

## PANEL THREE

THE INTERNATIONAL TREATY REGIME APPLICABLE  
TO NUCLEAR WEAPONS AND FURTHER TREATIES  
THAT HAVE BEEN PROPOSED

*Moderator: Jonathan Granoff<sup>+</sup>*

*Panelists: Hon. Dr. Christopher Ashley Ford<sup>\*</sup>; Hon. Thomas Graham,  
Jr.<sup>\*\*</sup>; Dr. Gloria C. Duffy<sup>\*\*\*</sup>*

JONATHAN GRANOFF:

Well, we're going to shift gears and get into the tools that are needed to get us to a safer and saner world. And this next panel addresses the tools that lawyers use in bringing nations together. And this session will be on the international treaty regimes, and we have three extraordinary panelists to address this issue. I'll just give a little introduction to them now . . . and I want to apologize in advance. Gloria Duffy is going to have to leave us at two minutes to two on the dot. But I want to go first with Dr. Christopher Ford, who is the Assistant Secretary of State in the Bureau of International Security and Nonproliferation and is also presently performing the duties of the Under Secretary of State for Arms Control and International Security. He served as Special Assistant to the president and Senior Director for Weapons of Mass Destruction and Counterproliferation at the National Security Council. He is, I think, the ranking person, the serious thought leader in our government presently on this issue. And it's my honor to give the floor to Ambassador Ford for the next 15 minutes. And then we'll have Ms. Duffy and then Ambassador Graham, and then some Q&A. Ambassador Ford, please.

---

<sup>+</sup> President, Global Security Institute; Senior Advisor, Permanent Secretariat of the World Summits of Nobel Peace Laureats

<sup>\*</sup> U.S. Ambassador, Assistant Secretary for International Security and Nonproliferation, U.S. Department of State

<sup>\*\*</sup> Former Special Representative for Arms Control, Nonproliferation and Disarmament; Former General Counsel, Arms Control and Disarmament Agency

<sup>\*\*\*</sup> President and CEO, The Commonwealth Club of California; former Deputy Assistant Secretary of Defense

CHRISTOPHER FORD:

Thanks Jonathan . . . I'm grateful for the chance to be part of this. Thanks for the invitation, and also for your flexibility and letting me participate from my family holiday here in the mountains. So this is not, for the record, what the State Department looks like on the inside. So many of you listening may not know this or expect it, but actually, Jonathan and I are old friends.

And I think of him as being always willing to listen, to take ideas seriously, and to engage open-mindedly about them, even when – and perhaps, especially when – they are ideas that challenge one's preconceptions or preferences. And so, since that is something that is extremely rare in modern political discourse, it's a delight to be able to be part of this.

And in that spirit, I hope you all will forgive me for choosing, as my focus today, a bit of what you might call a sort of friendly moral and legal critique of some aspects of current disarmament discourse, with the aim of trying to get us all to a place where we can, in fact, more constructively address these challenges together.

So what I'd like to do is offer a few thoughts first on the Treaty on the Prohibition of Nuclear Weapons, the TPNW, or the Nuclear Weapons Ban Treaty as it's sometimes called. And then following up on that, on nuclear weapons from the perspective of international humanitarian law.

So starting on the ban, just for the record, although I've said these points many times before, I'll just say very quickly that for the many countries that rely directly or indirectly on nuclear weapons for their security, the Ban Treaty is a fairly straight forward issue. We were not going to join it. We already consider it to be a failed treaty, and upon its entry into force, it won't bind us. All of these many states who rely in one way or the other upon nuclear weapons for security have also made very clear their rejection of a potential ban at this time and their rejection of the idea that there is any hint of what lawyers will recognize as *opinio juris* in the non-use of such weapons since World War II. And these messages should make it pretty clear to all concerned that there is not even a scintilla of a customary international legal norm against nuclear weapons emerging. But these are not new points from a US government official, so I won't dwell on them here. But what I would like to do, in talking about the ban, is to stress a couple of

further points. One is to point out what I think are the moral implications of the likely selectivity of the treaty's impact. And secondly, I'd like to talk a little bit about, or at least to point out, what I think may be the crisis instability problems that could be created in a world without nuclear weapons – and perhaps even the nuclear weapons use incentives that could be created thereby.

