15 Comments

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My assessment of the chapters by Professors Levie and Tucker can best be organized by the simple geometric diagram below (see figure 1).

Figure 1:

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  D
 /   \
A-----B-----C
     |     |
     E     
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Key:
A = Policy
B = International Legal Obligations of States
C = International Criminal Law Applicable to Persons
D = Geneva Protocol of 1925
E = International Customary Law

This diagram seeks to visualize my understanding of the relationship among national policy, codified and customary international law, and individual responsibility as they impinge upon the rules governing permissible weaponry in armed conflicts. Although I shall treat segments of the diagram one by one, the whole is, in my view, greater than the sum of its parts. I will begin with line ABC and then turn to DBE.

Think of B (International Legal Obligations of States) as a movable point along the line. I believe that Professor Levie clearly and Professor Tucker only slightly less clearly place point B at the right end of the line segment very near, or even coterminous with, point C (International Criminal Law Applicable to Persons). But I think that point B should be moved all the way to the left to be very near, if not super-
imposed upon, point A (Policy). Before turning to the significance of this difference, I want to assure potential critics that my moving the point from right to left is not simply another reflection of my radicalism.

Professors Levie and Tucker would make a clear separation between policy, or point A, and the requirements of international law, or points B and C at the other end of the line segment (figure 2).

Figure 2:

<table>
<thead>
<tr>
<th>PROFESSORS LEVIE &amp; TUCKER:</th>
<th>SUGGESTED CHANGE (D'AMATO):</th>
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<tbody>
<tr>
<td>A</td>
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<td>B</td>
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<td>C</td>
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Professor Levie concludes that tear gas, napalm, and herbicides should as a matter of policy be discontinued without delay, even though their use by American forces in Vietnam did not in his opinion violate any norm of customary international law. Professor Tucker is not quite so sure that tear gas and some herbicides might not have been unlawful weapons as used in Vietnam, but in any event he too deplors their use as a matter of policy even if a reasonable case could be made for them as far as international law was concerned.

However, I draw a much broader conclusion from this case in which international actions of a state so clearly seem to be mistakes of policy within an area traditionally regulated by international customary law. In my view this very clarity of perception of policy has a good statistical probability of testifying to a parallel responsibility under customary law. In this regard there is an analogy from United States tests of hydrogen bombs in the Pacific in 1954. When some Japanese fishing vessels were damaged from the explosions, the United States government paid them full compensation, while at the same time it disclaimed any legal liability. The policy was obviously clear—if by your own actions on the high seas you cause injury to someone else, you
should pay compensation. When the policy is that clear, can the legal requirement to pay compensation be absent? Was it persuasive—or even very useful—for the United States to make that disclaimer to the Japanese fishermen? Similarly, if Professor Levine finds it so clear that the use of certain weapons should be discontinued, is it persuasive that discontinuing them would be gratuitous and quite separate from the pressure that norms of customary international law exert upon national decision makers?

Indeed, the very strength of the policy reasons adduced for abandoning these weapons in Vietnam results from having the same policies occur with equal persuasiveness to decision makers in other nations during previous wars not all that dissimilar from Vietnam. Indeed, these policies were in fact responsible for the generation of articulated state practice amounting to customary international law. International norms do not descend upon us out of the blue. Instead they arise out of the policies of nations interacting with other nations.

Any existing norm of international law is the visible top of a pyramid of policies each having great force and conviction. In addition, from a jurisprudential viewpoint, we should not too easily nor too readily separate the is from the ought—we should not be too positivistic, as Professor Covey Oliver has characterized it. Granted, what ought to be done in the future is not equivalent to present law—here Professor Baxter has put it well in his comments in chapter 3 on Professor Falk’s discussion. On the other hand, in law, as Professor Lon Fuller has insightfully written, the is and the ought intersect in determining the very content of what law is.

