

However deplorable certain methods adopted by the PLO and/or groups operating in its name, Chairman Arafat's presence in the United States *per se* posed no security threat to the host state. Indeed, Secretary of State Shultz, in responding to press queries, as much as acknowledged that fact. Arafat was barred because of the personal animus of the Secretary, the widespread aversion to policies and practices of his organization, the fear that Arafat would "exploit" his presence diplomatically (the very *raison d'être* of international politics in a UN-type forum) and the belief that the exclusion would be diplomatically useful to the United States.

The U.S. action in the Arafat visa affair violated the nation's conventional and customary obligations. Like many international legal violations, the action also represents a claim for new law, for in the international system it is unfortunately too often the case that *ex delicto oritur jus*. If the new claim to a unilateral right of exclusion is accepted, the host state will henceforth be in a position to exploit its status by using and conditioning admission to UN headquarters as its own instrument of policy. Were such grounds for refusal by host countries to allow a treaty-authorized invitee to enter their territory to become lawful, international organizations would find it increasingly difficult to operate. Whether it is examined *de lege lata* or *de lege ferenda*, this treaty violation bodes ill for both the United Nations and the United States, a country that ultimately depends, as much as any other, on the integrity of the regime of international agreements.

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INTERNATIONAL LAW IN THE PUBLIC FORUM: THE *NEW YORK TIMES* AND THE LIBYAN CHEMICAL WEAPONS PLANT

Nations typically act first and worry about legalities afterwards. International lawyers thus find themselves relegated, for the most part, to the passive role of sorting out rationalizations of past events.¹ Once in a while, however, when a democratic government is contemplating an action that is legally questionable, international lawyers may have a chance to play a more active role. The government at that time might decide to introduce the issue of the legality of its contemplated action into the public forum, either in the hope that open debate may help pave the way for public acceptance of whatever action the government ultimately chooses to take or, more charitably, in a genuine search for the public will on the matter. The primary

¹ In a previous editorial, I discussed some aspects of governmental vs. academic international law rationalizations. See D'Amato, *Nicaragua and International Law: The "Academic" and the "Real,"* 79 AJIL 657 (1985).

forums are the daily media aimed at an informed readership—in the United States, one thinks of the editorial pages of the *New York Times* and the *Washington Post*. In contrast, a quarterly journal such as the *American Journal of International Law* in nearly all cases is not published on a timely enough basis to influence specific planned policy initiatives.

Accordingly, what the *Times* prints in its editorial pages about international law can have an enormous and disproportionate significance in shaping public perceptions about the propriety of possible foreign policy actions. An example followed the announcement by the United States Government in early 1989 that it was considering a unilateral military strike against a Libyan plant suspected of making chemical weapons. The *Times's* principal effort to present the international legal implications of that contemplated initiative surfaced in an op-ed piece by Professor Robert Tucker entitled "Using Force Against Libya?" in the January 11, 1989 edition.²

An examination of Professor Tucker's essay is revealing not only for what it tells us about the *Times's* ability to choose an exemplary international law statement, but also more generally for what it demonstrates about the level of international law thinking where it really counts in the public forum.

Professor Tucker's main argument is that we should exhaust all diplomatic initiatives before getting to the point of an actual preemptive strike against the Libyan plant. Hardly anyone would disagree with this nostrum, and therefore I will not quote the central portions of his essay that talk about it. But on the question of the content of international law, Professor Tucker said:

What would justify American military action against the Libyan plant? There is no satisfactory answer. Certainly, there is no satisfactory answer if justification is sought in contemporary law, and, above all, in the United Nations Charter.

The building of a chemical weapons plant is not forbidden by international law and the practice of states. While the use of chemical weapons is forbidden by the 1925 Geneva Convention,³ and, it may be contended as well, by customary international law,⁴ the prohibition does not extend either to the possession of chemical weapons or to their manufacture. If it did, there would be little need either for the conference now under way in Paris or for the treaty being negotiated in Geneva that bans "entirely the possession, production, acquisition, retention, or transfer of chemical weapons."