That may sound paradoxical, but I think it's actually a concern that we need to take very seriously. But on the first point, the selectivity, the Ban campaign is one of civil society activism and grassroots pressures that are directed, of course, at legislators and elected representatives, pushing them towards treaty accession or ratification. And civil society activism is a well-established way to seek social change, and an entirely legitimate one.

In this context on the global stage, however, the problem should also be pretty obvious. It is that nuclear weapons possessors that lack a free press and that use draconian tools of political oppression to suppress disfavored opinion and political activism in their civil societies – to the degree that they even have civil societies at all – are highly resistant and perhaps even immune to the kind of civil society pressures that the Ban has been driven by.

So, to the degree that this campaign actually succeeds in influencing the legislators and politicians that it targets, the Ban Treaty approach has the potential to bring about nuclear disarmament really only for those free democratic societies that actually listen to their citizenry and their citizens' concerns. I have to think that it can't really be the intended objective to bring about a world in which only dictators such as Vladimir Putin, Xi Jinping, and Kim Jong-un are the possessors of nuclear weapons, but that would seem to be the direction in which the Ban campaign is effectively pushing.

So that's a concern that I think people in the Ban Movement spend far too little time addressing, but I think there's also a further problem. For the sake of argument, let's assume that the Ban were, in fact, to persuade all of today's possessors to get rid of their weapons. Were that to occur, it's actually not entirely obvious to me that the world that this would create would necessarily be a world more desirable than today's world.

So imagine a world in which nuclear weapons have been dismantled, but in which countries still know how to build them,

and in which they still struggle with all the many conflicts and rivalries and challenges of a very problematic security environment. That world might, in fact, be one that is more unstable and more likely to see nuclear weapons use than today as well. I've talked about this in other fora in more detail, but I'll just make the point briefly here. In that imagined world, every technology holder would have an incentive to engage in what you might call a "reconstitution race" – to build nuclear weapons anew – anytime it was in a major military crisis with another such technology holder.

Yes, each would have that incentive to reconstitute, for fear that the other guy would himself do so; neither would want to be a non-nuclear-armed power in a fight with a nuclear-armed power. But it's even worse than just that. Whomever happens to "win" the reconstitution race would also have an incentive actually to use such nuclear weapons first. In other words, if you happen to reconstitute your arsenal before your adversary succeeds in reconstituting his arsenal, there's an incentive to strike first – to take advantage of your short-lived monopoly and use your new arsenal to prevent the enemy from getting one. So you almost create more incentives to use nuclear weapons preemptively in such a world than exist today, and to turn every single crisis, as Thomas Schelling has observed, into a nuclear crisis.

And that is without even factoring in what I think may also be a very dramatic problem of the fact that by dismantling the architecture of nuclear deterrence, you may, in fact, give great powers more incentives to engage in conflicts with each other in the first place, thus teeing up the likely dynamics of such reconstitution, perhaps with even more frequency than they have been in the last many decades of great power peace under the nuclear umbrella.

So I say this not to say that I know for sure what such a disarmed world would look like, but rather to make the point that these are enormously more complex issues and questions than one normally hears from disarmament advocates, particularly in the Ban Movement. And so if the objective is, in fact, to strengthen international peace and security and to prevent human suffering as effectively as possible, there needs to be a lot more done to think this stuff through. They clearly haven't yet.

Surely the point is not just to be able to say that you achieved disarmament, or to seek it at really any cost whatsoever. If real security and stability is, in fact, the objective, we have a lot more hard staring at these challenges, I think, than one usually hears in disarmament community debates. So let me put the Ban aside and talk quickly about international humanitarian law here, too, because I think this is also an area that rewards attention to detail – and in which we need to get beyond mere assertions and superficial certainties in order to look at the real complexity of the challenge. Because I think the detail really does matter.

