



National Security Law Report

Volume 17, Number 1 STANDING COMMITTEE ON LAW AND NATIONAL SECURITY January 1995

A Toothless Watchdog

The International Atomic Energy Agency

by Robert Rudney

On August 2, 1990, Saddam Hussein invaded Kuwait. That same month, the International Atomic Energy Agency (IAEA), the verification "watchdog" agency for the Nuclear Nonproliferation Treaty (NPT), found Iraq to be in complete compliance with its treaty obligations.

Only after Desert Storm and UN Security Council Resolution 687, requiring demolition of Iraq's mass destruction weapons program, was the full extent of Saddam's mammoth \$15-20 billion nuclear arms project revealed.

The IAEA took its share of credit for these revelations which overshadowed its "whitewash" of the Iraqis during previous inspections. Yet, had it not been for Iraq's defeat in the Gulf War, Saddam Hussein would probably today have possession of a nuclear weapon.

Over the past two years, North Korea exploited the IAEA's inherently flawed verification system, while moving ahead inexorably toward weapons production. The protracted IAEA-North Korean "diplomatic dance" provided the perfect cover for North Korean noncompliance, ultimately dragging a reluctant United States onto the dance floor. In the process, North Korea achieved its objectives. Defense Secretary William J. Perry has publicly acknowledged that North Korea probably has at least one bomb. The North Koreans were able to remove plutonium fuel rods from their reactor without penalty, thereby casting doubt on the findings of any subsequent IAEA inspection. According to the

October 1994 U.S.-North Korean agreement, North Korea will retain the fuel rods for at least eight years.

The crux of the verification problem is that the IAEA is permitted to verify only where the inspected State party wants it to inspect. This is the arms control equivalent of the drunk searching for his keys a block from where they were dropped because there was no street light near the first site.

The IAEA was originally founded in 1957 to promote international cooperation in the peaceful uses of nuclear energy. Its treaty verification duties only

Continued on page 2

Provides Background on Standing Committee

Dan McMichael Salutes Frank Barnett at Conference Dinner

Note: Our October 1994 fourth annual review of the field conference was dedicated to the memory of Frank R. Barnett, a Standing Committee cofounder and our first Director, who passed away in August, 1993. We felt it was fitting to invite Mr. R. Daniel McMichael, of the Scaife Foundation in Pittsburgh—another key figure in the committee's creation more than three decades ago—to make some after dinner remarks in tribute to Frank Barnett. Because we found his remarks particularly eloquent in setting forth important background and capturing the spirit of a dear friend of our group, we reprint them below for our readers. —RFT

Simply put, Frank Rockwell Barnett hated tyranny. As unusually modest and low key as he was about himself and in his work with other people, whenever the subject of brutality came up, his voice would take a steely edge and his eyes would grow cold with a controlled kind of fury.

This was the dynamic that drove him through most of his professional life, that gave him the

Continued on page 4

Inside

- 3** Book Reviews—Merchant Ship Targeting and Maritime Claims
- 4** Calendar of Events
- 6** Humanitarian Law Conference Set for March

Toothless IAEA . . .

Continued from page 1

came later, with the entry into force of the NPT in 1970. The contradictory promotional and policing mandates continue to beset the agency.

Under the treaty regime, the member-States and the IAEA are obliged to negotiate a safeguards agreement, by which the agency is responsible for carrying out the NPT provision on "preventing diversion of nuclear energy from peaceful purposes to nuclear weapons." It is up to the member-State to declare its nuclear facilities and materials to be safeguarded. Relying heavily on accounting systems and unmanned monitoring equipment, IAEA inspectors examine preselected "strategic" points in a nuclear plant and simply confirm that no diversion has taken place since their last visit.

However, the IAEA is powerless to enforce the NPT commitment by non-nuclear weapons States "not to manufacture or otherwise acquire nuclear weapons." For example, Iran could purchase a nuclear warhead outright from a Soviet successor State and not be in violation of its safeguards agreement (although it would have broken its NPT pledge).

Except for the extraordinary UN-mandated inspections in Iraq, the IAEA has never inspected an undeclared facility or examined unsafeguarded material. By definition, such material is outside its jurisdiction. But events in North Korea and Iraq have demonstrated the dangers of NPT member-States circumventing the safeguards system.

