
SYMPOSIUM: *FALLOUT: THE FUTURE OF NUCLEAR SECURITY AND NON-PROLIFERATION*

KEYNOTE ADDRESS*

Larry D. Johnson **

Those are extremely kind words. Thank you, David. I do want to thank the Director of the Dean Rusk Center and the staff of the *Georgia Journal of International and Comparative Law* for their warm and hospitable welcome and for organizing this wonderful event.

I have to add the disclaimer that I may have known something about this field at one point when I was in Vienna as Legal Adviser of the International Atomic Energy Agency (IAEA). Even then, I was just a country lawyer that got plucked out of the UN to sit with nuclear physicists and experts in nuclear matters. Since then I have been doing other things.

But I did want to come to this event, in part, to honor my very dear late friend, Professor Gabriel (Gabe) Wilner of this law school. I knew Gabe back in the 1970s when he was working as an international trade lawyer in the UN Legal Office. After he left the UN, Gabe started bringing me to Georgia back in the 1970s. He had me come to Georgia Law in 1975 to talk

* The *Georgia Journal of International and Comparative Law*, in partnership with the University of Georgia School of Law and the Dean Rusk Center for International Law and Policy, held its annual symposium on November 12, 2010. The symposium, titled *Fallout: The Future of Nuclear Security and Non-Proliferation*, included panels on topics such as regional/bilateral versus multilateral frameworks for nuclear non-proliferation, nuclear energy security, and emerging nuclear threats in the face of recent sanctions and monitoring. This Article is an edited, annotated transcript of the keynote address of the symposium, given by Professor Larry D. Johnson.

** Adjunct Professor of Law, Columbia Law School. M.P.A., John F. Kennedy School of Government, Harvard University, 1971; J.D., Harvard Law School, 1970; B.A., University of Nebraska, 1967. Former Assistant Secretary General for Legal Affairs (Deputy Legal Counsel), United Nations Headquarters (2006–2008); Legal Advisor, International Atomic Energy Agency (IAEA) (1997–2001); and Chef de Cabinet, Office of the President, International Criminal Tribunal for the former Yugoslavia (2003–2005).

about the United Nation General Assembly's definition of "aggression." As I remember, Dean Rusk asked, "How is that going to work?" I was a young lawyer and had no idea how to answer the question.

Oddly enough, the International Criminal Court recently adopted a definition of aggression and created the crime of aggression. And I found myself asking, "How is that going to work?" It was the same question Dean Rusk and Gabe Wilner asked me here in Georgia back in 1975, and a lot of people continue to ask it today. But anyway, I have very fond memories of coming to Georgia because of Gabe.

I thought I would examine developments in nuclear non-proliferation over the past year and a half. I acknowledge that I am a bit of an outsider at this point. The people seated to my left are the real experts. They are free to correct anything and everything I say. But I hope to at least hit the highlights.

Is there something going on in the world of nuclear non-proliferation that is unusual? I think there is, and I will get to that in a moment.

As an initial matter, I should say that I am not going to go into a detailed discussion of the Nuclear Non-Proliferation Treaty (NPT) because I think it has been thoroughly covered by the other panelists. The only thing I have to add to our discussion of the "Grand Bargain"—the idea that non-nuclear states can gain access to peaceful nuclear energy provided they submit to IAEA safeguards and agree to act in good faith to move toward disarmament¹—is an idea that it is very much like a contract. If the nuclear weapons states are not making good faith efforts to disarm, then non-nuclear weapons states can make a colorable argument that they are excused from their obligations under the treaty. That is a real danger.

Next, to honor one of Georgia's great U.S. Senators, Sam Nunn, I would like to quote him. He is quoted in a 2010 film called *Nuclear Tipping Point*:

[I]f you view the goal of getting to zero [nuclear weapons] as the top of the mountain . . . then we can't even see the top of the mountain today. We're heading down. We're not heading up. It's gonna take a long time to see the top of the mountain, but I think we have an obligation to our [future generations] to

¹ Amir Azaran, *NPT, Where Art Thou? The Nonproliferation Treaty and Bargaining: Iran As a Case Study*, 6 CHI. J. INT'L L. 415, 418 (2005) ("The goal of giving countries access to nuclear energy in exchange for placement of their nuclear programs under a system of international inspection is sometimes termed the 'grand bargain' of the NPT.").

build paths up the mountain, to get other people to go up the mountain with us²

That is our opening quote. Why are we heading down the wrong side at the moment? Let me just briefly run down the list of the challenges. Iran and the Democratic People's Republic of Korea (North Korea) continue to develop nuclear weapons, related technologies, or both.³ Despite hopes that recent negotiation attempts with North Korea would bring them back into the fold, they did not.⁴ There is a risk that the NPT regime might collapse, especially if North Korea and Iran get away with developing weapons with impunity.⁵