Law necessarily includes within its own content certain natural or ethical principles of method and substance—in a way well exemplified by the sort of approach taken by Professor Falk in chapter 1. Professor Falk does not discuss primarily what the law should be in the future as a matter of policy or ethics, but what the legal requirements were with respect to Vietnam. He interprets the is of the law in the context of widely held past views or subjective expectations of the ought. By this method of interpretation he helps to determine the content of the law in much the same way as a judge would in the context of a real case.

Finally, the working out of customary international law over time entails a certain internal momentum. Incipient customary law itself becomes another policy reason that reinforces the law. In other words, a nation usually finds a strong policy interest in simply obeying international law. This policy interest, added to others, crystallizes and reinforces the emergent norm. This kind of process seems to have taken
place, whether subliminally in certain cases or not, within the United States, leading to the almost unanimous conclusion that we really ought to have stopped the use of tear gas, herbicides, and perhaps napalm and antipersonnel bombs in Vietnam long before United States involvement in the war ended. This conclusion is probably not isolable from the requirements of international customary law. Point B in this case is very close indeed to point A.

Perhaps a basic reason for Professors Levy and Tucker separating points A and B is that they do not separate points B and C. They do not distinguish between international legal norms applicable to states and international customary law governing individual conduct. For example, if the use of tear gas violates customary law, then Professors Levy and Tucker would probably say that those Americans in the hierarchy of military command who ordered the use of tear gas in Vietnam would be war criminals. Clearly they are very reluctant to want to be open to such a conclusion, and thus they are impelled to separate policy from law. An even clearer case would be any legal opinion penned by present counsel for the Pentagon or for the State Department. If they were to conclude that the American use of certain weapons and technology in Vietnam contravened international law, they might fear that such a conclusion could be used against their own colleagues in government in any real (or even mock) war crimes trial. Quite naturally they would be likely to conclude with great force that such weaponry should be discontinued immediately as a matter of policy, but not as a matter of international law.

By advocating that point B be moved away from point C and toward point A, I am basically saying that in certain areas of substantive uncertainty individual responsibility for war crimes should not be co-terminous with the international obligations of states. A simple violation of international law might be enough to deter a country from using tear gas in warfare without making the governmental advocate of such use a war criminal. Indeed the Geneva Protocol of 1925, like the Hague Conventions of 1899 and 1907, was addressed to states. It was only the Nuremberg trials that picked up some of the substantive provisions of conventions and made criminal legislation out of them. Of course, the Nuremberg tribunals were justified in doing this insofar as grave substantive breaches were concerned.

With respect to certain types of warfare that, as Professors Levy and Tucker have found, are quite controversial as to their inclusion or exclusion from the Geneva Protocol, it might be unfair to hold a deci-
sion maker who orders their use criminally liable. Normally, ignorance of the law is no excuse; but perhaps uncertainty of the law should be. For purposes of criminal law, the statute should be very clear and unambiguous. I think that even state practice, after some perhaps regrettable excesses at Nuremberg and in the Far East, has come around to this position. In the United States Lieutenant Calley was prosecuted for one of the clearest of all possible war crimes. On the other hand, there is not much support for prosecuting individuals for violation of uncertain rules, such as a pilot who dropped tear gas or a decision maker who ordered the use of herbicides.

If it is accepted that there can be a distinction between laws of warfare applying to states and those creating war crimes, then we may have resolved the apparent dilemma of counsel for the United States government. They might have felt free months or even years before now to argue strongly that the use of weaponry and technology such as tear gas and herbicides, and perhaps even napalm, violated international customary law. Along with their friends outside of government, these counsel might have felt less constrained to distinguish so sharply between policy and law if they knew that their conclusions would not redound to the great personal disadvantage of decision makers within the government. Professor Falk has arrived at this same point by recommending a general amnesty for governmental decision makers. My point is that this can be done within the law rather than by resorting to an external device such as amnesty.

I now turn to the vertical line segment DBE. Professors Levi and Tucker have given great attention to the part visible above the horizontal line, namely point D (Geneva Protocol of 1925) (see figure 3).