² Tucker, *Using Force Against Libya?*, N.Y. Times, Jan. 11, 1989, at A25, cols. 2-5.

³ Of course, Professor Tucker knows that it is the Geneva Protocol and not the "Convention."

⁴ Back in 1975, Professor Tucker and I exchanged views about the question whether the American use of chemical weapons in the Vietnam War was contrary to customary international law. See LAW AND RESPONSIBILITY IN WARFARE 161-72, 176-82 (Peter D. Trooboff ed. 1975).

Apart from the legal question, Professor Tucker considered whether the possession of a chemical weapons plant by Libya could be viewed as a threat to other states that would justify their using force in self-defense. Although conceding that the United Nations Charter may be interpreted to permit anticipatory measures of self-defense, Professor Tucker feared that this case would be a further unjustified extension of that concept. It would result in justifying virtually any conceivable use of force under the name of anticipatory self-defense. He continued:

Besides, to use self-defense as a justification for destroying the Libyan plant requires that we wait until injury to our interest is done or at least imminently threatened. By then, however, Libya might already possess large quantities of chemical weapons and have distributed equally large quantities of these weapons to its friends.

...⁵
The Libyan case reminds us that force remains an indispensable instrument of order and that circumstances may require its unilateral employment. Given the characteristics of international society, there is always a danger that the principal provider of order may abuse its role. It has often done so, just as it has often taken up its task with less than clean hands.

But this is only to say that the time-honored means of providing order in international society is not a very satisfactory one. Nevertheless, it remains the only effective means we have. The incoming Bush administration must either get greater cooperation in Paris and elsewhere or it will have to act on its own.

Thus, Professor Tucker apparently fears that, if diplomatic initiatives do not work, the United States may have to employ unilateral force in violation of international law. How would he regard such a violation of international law? One possibility is that he would applaud it—for, if “force remains an indispensable instrument of order,” as he puts it, it follows logically that force leads to order while law leads to chaos. If international law is so misdirected, one should applaud its violation.

A second possibility is that Professor Tucker would not applaud, but rather would condemn, action in violation of international law. Then his last words should read “or the United States will have to act on its own even though it should refrain from doing so under international law.” Perhaps this schizophrenic interpretation is implicit in Professor Tucker’s reasoning.

A third possibility is that Professor Tucker is only paying lip service to international law. By taking up the legal considerations at the outset of his

⁵ What is omitted is Professor Tucker’s “diplomacy first” argument and a rather inconsequential argument that action against Libya in particular might be justified because it is an outlaw nation. Professor Tucker neatly observes that “in 1801, President Thomas Jefferson directed the commander of a naval squadron to act forcibly against the Pasha of Tripoli. Given the present pasha of Tripoli’s persistent pattern of lawless behavior, a similar view might well be taken.”

article and then dispensing with them once he launches into *realpolitik* argument, he may be conveying to the reader a view that legal considerations are a dispensable form of rhetoric.

In fact, it is difficult to tell whether any or all three of these interpretations are what Professor Tucker had in mind. Why, indeed, would he discuss international law at all if he (1) intended to show it was unworthy of serious consideration; or (2) wanted to accept, while also deploring, its violation; or (3) wanted to demonstrate its total irrelevance?