Non-state actors are another problem. Organizations like Al Qaeda have expressed interest in nuclear technologies—dirty bombs or the real thing.⁶

There is a troubling black market in nuclear materials. One example is the A.Q. Khan network out of Pakistan.⁷

The IAEA inspection regime has been criticized, and many parties have called for it to be reformed.⁸

Another challenge is negotiating a treaty to control fissile material. That is the stuff you use to make the bomb. Pakistan is blocking this effort.⁹

² NUCLEAR TIPPING POINT (Nuclear Security Project 2010), available at <http://www.nuclearartippingpoint.org/film/film.html> (interview with Sam Nunn at 49:26–:53).

³ See, e.g., *Fixing the Treaty*, Editorial, N.Y. TIMES, May 9, 2010, at WK7.

⁴ Tony Capaccio & Patrick Harrington, *North Korea Hints at Nuclear Negotiations with U.S.*, BLOOMBERG (July 27, 2009), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a5V_jY6JH5Co.

⁵ Orde F. Kittrie, *Emboldened by Impunity: The History and Consequences of Failure to Enforce Iranian Violations of International Law*, 57 SYRACUSE L. REV. 519, 532 (2007) (“Such a cascade of proliferation in the Middle East would likely lead to the worldwide collapse of the already tottering nuclear non-proliferation treaty (NPT) regime.”).

⁶ See, e.g., *Threat of Dirty Bombs ‘Increased,’* BBC NEWS (Mar. 24, 2009), <http://news.bbc.co.uk/2/hi/7960466.stm> (noting that while Al Qaeda has always been interested in nuclear weapons, they are better equipped to make dirty bombs).

⁷ William J. Broad & David E. Sanger, *Pakistani’s Nuclear Black Market Seen as Offering Deepest Secrets of Building Bomb*, N.Y. TIMES, Mar. 21, 2005, at A7 (“Nuclear investigators . . . now believe that the black market network run by the Pakistani scientist A.Q. Khan was selling not only technology for enriching nuclear fuel and blueprints for nuclear weapons, but also some of the darkest of the bomb makers’ arts: the hard-to-master engineering secrets needed to fabricate nuclear warheads.”).

⁸ See, e.g., Thomas B. Cochran, *Adequacy of IAEA’s Safeguards for Achieving Timely Detection*, in FALLING BEHIND: INTERNATIONAL SCRUTINY OF THE PEACEFUL ATOM 121, 138 (Henry D. Solinski ed., 2008) (“IAEA safeguards are inadequate for achieving the objective of timely detection of diversion of significant quantities of nuclear material from peaceful activities to the manufacture of nuclear weapons.”).

⁹ Jonathan Lynn, *Pakistan Blocks Agenda at U.N. Disarmament Conference*, REUTERS (Jan. 19, 2010), <http://www.reuters.com/article/2010/01/19/us-arms-nuclear-idUSTRE60I26U>

The big gap in the NPT—I should add—is that it does not deal with existing stockpiles.¹⁰

Having listed the challenges, let's discuss some of the efforts to address them. Let's go back to Sam Nunn. He is one of what has been referred to as the "Four Wise Men"¹¹ or the "Gang of Four."¹² This is a bipartisan group consisting of two Democrats and two Republicans. The Democrats are Senator Nunn and William Perry, the former Secretary of Defense under President Clinton.¹³ The Republicans are former Secretaries of State Henry Kissinger and George Shultz.¹⁴

In January 2007, the Four Wise Men wrote a joint letter to the *Wall Street Journal*. In their letter, they discussed how the deterrence value of nuclear weapons is decreasing.¹⁵ They quoted Ronald Reagan—that well-known "softy" on national defense—and his notion that nuclear weapons are "good for nothing but killing, possibly destructive of life on earth and civilization."¹⁶

The Four Wise Men pleaded for nuclear weapons states to view the eradication of nuclear weapons as a "joint enterprise."¹⁷ They listed eight steps that needed to be taken to begin the process.¹⁸ "We endorse setting the goal of a world free of nuclear weapons and working energetically on the actions required to achieve that goal . . ."¹⁹

The Four Wise Men renewed that call in 2008 in another *Wall Street Journal* editorial.²⁰ Then, in 2009, they met with newly-elected President Barack Obama, who proved to be a sympathetic ear.²¹ George Shultz was

20100119.