And if we can put aside some of our uncritically received certainties and absolutisms, I think it would be really valuable to work these issues through. Indeed, we might be able to make some concrete progress in changing “facts on the ground” and making the world somewhat safer. We should, for example, put aside the categorical statements about the supposed per se impossibility of ever having or using nuclear weapons in any way consistent with international law and look more at the details of how countries actually approach these questions. Details here matter, too, and from an international humanitarian law perspective, I suspect, not all nuclear postures and doctrines are created equal.

If we can make distinctions amongst them and identify particular points of friction or challenge in ways that actually help us address ourselves to concrete policy proposals – as opposed to just waving one’s hands in the usual sterile sorts of ways and saying the whole thing is just a misbegotten mess from the outset and all weapons should just go away – maybe some real security progress can be made. That’s really, frankly, where there is more prospect for constructive change in the world. And from a U.S. perspective, I think our own approach to these things holds up pretty well from a legal perspective.

I fully grant that if your starting assumption is that there is absolutely no legal or moral case for nuclear weapons possession in the first place that there’s no reconciling that position with our doctrine. Fair enough. But I don’t think it’s that simple, or that that starting assumption is correct in the first place. And I do think it is really important to remember how various doctrines and postures and approaches are, in fact, structured because some are most definitely better and more moral and more legal than others.

From the U.S. perspective, we are a model of transparency and openness, and accountability in this. We are practically an open book with regard to doctrines and postures, and plans, and numbers, and systems, and all of the other things that you might want to know about how someone else approaches nuclear weapons. Even if you don't like what you see, at least we give information and opportunities and meaningful material for real, serious, engaged debate on this sort of thing – and the chance for any concerned person to evaluate our approach. I think we're a model of that, I wish others – and some in particular – were much better than they are in these ways, and more transparent, accountable, open, and honest in the ways that we are.

When it comes to issues of international humanitarian law, we should also remember that in the 1996 ICJ case on nuclear weapons use, of course, the Court did not rule out the possibility of nuclear weapons use in what it described as an extreme circumstance of self-defense in which the very survival of a State would be at stake.

In light of that very particular phrasing, it's worth noting, and I think it is probably no coincidence that U.S. nuclear doctrine has long stressed that the use of nuclear weapons might indeed make sense only in extreme circumstances. Our declaratory policy is rooted in collective defense, exclusively against the most dire threats and in connection with protecting the vital interests – not just of the United States, to be sure, but also of our many allies and partners.

That is to say, bearing in mind the ICJ's standard, remember that the numerous democracies of North America and the Pacific Rim rely upon our "extended deterrence" for their own safety, and perhaps even for their continued existence as independent sovereign states. That is important. And I'd also point out the degree to which we in the United States are very explicit in recognizing the applicability of international humanitarian law to any potential use of nuclear weapons.

U.S. doctrine in weapons policy guidance has made this clear for a very long time. We have routinized the involvement of military and DOD civilian lawyers in nuclear planning and operational matters in a very deep operational level. This is a commonplace in our system, at least, and such lawyers are an official part of formal and informal planning, targeting, and

operational processes of all sorts, in policy reviews, in weapons evaluations, and so forth. Here, too, we are a model.

Precisely in order to ensure consistency with the law of war and relevant implementing guides, all members of the U.S. armed forces, of course, are also subject to the Uniform Code of Military Justice, which obliges them under criminal penalty to refuse to follow unlawful orders such as those that direct them to violate the laws of war. So there are some formidable, doctrinal, and procedural safeguards built into how we think about and approach these things, including review and advice by lawyers.

