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Panel Discussion*

SUSAN BURGESS: We will begin our panel discussion. Our moderator for the panel is Jonathan Charney, who is a Professor of Law here at Vanderbilt and is currently teaching an international law seminar on terrorism. Professor Charney is a member of the editorial board of the *American Journal of International Law* and is Chair of the Committee on the Formation of Customary International Law of the American Branch of the International Law Association.

PROFESSOR JONATHAN CHARNEY: Thank you, Susan. I want to thank all the panelists for being here. It has been a terrific program up to this moment; I hope we can keep the momentum going. We surely got a very good push from our last speaker.

What I'd like to do in order to get this rolling is to ask a question of the panel and hopefully get some responses and then perhaps it will open up the questions from the audience. I hope this brings in everybody; let's give it a try.

Kelsen, in his writings, took the position that in law, particularly international law, there are superior and inferior limits to the law; that is, when a norm is articulated and the society behaves in conformance with the norm, and it would do so even in the absence of the norm, the norm is not serving a legal function; it is not serving a normative function of encouraging behavior because the behavior would be in conformance with that norm in any event. There's also the inferior limit to the law; that is, a situation where a rule is articulated but the behavior of the society is so aberrant from the norm that the society fails to respond to it; the norm fails again to reflect a normative standard encouraging behavior of the society. Kelsen takes the position that if you're going to have effective law—law that functions as law—it somehow must fall within the middle of those two. I think we've been struggling with that here, perhaps, and there's perhaps a risk that each of the panelists might be facing the limits of Kelsen's two limits, and I wonder whether they would address themselves to that. I think Professor Friedlander could be argued to be suggesting a norm that approaches very closely to the infer-

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ior level of the norm, that is, if he articulates a fairly substantial ban on terrorism and seeks to enforce it, he will find tremendous violations of the law; the norm would not serve a function of law under those circumstances. It might be argued that Professor Franck, in his attempt to deconstruct idiots' law in particular, might get himself into the position of reaching the superior limit, whereby he has defined what states would do anyway, and the norms really do not have an impact on the society in general. We see Professors Paust and Murphy suggesting that the current situation is such that we are having very little impact on the society's behavior under the current legal regime and suggesting there should be some changes, but I don't know that they have come up with a solution that would fall within these limits either. We see Geoffrey Levitt and Professor Abbott suggesting that we may have to move away from the law, that this really is a political question, and the law may not have any effective role within this problem. I wonder whether each of the panelists, while perhaps addressing other presentations, might also consider this issue because I think it's fundamental. We're trying to solve a problem. I think there's a general consensus that some sort of terrorism, whatever that is—and I think we've avoided the definitional issue—should be dealt with effectively. Have they come up with a proposed approach that would be effective as well as accepted as legitimate? Why don't we follow the order of the presentations today and see what happens? Tom?

PROFESSOR THOMAS FRANCK: Well, I was afraid that was what we were going to end up with. I could see that coming some way down the pike. It's a very good question, Jon. I'm awfully glad you asked it. I guess the answer is yes, that's a good restatement of Kelsen's position. You win the John Austin Prize for 1986.

I'm going to address myself to the upper side of the equation, and I think quite seriously that it does provide an interesting way of linking things that several people have said and about which sensible people would want to express some concern as to the role that law can play.

At the superior level of the Kelsen analysis, you are dealing with situations in which the behavior of states accords with the norm, but it accords with the norm primarily because those states have other good reasons for doing what they're doing. Geoff Levitt gave us the Afghan air services cases, the Summit Seven imposition of the embargo on air services, air links to and from Afghanistan as one of those coincidences where political self-interest, the special circumstances of the case and the norm that had been more or less arrived at in the Bonn Declaration coincided. I was somewhat surprised to have him draw the Kelsenian conclusion and define that phenomenon as being essentially bearing wit-

ness to the efficacy of politics, demonstrating that you couldn't give much credit to it as a case study yielding credit and some useful pointers on the role of norms, that you couldn't give some credit to norms and derive some lessons about the utility of the use of norms.

I don't understand why not. The other case that comes to mind is the Iranian hostage case, in which you had a unanimous and then nearly unanimous International Court of Justice and a virtually unanimous General Assembly condemning the taking of hostages. Those decisions were not based on politics but on the concept of law. You also run into legal considerations when there are violations of the U.N. Charter's article 2(4), the prohibition on the use of force, another idiot rule. In those instances, the General Assembly rather consistently votes to condemn uses of force, sometimes a little more vigorously than other times, but it's condemned regardless of politics: whether it's the Vietnamese or the Russians or America in Grenada, or whatever. Certainly there is a consistency in this practice. But does that consistency coincide totally with everybody's self-interest? I don't think so. It's interesting to see Nicaragua, for example, having to vote along with the Soviet Union to its obvious embarrassment and to the undermining of its position among the Third World nations, the nonaligned. And it's interesting to see the Polish judge on the International Court voting with the West and the Third World on the Iranian hostage case. So what one has to do is look fairly carefully at those things to see whether it is really pure politics or whether there is at least the shadow of something else going on here. One becomes a kind of astronomer trying to see whether there's a shadow across the moon that would give you some indication that somewhere out there there's a sun. My feeling is that there is a shadow there, that nations do take law into account, and that there are costs involved in not taking into account the normative principle and that usually in these kinds of cases the normative principle coincides with nations' political interests, but sometimes it doesn't. Perhaps the French were able to go with the rule applied by the Seven because they didn't have an air link with Afghanistan to interrupt. What would have happened if they'd had such an air link? Would they have stopped the group from acting or made the group's action ineffective? Would there not have been a lot of pressure on France had they, in effect, resisted or undermined the will of the other states to apply the rule in that situation? We're talking about a very fragile thing here—law, the role of norms in these kinds of cases—and I wouldn't turn down even the slenderest evidence that there is something out there which makes it slightly costly to nations to act counternormatively, to frustrate the expectation of the community, whether it be in the General Assembly or whether it be among the