¹⁰ RAMESH THAKUR ET AL., CAN THE NPT REGIME BE FIXED OR SHOULD IT BE ABANDONED? 15 (Friedrich-Ebert-Stiftung, Dialogue on Globalization Ser. No. 40, 2008), available at <http://library.fes.de/pdf-files/iez/global/05760.pdf> (listing nuclear weapons stockpiles as one of the "major gaps" in the NPT regime).

¹¹ See David E. Hoffman, *Global Heroes*, FOREIGN POL'Y, Dec. 1, 2010, at 62 (noting this nickname).

¹² See Jonathan Schell, *Reaching Zero*, NATION, Apr. 19, 2010, at 11, 12 (noting this nickname).

¹³ Hoffman, *supra* note 11.

¹⁴ *Id.*

¹⁵ George P. Shultz, William J. Perry, Henry A. Kissinger & Sam Nunn, *A World Free of Nuclear Weapons*, WALL ST. J., Jan. 4, 2007, at A15.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ George P. Shultz, William J. Perry, Henry A. Kissinger & Sam Nunn, *Toward a Nuclear-Free World*, WALL ST. J., Jan. 15, 2008, at A13.

²¹ Robert Marquand, *Nuclear Weapons: Is Full Disarmament Possible?*, CHRISTIAN SCI. MONITOR (Apr. 6, 2010), http://www.cistp.gatech.edu/spotlights/Nuclear_weapons.pdf.

quoted as saying to President Obama that it is a bipartisan issue.²² “Why is it so hard for us to solve a problem that is obvious?”²³ Of course, the lawyers in the room know that just because something is an obvious problem does not mean it is obvious how to solve it. I think his point was, “This is an obvious problem. Let’s address it.”

In January 2010, the Four Wise Men wrote another editorial stating that the U.S. has to maintain the safety and security of our nuclear stockpile.²⁴ They were then interviewed in *Nuclear Tipping Point*.²⁵

Henry Kissinger has been a leader in this area. He is interesting because he is both a noted academic and President Nixon’s Secretary of State. He is also a noted realist—a realist *par excellence*. In February 2009, he had a piece that noted the Four Wise Men’s position is a restatement of every American president’s position since Eisenhower.²⁶ Yet, he noted that they were just announcing the initial steps toward a world without nuclear weapons: How do you ascertain the size of nuclear stockpiles throughout the world? How do you eliminate them? How do you verify that they have been eliminated?²⁷ He also stressed this would not be unilateral disarmament by the United States.²⁸ And President Obama has stated that the U.S. will not implement these steps alone.²⁹

In September 2010, Kissinger gave a speech in Vienna.³⁰ He said the collective security system does not appear to be working very well.³¹ He noted that China and Russia were stalling with sanctions against proliferators.³² He said that time was on the side of the proliferators.³³ He went on to add that the time may soon come for the international community

²² *Id.*

²³ *Id.*

²⁴ George P. Shultz, William J. Perry, Henry A. Kissinger & Sam Nunn, *How to Protect Our Nuclear Deterrent*, WALL ST. J., Jan. 20, 2010, at A17.

²⁵ NUCLEAR TIPPING POINT, *supra* note 2; see also Mike Shuster, *Documentary Advances Nuclear Free Movement*, NPR (Jan. 27, 2010), <http://www.npr.org/templates/story/story.php?storyId=123012569> (noting the film’s producers hope it will increase momentum for the movement to rid the world of nuclear weapons).

²⁶ Henry A. Kissinger, *Our Nuclear Nightmare*, NEWSWEEK, Feb. 16, 2009, at 40.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ Henry A. Kissinger, Former U.S. Sec’y of State and Nat’l Sec’y Advisor, Keynote Address at the Eighth International Institute for Strategic Studies (IISS) Global Strategic Review: Power Shifts and Security (Sept. 10, 2010) (transcript available at <http://www.iiiss.org/EasySiteWeb/getresource.axd?AssetID=46681&type=full&serviceetype=Attachment>).

³¹ *Id.*

³² *Id.*

³³ *Id.*

to take “decisive measures.”³⁴ He fears proliferating countries may use nuclear weapons in a conventional manner, and he asked whether nuclear powers, such as the United States, would be able to intervene even if they were not directly involved.³⁵ For example, if Pakistan launches a nuclear attack on India, will the five major nuclear powers just sit back and let that happen?

Now let's look more specifically at what happened in 2009 and 2010.

