



# National Security Law Report

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## Issues Beyond the Conference

### The Nuclear Non-Proliferation Treaty

by Leonard Weiss

On April 17th, representatives of 173 nations that have signed and ratified the Nuclear Non-Proliferation Treaty (NPT) began meeting in New York for the purpose of determining whether and for how long the Treaty will be extended.

The United States and all the other industrialized countries are seeking indefinite extension. However, a large group of countries led by Mexico, Egypt, Indonesia and Nigeria will not support indefinite extension on the grounds that the weapon-States have not lived up to their obligations under Article VI to pursue nuclear disarmament. Other countries complain that the nuclear suppliers, through export controls and other means, have violated their right under Article IV "to participate in the fullest possible exchange of equipment, materials and scientific and technological information for the peaceful uses of nuclear energy."

The disarmament issue had boiled down to a demand that the nuclear weapon-States complete a Comprehensive Test Ban Treaty (referenced in the NPT's Preamble) prior to the beginning of the extension conference, a demand that could not be met. The U.S. argument is that the end of the Cold War has brought major progress toward nuclear disarmament, that stockpiles are coming down, that a moratorium on testing is in effect (for all except China), and that indefinite extension will give the weapon-States confidence that they can continue down this path without worrying about the sudden large-scale removal of NPT obligations that

a short-term extension could produce.

While one might argue as to whether the pace of disarmament meets the obligation of Article VI, the obligation itself is unmistakable. Unfortunately, that is not the case with other parts of the Treaty, which incorporate great ambiguity, lack of definition, and even cognitive dissonance.

While it would be desirable to fix these problems with the Treaty, a result of which would be the resolution of complaints regarding Article IV, the Extension Conference will not do so because the issues are contentious, and Article VIII of the Treaty provides a procedure for amendment that is almost impossible to fulfill while still retaining universal application of the amended Treaty.

What are these problems, and what have been their consequences? As an illustration, consider Article I. Under Article I, weapon-States cannot, directly or indirectly, in any way assist, encourage, or induce a non-weapon-State to manufacture or otherwise acquire nuclear weapons or control over such weapons. Article II says non-weapon-States

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## March Breakfast Speaker

### Senator Specter Calls for Intelligence Help for U.S. Business

Senator Arlen Specter, Chairman of the Senate Select Committee on Intelligence (SSCI), addressed the March 16 Standing Committee breakfast meeting at the International Club. He was introduced by Standing Committee member Elizabeth Rindskopf, the General Counsel to the Central Intelligence Agency.

During his remarks, Senator Specter identified the need to appoint a new Director of Central Intelligence (DCI) as the number one short-term priority in the intelligence field at present. Among the substantive problems faced by the Intelligence Community, he identified the issues of weapons of mass destruction and terrorism as being preeminent. He

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are under an obligation not to receive assistance that weapon-States are prohibited from providing under Article I.

Now, it is a fact that the most difficult part of manufacturing a nuclear explosive device is producing the fissile material (Highly Enriched Uranium or Plutonium). To do so requires either an enrichment plant for physically separating the isotope U235 from natural uranium (a difficult, expensive process, but one pursued by Iraq, for example) or a reactor to bombard nuclear fuel with neutrons to create plutonium along with a reprocessing plant to chemically separate the plutonium from the remaining fission products and other spent fuel materials.

It is reasonable to suppose that the existence of a plutonium production facility in a non-weapon-State would induce its national security planners to think about the circumstances under which a stockpile of plutonium might be converted to weapons. (Only a few kilograms are needed for a Nagasaki-type device).

If assistance is provided by a weapon-State to help a non-weapon-State build or operate a reprocessing plant (presumably allowed under Article IV) and the non-weapon-State decides later on to make nuclear weapons, is the weapon-State then in violation of Article I? It could be, depending on the definitions of "assist," "encourage," or "induce." The Treaty gives no direction on this point. In testimony before the Senate Foreign Relations Committee, William C. Foster, the Chief of the American Delegation that negotiated the Treaty, said that such assistance was okay as long as it was accompanied by "safeguards."