nonaligned, or whether it be the European and Japanese and American Seven, or whatever, to frustrate the expectations that you're going to act as you said you were going to act when you signed your name to the norm. I think that it is there and one ought to emphasize it, not to the exclusion of these other factors, but to say that it isn't law because it gets enforced by political expediency seems to me to be writing off an independent variable; it may not be a very large independent variable, but I still see an independent variable there. Otherwise I'd be in a different profession, so, you know, this is a politically self-interested statement.

PROFESSOR JORDAN PAUST: I would like to add that law in the social process is not something that you can magically take a picture of and it stops at that instant in time, and in this sense, I'm really supplementing all of the comments that were made today. The implication from the comments is that law is a dynamic process within the overall social process. Perhaps contrary to Kelsen's notions of law and authority, or validity and efficacy as they relate to the supposed legitimacy of regimes, there are many participants in the process of shaping attitudes and behavior, not merely official elites, and there are many sanction strategies that can be engaged in even by private individuals. With respect to economic boycotts, for example, certain Jewish tourist groups economically boycotted hotels in Mexico. Apparently that had some effect on the Government of Mexico in changing a vote in the General Assembly.

Importantly, we are all involved whether we act or fail to act and whether we realize the extent of our involvement or simply leave more effective acting to others, in this process of law in the social process. Our actions or inactions will have social consequences. The fact that it's an ongoing process indicates that neither the Kelsenian superior nor inferior orientation is adequate in itself. At any given time, law might look like it relates to the inferior side of this Kelsenian thinking or to the superior side, but the point is that you can't guarantee a particular set of expectations in the future, nor can you guarantee, necessarily, a particular set of behavioral patterns in the future.

Even the reaffirmation of legal expectations at a particular time, apparently when we're in a so-called superior mode, when the norm is already self-executing because it matches patterns of behavior and patterns of expectations (i.e., what people in the real world do and think), even the reaffirmation of law and legal expectations in that social context can be very useful as a sanction strategy to condition attitudes for future behavioral patterns. Since law is an ongoing process, you want to reaffirm fundamental expectations about human rights and fundamental expectations about the prohibition of terrorism under Geneva law (article

33 of the Geneva Civilian Convention); for example, Geneva Protocol II's prohibition of terrorism in a conflict not of an international character is actually a useful reaffirmation. It aids in conditioning attitudes and behavior for the future. Further, there is something fundamentally unrealistic about focusing merely on the expectations and behavior of law violators when addressing the inferior side. In every society there are law violators. One wants to measure a general pattern of expectation and behavior in a given society as well as the intensity of demands and expectations. How widespread, intensely held and stable are the particular expectations? Are they likely to change? Such assumptions may be more useful than only partly empirical assumptions about superior and inferior limits to law.

I would also like to stress a point with respect to something that John Murphy said. He used that cute but deceptive phrase "one person's terrorist is another person's freedom fighter," and I'd like to stress that such rhetoric really should be insulting to any decent freedom fighter when there is an equating of terroristic strategies with freedom fighting as such. There's a very important point here—and I think John would agree—that we should differentiate, at least intellectually, between strategies of terrorism and, for example, a self-determination struggle that is otherwise legitimate. The General Assembly, for example, has declared in a 1984 resolution that the government of South Africa is an illegal regime and can be overthrown and that countries can engage in what one might term self-determination assistance, i.e., the support of armed struggles to overthrow that particular government. One should differentiate between permissible revolution or permissible self-determination struggles (as the overall macro-social violence circumstance) and particular tactics utilized by participants in those social struggles like the terrorist bombing of a cafe or, perhaps, an assassination of a police officer on the street. And one should not simplistically condemn one form of social violence because of the existence and impermissibility of the other or say that because the struggle is permissible, for example, anything goes and that the end justifies the means. I think that all of the panelists would generally agree here, but it's an important point.

In any event, there are others who try to define terrorism as if it excludes any sort of tactic used in a self-determination struggle. There are others who try to define terrorism as if it doesn't include tactics that we might identify as terroristic tactics if they serve the just cause, and I think this involves an unnecessary confusion between the just cause per se and particular strategies utilized during a just cause.

I'd like to add something else with respect to that which John Murphy said. He has rightly stated that in a war context the Geneva human-

itarian law already outlaws terrorist strategies against noncombatants (see Protocol II, article 4 and article 33 of the Geneva Civilian Convention, for example, if not also implicitly through other articles of Geneva law). But with respect to a nonwar context, I would disagree with John if he intimated—and I don't think he expressed himself directly on this point—that other forms of law do not already proscribe terroristic acts, for example, human rights law or prohibitions of genocide even in a nonwar context. In *United States v. Iran*, in 1979, it's quite important to recall, one of the elements of the United States memorial before the Court was the human rights violation by Iran as a complicitor in the deprivation of fundamental human rights of the hostages. The Court ruled, in fact, that human rights had been violated; not merely the protection of diplomats as such and that regime of law, but general human rights norms were litigated and applied by the Court.