**Figure 3:**

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<th>SUGGESTED CHANGE (D'AMATO):</th>
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**Key:**

B = International Legal Obligations of States  
D = Geneva Protocol of 1925  
E = International Customary Law
They seem to agree with the position taken by Professors Baxter and Buergenthal, in an essay they both cite, that the law of the matter is pretty largely in the Protocol. All of these men seem to agree that the Protocol is broader and more sweeping—and simultaneously, if paradoxically, even more detailed—than customary international law in the absence of the Protocol. This conclusion lets the United States slip out from between the narrow obligation of customary law and the broader shadow of the Protocol, to which the United States as a nonparty was not bound. I find that this view is not supported by a convincing independent study of the content of customary law. In short, BE (International Customary Law), which is the part of the vertical line segment that is under the horizontal line ABC, may not have been given its due in this collection or in any published book or article to date.

In the first place, I am not as sure as Professor Tucker that the Protocol could not have “created” a goodly amount of customary law relating to the use in warfare of gases and analogous liquids and materials. Certainly one could argue—to take a clear, if extreme, case—that shortly after the passage of the Protocol in 1925 there was, even for nonparties, a rapidly growing international customary law prohibiting the use in war of poisonous gas. Second, we should look very closely at the experience since 1925 (see figure 4). Professors Levie and Tucker, and to a large extent Professors Baxter and Buergenthal, seem to treat the post-1925 experience as relevant only to the interpretation of the scope of the Protocol, even though they all acknowledge a distinction between the Protocol and customary law.

**Figure 4:**

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subsequent practice affecting interpretation
  ↓
[1925]  GENEVA PROTOCOL OF 1925  [1975]
  ↓
(early customs)  (subsequent practice affecting custom)
  ↓
CUSTOMARY INTERNATIONAL LAW  [1975]
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The post-1925 experience, however, might be differently interpreted depending on whether one is interpreting the provisions of a treaty or the content of customary international law. The two types of interpretations do not follow the same methodology. The provisions of
a treaty lean heavily upon analogies with the law of contract even as to subsequent state practice—indeed, here is where Professor Levy's troubles with reservations to the Protocol belong. On the other hand, the interpretation of customary law is more analogous to the common law of judicial decisions (taking articulated state practice to be the rough equivalent of a judicial decision). As a result, contrary to the rather easily adopted assumptions of Professors Levy, Tucker, Baxter, and Buergenthal, customary international law might just possibly have evolved in such a way as to be more immediately relevant and more prohibitory of the use of tear gas and herbicides than any interpretation, broad or narrow, of the Protocol.

To some extent Professor Tucker's discussion may leave this possibility open. By focusing upon certain principles of law—such as weaponry deemed inhumane, indiscriminate, disproportionate, or treacherous—he may be implying that the ambit of customary law could be more particular and immediately relevant to the weapons used in Vietnam than might be the Protocol or the Hague Regulations. The specific trouble with this approach, as Professor Tucker himself seems to recognize, and as Professor Baxter mentions, is that customary law began not with these principles, but rather with the prohibition of specific conduct. The principles came later, interpolated by scholars and governments and, in some cases, tribunals. The principles thus do not constitute the law, although they are relevant factors in interpreting the nature and scope of acts of states that are alleged to constitute precedential situations for customary legal development.

If a definitive study of the customary law pertaining to the use of weaponry and technology in Vietnam is desired, it should be recognized that its preparation will be a time-consuming and costly project. It would include a detailed study of the state papers of many governments and the events of numerous wars. This would be undertaken for five principal purposes. First, it would identify the technologies that were available and were, or were not, employed. Second, if certain technologies were used, the study would determine whether they were relied upon only as reprisals or only to a lesser extent than they effectively could have been. Third, it would uncover what government officials and military officials said among themselves and to each other about the possible and permissible use of such weapons. Fourth, it would discover whether protests were given or received concerning any such actual or threatened use. And, finally, it would pose related questions such as those that the foregoing may have suggested. Until such a study is undertaken, I, for one, would be a little cautious about concluding that the use in Vietnam of tear gas or herbicides clearly did not constitute a violation of customary international law.