In February 1992, the IAEA Board of Governors asserted the organization's right to undertake "special" inspections of suspect sites in undeclared facilities. Still, the IAEA must receive permission from the affected State party to conduct such an intrusive inspection. In February 1993, the Board of Governors duly requested a "special" inspection of the North Korean waste storage site at Yongbyon, but was rebuffed.

The IAEA's lax verification regime pales by comparison with that of the Chemical Weapons Convention (CWC), scheduled to enter into force next year. Under the CWC, any member-State will have the power to request a challenge inspection by the international authority of a suspect site on the territory of another State-party. The challenged State-party will have no right of refusal if the international authority agrees to the inspection.

While extremely lethal, chemical weapons do not approach the level of death and destruction that can be wrought by nuclear weapons. What is lacking is a sense of proportionality—the rigor and intrusiveness of arms control verification regimes

should be in direct proportion to the dangers inherent in the weapons to be banned.

In addition, the IAEA has fundamental management problems. Under the safeguards system, 70 percent of inspection time (and more than 60 percent of the safeguards budget) are spent verifying facilities in Japan, Germany, and Canada. This perfunctory waste of time and money comes when the agency is suffering a serious budget crunch.

Moreover, the agency's Board of Governors includes representatives of NPT non-signatories (and covert nuclear proliferators) like India and Pakistan, as well as terrorist States like Libya and Syria. These transgressor-States now serve as judges of the North Korean program.

The IAEA "watchdog" reputation is so tarnished that even the UN negotiators now drafting the Comprehensive Test Ban Treaty (CTBT) have rejected the agency's request to become the verification arm for that agreement.

The NPT Extension Conference opens in New York in April 1995. A number of developing countries are pressing the United States to agree to a CTBT in return for an indefinite extension of the NPT regime. In addition, the United States should demand a fundamental restructuring of the IAEA to include the transfer of its safeguards division to the UN Secretariat. Much like the UN Special Commission on Iraq, the nuclear safeguards inspection office should be directly responsible to the UN Security Council.

By this measure, the IAEA would be left with its nuclear safety and technical assistance functions. The contradiction between the IAEA's promotional and policing responsibilities would be resolved, once and for all.

Continued on page 5

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The *National Security Law Report*, which is published monthly, contains articles concerning the law relating to the security of the Nation and associated topics. The *National Security Law Report* is sponsored by the ABA Standing Committee on Law and National Security. The views expressed in this publication are not necessarily those of the Standing Committee or the American Bar Association. Comments or original articles should be directed to Professor Robert F. Turner, c/o Staff Director Holly Stewart McMahon at the Standing Committee's Washington office (see box on page 5).

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BOOK REVIEW

by Robert F. Turner

THE LAW OF NAVAL WARFARE: TARGETING ENEMY MERCHANT SHIPPING

Edited by Richard J. Grunawalt

US Naval War College: International Law Studies, Vol. 65 (1993)

Pages: 383.

EXCESSIVE MARITIME CLAIMS

by J. Ashley Roach & Robert W. Smith

US Naval War College: International Law Studies, Vol. 66 (1994)

Pages: 375.

These two quite excellent volumes constitute the most recent offerings from the Naval War College "Blue Book" series, which dates back to 1901 and includes books by some of the nation's foremost international law scholars.

The Grunawalt book is a collection of essays and commentary from a three-day symposium held at the Naval War College in early 1990 which brought together preeminent legal scholars, senior government officials, and military professionals from around the world to examine an important issue in the law of armed conflict. On the one hand, the 1936 London Protocol—accepted as conventional law by most nations of the world at the time—provided that (with certain exceptions) "a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety." In contrast, however, State practice during World War II, and more recent conflicts like the 1988 Persian Gulf "Tanker War," has been characterized by almost uniform disregard for this rule. (Although, as several contributors point out, the World War II experience involved not an official rejection of the Protocol but assertions that its terms were being departed from as a "reprisal" to breaches by the other side—implicitly, at least, an assertion that the parties otherwise accepted the Protocol as binding law.) Are merchant ships legally protected by the law of armed conflict as civilian objects, or has State practice created a customary law superseding the 1936 treaty and making it "open season" on enemy merchant fleets during periods of conflict?