In the UN, the Security Council has been active. You will recall that the Security Council has a role to play once the IAEA determines a country is in violation of the NPT.³⁶ The Security Council did increase sanctions against North Korea in June 2009³⁷ and against Iran in June 2010.³⁸

I should now mention an often forgotten part of the UN Charter, which was ratified in June 1945,³⁹ just a few months before America dropped atomic bombs on Japan. At that time, a provision was adopted allowing the Security Council to develop a plan for members to develop an arms control plan,⁴⁰ in addition to the powers it later gained related to the IAEA. The Security Council, with the passage of these sanctions against North Korea and Iran, has reaffirmed that it has the power to do this. Additionally, the EU and the U.S. have implemented sanctions on Iran that are tougher than those called for by the Security Council.⁴¹

The next panel, I know, will discuss whether these sanctions will be effective. And then you have to determine what you mean by “effective.” Is it effective if nobody is cheating? Or is it effective if it changes the behavior of the policy leaders in the proliferating countries? If not, then what is going on? But all of that is for the next panel.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Statute of the International Atomic Energy Agency art. 3(B)(4), *opened for signature* Oct. 26, 1956, 8 U.S.T. 1093, 276 U.N.T.S. 3 (“In carrying out its functions, the [IAEA] shall . . . [s]ubmit reports on its activities annually to the General Assembly of the United Nations and, when appropriate, to the Security Council: if in connection with the activities of the Agency there should arise questions that are within the competence of the Security Council, the Agency shall notify the Security Council, as the organ bearing the main responsibility for the maintenance of international peace and security . . .”).

³⁷ S.C. Res. 1874, U.N. Doc. S/RES/1874 (June 12, 2009); *see also UN Tightens North Korea Sanctions*, RADIO FREE ASIA (D.C.) (June 12, 2009), <http://www.rfa.org/English/news/korea/UN-06122009144445.html>.

³⁸ S.C. Res. 1929, U.N. Doc. S/RES/1929 (June 9, 2010); *see also* Neil MacFarquhar, *U.N. Approves New Sanctions to Deter Iran*, N.Y. TIMES, June 10, 2010, at A1.

³⁹ U.N. Charter.

⁴⁰ *Id.* art. 26.

⁴¹ *See, e.g.*, Mark Landler & Stephen Castle, *U.S. and Europe Press Tighter Sanctions on Iran*, N.Y. TIMES, June 17, 2010, at A6.

President Obama and the U.S. decided to go to the Security Council in September 2009 on the issue of non-proliferation.⁴² This was his first entry into the UN world. The President actually sat as the head of the Security Council—the first time a U.S. President presided over the body.⁴³ The U.S. then negotiated a resolution stating that the proliferation of nuclear materials represented “a threat to international peace and security.”⁴⁴ As those of you who have taken International Law know, those are the buzzwords—the trigger phrase—that allow the Security Council to adopt binding resolutions.⁴⁵

At this meeting, the UN Security Council also called for “a Treaty banning the production of fissile material.”⁴⁶ And, this is interesting, it called on states to adopt “best practices . . . with the aim of securing all vulnerable nuclear material from such [risk of terrorism] within four years.”⁴⁷ It is very unusual for a UN resolution to have a timetable like that. It was clearly the result of pressure from the United States.

Then, we had a number of developments in April 2010. On April 5, President Obama delivered a speech in Prague.⁴⁸ He announced that the United States would move toward a world without nuclear weapons.⁴⁹ He also announced concrete steps the U.S. would take to reduce nuclear stockpiles: the U.S. would pursue a START agreement with Russia, push for a cut-off for the development of fissile materials, give priority to ratifying the Comprehensive Nuclear Test-Ban Treaty, and pledge to secure loose nuclear materials within its borders pursuant to the UN Security Council resolution passed earlier in September.⁵⁰

One day later, on April 6, the Department of Defense issued the Nuclear Posture Review.⁵¹ There was a major section dealing with when the United

⁴² See Helene Cooper, *Obama, at U.N., Is Backed on Iran and Arms Curbs*, N.Y. TIMES, Sept. 24, 2009, at A1.

⁴³ *Obama Leads Summit's Adoption of Nuclear Arms Resolution*, CNN (Sept. 24, 2009), http://articles.cnn.com/2009-09-24/politics/obama.un.nuclear_1_nuclear-weapons-nuclear-arms-nuclear-powers?s=PM:POLITICS.

⁴⁴ S.C. Res. 1887, para. 1, U.N. Doc. S/RES/1887 (Sept. 24, 2009).

⁴⁵ U.N. Charter art. 48.

⁴⁶ S.C. Res. 1887, *supra* note 44, para. 8.

⁴⁷ *Id.* para. 24.