Indeed, Article III of the NPT requires that non-weapon-States Party to the Treaty must put all their nonmilitary nuclear facilities under safeguards administered by the International Atomic Energy Agency (IAEA). The problem is that the safeguards system, which is implemented on a case-by-case basis through a negotiated arrangement for materials accounting and inspection, is currently incapable of meeting reasonable goals for timely detection of possible diversions of nuclear materials from a commercial scale reprocessing plant.

The entire premise behind Foster's testimony and the NPT "bargain" (of eschewing weapons for receipt of safeguarded nuclear materials, equipment and technology) is that safeguards are effective, i.e., that they meet reasonable, objective, technical standards for timely detection of any diver-

sions. To provide nuclear assistance without *effective* safeguards is tantamount to providing it without safeguards at all.

Accordingly, in the case of trade involving enrichment or reprocessing technology, or equipment, there is a conflict between the requirements of Article IV and those of Article I.

If this conflict is not resolved in favor of prohibition of such trade under Article I, there is significant risk that the NPT could become an instrument for spreading the bomb. The Iraqi bomb program, in fact, is an example of how nuclear-related trade with an NPT Party can result in a serious proliferation problem.

The conflicts in the Treaty are the result of compromises made during the NPT negotiations in the 1960's in order to get various countries, particularly Germany, on board. As a result, there has been a need to carefully consider what sorts of nuclear materials, equipment and technology can be safely transferred under safeguards, and what things must be kept back for the sake of prudence, Article IV notwithstanding. Hence, we have suppliers' agreements, unilateral and multilateral export control arrangements, constant attempts to improve the safeguards system, and the sharing of intelligence information as elements in a nonproliferation regime of which the NPT is only a part.

That the regime is getting stronger is evident, although the best advances have frequently been the result of bad experiences. The IAEA is currently considering augmenting its safeguards arrangements and exercising long-dormant authorities as a result of its Iraq experience where, prior to the Gulf War, inspectors were denied access to a facility on the grounds that no nuclear work was going on

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### **John H. Shenefield**

*Chairman, Standing Committee on Law and National Security*

### **Holly Stewart McMahon**

*Staff Director*

### **Robert F. Turner**

*Editor*

### **Jackson R. Sharman III**

*Associate Editor*

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## BOOK REVIEW

*Somalia and Operation Restore Hope: Reflections on Peacemaking and Peacekeeping*  
by John L. Hirsch and Robert B. Oakley  
Washington, D.C.: United States Institute of Peace  
(1995).  
Pages: 227.

by Walter Gary Sharp, Sr.

Somalia—a barren region of fiercely proud nomads with no centralized government; a territory on the Horn of Africa of no strategic value until the opening of the Suez Canal; a country artificially apportioned and colonized by Great Britain, France, and Italy; a nation gutted and destined for conflict when its vast central region was given to Ethiopia; a Republic left unprepared to govern itself that spiraled from democracy to anarchy when a military coup deteriorated into vicious clan warfare; a superpower playground of economic and military assistance during the Cold War; a countryside of people ravaged by disease and mass starvation; and finally, a testing ground for humanitarian intervention by the emerging new world order.

*Somalia and Operation Restore Hope* is the first full political reflection of the international community's policy on Somalia. It is an engaging operational history of the success of Operation Restore Hope (ORH) and a brilliant analysis of the weaknesses of the international community that precluded a more successful conclusion to UN operations in Somalia. This book chronicles the history of Somalia that led to humanitarian disaster, details the limited success and the deficiencies of UN operations in Somalia, and suggests corrective action for future operations.

Ambassador Robert Oakley and John Hirsch are diplomatic veterans with years of experience working in countries ravaged by internal conflict. Ambassador Oakley served as U.S. Ambassador and Deputy Chief of Mission in Mogadishu in the mid-1980's, and was the U.S. Special Envoy during ORH. John Hirsch served as Ambassador Oakley's deputy and Political Adviser to the Unified Task Force—Somalia (UNITAF), the U.S. led coalition force tasked with the implementation of ORH.

