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State Support of International Terrorism: Legal, Political and Economic Dimensions

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edgment of what has happened to the United Nations and an effort to rectify it. It is to be hoped that the December 16, 1991 repeal of the Zionism is racism resolution by the UN General Assembly marks the beginning of a movement in that direction.

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State Support of International Terrorism: Legal, Political, and Economic Dimensions. By John F. Murphy. Boulder: Westview Press, 1989. Pp. 121. Index.

Life today presents us with an omnipresent terroristic melodrama. We are pummeled continually by images of terroristic violence and oppression. These assail our sense of well-being, filling us with fear, hatred and an urge for vengeance. Herman Melville described, years ago, the rage and hatred felt by another generation. As Melville said of Ahab, we are plagued by lies, but also by

truth with malice in it; all that cracks the sinews and cakes the brain; all the subtle demonisms of life and thought; all evil to crazy Ahab, were visibly personified, and made practically assailable in Moby Dick. [Ahab] piled upon the whale's white hump the sum of all the general rage and hate felt by his whole race from Adam down; and then, as if his chest had been a mortar, he burst his hot heart's shell upon it.¹

So it is with us and terrorism. Terroristic outrage is an omnipresent danger because governments and rebels use it when "necessary" to an important end. It infringes upon our law, policy and individual thoughts, and it is not likely to end with the ending of the Cold War.² The phenomenon calls for deep thought and innovation.

Professor Murphy's book is a small exposé on state support and sponsorship of

¹ H. MELVILLE, *MOBY DICK* 184 (Everyman's Library 1988) (1851).

² Some traditional notions of international law will be resurrected with the demise of the Cold War, while others will remain interred. Reisman, *International Law after the Cold War*, 84 *AJIL* 859 (1990).

terrorism. It is enjoyable, well written and interesting, but its space limitations and focus ultimately prevent it from advancing the debate over what terrorism is or what to do about it. Although the end of the Cold War is a harbinger of hope, it may signal the weakening of regional control and tempt an exacerbation rather than a diminution of terrorism. The book tries to address the problem of terrorism while avoiding the devastating reality of its ubiquity; although not aimed at the scholar, it manifests Murphy's rich talent and expertise and whets our appetite for a sequel.

The impetus for this project (and perhaps another reason for its limited focus) seems to have been a report by Defense Systems, Inc. (DSI). Murphy distills out of DSI's list of types of terrorism, state sponsorship and state support (pp. 33-38). He provides a good overview of current mainstream Western thinking on some aspects of state terrorism and a succinct and accessible summary of many basic traditional, Cold-War-driven ideas, issues and sources. The space limitations, intended audience, perspective and choice of sources, however, restrict the book's impact. We await the application of Murphy's expertise to a sequel critically scrutinizing the ideas presented in this exposé.

Chapter 1 briefly describes the debate over defining terrorism, reporting some U.S. and European academic and governmental definitions without really entering the fray. Murphy believes that the debate over definition is not productive, but he does not explain in any depth why not. His goal—to develop a nonideological approach to terrorism—is laudable, but again the limitations of space and focus prevent its fulfillment. Murphy is limited to describing only one point of view, without hard scrutiny of any. He rejects as unhelpful a "generic" definition of terrorism and avoids discussing the profound moral and political implications of conduct promoting national liberation movements or of governmental reaction to them.³ Indicating that "states

³ See Randall, *The Politics of Terrorism* (Book Review), 1 *CRIM. L. F.* 347, 348 (1990). I empathize, having wrestled with the problem myself.

unfriendly to the United States and other Western democracies" follow the path of using "terrorism as a kind of surrogate warfare, . . . a substitute for more conventional means," he then notes that, "taking a broader view, some have alleged that the U.S. government itself is a major sponsor of international terrorism" (p. 1). Unfortunately, he has no space to analyze the difference between what the "anti-Western-democracy states" do and the "broader view." It would be interesting to scrutinize specific conduct by most states—not only antagonists of the West—to see whether they all use "terrorism as a kind of surrogate warfare," at least when important national security interests are involved. More scrutiny, distinguishing the broader view from terrorism as surrogate warfare, would be welcome.