⁴⁸ Barack Obama, U.S. President, Remarks in Prague on Nuclear Weapons (Apr. 5, 2009) (transcript available at http://www.whitehouse.gov/the_press_office/Remarks-By-President-Barack-Obama-In-Prague-As-Delivered).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ U.S. DEP'T OF DEF., NUCLEAR POSTURE REVIEW REPORT (2010), available at <http://www.defense.gov/npr/docs/2010%20nuclear%20posture%20review%20report.pdf>.

States would use nuclear weapons.⁵² In the past, the United States has reserved the right to use nuclear weapons in response to any attack on America or its allies involving a weapon of mass destruction, such as a biological weapon.⁵³ The U.S. has also stated it reserved the right to use nuclear weapons in the event of a large scale conventional attack on the United States.⁵⁴

The U.S. has reformulated this doctrine. This reformulation can be considered a negative reassurance.⁵⁵ We see this from time to time. Nuclear weapons states will announce negative covenants to make non-nuclear weapons states feel less vulnerable.

The U.S. has now announced that it will not use nuclear weapons against non-nuclear weapons states that are (a) parties to the NPT and (b) in compliance with their obligations.⁵⁶ So, if an NPT member in good standing launches a biological attack on the U.S., the U.S. will not respond with a nuclear attack. Instead, it will merely unleash “a combination of old and new conventional weapons.”⁵⁷ The U.S. does, however, reserve the right to revisit this position in light of the potentially catastrophic effect of biological weapons.⁵⁸

As you can tell, the umbrella of this pledge is limited. It does not include the other major nuclear powers—Russia, China, France, and the UK. It does not include non-NPT states—Israel, Pakistan, North Korea, and India. There is no pledge to those who are NPT members but not in compliance with non-proliferation obligations. Most commentators think “non-proliferation obligations” go beyond the NPT treaty obligations to include obligations under Security Council Chapter VII resolutions.⁵⁹

⁵² *Id.* at 15–17.

⁵³ *Id.* at 15.

⁵⁴ *Id.*

⁵⁵ *Id.* (“[T]he United States is now prepared to strengthen its long-standing ‘negative security assurance’ by declaring that the United States will not use or threaten to use nuclear weapons against non-nuclear weapons states that are party to the [NPT] and in compliance with their nuclear non-proliferation obligations.”).

⁵⁶ *Id.*; see also David E. Sanger & Peter Baker, *Obama to Limit Scenarios to Use Nuclear Weapon*, N.Y. TIMES, Apr. 6, 2010, at A1.

⁵⁷ Sanger & Baker, *supra* note 56.

⁵⁸ U.S. DEP’T OF DEF., *supra* note 51, at 16.

⁵⁹ See, e.g., Orde F. Kittrie, *Averting Catastrophe: Why the Nuclear Nonproliferation Treaty Is Losing Its Deterrence Capacity and How to Restore It*, 28 MICH. J. INT’L L. 337, 363–64 (2007) (“[T]he purpose of enforcement action under Chapter VII ‘is not to maintain or restore the law, but to maintain or restore peace, which is not necessarily identical with the law.’ Thus, if an act of nuclear proliferation constitutes a threat to international peace and security, the Security Council can sanction the proliferant regardless of whether the act is a violation of the NPT or any other international legal instrument.” (quoting HANS Kelsen, *THE LAW OF THE UNITED NATIONS* 294 (1964))). Further, the U.N. Security Council considers

Anyway, as I see it, Iran is the only country that currently is left outside the pledge as a result of its non-compliance with NPT.

For these countries not included under this assurance, the U.S. may still use nuclear weapons under “extreme circumstances” to defend the interests of the United States and its allies.⁶⁰ The Nuclear Posture Review noted that “[i]t is in the U.S. interest and that of all other nations that the nearly 65-year record of nuclear non-use be extended forever.”⁶¹ Then, starting on April 8, we had a whole week of boom, boom, boom—first came the START Treaty, which was signed by Presidents Medvedev and Obama.⁶² I don’t want to go into too many specifics. Our friends here from the Defense Department can fill you in on that. But basically, each side agreed to reduce their strategic launchers, missiles, and nuclear bombers.⁶³ “Strategic,” in this context, refers to weapons capable of a long-range attack carrying a high yield.⁶⁴ The pros of the Treaty, according to commentators, are that there will be fewer weapons to monitor⁶⁵ and that the Treaty does not negatively affect America’s ability to develop missile defense systems.⁶⁶

Those who criticize the Treaty say it is too weak because it does not reduce tactical nuclear weapons—those which are short-range, low yield, and appropriate for use on a battlefield.⁶⁷ My understanding is that the Russians enjoy a considerable edge over the United States when it comes to tactical weapons. The U.S. has about 500 tactical nuclear weapons.⁶⁸ The Russians have about 2,000.⁶⁹ The concern is that Russia, thus, has more to gain from

itself “authorized to sanction any proliferant activity, regardless of whether or not that activity violates the NPT or any other legal instrument.” *Id.* at 340.