In terms of the use of military force—I'm not picking on John, but John made the point, and I don't think he will disagree—John made the point that the use of military force is nearly impermissible as a response or that he was at least quite cautious as to when we should use military force, and he rightly emphasized that the bombing of Libya raised serious problems and concerns in terms of legal propriety. But I suspect that John would agree, and it might be a useful point for discussion, since we haven't paid a lot of attention to the military instrument as a sanction response, that an Entebbe-type evacuation mission, when it is reasonably necessary to engage in the use of force and the use of force is otherwise proportionate, as many scholars and apparently many nation-states recognize, can be permissible in a given case—perhaps in Lebanon in the future—although there might be other implications concerning such a strategy of force.

PROFESSOR JOHN MURPHY: Jon, one of your students told me that you're noted for asking difficult questions, and I think that you've just demonstrated that in the question you have given us. I will turn to that in just a minute, but perhaps I ought to respond very briefly to the points that Jordan Paust has raised to make sure there is no misunderstanding of what my position is on these. With respect to the South African situation, I wanted to make a distinction there that I think is important. The distinction is that there are really two different sets of issues for present purposes. One is the question of legitimacy of support for groups such as the African National Congress (ANC), outside support to wage a war of national liberation directed against military targets, and the other is the question of providing support for such a group that would directly constitute sponsorship of terrorist activity; this, of course, gets back to my desire to try to define terrorist activity as being very

narrow indeed. As far as I am concerned, the first question is a very close issue, that is, the legitimacy of providing arms to the ANC to carry out not terrorist activity but military attacks against the South African Government. My own preference in this area, as in many others, is to put as many possible constraints on that sort of activity and to try to resolve the very difficult problem of apartheid in South Africa by means other than military force. To the extent that the ANC ups the ante in South Africa through military action, there is going to be a response by a powerful South African government and a spreading of military action in that troubled part of the world.

Assuming, however, that the answer to the first issue is "yes, it's fine to give arms to the ANC and to allow them to wage a war of national liberation in South Africa," I would submit that it's not permissible to sponsor or encourage the ANC to engage in activity that could be called terrorist, such as a deliberate targeting of civilians, blacks and whites, in South Africa or in Southern Africa in general.

The answer to the second question—whether I think other forms of law are relevant, namely human rights law—is yes. Returning to my basic thesis that terrorism should be narrowly defined, I would suggest that a lot of issues that are sometimes described as questions of terrorism are more appropriately evaluated as constituting human rights issues. For example, the term "state terrorism" is often applied to torture by an oppressive government. It seems to me that calling torture "state terrorism" is for political purposes. For analytical purposes of the law, it's better to refer to egregious violations of human rights and analyze them under human rights law rather than overloading the already overloaded term of terrorism.

Third, with respect to the Entebbe-type situation, one hopes that kind of operation will be carried out with the agreement of the host country, and there have been some successes and failures of military intervention, particularly in the case of aircraft hijacking, to try to bring the hostage-taking situation of the airplane on the ground to an end. The Entebbe situation, of course, did turn into one in which there was, in effect, state sponsorship by Uganda of the terrorist activity underway, and, in my opinion, the legality of the Entebbe action is secure. In a situation where there is really no alternative and the danger to one's nationals and maybe the nationals of other states is imminent, under self-defense norms and policies, the Entebbe-type action is permissible.

Let me come to your very difficult question, Jon. With respect to Kelsen's superior limit to law, i.e., his proposition that if states act in accordance with a norm when they would have done so in its absence, it doesn't amount to a norm, I think that, and I'm hesitant to say this with

respect to someone as prominent as Kelsen, that is a bit simplistic. The very fact that a norm has been set forth in a legal instrument gives it a special weight and dignity. It is significant, in other words, if one titles the norm a matter of law rather than just a matter of policy. Just because states would act in accordance with the norm in the absence of its manifestation in legal form does not negate the importance of it being set forth in a legal instrument or developed through legal processes as a customary norm.

With respect to the second situation, that is, the so-called inferior limit to law, where you have a clearly articulated norm often violated, it seems to me that Kelsen's approach may again be a bit simplistic. In international affairs today we have a struggle for law. In some important cases of violation of norms, such as article 2(4) of the United Nations Charter or the prohibition of torture, there are nonetheless frequent reaffirmations of the basic norm. More important, there are few, if any, claims by states that these norms no longer exist. Hence, it is important to keep reaffirming these norms and to deal with the contextual problems, be they political, psychological, social or cultural, that are obstacles to greater adherence to the norms. In other words, I think these violations raise the issue of how to make these norms more effective but do not negate their existence.

MR. GEOFFREY LEVITT: We have heard a few semi-facetious references today to this concept of an antiterrorism industry, and we do have to remember that there is a real danger and a real potential problem if we turn our study of terrorism entirely into an academic subject. After all, we are talking about real people's lives being taken or shattered in various ways and we, I think, owe it to ourselves and to everyone who might be affected by this to keep that in mind. Having said that, I'm now going to treat terrorism as a subject because, as a matter of fact, one of the things that does make the study of international terrorism as interesting as it is is the fact that it poses the issue of the role of law versus the role of politics in dealing with an international problem. There are some commentators who have argued that the development of international law itself on the terrorism issue is fundamentally flawed. The international law that exists, that we've been talking about today and that's embodied in the conventions and that we've mentioned in these other instruments, is skewed towards protecting the terrorists themselves. It's riddled with exceptions, exemptions and immunities and so on and is, therefore, doomed to being ineffectual. I don't agree with that; I think that the international law that has been developed, while not perfect from the viewpoint of counterterrorism—but what is—nonetheless has a potential for being very effective as a means of

