 and is currently serving as Chairman of the Committee on Responses to State Sponsored Terrorism. Professor Murphy has published extensively in the areas of international terrorism, international and domestic security and human rights.

sorship of acts of terrorism. I will then discuss some definitional problems, both of terrorism, and of state sponsorship of terrorism and address some of the points Tom Franck raised in his talk. Next, I will turn to possible responses to international terrorism. Responses to terrorism fall along a spectrum from the least coercive to the most coercive. They include the following general categories: First and least coercive, is quiet diplomacy; second, is public protest; third, is the bringing of international and transnational claims, that is, claims that are brought in United States courts but that have a transnational dimension to them; fourth, a topic that Ken Abbott will discuss in more detail later, is economic sanctions; and fifth, is military force.

To begin, a distinction needs to be drawn between private acts of international terrorism and acts of international terrorism that involve state sponsorship. If only private acts of international terrorism are present, we have basically a criminal law problem with an international dimension. Here we find issues of jurisdiction over the crime and of international cooperation, some of the issues Jordan Paust addressed in his remarks.

By contrast, with state sponsored terrorism, instead of cooperating to combat terrorism, states use terrorism to further their interests. With state sponsored terrorism, the primary concern is not criminal law but relations between the victim state and the state sponsoring the terrorism. This, in turn, involves international law norms that place constraints on the use of violence and raises issues similar to those found in the law of armed conflict, namely, what tactics are impermissible regardless of how just the cause is. State sponsorship of terrorism also raises the issue of possible violations of the United Nations Charter, particularly article 2(4), which prohibits threats or the use of force against the territorial integrity and political independence of states.

I'd like to turn now to some definitional questions. Definitional problems have constituted the most serious barrier to effective action in dealing with terrorism, whether it be private acts of individual terrorism or state sponsored acts of terrorism. In a recent article in *Foreign Affairs* Walter Laqueur of the Georgetown Center for Strategic and International Studies, a leading commentator, stated that between 1936 and 1981 there were 109 different definitions of terrorism advanced.[1] He also pointed out that during recent years the United States Government has advanced at least six different definitions.

The late Richard Baxter, formerly of Harvard University and a judge

1. Laqueur, *Reflections on Terrorism*, 65 FOREIGN AFF. 86, 88 (1986).

on the International Court of Justice, once made an apt comment on the definitional problem. He said, "We have cause to regret that a legal concept of terrorism was ever inflicted upon us. The term is imprecise, it is ambiguous, and, above all, it serves no operative legal purpose." In practice, "terrorism" has been used as a label to pin on one's enemies. This is demonstrated by the well-known cliche that "one man's terrorist is another man's freedom fighter." Ideally, I would suggest that we renounce use of the term "terrorism." I realize, however, that this is not going to happen. Nonetheless, for purposes of legal analysis, we should put the term "terrorism" aside and focus instead on acts that should be regarded as illegal under any circumstances whatsoever.

To the extent that the United Nations has made some progress in dealing with terrorism, it has done so by simply avoiding the problem of defining international terrorism. As you probably know, the United Nations and its specialized agencies have adopted a variety of so-called antiterrorist conventions. These include three conventions in the civil aviation area that proscribe aircraft hijacking and sabotage and treat these acts as international crimes subject to universal jurisdiction.[2] There is also a convention proscribing attacks on so-called internationally protected persons, that is, diplomats and other persons such as heads of state enjoying immunity.[3] I might note parenthetically that some commentators have pointed out that it is no surprise that diplomats would get together in the United Nations and draft a convention making it a crime to attack diplomats. Along the same lines, there are conventions against hostage-taking and the theft of nuclear material in transit.[4] The latter convention addresses the possibility of terrorists getting hold of nuclear material.

These conventions do not speak in terms of terrorism. Their drafters decided, for a variety of reasons, that hijackings of airplanes, attacks on airplanes, attacks on internationally protected persons, hostage-taking and the theft of nuclear material in transit are to be regarded as imper-

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2. Convention for Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, T.I.A.S. No. 7570; Convention for Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 105; Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219.

3. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95.