⁶⁰ U.S. DEP’T OF DEF., *supra* note 51, at 16.

⁶¹ *Id.*

⁶² Measures for the Further Reduction and Limitation of Strategic Offensive Arms, U.S.-Russ., Apr. 8, 2010, S. TREATY DOC. NO. 111-5 [hereinafter New START Treaty], *available at* <http://www.state.gov/documents/organization/140035.pdf>; Peter Baker & Dan Bilefsky, *Obama and Medvedev Sign Nuclear Arms Pact*, N.Y. TIMES, Apr. 9, 2010, at A8.

⁶³ New START Treaty, *supra* note 62, art. II.

⁶⁴ Jim DeMint, *The Treaty Is MAD*, NAT’L REV. (July 29, 2010), <http://www.nationalreview.com/articles/243568/treaty-mad-jim-demint>.

⁶⁵ Steven Pifer, Dir., Arms Control Initiative, Brookings Institution, Statement Before the Senate Armed Services Committee: New START and U.S. National Security (July 27, 2010) (transcript available at <http://armed-services.senate.gov/statemnt/2010/07%20July/Pifer%2007-27-10.pdf>).

⁶⁶ *Id.*

⁶⁷ DeMint, *supra* note 64.

⁶⁸ Robert S. Norris & Hans M. Kristensen, *Global Nuclear Weapons Inventories, 1945–2010*, 66 BULL. ATOMIC SCIENTISTS 77, 78 (2010).

⁶⁹ *Id.*

this Treaty because the U.S. is narrowing its advantage in strategic missiles while leaving the Russian edge in tactical weapons untouched.⁷⁰

Additionally, the Treaty only reduces active missiles.⁷¹ It does not touch those which are stored in stockpiles.⁷² Others say there is an interpretation problem. Some fear the Russians will interpret the Treaty as prohibiting a U.S. missile defense system.⁷³ More on this later.

Then, four days later, on April 12, you had the Nuclear Security Summit.⁷⁴ I will not go into greater detail about this because it has already been covered by other presenters. But, as you gleaned from those presentations, the emphasis was on ways to secure nuclear materials to ensure they do not fall into the hands of proliferators and dangerous non-state actors.

Another new development in 2010 was the actions taken by the International Committee of the Red Cross. You don't normally think of the Red Cross as being a player in the non-proliferation world, but remember that they are the guardians of the Geneva Convention. The President, a Swiss national named Kellenberger, on April 20, welcomed all the initiatives of the U.S.⁷⁵ He noted that the first doctor to arrive in Hiroshima after the bomb was a Red Cross doctor.⁷⁶ He recalled the 1996 International Court of Justice (ICJ) judgment on the legality of nuclear weapons⁷⁷—it seems odd in a law school not to refer to that—where the ICJ, in an advisory opinion, said that generally the use of nuclear weapons would be contrary to international law but that they could not decide whether in the extreme circumstance of self-defense whether it would be lawful or unlawful.⁷⁸ It was a 7–7 decision.⁷⁹

The point of the Red Cross President was that he had a hard time seeing how the use of nuclear weapons could be legal under international law.⁸⁰ Why is that? Well, because of the nature of the weapon, which cannot

⁷⁰ DeMint, *supra* note 64.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Nuclear Security Summit, Washington, D.C., April 12–13, 2010*, U.S. DEP'T STATE, <http://fpc.state.gov/c35775.htm> (last visited Dec. 23, 2011).

⁷⁵ Jakob Kellenberger, President of the ICRC, Statement to the Geneva Diplomatic Corps (Apr. 20, 2010) (transcript available at <http://www.icrc.org/eng/resources/documents/statement/nuclear-weapons-statement-200410.htm>).

⁷⁶ *Id.*

⁷⁷ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 8).

⁷⁸ Kellenberger, *supra* note 75.

⁷⁹ *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 77, para. 105(2)(E).

⁸⁰ Kellenberger, *supra* note 75.

distinguish between military and civilian targets.⁸¹ The test of proportionality cannot be met as well.⁸² The Red Cross continued by pleading with nuclear states never to use nuclear weapons regardless of the state's view on their legality.⁸³

Then, in May 2010, we had the NPT Review Conference.⁸⁴ Last time, in 2005, the attendees could not even agree on a final document. This time, they all agreed on a final document.⁸⁵ In the NPT world, at least, that is considered a success.