As for the substance of Professor Tucker's remarks about international law, he states one thing with absolute assurance: "The building of a chemical weapons plant is not forbidden by international law and the practice of states." But if for a moment we accept his proposition that the *use* of chemical weapons of warfare is contrary to international law, why is it so clear that international law would nevertheless permit the manufacture of such weapons? Surely, there is a pragmatic connection between making and using a prohibited item. Legal systems throughout the world have discovered this connection with respect to items as diverse as dynamite, drugs and narcotics, handguns, toxic chemicals and biological weapons. If a country were simply to ban internally the use of an item without banning or controlling its manufacture or possession, we might say that its lawmakers were naive or unreasonable. Similarly, a discerning lay reader who may be unfamiliar with international law might nevertheless find strange Professor Tucker's absolute assurance that building a chemical weapons plant is something entirely different under international customary law from using the products of that plant for their intended purpose. Tucker's claim that the former is legal and the latter illegal may simply convince the discerning lay reader that international law is an unrealistic, if not irrelevant, plaything for academics.⁶

Professor Tucker bolsters his argument that customary international law does not currently forbid the manufacture or possession of chemical weapons by referring to the inclusive treaty being negotiated in Geneva. He says that there would be "little need" for such a treaty if international law already banned the production or possession of such weapons. Yet a great many treaties—my personal impression is, the vast majority of them—are concluded not to change the underlying customary law but to clarify it, develop it and add treaty sanctions to it. In nearly every case it seems to me to be an empirically erroneous argument to contend that just because nations are in the process of negotiating a prohibitory treaty on a particular subject, that subject must not be prohibited under present customary international law. Yet this is just the argument Professor Tucker offers as the sole support for drawing a line between the legality of manufacture and the illegality of use.

⁶ The reader is less likely to question the accuracy of Professor Tucker's statement that it is legal to manufacture chemical weapons plants, because that statement appears in an unqualified form in the *New York Times* and the many letters and op-ed pieces that might have questioned Professor Tucker's conclusions were *not* published.

Professor Tucker's unwillingness to question whether the customary law prohibition of the use of chemical weapons might not carry over in some degree to a prohibition of their manufacture or stockpiling leads him to a strange discussion of the law of self-defense. He says that "to use self-defense as a justification for destroying the Libyan plant requires that we wait until injury to our interest is done or at least imminently threatened." Under this view, the United States is disabled from acting in self-defense at present, but another nation that is more vulnerable and closer to Libya, such as Israel, presumably would not be similarly disabled. If Israel but not other states can currently act in anticipatory self-defense against the Libyan plant, the fact that it is a plant that manufactures *chemical weapons* becomes irrelevant.⁷ The self-defense rationale would permit Israel (but not the United States) to bomb *any* military or potentially military installation in Libya, whether chemical or not. Professor Tucker's argument has the twin faults of being overinclusive and not pertinent to the topic of chemical weaponry.

Of course, Professor Tucker's essay was severely limited in terms of length and was intended for mass consumption; hence, perhaps one should not be overly critical of it. Certainly, one cannot hope for citations of authorities in such an essay. Nevertheless, I think that what Professor Tucker did choose to say within the confines of the space given to him leaves the reader wondering whether anything of value was said at all.

To be sure, the *Times* could defend the piece, if it felt any need to do so, on the ground that it is a "balanced" presentation that gives competing considerations and leaves it up to the reader to draw conclusions. Superficially, this seems attractive. But in fact there are flat-out unbalanced statements, such as the assertion that it is legal to manufacture chemical plants and the claim that a use of unilateral force can be an "indispensable instrument of order." As for "balance," Professor Tucker pits both of these assertions against each other without resolving the contradiction—a lawless sort of balance leaving the United States Government free to go either way.

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SOVIET INITIATIVES: U.S. RESPONSES— NEW OPPORTUNITIES FOR REVIVING THE UNITED NATIONS SYSTEM

This issue of our *Journal* highlights "new thinking" by two leading Soviet legal scholars. That, however, is only part of a larger transformation of the climate in which international law and institutions operate. Nowhere has this transformation been more remarkable than at the United Nations.

⁷ For similar reasons, in an earlier editorial, I defended Israel's air strike on the Iraqi nuclear reactor as justified by the norm against nuclear proliferation and *not* by any notion of self-defense. See D'Amato, *Israel's Air Strike upon the Iraqi Nuclear Reactor*, 77 AJIL 584 (1983).