4. International Convention Against the Taking of Hostages, 34 U.N. GAOR Supp. (No. 39) at 23, U.N. DOC. A/34/39 (1979); Convention on the Physical Protection of Nuclear Material, *opened for signature* Mar. 3, 1980, *reprinted in* 18 I.L.M. 1419 (1979).

missible and that a state party which apprehends a person committing such acts should be required either to extradite the person to a state having jurisdiction over the crime or to submit the person to its own prosecutorial authorities for purposes of prosecution.

I would like now to consider the hypothetical that Tom Franck raised about individuals assassinating Hitler and fleeing to Holland. Assuming both Germany and Holland were parties to a convention making assassination an international crime, the convention would oblige Holland either to extradite these individuals to Germany or to submit them to the appropriate authorities for prosecution. Obviously Holland would choose the latter course of action, and I think it is fair to say that those authorities would exercise prosecutorial discretion in deciding not to bring an action. Alternatively, if the perpetrators of the assassination were tried and convicted, the penalty imposed would be very minor indeed.

But the basic issue is whether we should, as the sophist would suggest, regard assassination as legally permissible under certain circumstances and, if so, whether we should adopt this proposition as a matter of law in the form of legislation or a treaty. In my view, there is a grave danger in adopting such a proposition as a legal concept because this would open loopholes to the fundamental prohibition against assassination. Clever lawyers could use such a loophole to justify assassinations of more questionable morality than that of Hitler.

To illustrate the problem further, consider the aircraft hijacking situation. The approach taken in the aircraft hijacking conventions is, I suppose, to use Tom Franck's term, idiots' law, but it includes the extradite or prosecute alternative as I mentioned. A particularly interesting example of a bilateral anti-aircraft hijacking convention is the United States-Cuba Memorandum of Understanding on Hijacking of Aircraft and Vessels and Other Offenses [the Memorandum].[5] It provides that if any person hijacks an aircraft or vessel registered under the law of one party to the territory of another party, the party whose territory the hijacker reached shall either return the hijacker to the party of registry or bring the hijacker before its courts for trial in conformity with its laws for the offense punishable by the most severe penalty according to the circumstances and seriousness of the acts. Thus the Memorandum incorporates the extradite or prosecute formula but does so in a more meaningful way than do the multilateral antiterrorist conventions. Unlike the multilateral conventions, the Memorandum requires that the accused actually be tried and not merely be submitted "for the purpose of prosecution."

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5. Memorandum of Understanding on Hijacking of Aircraft and Vessels and Other Offenses, Feb. 15, 1973, United States-Cuba, 24 U.S.T. 737, T.I.A.S. No. 7579.

At the same time, the Memorandum severely limits the extent to which the state party where the hijacker arrives may take his motivation into account in prosecuting him. It provides, in pertinent part, that there may be taken into consideration:

> any extenuating or mitigating circumstances in those cases in which the persons responsible for the acts were being sought for strictly political reasons and were in real and imminent danger of death without a viable alternative for leaving the country, provided there was no financial extortion or physical injury to the members of the crew, passengers, or other persons in connection with the hijacking.[6]

In 1976 the Memorandum was denounced by Cuba on the ground that the United States had failed to control anti-Castro terrorists who had planted a bomb on a Cuban civilian aircraft. Nonetheless, Cuba has continued either to prosecute hijackers or to extradite them to the United States. I would suggest that the Memorandum is an attempt to meet the kind of concern that Tom Franck was raising without excusing the acts of hijacking planes and ships.

Let me come back to the very important question of definition. I agree absolutely with what Tom Franck suggested—he called it deconstruction—that is, narrowing the scope of the international law of terrorism to include only particular acts that all decent people find impermissible. Even under this approach, however, there are currently gaps in the law. For example, acts that the law of armed conflict regards as terrorism or war crimes, such as bombings that deliberately target a civilian population with no justification of military necessity, do not fall within the parameters of international law if they occur outside of a situation covered by the law of armed conflict. The bombing of or the deliberate attacks on civilians seem to me to pose perhaps the most difficult problem that Tom Franck identified in his discussion of the distinction between idiots' law and sophists' law. To illustrate, I assume that South Africa's apartheid system enjoys little, if any, support in this room. Some persons here may support a liberation group such as the African National Congress using force against the government in order to force them to abandon apartheid. The question I would pose to you is whether targeting of the South African civilian population by the African National Congress should be regarded as criminal behavior and subject to penal penalties. Those who argue that it should not claim that if the cause is just, any means are acceptable. The law of armed conflict has traditionally rejected this proposition, but it's one that enjoys substantial support among

6. *Id.* at 738.

states today.