defeating or at least suppressing the threat of terrorism. In other words, where we're at the stage now—"we" meaning the international community, for lack of a better, more precise term—we've defined some norms in this area, some very specific norms, and as I said, some very potentially effective norms. But we've been stuck at that stage, it seems to me, for almost the last two decades now. We've got to move past that stage to the stage of enforcing those norms. And I would argue that the way we go about enforcing those norms effects fundamentally the integrity of the norms themselves. And that's why, I guess, my real point in the discussion of the Afghan sanctions was that the way we've been enforcing the norms so far has been so selective and so politically biased as well as ineffectual that we're risking a severe degradation of the norms themselves that we've achieved so far. The point that I derive from that is not the fact that there's a political context to all this that makes the role of law meaningless, because I think that's self-evidently not true, but that without a very careful consideration of the political context of enforcing these norms, our efforts to do so are going to be doomed to failure.

PROFESSOR KENNETH ABBOTT: I wish I could come up with questions in my classes that fill almost the whole discussion; this is a great question.

I also want to respond to the point you made that the two of us at the end of the panel took the position that law has no effective role in the fight against terrorism. It is interesting that the way the panel has been structured—and you can see it in the responses to your question as well as in the presentations—we began with speakers who were concerned with the broadest jurisprudential foundations of international law and moved gradually to speakers who were more concerned with the practical application of norms in real life political terms. But I don't think either of us at the end believes that law has no effective role and that all is sanctions, that is, politics and power.

When you said our position was that law has no effective role, I'm not sure if you meant that we thought the norms against state support of terrorism were inferior norms or superior norms in the Kelsen system. I don't think they are inferior norms, that is, I don't think they're like Prohibition—norms that nobody pays any attention to. Most states follow those norms, although saying that suggests there will be a problem with Kelsen's superior limit. Most states do not support terrorism, except perhaps in some marginal ways like releasing a particular terrorist because they fear retaliation from other terrorists. I don't think the norms are inconsistent with what states do at all, to the extent we have norms that are clear.

As to the superior limit, I think that's a closer question. Certainly

most states do not support terrorism in any organized way; certainly most individuals do not engage in terrorism or anything like it in any serious way. But most people do not steal or kill either, and yet we still have norms against theft and murder.

On a somewhat less elevated jurisprudential plane than Kelsen, it seems to me that in connection with terrorism, as in most areas of social life, there are small numbers of participants in the social process who will try to take advantage of other participants' compliance with the rules to gain a unilateral advantage for themselves. A terrorist-supporting state takes advantage of the general peaceful international society that international norms help to bring about, in order to achieve its own ends, to disrupt democracy. For those fringe states you need norms, even if most states act consistently with the norms for moral or political reasons, for reasons of reputation or whatever, just as you need a norm against murder for the few people who might consider committing a murder.

Now if you have these few aberrant states—and there are only five or six that we've talked about here, Libya, Syria, Iran and so on—for those aberrant states, the question is, how much does the norm do to change their behavior? It doesn't seem to me that just by being there, the norm does a great deal to change the behavior of those particular countries, although I think it does have some effect on their behavior. What I described in my remarks was the effect of reputation. One of the best things a state can have is a good—whatever that means in a particular context—reputation, because that means that other states will be more willing to interact with it, to join organizations with it, and to engage in various beneficial transactions with it. The reputation of being a law-abiding state can also serve you well, and I think most states want to retain that aspect of their reputation. But we can certainly question whether considerations like this are strong enough to influence those few states that are so committed to a particular issue that they are willing to support terrorist groups to advance that issue.

So in the end I come out where Geoff Levitt did. For the most part, the norms against terrorism only reflect what society and states will do anyway. But there are aberrant states who are willing to violate the norms for their own reasons, and for them we need not only norms but enforcement. The norms legitimate enforcement, guide enforcement and may even constrain enforcement in areas like proportionality. What I find interesting, then, is studying the range of peaceful measures to see how they contribute to the goal of enforcing the accepted norms.

PROFESSOR ROBERT FRIEDLANDER: Though I wonder if there's anything left to say, I will address my first remark to Jordan

Paust. It took me four years to come up with one definition, and sadly, no one pays any attention to it. I'm not sure I even remember it. As a practicing member of the radical right and a participant in the so-called Washington real world, I'm going to take the inferior side of the international legal norm spectrum to turn it inside out and also to play the devil's advocate, because all the angels have been singing with the choir here.

I think the unarticulated issue becomes: What is the nature of the threat in a global sense? In 1967 in a famous, and perhaps infamous, statement made at the American Society of International Law's Annual Meeting, former Secretary of State Dean Acheson said, and I quote, "The survival of states is not a matter of law." No state will allow itself to be bombed and gunned out of existence with perhaps the singular exception of Lebanon. That is reality. That may also be international anarchy. That is the problem.

PROFESSOR CHARNEY: With that, why don't we get the audience to jump in and then we'll see where it goes.

PROFESSOR ALBERTO COLL (United States Naval War College): This is a question to Professor Murphy. John, I have difficulty with a statement you made that a state should exhaust all peaceful remedies before using military responses to terrorism. There's obviously, of course, the problem of defining "exhausting" and defining "all," which would get to be rather cumbersome given the slow motion with which all the international machinery moves. But it also seems to me an inappropriate standard when we're dealing with self-defense issues under article 51 to require that when you're faced with an attack, with a threat or a form thereof, to require that before you respond in self-defense you have to exhaust all peaceful remedies. That does not quite sound right to me.