Murphy sets out to develop "a typology of state support and sponsorship of terrorism that minimizes reference to specific states, and to define international terrorism, state support and state sponsorship, without depending on political ideology" (p. 2). Despite his good faith and articulate effort, the book's brevity and focus cause him to slight the very painful issues that would enlighten the reader and prevent him from meeting his avowed goal of coming up with an original, neutral, nonpolitical or even nonideological discussion of terrorism. He avoids the sticky problem of defining terrorism generically, wishing only to analyze state terrorism in a way that focuses on particular acts already perceived and proscribed as international terrorism (p. 2). He does enlighten the nonspecialist, briefly showing how multilateral treaties require states to prosecute or extradite individuals charged with specific, proscribed conduct (hijacking, hostage taking, torture, bombing civilians, and crimes against internationally protected persons) that is generally recognized as terrorist; but space constraints and desire to avoid a quagmire pre-

vent him from analyzing what it is about this conduct that makes it terrorist or criminal. While most of us would readily consider this conduct terroristic, we are not provided with insight into the required criminal elements.

Thus, owing to space constraint or intention, the author does not address the seemingly intractable conundrums posed by the interrelationship of world politics, violence, morality, ideology and law. This avoidance of the moral dilemma that permeates what he calls the definitional quagmire combines with his other constraints to derail his effort to come to grips with state terrorism and erodes his opportunity to advance the debate on it.

It may well be, as Murphy suggests, that the most efficient way to deal with terrorism is to prohibit specific conduct rather than some generic mega-crime called terrorism. Nevertheless, as he also recognizes (p. 3), we live in a world where terrorism is a reality and where the term is utilized for good or for evil. Thus, it is necessary to wrestle with it and its conceptualization—to come to grips with the principle or principles that make hijacking, hostage taking, killing diplomats, or bombing a civilian neighborhood or a Pan Am flight terrorism. To say that conduct is punishable because it is proscribed, and that it is proscribed because states agree that it is terrorism, obviously begs the analytical question. The problem with the inductive approach by itself is that unless we distill the essential principles of the conduct that has been condemned by international and domestic law to see what makes it terrorist, we gain no conceptual insight and have no standards. We have a system like that of ancient common law England, without principles, policy, coherence or conceptual integrity. Analysts must discern principles behind the simple agreements or decisions.⁴ Otherwise, we agree that international law is nothing more than the "will of the sovereign(s)," giving in to the tendency evident among some political scientists and manifest in the rhetoric of the so-called war against terrorism (or

See C. BLAKESLEY, *TERRORISM, DRUGS, INTERNATIONAL LAW AND THE PROTECTION OF HUMAN LIBERTY* (at press, 1992); Blakesley, *The Modern Blood Feud: Thoughts on the Philosophy of Terrorism*, 33 *CATH. LAW.* 177 (1990).

⁴ D. P. MOYNIHAN, *ON THE LAW OF NATIONS* 109 (1990).

drugs). Law becomes nothing more than a propagandistic exercise, in or by which the greatest power almost always wins.

Murphy's insistence on the difficulty of coming up with "a generic definition" misses the point. It is not as important to develop a generic definition as it is to capture the essence of the social evil and legal wrong(s) that terrorism represents. Murphy emphasizes sanctioning; but we must understand what social harm we are sanctioning and why. His analysis of the international law of sanctions, like that of many commentators, is wanting, because he discusses penalties as if they were mere politics. That may be what politicians think and want, but it loses sight of the basic principle of penal jurisprudence: *nulla poena sine lege*. Imposing punishment or sanction is penal in nature, although many politicians indicate otherwise. For application of a legal penalty to be appropriate, proof of elements constituting a prohibited social harm is required. The basis for sanction must be principled and articulated in advance. If the purpose is not legal but political—if sanctions are political tools to be used against one's enemies—we should recognize that and not implicate "the rule of law." To refer to political management of others as the rule of law is to debase the latter. It is not surprising that this deficiency hampers Murphy's analysis; it also afflicts much international penal law (and commentary thereon). There are twenty-two categories of international crimes, representing 314 international instruments enacted between 1815 and 1988, none of which has properly defined the offenses proscribed or provided the rudimentary elements for the establishment of "guilt."⁵ Of course, incorporation into national law, by promulgating explicit penal elements to be proved, rectifies the deficiency domestically. But that leaves international law insufficient, invigorating the claim that international law is not law at all. Yet many internationalists are willing to ac-

cept this exercise in vagueness and futility; perhaps they just do not notice.

If we are talking about a rule of law, it is not appropriate to punish an individual, a group or a nation for vague, undefined conduct. We must determine the concrete *actus reus*, *mens rea*, and proscribed social harm. Murphy wants to avoid any political application, but his approach actually implies approval of just that. The failure to address the essential and specific evil of terrorism (in both a generic and a specific sense) prevents him (and most commentators) from developing an original thesis that would help us to understand what it is about certain conduct that makes it terrorist and punishable.