In September 2010, Laura Kennedy, the ambassador of the U.S. in the General Assembly's Disarmament Committee, made a statement defending the START Treaty.⁸⁶ On the topic of fissile cut-off, she said that "[i]f the start of negotiations continues to stall, those countries that still wish to negotiate . . . will have to consider other fora, existing or ad hoc, [for continued negotiations]."⁸⁷ The United States, it seems, is running out of patience.⁸⁸ So there may be some movement on that front. Some say this is a threat. The U.S. is threatening to move the discussions out of its current venue,⁸⁹ which requires consensus.⁹⁰

The irony is that all these bodies operate on the basis of consensus. And who wanted consensus initially? The nuclear weapons states. The permanent members wanted consensus as a means of maintaining a veto. But if you have consensus, everybody gets a veto. So be careful what you wish for: Pakistan has a veto.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, May 3–28, 2010, U.N. Doc. NPT/CONF.2010/50 (Vols. I–III), available at <http://www.un.org/en/conf/npt/2010/>.

⁸⁵ *Id.*

⁸⁶ Laura Kennedy, Ambassador, U.S. Delegation to the Conference on Disarmament, Plenary Session Speech at the Eighth IISS Global Strategic Review: Strengthening the Global Arms Control and Non-Proliferation Regime (Sept. 12, 2010) (transcript available at <http://www.iiss.org/EasySiteWeb/getresource.axd?AssetID=46873&type=full&servicetype=Attachment>).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Fissile Material Cut-Off Treaty (FMCT)*, REACHING CRITICAL WILL, <http://www.reachingcriticalwill.org/resources/fact-sheets/critical-issues/4737-fissile-material-cut-off-treaty> (last visited Dec. 24, 2011) ("Consequently, several delegations at First Committee in 2010 including those from the United States, Japan, Liechtenstein, and Australia announced they would support moving negotiations for a fissile materials treaty to another forum if the deadlock in the [Conference on Disarmament] continued.").

⁹⁰ *Disarmament: An Introduction to the Conference*, UNITED NATIONS OFF. AT GENEVA, [http://www.unog.ch/80256EE600585943/\(httpPages\)/BF18ABFEFE5D344DC1256F3100311CE9?OpenDocument](http://www.unog.ch/80256EE600585943/(httpPages)/BF18ABFEFE5D344DC1256F3100311CE9?OpenDocument) (last visited Dec. 24, 2011) ("The Conference [on Disarmament] conducts its work by consensus.").

At this same meeting of the Disarmament Committee, somebody from Russia's upper house of parliament (the Federation Council) confirmed that the START Treaty is important.⁹¹ He anticipated it would have difficulty in the lower house (the Duma) but that it would have less trouble in the Federation Council.⁹² He stressed the importance of ratification.⁹³ He also was asked about containing proliferation in Asia.⁹⁴ He replied:

I will start with one of my favourite topics: Iran. When [the Iranian President] made one of his brilliant statements, saying that Russia and the UK have to pay contribution to the Islamic Republic of Iran for the occupation of Iranian territory during World War II, and he said that just prior to the V-Day this year, I invited an Iranian Ambassador to my office in Moscow. . . . I reminded him that the Soviet-Iranian Treaty of 1921, which allows Soviet and Russian troops to be deployed on the Iranian territory, is still valid.⁹⁵

He continued:

[Russia is not under] any illusions about the character of the Iranian regime at all. That is why, if we cooperate with Iran . . . when we build Bushehr, this is how we try to keep these people playing by the rules of IAEA. That is the only legal mechanism to make them cooperate with international institutions.⁹⁶

He went on to say that, if START failed, both Obama and Medvedev would be weakened.⁹⁷ He said it needed to be non-partisan in both countries.⁹⁸

⁹¹ Mikhail Margelov, Chairman, Foreign Affairs Comm., Fed'n Council of Russ., Plenary Session Speech at the Eighth IISS Global Strategic Review: Strengthening the Global Arms Control and Non-Proliferation Regime (Sept. 12, 2010) (transcript available at <http://www.iiss.org/EasySiteWeb/getresource.axd?AssetID=46872&type=full&servicetype=Attachment>).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Strengthening the Global Arms Control and Non-Proliferation Regime, Plenary Session Q&A at the Eighth IISS Global Strategic Review: Strengthening the Global Arms Control and Non-Proliferation Regime (Sept. 12, 2010) (transcript available at <http://www.iiss.org/EasySiteWeb/getresource.axd?AssetID=46868&type=full&servicetype=Attachment>).