PROFESSOR MURPHY: Well, let me clarify my position here. I agree with you; I agree with your last point that if a terrorist attack is imminent, and there is no opportunity to pursue peaceful means, neither the United States nor any state has to go to the United Nations Security Council or file a claim with the International Court of Justice or pursue any of the other means of dealing with state sponsored terrorism that I talked about in my remarks. In that kind of situation, if the criteria of article 51 are met, as they may well be in a situation where a state is sponsoring a terrorist attack, the United States can act militarily.

The reason I raised the point of peaceful methods of dispute settlement is that I think those aspects of the situation have not received sufficient attention. In other words, my own preference, both as a matter of policy and law, is to give greater emphasis to peaceful methods of resolv-

ing disputes and less to the military option. In the specific case of the United States and Libya, as I said in my remarks, what troubles me most is the Gulf of Sidra incident. The claim of Libya that the Gulf of Sidra is part of its territorial waters has no international support. Nor is the Gulf of any importance as an international waterway. Hence, it was not necessary for the United States to send a naval armada into the Gulf to negate Quaddafi's claims to protect the freedom of the high seas. It seems clear to me that the United States did not send the armada to the Gulf of Sidra because it was concerned about upholding the freedom of the seas and ensuring that the Libyan claim didn't ripen into a norm of customary international law. Rather, it was seeking to provoke a military response from Libya. This seems incompatible with the United Nations Charter's obligation to pursue peaceful methods of dispute settlement.

But to go back to the use of force in self-defense, Dean Acheson once said that law is not a suicide pact. The law is not a suicide pact, and I do not rule out the use of military force against states that sponsor terrorism. Also, I would not require the exhaustion of peaceful means in situations where that alternative isn't available and one has to act in self-defense to protect oneself.

PROFESSOR PAUST: I would like to clarify a point. Not only does article 33 of the Charter require this exhaustion of peaceful means, if it would not be futile, I guess, but article 51 of the Charter has been interpreted not to allow preemptive self-defense, and I would caution use of language such as "when an attack is imminent." What we really need is a process of attack and the United States response to a process of attack. As I understand it, in the case of Libya, the United States claim was that our people were under a process of attack, however loose, when Libya was carrying out over a period of time a process of attacking our people around the world. And you don't have to wait until a particular bullet is fired if you adopt the process of attack rationale. But that is quite different than "they're about to do it, there is an imminent attack." Apparently the latter is not readily accepted by the community and, indeed, by the Court (e.g., *Nicaragua v. United States*). You have to have an actual armed attack. Otherwise the use of force can amount to an impermissible act of aggression, if it is otherwise violative of article 2(4) of the United Nations Charter.

PROFESSOR JEROME REICHMAN (Vanderbilt University School of Law): It seems to me that there is a fundamental and subtle ambiguity at the heart of the article 2(4) analysis that casts a big shadow over all this discourse. On the one hand, aggression is clearly bad under

article 2(4) and everyone has agreed to that. On the other hand, aid to participants in a civil war has become the big black gaping hole in article 2(4) in our generation—there's always a big hole in every generation; that happens to be ours. Look at it analytically for a minute. Take the Definition of Aggression Resolution of 1974, for example, which we promoted and signed along with everybody else. Just about every act of any importance under the rubrics of state sponsored terrorism or of state support for terrorists—Professor Abbott's list here—would violate certain clauses of the Definition of Aggression. On the other hand, the very same behavior could be permissible when qualified within the framework of aid to insurgents and aid to civil war without too many compunctions. I submit, therefore, that it's very difficult, from an analytical perspective, to arrive at any serious and normative solution to this problem without a willingness to proscribe certain behavior as such. The same behavior that qualifies as aggression, or that would qualify as aggression in another context, cannot simply be rehabilitated because it occurs in the context of civil war. If large states that are capable of providing such aid are willing to forego these kinds of encroachments on the principle of article 2(4), that makes it much easier to urge and convince smaller states that they will have to forego the forms of behavior under discussion here. I don't think you can allow powerful states to be selective about article 2(4) without other, less powerful states saying that they, too, can be selective in a manner consistent with their means.

PROFESSOR FRANCK: Well, I think that's a very valid analysis if you are proceeding entirely from anything so esoteric as the data of real world behavior. But, on the other hand, if you focus on the magic world of the International Court, the Nicaraguan case makes quite clear, in what I think is one of its saving graces or more gracious paragraphs, that aid to governments in civil war situations is entirely legal, which, after all, was an issue. It was an open question, and the Court seems to treat it as a closed question that yes, of course, you can go to the aid of the civil powers in a civil war situation, defining civil powers as being the recognized government, and you may not go to the aid of the rebels, at least not until the point where you may reach the phase where you can't tell them apart anymore, in which case there may be an obligation of neutrality vis-à-vis both sides, and a violation of neutrality towards one side may justify a violation of neutrality vis-à-vis the other side. But the Court's position on this is extremely conservative; this is a very conservative, pro-government, anti-insurgency position and, in fact, the American Civil Liberties Union at one point held a series of meetings, where they asked me to advise them, on whether they should take a position on the United States withdrawal from 36(2) jurisdiction of the World Court,

and I thought they shouldn't, and the argument that won them over—I mean, one has to think in terms of the American Civil Liberties Union when you're advising the American Civil Liberties Union—is that this is an extremely conservative, pro-statist Court; it's not a civil rights Court or a Court that is particularly interested in advancing insurgent movements or rebels or reformists groups or any of those kinds of things. Look at this decision. It says that governments are always right and may be aided and insurgents are always wrong and may not be aided so that, in the world of legal theory, that question seems to me to have been answered to close the black hole. But you're quite right that in practice out there, there are lots of folks doing it, and we are among those who do it most. We have our favorite insurgent groups and we're extremely busy helping them, and, of course, others started it and are doing it too—not just superpowers by any means, even quite small nations.