To help answer this important question, Professor Grunawalt has assembled a wealth of scholarly

insight featuring both senior government attorneys and legal scholars from several countries. It begins with a brief but impressive overview of the law and historic practice by the late Syracuse University Law Professor Fred Goldie. This is followed with a paper on submarine warfare and the London Protocol by perhaps the "dean" of American law of war scholars, Professor Howard S. Levie, with commentary by Cambridge Law Professor A.V. Lowe and Dieter Fleck—Director of International Legal Affairs of the German Defense Ministry.

While all of the contributions in this book are valuable, this reviewer found particularly interesting the non-lawyer perspective provided by retired Vice Admiral (and former Naval War College President) James Service, who in chapter V examined the future of naval warfare through the eyes of a veteran "naval warrior." He argues that future conflicts will likely be limited in scope and focused heavily upon targeting economic assets—wars of attrition, with the 1988 Iran-Iraq tanker war perhaps being the model.

Admiral Service then discusses the capabilities and limitations of modern naval platforms. Satellites and other modern intelligence-gathering capabilities will combine with highly-accurate over-the-horizon weapons like cruise missiles both to make long-range engagements attractive and to dramatically increase the risks to naval platforms which seek to abide by pre-World War II rules requiring warning and perhaps searching enemy merchant ships before they can be engaged. Whereas in an earlier era a warship could often give an adversary the "first shot" and still prevail in battle, today's technology makes it possible for even apparent merchant ships to be armed with a one-shot, one-kill capability. Modern communications also increase the risk inherent in disclosing a warship's presence to a potentially unfriendly merchant ship master. The Admiral writes:

Blind adherence to the literal words of the Protocol would unacceptably put at risk all of my forces . . . and unnecessarily prolong the conflict. My conclusion is, therefore, that the Protocol does not meet well the needs of the community of nations it serves.

If I were to go to war today . . . I would recommend to my superiors tactics that would be inherently at odds with the London Protocol. Not insignificantly, however, I believe those tactics would be consonant with the original purpose of the Protocol—to minimize the effects of war.

In commenting upon Admiral Service's paper, retired Vice Admiral James Doyle—whose remarkable background combines service as Deputy Chief

Continued on page 6

McMichael on Frank Barnett . . .

Continued from page 1

tireless energy and unfaltering will to help shape and build in this country new institutions and new cadres of young people who understood and were able to articulate the emerging role of the United States in a troubled and turbulent world.

He did not come by this naturally. Such awareness of tyranny and all that it stands for doesn't come naturally to any of us (would that it did). We have to learn it either directly or vicariously, and Frank learned it in a fairly direct manner.

As an Elizabethan scholar and teacher-turned-machine-gunner for the 69th Infantry Division that swept through Europe in 1945, Frank saw the dying embers—the legacy, if you will—of fascism, a pretty good lesson in itself as regards tyranny. But when his unit became the first to link up with the Red Army at the Elbe River—where Frank served as the interpreter between the forces and became involved in subsequent logistical matters—an even more stark lesson in tyranny emerged.

To quote *The London Daily Telegraph* of August 23 of last year [1993]:

There [at the Elbe River, Barnett] witnessed the negotiations over the repatriation of Red Army POWs captured by the Nazis, and was shocked to see weeping Russians hug the ground and beg to remain with the Americans. Barnett's worse fears were confirmed when the repatriated men were immediately placed before a firing squad. The experience marked him for life.

Indeed it did. Shakespeare became a hobby—beloved, but hobby all the same. Following the war there was, first, serving on the staff of General Lucius Clay in the Military Government of Berlin, and then off to Oxford as a Rhodes Scholar to read philosophy, politics, geopolitics and economics. Then back to Wabash College for a brief time—and with the specter of weeping Russian soldiers still hovering over him, Frank Barnett joined forces with former OSS Director “Wild Bill” Donovan and William J. Casey in a committee to assist anti-communist Russian escapees from Berlin and Vienna.