It is also important to define state sponsorship of terrorism and to distinguish it from state support. State support of terrorism is a much broader concept than state sponsorship. One can argue that any country that fails to fulfill its obligations under the antiterrorist conventions or any country that generally provides safe haven for people who have engaged in terrorist acts, is lending support to terrorism. But one must distinguish between such actions and state sponsorship of terrorism where the state uses terrorism as a tactic to further its interests as it sees them.

State sponsorship and the issue of how to define terrorism are inextricably intertwined. If you label your adversaries as terrorists and any country that supports them as sponsoring terrorism, there is no chance whatsoever of reaching agreement on how to define and deal with terrorism or with the problem of state sponsorship of terrorism. In contrast, if you define terrorism narrowly and avoid using the term as a political label to pin on your enemies and agree to prosecute anyone who engages in such acts, even if you approve of their cause, you may be able to deal effectively with individual acts of terrorism as well as with states that sponsor them. So take your favorite liberation group. If, for example, you support the Contras and Contras engage in these impermissible acts, you should not only condemn the acts but be willing to prosecute those responsible for them. The same should be true if members of the African National Congress or the Irish Republican Army committed the terrorist acts. In short, there is an overriding need to try, to the extent that we can, to reach agreement on those acts that we cannot justify as a legal matter under any circumstances.

I would like to turn now to the question of possible responses to state sponsorship of terrorism. I think it's important to recognize that although we are talking about legal responses to state sponsored terrorism, the legal dimension is only part of the picture. The diplomatic, political, economic and social dimensions are equally if not more important.

Quiet diplomacy is the first option on the least coercive end of the spectrum. And there is room here for more creative diplomacy. Consider for a moment Irangate or Contragate. There was nothing inherently wrong with the United States attempting to approach Iran about the problem of its sponsorship of terrorism. It would seem appropriate for the United States to negotiate with Iran over this issue, negotiations that would necessarily involve some concessions by the United States. The problem was that it simply made no sense for the Administration to give arms to Iran in an effort to induce it to stop its sponsorship of terrorism.

If quiet diplomacy doesn't work, public protest may be helpful. The

larger the number of states that protest, the better. To obtain widespread condemnation of the acts, we need to have a narrow definition of terrorism. We have to show that the state involved is supporting acts that any fair-minded individual would regard as impermissible. Moreover, I suggest that such public protests should include an allegation, with supporting analysis, that the state has violated international law as well as general principles of morality. This could add weight to the argument.

The third possible response, which we might couple with public protest, is the bringing of international and transnational claims. International claims might be brought in various forums. They might be brought in the political bodies more often. It has always struck me as ironic that the United States usually finds itself in the United Nations defending itself against claims brought by states like Libya that sponsor terrorism. To my knowledge, the United States has not taken the initiative in the United Nations to charge Libya and like-minded states with sponsoring terrorism. This should be done.

There is also the possibility of some kind of international adjudication. This could take the form of international arbitration or a suit before the International Court of Justice. For example, if part of the United States problem with Libya was truly over the status of the Gulf of Sidra, it is hard to imagine a more appropriate issue for international arbitration. However, the United States made no attempts to submit that issue to international arbitration.

With respect to the International Court of Justice, as you know, the United States has withdrawn from the court's so-called compulsory jurisdiction. It is still possible, however, for the United States to go before the Court by reason of special agreement or under compromissory clauses in multilateral or bilateral treaties. Remember that the United States brought a successful action against Iran before the International Court of Justice for actions that one can describe as state sponsored terrorism.[7] And it is interesting to note that, at least the last time I looked, the government of Iran was still a party to two of the treaties and conventions that the Court relied on in that case in assuming jurisdiction, namely, the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, and of all things, a United States-Iran Amity and Friendship Agreement.[8] Both agreements have compromissory clauses which allow one

7. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 180 I.C.J. 3 (Judgment of May 24).