Let me, if I may, raise just one other question which, it seems to me, we ought to be addressing here, because there's always a danger of wandering off into related but separate topics. This is supposed to be a conference on state terrorism, and one of the questions that I couldn't address in my opening remarks and which has not come up is why are we talking about a concept called "state terrorism"? There was a time when state terrorism meant the government of Israel, and you could understand why the Palestine Liberation Organization was interested in talking about state terrorism because when they would blow up a bus with children somewhere in Israel, they would say, "well, that's because of what the Israelis are doing in bombing a Lebanese village" or something of that sort, so as a rhetorical tactic the concept of state terrorism crept into our vocabulary. And now, it seems to me, it's kind of a cop-out because now here we are discussing it very seriously, in relation to Quaddafi, in relation to the government of Syria, and so on. I don't understand what state terrorism is. Terrorism is done by people, not by states, and if Libya is encouraging and financing and recruiting somewhere towards the upper end of Professor Abbott's trilogy, it's not Libya, it's an individual, or a group of individuals, who are doing so. And that seems to be relevant to a whole series of questions, such as what kind of response are we entitled to. I mean, when Seymour Hersh is absolutely outraged because it's conceivable that we were trying to hit Quaddafi's tent in the raid, I react exactly the opposite way. Our response seems to me infinitely the most sanctioned invocation of whatever shadow of article 51 is applicable to that case. I hope that's what we were doing, and I hope that somebody is looking into why we missed. Our acts were infinitely preferable to bombing the state railroad, bombing the state hospital, bombing the state library or doing any of those

other kinds of things which would apply if there were a live, legal right to engage in reprisal. If it were a reprisal that we were conducting rather than an act of self-defense—and I somewhat differ with Jordan Paust about what the practice shows about the right to anticipatory self-defense—it was permitted and has taken place in many different situations, beginning with the preemptive strike at Suez and so on. I don't think anyone today believes seriously that you have to wait for the nuclear bomb to land before you respond—that carries idiots' law to the *reductio ad absurdum*, and even reasoning back from the *reductio ad absurdum*, you realize that that can't be the law—if that is what the law says, then the law is an ass. And so clearly, in practice, we come up with something else, but whatever right there is to anticipatory self-defense has to be, exactly as was suggested, justified in terms of an ongoing threat, *i.e.*, that the Berlin nightclub was event number nine, and we have absolute proof of twelve other events that are about to take place, unless. . . . And then the question is, unless what? And the words after "unless" have to be firmly rooted in the exigencies of preventing acts number four, five and six up to twelve from occurring, and if getting rid of Quaddafi is the best way to do that, then that is the thing that is legal, that is the most proportionate remedy. If closing down the airports is the best way of doing it, then that's what you do. But it has to be justified, and that brings us back to the issue of legitimation. What could we have done beyond President Reagan's making a speech on television later to the American public? I remember then—this is my last point—the edifying spectacle of Adlai Stevenson sitting in the Security Council saying we're just going to sit here until hell freezes over to convince you people that there are these missiles being built in Cuba. We ought to have been doing that; once we've blown our cover anyway on the fact that we'd cracked the Libyan code, we should have convened that Security Council and sat there until hell froze over to say, we're going to try to hit Quaddafi's tent—we wouldn't have to specify that—but we are going to react to this, but before we do we want you all to know that this is what happened and this is what we see is going to happen and something has to be done to intervene and we're going to exercise the minimal prerogative. If we're able to do that, and we're able also to act in concert, or at least with the approval of a significant group of like-minded states, then it seems to me that the legal requirements would have been met.

PROFESSOR PAUST: I think it's important, from the way the question was asked, to stress that article 2(4) is not an idiots' law, and if you look at the actual language in article 2(4), not all uses of force are proscribed. It says specifically, the threat or use of force *against* territorial integrity, *against* political independence, or in any other manner incon-

sistent with the purposes of the Charter, leaving other sorts of use of force unregulated in a sense. And if you look at the activities, especially the legally oriented or legally relevant activities of the General Assembly, you realize that we're not talking merely about the 1974 Declaration of Aggression. The 1970 Declaration on Principles of International Law pays some attention to the permissibility of self-determination assistance in certain social contexts, and the 1984 General Assembly Resolution condemning the government of South Africa and authorizing support for insurgent activities is quite clearly relevant as well, especially in view of the actual context of armed struggle occurring in that arena.

AUDIENCE QUESTION: Professor Friedlander referred to terrorism as an act of war, and Professor Paust referred to international criminals being subject to universal jurisdiction of all nation states. Professor Murphy referred to two options available with regard to international adjudication and arbitration or the International Court of Justice. I wonder what each of them would think about the establishment, or reestablishment, if you consider the Nuremberg trials, of an international tribunal with criminal jurisdiction over individuals?