It was also then that Mr. Smith Richardson, Sr., found Frank and asked him to direct the programs of the then Richardson Foundation, which enabled Frank to begin the process of institutionalizing means to help raise the literacy rate of lay, political and intellectual leaders of the nation to understand better not only the issues of the Cold War, but to become more familiar with the imperatives for strong, consistent and rational leadership that had

fallen upon the United States in the aftermath of World War II.

This was not an easy task, I can tell you, during the 1950s especially—given the McCarthy hearings and other too-shrill voices that overreached in their zeal to “protect America.” Not that they weren't—most of them—sincere. They were for the most part. But they didn't have the hang of things, and more harm was being done than good. Polarization was occurring when consensus should have been taking place between Democrats, Republicans, liberals and conservatives about the realities of tyranny and oppression and how the United States should handle itself globally with its vital interests.

Nobody understood this dilemma better than Frank. By now it is late 1956—and the two of us had met and had had long talks in Chicago about these matters. By this time, Frank was well along in trying to find ways to build the kind of consensus the nation needed if it was to upgrade the literacy of its leaders—lay and professional alike—in understanding more clearly the dynamics of geostrategic affairs in an increasingly more complex and dangerous world (a factor which still plagues us today in this post-Cold War era and for which this conference is particularly well tailored).

By the early 1960s, Frank had established an impressive, informed, ad hoc group of talented leaders—of respectable diversity, especially for those days—who shared the same concerns as did he. Among them: a patrician Richmond lawyer, name of Lewis F. Powell, Jr.; an up-and-coming Northern Virginia lawyer, name of John O. Marsh; a brusque Navy JAG, name of William C. Mott, and an indescribably gifted Chicago lawyer, name of Morris I. Leibman.

There were, of course, quite a few others. But for tonight's purpose, I'll just stick with these extraordinary individuals, because they are the genesis of this Standing Committee.

It was Justice-to-be Powell's idea, you see, in answer to the critical question all of us had raised. How can we begin to institutionalize the increasing of geopolitical literacy in the United States in ways that are credible and have high leverage?

The law.

An understanding of the rule of law has to be the cornerstone if we are trying to frame geopolitical

Calendar of Events

March 16—Breakfast Meeting, International Club (Speaker: Senator Arlen Specter, Chairman, Senate Select Committee on Intelligence)

issues that delineate tyranny and political freedom.

So—supplied by Frank Barnett's conceptual guidance—Lewis Powell, with Morry at his side, took the matter to the ABA's House of Delegates in 1963, as I remember. And after a bit of spilled blood, what is now known as the ABA Standing Committee on Law and National Security was founded, with Frank as its first director. Frank subsequently founded the National Strategy Information Center, but he remained active with the Standing Committee until his death last year.

Those of you who follow the Committee's activities are well aware of the continuing impact of its work across the land, from high school classrooms and college campuses to boardrooms and the halls of government—and on distant battlefields. The Committee's leadership and composition have been consistently high in integrity and sense of mission, with people like John Norton Moore, John Shenefield, Bob Turner and really all members of the Committee.

Frank Barnett was a man of extraordinary courage and vision, so that he was naturally attracted to others of courage and vision and they to him—which is what has given this Committee a life and vitality seldom seen elsewhere in volunteer activity.

And courage and vision are here tonight, not just a reference in paying tribute to Frank Barnett, but in the very people you have selected and the issues they are addressing. You have a tough, no-fooling program. You have courageous and highly talented people to lay it out.

It is the kind of fare that Frank Barnett would have relished!

Edward Hidalgo (1912-1995)

We report with great sadness the death of Standing Committee member and former Secretary of the Navy Edward Hidalgo, who suffered cardiac arrest on January 21 at the age of 82. A native of Mexico City and graduate of Columbia Law School, Ed Hidalgo served his country in numerous capacities over a period of more than half-a-century and was active in Standing Committee programs for many years. He will be missed.

Toothless IAEA . . .

Continued from page 2

Moreover, it should be admitted that the IAEA's claim to "special inspections" is not sufficient in today's dangerous world. Nuclear inspectors should be armed with the same challenge inspection authority as their chemical counterparts under the CWC. They should also be given the right to search for nuclear weapons and not simply measure levels of nuclear materials.