8. Convention on Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S.

party to refer a dispute regarding the agreement to the International Court of Justice even if the other party to the dispute objects to the Court's jurisdiction.

We should also give more thought to bringing claims against friendly states that violate their obligations under applicable treaties. One thinks of Italy, Egypt and Yugoslovia in the case of the *Achille Lauro*. According to various reports, France and Italy have been making special deals with terrorists that allow them to use their territories as bases for attacks in exchange for promises not to attack French or Italian targets. It would be worth exploring whether such arrangements violate applicable provisions of treaty law or norms of customary international law.

An example of a transnational claim would be an action in a United States court, either against a country like Libya or against an organization that is identified as sponsoring terrorist acts, such as the Palestine Liberation Organization. There have been some cases such as the *Tel-Oren* case,[9] in which such claims did not succeed, but it is possible that such claims might succeed in the future. One proposal currently under consideration, for example, is that we adopt legislation, let's say a variant of the Racketeer Influenced Corrupt Practices Act,[10] which would allow civil claims against states and organizations that support terrorism.

The area of economic claims is going to be addressed by Ken Abbott, and I look forward to his remarks this afternoon. I would make just one or two comments. First, some of you may be aware of the Bonn Declaration.[11] The Bonn Declaration is a political statement that was entered into in 1978 by the countries participating in the economic summit at Bonn. It calls for the cutting off of air service between countries that lend support—that is, by refusing to prosecute or extradite—to terrorists who hijack airplanes; its scope is limited to the hijacking of airplanes. The Bonn Declaration, a non-binding political statement, was applied with some difficulty to Afghanistan in connection with the hijacking of a Pakistani airliner to Afghanistan. It has not been applied since. It was not applied against Lebanon in the case of the TWA 847 hijacking, although the United States unilaterally imposed certain sanctions against Lebanon.

I am not sanguine about the usefulness of military force against states sponsoring terrorism. The issue posed in law reviews and at conferences

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No. 8532, 1035 U.N.T.S. 167; Treaty of Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, Iran-United States, 8 U.S.T. 899, T.I.A.S. No. 3853.

9. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984).

10. 18 U.S.C. §§ 1961-68 (1982).

11. Bonn Declaration on Hijacking of 1978, *reprinted in* 17 I.L.M. 1285 (1978).

I've attended is whether armed force can be justified as an act of self-defense under article 51 of the United Nations Charter. Relatively little attention has been paid to requirements under the Charter to exhaust all peaceful means of settling disputes between states. Also, article 27 of the United Nations Charter provides that if other peaceful means of resolving disputes do not succeed, the parties to the dispute *shall* refer it to the Security Council. Disputes over terrorism, to my knowledge, have seldom been referred to the Security Council. In this connection, the Gulf of Sidra incident is troubling. In my view, the Gulf of Sidra incident resulted not from a dispute over the freedom of the high seas but rather from United States designs to provoke a military response by Libya. This strategy resulted in a variety of violent events and ultimately in the bombing of that country. Arguably the move of the large United States fleet into the Gulf of Sidra violated the obligation of the United States under the United Nations Charter to exhaust all means of peaceful settlement of disputes.

Finally, as some of you may know, Seymour Hersh, in *The New York Times Magazine*, claimed that the intent of the Reagan Administration in the bombing of Libya was to kill Quaddafi.[12] That is, the intent was to hit his tent, which included his wife and various children as well as Quaddafi. Assuming, *arguendo*, that the United States could use military force against Libya for its sponsorship of terrorism, the issue arises whether an intent to kill Quaddafi with the likelihood of killing members of his family as well is consistent with the law of armed conflict. Thank you very much.

12. Hersh, *Target Qaddafi*, N.Y. Times Magazine, Feb. 22, 1987, at 16, col. 1.