PROFESSOR FRIEDLANDER: I am thinking how I am going to reply to that—whether it will be in my personal capacity or in my professional capacity. I will start off by pointing out that a little noticed and unknown clause of H.R. 4151, known as the Diplomatic Security Act, which has now entered into law, provides for the creation of an international terrorism court. This was voted by the same United States Senate which put a reservation last year on the Genocide Convention having to do with an international penal court. That shows the consistency of thinking of the United States Senate; it also, I think, shows the parameters of the problem. Back in 1970, I believe, Secretary-General U Thant, at a United Nations anniversary dinner in New York, proposed, because of the flurry of hijackings at that time, to establish an international hijacking court. He got absolutely no response.

I am concerned with realities, speaking as a Capitol Hill person and particularly as a Senate person and as someone who is now very much involved in the approval or disapproval of treaties. I just think, at this point in time, from the American perspective, that it is unrealistic to believe that the United States Senate would approve participation in an international criminal court or an international terrorist court or an international hijacking court, for better or for worse.

PROFESSOR PAUST: I think that, however unrealistic it is, it might still be worth pursuing in the long-term. You have to take a long-term perspective sometimes. I agree with Bob though, that it's probably

unrealistic. Perhaps an alternative might be something that was thought of previously. If a particular nation state is willing to, and constitutionally can, partly internationalize its court or judicial proceedings, or perhaps create a military commission *à la* Nuremberg, made up also of foreign judges, we might have a greater respect for and a greater internationalization of the judicial mechanism. Apparently, though, nation-states prefer to prosecute domestically and with their own judges when they do prosecute.

PROFESSOR MURPHY: Let me add just a word or two on the international criminal court concept. First, I think it's worth noting that in the wake of the exuberance of Nuremberg there was both a draft code of offenses against mankind and a draft statute for an international criminal court done by the United Nations under United Nations auspices. Indeed, the United Nations is currently working on a code of offenses that has been decoupled from the possibility of an international criminal court. There have also been some private groups that have done work on a statute for an international criminal court. I think that, as others have already indicated, the political possibility of a global international criminal court is nil today, particularly in light of the various difficulties the International Court of Justice is having. I think it is worth noting, however, that in the late 1970s, then French President Valéry Giscard d'Estaing proposed a regional international criminal court, and it would be interesting to have that possibility explored. The Europeans, of course, already have a system of regional courts—the European Court of Human Rights, the European Court of Justice—and it is not beyond possibility that a European international criminal court might be established. That also would face a lot of barriers, but it's a more realistic possibility than a truly global international criminal court.

AUDIENCE QUESTION: It seems I hear almost every speaker saying that certain acts of terrorism are violations of the law no matter who perpetrates them. Yet our country, by supporting the Nicaraguan contras especially, and doing other acts, seems to be doing the very same things you all are condemning except on a much bigger scale, so perhaps the large scale actions means it's not terrorism? And if we are going to deal with the problems of world terrorism, should we not, as the most powerful and dominant country in the whole world, look to our own self, look to our own legitimacy, before we begin to judge other countries? Can we judge ourselves by the same standards by which we are judging them?

PROFESSOR PAUST: While answering your question only in part, I have a footnote reference to the fact that the International Court of Justice, in *Nicaragua v. United States*, has condemned United States

encouragement of terrorist activities by supplying a 1983 guerilla manual to certain groups, although the Court itself was not willing to go further in terms of the kind of labels that Ken Abbott was talking about other than stating that there was an encouragement, an impermissible encouragement. They did not say that there was a sponsorship of terrorism or an assistance to or acquiescence in terrorism as such. But, yes, I think generally that no matter who the law violator is, there should be corrections of those law violations, and clearly states can be guilty of complicitous encouragement, toleration or acquiescence in violations of international law. None of us have actually refrained from criticizing the government of the United States from time to time. I think that, in a sense, the question is a good question, and, in a sense, the question is unfair because all of us are on record, I believe, as criticizing certain aspects of United States foreign policy.

PROFESSOR MURPHY: Let me make one quick comment. Yes, it seems to me, as I hope the thrust of my earlier remarks indicated, that the United States should at least refrain from sponsoring any acts that can be defined as terrorism, and, to the extent possible, we should prosecute and punish acts of terrorism even if they are committed by groups which generally we approve of. I just want to mention one case, our support of the rebels in Afghanistan. In my view, the legitimacy of providing arms to the rebels in Afghanistan is clear. The Soviet Union invaded the country; the rebels are fighting to drive the Soviet Union out; and as a matter of collective self-defense, it's perfectly appropriate for the United States to provide arms to them. However, one thing that is not very much noticed about the Afghan conflict is that the amount of brutality on both sides is absolutely startling, including, of course, brutality by the Afghan rebels that we support. We may applaud their defense against the Soviet invasion, but the kind of brutality that they and the Soviet Union engage in is simply impermissible. Afghanistan is, indeed, a sorely neglected instance of widespread violation of humanitarian norms.

PROFESSOR FRANCK: I think in reply to the questioner's very sensible question that the answer is that, to some extent, we have stopped defining the legality—stopped judging our actions—by our standard and are now, to a considerable extent, judging our conduct by their standard. In the early 1970s, as the result of a series of proposals by the then Secretary-General of the United Nations, the General Assembly began the exercise of trying to define a code against terrorism, and they, that is, the Third World and the Soviet Union, shot it full of holes which consisted of such permissive statements as terrorism is illegal and *except*

in wars of national liberation and *except* in situations where oppressed classes are seeking to redress historic injustices, and by the end you had Swiss cheese. And we have lived through a prolonged period of time in which we have seen "them" establish a standard which we now take rather seriously; we sort of said, well, okay, if that's the way they want to play the game, maybe we ought to play it by their rules.