The nuclear nonproliferation regime has been poorly served by the IAEA's dilatory safeguards system. The regime requires a fully empowered policing authority, not a sclerotic, toothless "watchdog" agency.

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Review—NWC Blue Books . . .

Continued from page 3

of Naval Operations and Professor of Law—concludes that, while the nature of modern naval warfare may require some “reassessment or fresh interpretation” of the London Protocol, as a practical matter domestic political constraints will likely preclude the United States from ever embracing a policy of targeting enemy merchant ships without first endeavoring to warn and protect the lives of non-combatants. Thus, he reasons, our future role is more likely to involve protecting neutral commerce on the high seas against the kind of enhanced threats—such as Silkworm and Exocet missiles—we witnessed during the 1988 Tanker War.

If there is a majority view among the legal scholars in this volume, it is in support of the position taken by Naval Warfare Publication (NWP) 9—the highly regarded *Commander's Handbook on Naval Warfare*—that the 1936 London Protocol remains valid but that enemy merchant ships become lawful targets if they fail to stop, actively resist search, or surrender their protection by being armed, contribute to the enemy's “war-sustaining capability,” or engage in certain other specified practices.

Professor Grunawalt, who as a Navy JAG Captain in 1987 was the principal author of NWP 9, has produced an excellent book that provides diverse and valuable insights into a highly relevant dilemma facing the world community today. It is highly recommended.

The Roach & Smith volume continues in this fine Blue Book tradition, and is particularly timely in view of President Clinton's decision to seek Senate advice and consent to ratification of the 1982 UN Law of the Sea Convention. Author J. Ashley Roach is a highly-respected retired Navy JAG attorney now serving in the State Department Legal Adviser's office. His co-author, Dr. Robert W. Smith, works in the Office of Oceans Affairs at State. The two writers provide a brief but comprehensive overview of a wide range of foreign national claims to control areas of the oceans or their resources beyond the limits permitted by the 1982 convention.

Some of these claims are reasonably well known—such as the 1973 Libyan assertion that the Gulf of Sidra is “internal waters”—a claim that has led to several military skirmishes (and the loss of several Libyan aircraft) as the United States has challenged the claim by Freedom of Navigation (FON) operations in the area. Others, such as Vietnam's 1982 claim of part of the famous Gulf of Tonkin as “historic waters” and its assertion that foreign warships are prohibited from exercising high seas freedoms

Humanitarian Law Conference Set for March 10-11

The Duke University School of Law's Center on Law, Ethics and National Security will co-host a conference with the University of Virginia's Center for National Security Law on “Strengthening Enforcement of Humanitarian Law” in Durham, NC, on March 10-11, 1995. For further information, contact Pat Humphrey, at (804) 924-7442, by February 15.

within its contiguous zone, have received little notice by most Americans.

While many of the claims are in flagrant violation of both customary law and the 1982 treaty—such as Namibia's 1991 claim to a 200 mile contiguous zone and North Korea's 50 mile military boundary—others are more subtle, and involve things like drawing straight baselines (from which the territorial sea, contiguous zone, and other legitimate maritime zones are measured) stretching hundreds of miles rather than properly following the natural curvature of the coastline. For example, Burma (Myanmar) has used a 222-mile straight baseline to claim an area in the Gulf of Martaban about the size of Denmark as “internal waters.”

While this is not a book aimed at the casual reader, even non-specialists will benefit from chapter IX on “The Future of U.S. Ocean Policy,” which summarizes the various programs our government has implemented to protect the freedom of the seas and to promote the further codification of the law of the sea.

As the authors observe, “[t]he oceans encompass more than 70 per cent of the surface and the globe.” Maintaining historic US access to those areas—in the air, on the surface, or underwater—is critical to US national security interests. This volume demonstrates that our Freedom of Navigation program has produced concrete, positive results over the years; as have a series of bilateral agreements negotiated with States like Canada and the Soviet Union. The book suggests that at least some of the remaining problems may be resolved if and when the United States becomes a party to the 1982 LOS Convention.

The value of the book is enhanced by the inclusion of more than 30 detailed maps and extensive appendices, including important US policy declarations and lengthy excerpts from the 1982 Law of the Sea Convention.