And this is true across our entire military spectrum, not simply with respect to nuclear weapons – though nuclear weapons is an area that is not an exception to this. In the broader context of the fundamental purpose of our deterrent force being to deter aggression, I think we in the United States thus stand in a strong position, particularly vis-a-vis some other nuclear powers, with regard to our approaches.

And if you're looking for points of departure on where to push for real concrete change in ways that can help make doctrines and policies more consistent with international humanitarian law, you might look to some of those other parties for focus of attention. For example, I think there are some real reasons to be concerned about Russian doctrine and policy.

Now it's true, of course, that they say in Russia that their doctrine conforms with international law, and that Russia has nuclear weapons only for defense and deterrence and these would only be used in extremis. I hope that's the case, but there are some interestingly worrying signs. The Russians have, for example, suggested that they might respond with the all-out use of nuclear weapons if they see even a single incoming ballistic missile, apparently irrespective of whether or not that missile is likely to be armed with a conventional or nuclear warhead, or whether its target is a city or an empty stretch of taiga, for example. Especially coming from a country that itself has an enormous arsenal of missiles that are capable of carrying nuclear or conventional warheads rather interchangeably, it's not entirely obvious to me how such a threat of reflexive nuclear use in response to any missile attack would be consistent with the law of armed conflict.

So those are the things on which I think that the Russians should be pressed to answer questions and to display some real

transparency and clarity in how they approach these matters. Another point of worry is their development of the so-called “Poseidon” system: nuclear-powered underwater drones that the Russians apparently intend to fit with massive multi-megaton, nuclear warheads and launch across the sea in wartime in order to inundate U.S. cities with radioactive tsunamis. I’m not making this up.

This operational concept raises, surely, some very serious questions about the extent to which it could possibly ever be used in compliance with applicable legal rules and principles. And then, of course, there is the rather infamous “Dead Hand”, or “Perimeter” system, which has been described in media accounts – which the Russian strategic rocket forces commander, I think, confirmed back in 2011– as a system that would automatically launch all Russian nuclear forces in the event that its computer detected detonations in Russia and its computer brain lost contact with the General Staff.

Could Russia really defend such a system as being anything other than some kind of a barbarian’s vindictive funhouse mirror model of retribution, taking place only after Russia has already lost a war and there is thus by definition no military necessity involved? I don’t know, but goodness, we should be asking them these questions! This ought to be a focus of very considerable concern in the disarmament community.

Governor Brown made a point in the last panel, Jonathan, about how the rule of law rests upon a consensus of values and principles. And I think that’s true, but it’s also a little bit worrying in this context because it sounds like Russia is far outside the realm of defensible values and principles here. Moreover, in another area that I’ve worked on very closely, issues of cyberspace security and how the law of armed conflict applies in cyberspace, Russian officials have in recent months begun to try to walk away from prior affirmations that international humanitarian law applies where it is difficult to distinguish civilians from military combatants.

They’ve said that very explicitly in cyberspace now, which is deeply disturbing in itself, but if that is a principle that they think is somehow true as a matter of law, what on earth does that mean about their likely behavior in the event of a nuclear conflict? Especially from a country that possesses things like “Perimeter”



and “Poseidon,” what does this argument about the inapplicability of international humanitarian law mean? Could they really be contending that they feel in no way bound by law at all? So here’s where we should be asking the hard questions, not of people who model transparency and engagement on these issues, but rather those who try to hide what they’re up to and who suggest, when you do press them on these things, some very disturbing things. So that I think is something that I would suggest the disarmament community should be focusing on. If the Russians think any of this actually makes sense, and its legal and moral, make them defend it.

And then, of course, there’s China. I don’t think we should be sanguine about their policies either, notwithstanding all of their rhetoric about “no first use” and minimum deterrence. “No first use” is, of course, one of those things that one rather doubts would hold up if they were really in danger of losing a conventional war. I’ve always said that no first use policies are most credible and believable and trustworthy where they’re least needed, and that where they would be most consequential and most needed, you simply can’t rely upon them. But there’s much more to it than that. It’s not just that Beijing has raised questions about its own “no first use” policy. It’s that for a country that has an alleged philosophy of “minimum deterrence” in the first place, China has been consistently building up the size of its arsenal for a generation now, even during a time in which the threats facing it in nuclear terms from the United States and Russia have essentially fallen through the floor. Since China joined the NPT in 1992, the U.S arsenal that arguably threatens China, and the Russian arsenal that arguably threatens China, have fallen by a collective total of something like 60,000 weapons.