⁹⁵ *Id.*

⁹⁶ *Id.* (referring to the nuclear power plant).

⁹⁷ *Id.*

⁹⁸ *Id.*

Now, in the last month, in the Disarmament (First) Committee of the General Assembly, Pakistan broke consensus regarding a draft resolution supporting the Fissile Material Cut-Off Treaty (FMCT) process.⁹⁹ In the Committee's vote on the resolution, only Pakistan and North Korea voted against, with twenty-three countries abstaining.¹⁰⁰ Pakistan's representative said the Treaty was not evenhanded and would constitute a "permanent[] freeze" on strategic nuclear materials.¹⁰¹ He said it would be unfair to Pakistan.¹⁰² Why? India has a huge stockpile of these materials and would not be covered, so Pakistan would be permanently behind India in this regard.¹⁰³

Moving to bilateral reductions, the Americans and Russians both praised the START Treaty in the General Assembly. Interestingly, they said this was part of their commitment under Article 6 of the NPT.

In the U.S., on September 15, Sam Nunn endorsed START.¹⁰⁴

On the sixteenth, the Senate Foreign Relations Committee voted the START Treaty out of the Foreign Relations Committee to the full Senate by a vote of 14-4.¹⁰⁵ The vote included three Republicans: Richard Lugar, Georgia's own Johnny Isakson, and Bob Corker.¹⁰⁶ There were several declarations attached to the Treaty, including one on America's right to develop a missile defense system.¹⁰⁷

President Obama, when discussing his priorities for a "lame duck" session following the midterm elections, included START ratification, in addition to economic issues.¹⁰⁸ He said START was needed to send a strong message to the Russians that the U.S. was serious about arms reduction.¹⁰⁹ Additionally, the U.S. needed to send a message to the rest of the world to get support for isolating Iran.¹¹⁰ In other words, if America is going to get

⁹⁹ *FMCT Treaty 'Unacceptable', Says Pakistan*, STATESMAN, Oct. 14, 2010 [hereinafter *FMCT Treaty 'Unacceptable'*].

¹⁰⁰ See Press Release, General Assembly, If Disarmament Conference Fails to Start Work by End of 2012 Session, General Assembly to Consider Options for Fissile Material Ban, Says First Committee, U.N. Press Release GA/DIS/3448 (Oct. 28, 2011).

¹⁰¹ *FMCT Treaty 'Unacceptable,' supra* note 99.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Sam Nunn & John Warner, Opinion, *Nuke Treaty Deserves Support*, POLITICO (Sept. 16, 2010), <http://www.politico.com/news/stories/0910/42268.html>.

¹⁰⁵ S. EXEC. DOC. NO. 111-6, at 81 (2010).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 93.

¹⁰⁸ Barack Obama, U.S. President, Remarks After a Cabinet Meeting (Nov. 4, 2010) (transcript available at <http://www.whitehouse.gov/the-press-office/2010/11/04/remarks-president-after-a-cabinet-meeting>).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

the world to go against a proliferator, it needs to follow its promise under the Grand Bargain to disarm as well.

November 9, John Bolton and John Yoo objected to the START Treaty in an op-ed.¹¹¹ They said this was a “Trojan horse.”¹¹² They said it ignored U.S. responsibilities and left the Russians at a considerable advantage.¹¹³ We shall see how the debate happens.

The conclusion is not rocket science. In 2009 and 2010, we have had a remarkable series of events on nuclear non-proliferation. There have been a lot of positive international developments, such as the Cut-off Treaty, the Comprehensive Test Ban Treaty, and the NPT Review Conference. Domestically, you have the new Nuclear Posture Review, the signing of the START Treaty, and an administration committed to doing something about nuclear proliferation. Of course, you have the challenges there, too. Whether you have the stars coalescing is unclear. We will have to see whether they ultimately align. But the key point is that they are moving, and we will have to keep our eyes open to see if the recent momentum can be maintained.

From here, I will return to the Sam Nunn quote I mentioned earlier.¹¹⁴ I think it is time for us all to put on our hiking boots and begin that climb so that we can at least see the top of the mountain, and the challenge is to get others to climb up with us.

Thank you very much.

¹¹¹ John R. Bolton & John Yoo, Op-Ed., *Why Rush to Cut Nukes?*, N.Y. TIMES (Nov. 9, 2010), <http://www.nytimes.com/2010/11/10/opinion/10bolton.html>.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ See NUCLEAR TIPPING POINT, *supra* note 2.