What makes that kind of answer to your question, it seems to me, less than useful is that it doesn't in fact resound in the real world. It resounds in a rhetorical world. I see very little difference between our candidates for good violent movements and their candidates for good violent movements. Nor do I take any particular joy out of the fact that we're now both playing by their rules rather than by our rules. I'm not surprised that we're backing violent and religiously fanatic mujahadeen against their enemies, a violent and agnostic regime. I don't buy John Murphy's explanation that this is collective self-defense, because we have an ambassador sitting in Kabul, we recognize that government, and the law at least as the International Court has defined it is that you can help governments but you can't help insurgents, so there may have been a right of self-defense at one moment in history, but it's over, and you can't now be helping the mujahadeen on the theory that you're engaging in collective self-defense with some entity that is not the government that you recognize. So where does all that lead us? I think where it leads us is that we are in a situation here where it isn't so much the standard that is wrong. I think there's nothing wrong with the Reagan Doctrine. I think that the idea that a group of people could sit down together and attempt to define decent, law-abiding, democratic, representative regimes and decent, law-abiding, human rights-respecting, rebel movements and establish a law that says you can help those, but you cannot help nasty, oppressive, totalitarian governments or rebel movements—I don't find that troubling. What's troubling is the fact that the people who make these proposals, their people and our people, do not ever seem to turn to the question of how to make that proposal for a norm in any way legitimate by devising a process for its legitimate application case-by-case. They are claiming the right of the United States, an interested party, to make that determination unilaterally. At the very least they ought to propose a process by which some number of states collectively engage in a credible, disinterested examination of whether a particular regime or a particular liberation movement, is the instrument of the good or the bad forces. But if you can't devise a system of application that carries minimal credibility and you're proceeding entirely by self-assertion—these guys are good and these guys are bad—we're not talking about anything. You're just talking about not having a law. And we already know that

we don't have a law, so we don't need a law to tell us that we don't have a law.

AUDIENCE QUESTION: While we're discussing the definition of state sponsored terrorism, I'd like to challenge Professor Murphy's assertion that state-administered tortures and killings, which go on regularly in countries like Chile, Guatemala and South Africa, are not acts of state terrorism. It seems to me that the results of those acts are terroristic in that they are promoting political ends through the use of violence on innocent civilians.

PROFESSOR MURPHY: Let me make sure that you understand that I have no sympathy whatsoever for such actions. My suggestion, nonetheless, is that we not call such actions state terrorism because it makes more complicated the problem of trying to identify terrorism as a separate legal category. What you define as state terrorism should be defined very specifically as torture or other forms of violations of international human rights. It is quite clear, to be sure, that the United Nations is not doing all it could or should with respect to promoting human rights. Moreover, it's important to note that whether you call it torture, state oppression, state violation of human rights or state terrorism, there is a connection between that kind of behavior and international terrorism. While oppressive state behavior can be very effective in combatting any kind of revolutionary activity in the state itself, the result is that the individuals who are trying to overthrow the oppressive government are going to take the battle outside of the country and hijack airplanes or attack diplomats or set off bombs elsewhere because they can't carry on the fight internally.

In terms of analysis and categorization, it is useful to make these distinctions. Torture and other egregious violations of human rights should be categorized and analyzed under international human rights law. Terrorism in an armed conflict should be categorized as war crimes, and then analyzed under the law of armed conflict. Terrorism would then be limited to acts of a criminal nature by private individuals. In short, it seems to me that if you call everything terrorism, you overload the term, and the result is you have a very slippery concept. One only has to turn to United Nations debates about what is the most important terrorism to deal with; one side to the debate says it should be state terrorism, and others say, no, it is private acts of international terrorism. One doesn't have to make a choice. Both state terrorism or egregious violations of human rights and international terrorism should be combatted as a matter of high priority. But confusion of terms should be avoided.

PROFESSOR PAUST: I think the main point is that John Murphy

believes that we should focus on particular acts and, again, not call anything terrorism. I would simply add that although that might be a useful approach to sanctions against strategies of terrorism, if you're going to try to define terrorism, which is my preference, you should be intellectually honest and try to come up with a neutral definition that does not exclude particular contexts, actors or tactics, and let the chips fall where they may. Identify the strategy, no matter who the participants are. Further, as Tom Franck has pointed out, there's really no such thing as a state in one sense; there are merely individuals acting and interacting, so state terrorism, I suppose, is intellectually dishonest as a phrase or a concept. In one sense there's no such thing. There are individuals who act supposedly on behalf of the state, or not, trying to use these strategies to shore up their own power, or to pursue other values, and so forth.

PROFESSOR CHARNEY: I've been informed that there's a footnote to this discussion before we wrap it up. Professor Friedlander.

PROFESSOR FRIEDLANDER: As the last speaker, and the last panelist, and therefore asserting the final wrap-up claim as an historian and as a Senate Counsel, I would just like to offer a footnote to today's discussion with respect to a question posed by Professor Franck. Should the United States government be looking into why we could not hit Colonel Quaddafi on the bombing mission, to which Tom has given his approval? I will tell you, off the record, historically and factually, it is because Colonel Quaddafi was on the potty!! And that's what actually happened. Thank you.

PROFESSOR CHARNEY: With those edifying comments, I want to thank all the panelists for their presentations and their participation here. It's been, I think, a terrific conference. I thank Susan Burgess again for all her organizational work and the audience for their participation. There will be a reception in the Alexander Room immediately after we recess. Thank you very much.