Together, the authors record a bold message that is vital to consider during the planning and conduct of future UN peace operations. They describe an international intervention that was initially *successful* in that it broke the cycle of violence, allowing the Somalis the opportunity to rebuild

their political infrastructure. This success occurred despite significant shortcomings of the United Nations and the wavering leadership of the international community.

The failure of the international community to react to a humanitarian crisis in a timely manner, and then its failure to politically, economically, and financially resource its own mandate are the key lessons of this book. The first UN operation in Somalia (UNOSOM I) was a timid, overdue, inadequate, and poorly resourced response to a tragic crisis in which thousands of Somalis were dying daily. In contrast, UNITAF was a disciplined and organized force that quickly accomplished its limited mission of establishing a secure environment for humanitarian relief operations; however, the uncertainties caused by the U.S. presidential transition, the rush to withdraw U.S. forces, and the foot-dragging approach of the UN towards the UNITAF-UNOSOM II transition, inevitably destined UNOSOM II for failure. UNOSOM II was indecisive and less disciplined than UNITAF, and was given a broad, shifting mandate without the resources to accomplish its mission.

The most destructive political conduct that undermined operations in Somalia was the failure of a number of the troop-contributing countries to adhere to UN policies. Without consulting the UN Secretary-General, the United States, for example, unilaterally took political action (after the October 3rd raid in which 18 U.S. soldiers died) that reversed significant UN initiatives and undermined the authority and credibility of the UN Special Representative in Somalia. These initiatives were previously supported by the United States through both public statements and Security Council votes. Additionally, at the direction of their governments, some national contingents defied orders issued by their UN commander.

*Somalia and Operation Restore Hope* was published by the U.S. Institute of Peace, a publicly funded institution devoted to strengthening prospects for international peace. Its publishing of this candid statement of the political dilemmas and operational problems that arise during UN peace operations makes a significant contribution toward the effective conduct of future such operations.

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*Major Sharp is a Marine judge advocate who currently serves as a Deputy Legal Counsel to the Chairman of the Joint Chiefs of Staff. During Operation Restore Hope, he served as the international law adviser and Deputy Staff Judge Advocate to the Commander of the Unified Task Force.*

## Sen. Specter Breakfast . . .

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noted that the Administration has proposed new antiterrorism legislation that might have allowed us to deport some of the key figures in the World Trade Center bombing had it been enacted earlier. "It is not easy to craft provisions which will enable us to deal with suspect aliens consistent with constitutional protections," he said, and he noted in particular the Fifth Amendment problems inherent in trying to protect intelligence information which may be the only evidence of an alien's terrorist connections.

There are also "guilt by association" difficulties inherent in "not permitting foreign groups to raise money and engage in activities in the United States to further their international terrorism," he said. Those issues will also be considered by the Senate Judiciary Committee's Subcommittee on Terrorism, which Senator Specter also chairs.

"We have not yet come to grips" with the "ominous" problems of weapons of mass destruction. In particular, he noted the growth of organized crime in the former Soviet Union and the accompanying risk of black market sales of components from dismantled nuclear weapons. He noted that the SSCI had held a closed hearing on that issue the previous day, and concluded that "there are some indicators that that really is a potential problem."

Senator Specter expressed "concern" about the Administration's "Statement of Agreed Principles" with North Korea, which he characterized as having uncertain legal effect. "It does not rise to the level, so they say, of an executive agreement, which under the statute has to be reported to the Senate; and certainly doesn't rise, so the Executive branch says, to the level of a treaty, which would call for ratification under the United States Constitution." This is a matter of "some delicacy" in view of the "tenuous" relationship between the United States and North Korea. "But, at the same time," he added, "I have grave reservations about the agreement, which has a window of some five years before there is an opportunity to have inspections on items like their spent fuel rods, which is a very solid indicator—and perhaps the best indicator—of what they are doing by way of developing nuclear weapons." He noted that history suggests that "the North Koreans [are] not exactly the most reliable partners in the world."