Although he believes it is futile to try to define terrorism generically, Murphy admits that it would be wise to proscribe "major forms of terrorist acts currently neglected by international treaty law" (p. 22). One wonders how this can be done without coming to grips with what it is that makes such conduct terroristic and what elements must be proved to penalize it. He notes that bombing of civilians and theft of military nuclear material are terrorist but does not analyze in depth why or when this is so. (Would theft of nuclear material be criminal terrorism if done in peacetime, to prevent the development of nuclear weapons or to prevent an enemy from using it militarily?) He suggests that actions in support of national liberation and repressive responses by target governments themselves raise profound issues of law and morality that deserve a great deal more analysis than they have received to date. However, he believes that "clear analysis of these issues is hindered rather than helped by treating them as part of the problem of terrorism" (*id.*). To suggest this, without analyzing why already developed offenses ought to be punished as terroristic offenses for some reason other than just because nations have agreed to do so, begs the question and believes what is really a simple reiteration of a positivistic, status quo policy orientation. Similarly, justification of the U.S. interception of the Egyptian airliner carrying the hijackers of the *Achille Lauro* and equivocation over the U.S. bombing of Libya suggest an assumption of a particular political perspective or orientation. An intention not

⁵ See Blakesley, Introduction to the Draft Convention for an International Criminal Tribunal 5 (presented to Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1990); 1 & 2 M. C. BASSIOUNI, INTERNATIONAL CRIMES: DIGEST/INDEX OF INTERNATIONAL INSTRUMENTS 1815-1985 (1986).

to present an in-depth analysis of these events (p. 102), along with mere iteration of one position, undermines his attempt to provide a test of illegality based on the means, rather than the goal, of prohibited conduct. One hopes that he will add more of his own rich ideas to the scholarly debate, either by critiquing the positions he reports or by presenting arguments in their favor.

Chapter 3 describes the role of Western intelligence networks, their deficiencies and their potential to combat state terrorism. Murphy presents an interesting summary of some of the U.S. law related to intelligence surveillance at home and abroad. He notes the tension between constitutional principles and the need for intelligence to combat terrorism, but he avoids analysis of the tension and withholds his views. Chapter 4 describes the options of diplomacy, protest, international claims and transnational litigation as desirable, peaceful ways to combat terrorism. The use of civil remedies in the Alien Tort Statute,⁶ in civil Racketeer-Influenced and Corrupt Organizations Act (RICO)⁷ cases and in the criminal provisions of RICO⁸ is discussed. Again, we are not given Murphy's opinion on the viability, wisdom or constitutionality of these remedies. The discussion of the Alien Tort Statute is limited to *Tel-Oren*.⁹ It does not mention *Amerada Hess*, which held that the Alien Tort Statute does not apply to actions against foreign states.¹⁰ Some discussion of the Foreign Sovereign Immunities Act (FSIA) as a vehicle for litigation against state sponsors or supporters of terrorism, focusing on whether the FSIA's exceptions

to sovereign immunity allow federal jurisdiction, would have been apt.¹¹ Murphy would have a lot to contribute to the debate on the political question doctrine and the wisdom of litigating these matters.

Chapter 5 considers the application of economic sanctions to prevent or punish state support and sponsorship of terrorism, contrasting them with the use of force. Although he generally concludes that actions taken by the United States and its allies were appropriate, Murphy advocates restraint in the use of force to combat or punish state terrorism. His distinction between sponsorship (pp. 33-38) and support (pp. 33-34, 108-109, and 120) of terrorism, and his point that force is more appropriate in reaction to the former, are interesting, but not elaborated. Quite taken with Professor Keith Highet's "draconian" and "sweeping" economic sanctions against states sponsoring terrorism, Murphy is rightfully hesitant about the use of force, but an elaboration of the analytical differences and the value of choosing the sort of "civil death [penalty]" for nations involved in sponsoring terrorism (p. 78) rather than the use of physical force would have been interesting. The concept of terrorism could have been illuminated by analysis of how and why the most draconian level of economic sanction (oppression and slow death by starvation and lack of medical care for the entire population) differs from what he considers terrorism. Unfortunately, again, we are not treated to an in-depth explanation or analysis. In addition, Murphy seems to assume that economic sanctions would be applicable only against enemies of the

⁶ 28 U.S.C. §1350 (1988).

⁷ 18 U.S.C. §§1961-1968.

⁸ As done in *United States v. Bagaric*, 706 F.2d 42 (2d Cir. 1983).

⁹ *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985). Murphy discusses briefly Professor Koh's interesting article, *Civil Remedies for Uncivil Wrongs: Combatting Terrorism Through Transnational Public Law Litigation*, 22 TEX. INT'L L.J. 169 (1987), but does not analyze in depth or critique the argument that such matters ought to be battled out in Congress rather than in the courts.