Senator Specter announced that he "took the lead," joined by several other committee chairmen, in sending a letter to Senator Dole recommending that the Senate consider treating the statement of

principles as a treaty. He argued that the Senate has the power under the Constitution to consider the document as a treaty even though it has not been formally submitted as such by the Executive. "The whole Senate ratification process of treaties has become a very *pro forma* matter, sometimes we even ratify six at a time," he said. In terms of importance, he added, the North Korea agreement is certainly more important than many of the issues submitted as treaties for Senate approval.

During the question period, Senator Specter was asked: "What can you tell us about industrial espionage?" He responded: "There is a lot of it!" Elaborating, he added that "some of the foreign intelligence agencies are using those means a great deal more than our intelligence agencies." He disclosed that when our intelligence people "come across information that there are bribe attempts where the United States is competing with a foreign contractor to try to win a contract in a third [country], that information is relayed by our intelligence agencies to the foreign governments so that they understand what's happening to try to eliminate the disadvantage that the United States corporation may have in the bidding process, because our laws are very tough in terms of prohibiting bribes. But the practice is not even to tell the competing company what is happening, but just to inform the government which is letting the contract." Mentioning a recent dispute with the French, he added: "My own sense is that we ought to be more actively engaged in helping U.S. business interests, but I think it has to be very, very carefully done so that we don't create international incidents and so that we don't utilize means that are really contrary to principles of fair play and decency."

When asked about the problem of "illegal aliens," the Senator responded that "We have some pretty good indicators—some evidence—that there are people in this country who are illegal aliens who are very heavily engaged in terrorist planning." He cited the Trade Center bombing as an illustration of the problem. "We are all at risk to terrorists," he concluded, and "we could be more at risk in the future."

### Calendar of Events

**August 6**—Presidential Showcase on "Law Enforcement and Intelligence: The Legal Dilemma," ABA Annual Meeting, Hyatt Regency Hotel, Chicago.

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there, when in fact the site contained a radiochemical laboratory.

Finally, it is important to note that no matter how effective safeguards become, there is no protection from an NPT Party exercising its right under Article X to leave the Treaty after providing three months notice and an explanation of how its "supreme interests" have been "jeopardized." This is undoubtedly what Saddam Hussein would have done once reaching the ability to manufacture nuclear weapons. The Treaty provides for no sanctions for withdrawal. Violations may be taken to the Security Council of the United Nations for action, where, of course, the veto can be exercised.

There are many flaws in the Treaty other than those described here, as shown in the following list:

1. The NPT does not forbid a non-weapon-State from possessing nuclear weapons. (It forbids the acquisition, but in theory a country with weapons could sign the NPT as a non-weapon-State and not give up weapons already made.)
2. There is nothing in the Treaty that prohibits a non-weapon-State Party to the Treaty from assisting another non-weapon-State to manufacture or otherwise acquire the bomb.
3. The Treaty should be clarified to ensure no challenge to the notion that safeguards includes the ability to search for nonnuclear activities relevant to bomb-making, including R & D. To ensure that this doesn't convert the IAEA into a university on weapons design, only inspectors from current or former weapon-States should be involved in this activity.
4. The Treaty does not require the IAEA to verify the obligation of a non-weapon-State not to receive assistance in the manufacture or acquisi-

tion of nuclear weapons.

5. The Treaty does not require the IAEA to verify that exports of nuclear hardware by NPT suppliers to non-weapon-States are accompanied by safeguards.

6. The Treaty does not define the point at which one can say that construction of a nuclear explosive device has begun. The Foster criterion relating "manufacture" to construction of a component having relevance only to a nuclear explosive device could constitute such a definition. In that case, activities involving machines capable of creating such components could become subject to special inspections.