¹⁰ *Argentine Republic v. Amerada Hess Shipping Corp.*, 109 S.Ct. 683 (1989). It is likely that the decision was published after he finished writing the book.

¹¹ See Randall, *supra* note 3, at 353-54. This will be even more interesting when Murphy is able to consider the Anti-Terrorism Act of 1990, S. 2465 (the Grassley-Heflin bill), to supplement 18 U.S.C. §2331, currently being discussed before the Senate Committee on the Judiciary, Subcommittee on Courts and Administrative Practice. This act would establish an express right to victims of terrorism to recover damages from its perpetrators. The Department of Justice and the State Department have argued that this act ought not to apply to any government or government official, because of the FSIA. See Zagaris, *Senate Holds Hearings on Anti-Terrorism Act Designed to Provide Victims of Terrorism with Opportunities to Sue Terrorists*, 6 INT'L ENFMT. L. REP. 293 (1990).

United States. The discussion of economic sanctions, like the book, seems to suffer from his refusal to discuss the "broader view" of terrorism.

Murphy wants to emphasize the means rather than the goals of force and argues that the laws of war and the UN Charter are to govern intervention. He aptly suggests that any broad principle allowing humanitarian intervention is dangerous. In his cavil against the eloquent McDougal/Reisman defense of the raid on Entebbe and his hairsplitting quibble with Professor Schachter's analysis of the attempt to rescue U.S. hostages in Iran,¹² Murphy shuns in-depth critique, so misses the chance to further the discussion of another important, albeit thorny issue. We know that, like Hightet, Murphy would apply draconian economic sanctions, but we are left wanting to know why, how and when these are more appropriate than limited use of force. His discussion of the use of armed force is an interesting introductory description of some other scholars' views. He whets our appetite for his significant expertise to elaborate and apply his cautious views on force to the definition of terrorism.

Murphy is less than sanguine about the efficacy of international adjudicatory (or even arbitral) remedies in relation to state-sponsored terrorism (p. 59), using the *Nicaragua v. United States* case (pp. 59-60) to present his skepticism and belief that they degenerate into ideological sniping. Here again, it would have been interesting to see some analysis of *why* he feels this is so and how this is different from other litigation. Is his dissatisfaction with international adjudication based on the fact that ideology determined the outcomes or on the victory of an opposing ideology? Certainly, adjudication is fraught with political and ideological overtones. Is it really so different, in terms of its political or ideological tenor, from adjudication in domestic systems?

State Support of International Terrorism is a useful primer for someone with a general interest in the subject. It is a brief, well-written, interesting survey of contemporary, mainstream thought on the subject of

terrorism. It presents some incipient thoughts that ought to be expanded. Without deep scrutiny, it also presents state and individual terrorism through the prism of the traditional, state-developed instruments and interpretation. Murphy aimed to provide a nonpolitical analysis, but the very foundation of his study, perhaps like that of any study, is political. Avoidance of the tough issues exacerbates the problem. It would have been helpful to have more in-depth criticism or analysis of the academic positions described. We would all profit from having Murphy's broad experience and keen analytical skills applied to elaboration, analysis and critique of what he sets forth here.

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Whalen, Richard J., and R. Christopher Whalen (eds.). *Trade Warriors: The Guide to the Politics of Trade and Foreign Investment*. Washington, D.C.: The Whalen Company, Inc., 1990. Pp. v, 467. Index. \$34.95.

Any study of the formulation of trade policy should encompass more than the examination of legal theories such as "most favored nation treatment" or the "act of state" doctrine. The drafting of legislation, or the execution of law, is affected by the philosophy of the persons involved. After a short survey of recent trade issues, this book proceeds to examine the personalities that shape U.S. trade policy.

Richard Whalen and R. Christopher Whalen are the editors of this book; other writers and collaborators are identified in an appendix note on sources. The back cover prominently identifies the Whalen Company, Inc., as "one of Washington's oldest political consulting and communications firms, founded in 1970."

In an opening discussion on the historical perspective of U.S. trade relations, *Trade Warriors* quotes authors and congressional personnel for their view of the evolution of current U.S. trade and foreign investment policy. The major issues noted include the United States-Japan disputes on FSX aircraft production, the Semiconductor Trade Agreement and the Structural Imperatives

¹² See McDougal & Reisman, Letter to the Editor, N.Y. Times, July 16, 1976, at A20; Randall, Book Review, *supra* note 3, at 353.