7. The Treaty does not prohibit a non-weapon-State from using nuclear energy for military purposes but is unclear as to permitted "military uses" that are exempt from safeguards. In a recent book, David Fischer posed questions as to whether a non-weapon-State could build a reactor, claim it is the prototype of a naval reactor and thereby exempt its fuel from safeguards. Likewise a State could withhold material from safeguards upon becoming an NPT Party by claiming (to itself—it has no obligation to inform the IAEA) that the material is for permitted military purpose. Finally, the Treaty appears to allow a "military" enrichment plant whose output is only for naval reactors to be unsafeguarded, and the Treaty appears to allow unsafeguarded nuclear exports for permitted military use.

8. The Treaty's language in Article III has been used to support arguments against making safeguards more intrusive. The Treaty should state as a principle that whenever a conflict occurs between effective safeguards application and compliance with Article IV, resolution in favor of effective safeguards shall govern.

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### Standing Committee on Law and National Security

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*Advisory Committee Chair:* Kathleen Buck

*Staff Director:* Holly Stewart McMahon  
1800 M Street, N.W. • Suite 200 South  
Washington, D.C. 20036  
(202) 466-8463  
fax (202) 331-2220

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9. The Treaty does not embargo transfers of sensitive equipment, materials or technology—but it should whenever effective safeguards do not apply.
10. The Treaty does not provide for sanctions for violators or for withdrawal from the Treaty.
11. The Treaty is difficult to amend, but worse than that, only those parties ratifying the amendment are subject to its terms.
12. The Treaty does not preclude possession and stockpiling of plutonium or highly enriched uranium by a non-weapon-State, regardless of economic or technical justification or the effectiveness of safeguards.
13. The Treaty does not preclude nuclear trade with States not Party to the NPT.
14. The Treaty's provision on withdrawal does not provide for any disposition of nuclear assistance received by the withdrawing State by virtue of its NPT membership.

The purpose of pointing out these problems is not to denigrate the value of the Treaty, which has played an important role in nurturing a nonproliferation ethic in the world and in dealing with difficult issues in South Africa, the Newly Independent States of the Former Soviet Union, and North Korea, but rather to show that our experience over the past 25 years since the NPT came into force has shown that nonproliferation is a complicated busi-

## Zoë Baird Named to Standing Committee

ABA President George E. Bushnell, Jr., has appointed Aetna Life & Casualty Company General Counsel Zoë Baird to the vacancy on the Standing Committee created by the death in January of former Navy Secretary Edward Hidalgo.

President Clinton's first choice to be Attorney General of the United States, Ms. Baird currently holds presidential appointments both as a member of the President's Foreign Intelligence Advisory Board (PFIAB) and on the President's Commission on the Roles and Capabilities of the U.S. Intelligence Community. After earning her A.B. and J.D. from the University of California at Berkeley, she clerked for Judge Albert C. Wollenberg before accepting a position as Attorney-Advisor in the Justice Department's Office of Legal Counsel and then serving as Associate Counsel to President Carter.

ness requiring an expanding variety of actions and institutional arrangements, including tough export controls, in order to make it work.

*Mr. Weiss is Staff Director for the Minority, U.S. Senate Committee on Governmental Affairs.*



*David Martin at a recent Standing Committee conference in Washington, DC.*

## David Martin (1914-1995)

We report with great sadness the March 16 death of David Martin, who served for many years as Associate Editor of this *Report* and was a regular participant in Standing Committee conferences and breakfasts.

Born and raised in Canada, David worked as a free-lance journalist in London before joining the Royal Canadian Air Force and serving in India and Burma during World War II. Following the war, he served as executive director of the Refugee Defence Committee and the International Rescue Committee, working to prevent the forced repatriation of refugees from countries that had fallen under Communist control. In the mid-1950s, he coordinated the last expedition to the South Pole of explorer Richard E. Byrd.

David moved to the United States in 1959, and for the next 20 years worked in senior staff positions in the U.S. Senate—first as national security adviser to Senator Thomas Dodd (R-Conn.), and then as senior analyst with the Subcommittee on Internal Security of the Senate Judiciary Committee. Among his many other accomplishments, he authored three books about Yugoslavia and contributed countless articles to this *Report*. The Standing Committee has lost a great friend—he will be missed.