So, over the last generation, the nuclear threat facing China has absolutely fallen off a cliff. And yet China continues to build and build. From a country that professes “no first use” and “minimum deterrence” as a policy, you would think that would be the obvious reason for them to cap or even reduce their arsenals. Nor do they face growing relative conventional threats, for their armed forces are bigger and more capable than ever relative to ours and the Russians. But they’re still building up their nuclear weapons. Along with their obvious embrace of counter value targeting – which is to say, targeting civilian cities as such as opposed to military assets – this seems utterly indefensible, and not obviously consistent with

China's legal obligations. So these are reasons to ask the Chinese some very hard questions too.

I make all these points about Russia and China, frankly, to problematize the discourse here, because there is a moralistic simplicity in so much of what one hears coming out of disarmament circles that misses so much critical detail about the real world. And I would urge that we pay a lot of really close attention to how the details of these things really do work. Because I think the road to resolving these problems, and to a disarmed future, must necessarily run through a really deep engagement with actual, concrete, real-world security challenges. It lies through thinking about and working to ameliorate those problems in ways, if I may be so bold, that the disarmament community has not traditionally been very good at doing, or even to have recognized the need to do. And I think we've got a lot of work to do also in shoring up institutions such as the NPT and the CWC and the BWC, which are under such enormous threat these days. There's a huge agenda out there, but it's an agenda that involves really embracing the challenges of security and not waiving one's hands and trying to wish them away. I'm sorry to speak so long, but you can tell, I feel very strongly about these things. Thanks, Jonathan.

JONATHAN GRANOFF:

And Dr. Ford, we'll be returning, you'll have more opportunity to speak before we close out. So, Ms. Gloria Duffy is presently the head of the Commonwealth Club. She's built it to be a formidable institution, but there was a period in which she served in government as the Deputy Assistant Secretary of Defense and Special Coordinator for cooperative threat reduction. What that means is that she was responsible for negotiating the dismantlement and destruction of the weapons of mass destruction of Russia, the Ukraine, Belarus, and Kazakhstan.

She completed over 50 agreements with these countries for dismantling and disposal of their weapons of mass destruction. She managed a budget in the hundreds of millions of dollars and her service in our government was an unequivocal success story. And my only possible debate with this amazing woman is the failure of the government to take victory laps for such successes and let more people know that we technically know how to get to a safer

world. Gloria Duffy, please. And I'll apologize on your behalf that you're going to leave us at 2:00 sharp. But we're going to get you back somehow.

GLORIA DUFFY:

Thank you so much . . . to Jonathan, Tom Graham and other friends and colleagues for inviting me to join you today. And I see some friends on the attendee list, hello to everybody. Obviously, today's session comes at a very pivotal time. We are in a period that former Secretary of State George Shultz has just called, in his new book, *A Hinge of History*, comparable to the immediate aftermath of World War II. The future of nuclear weapons is one of the areas in which we face some clear and divergent choices on which our future depends. We meet at a time when there are a number of concerning developments, including the removal of the Secretary of Defense, the resignation of the Director of the National Nuclear Security Organization and a number of other events. But I'd like to step back, as concerning as those recent developments are.

That's not the topic of my brief presentation. My expectation is that we will have a peaceful transition in our national leadership. So I'd like to describe how the U.S might better utilize some of the major tools we have available to us to safeguard our security. Some of which, as Jonathan referenced, we have used successfully in the past. Obviously, negotiated arms control agreements have been a major tool for the U.S to safeguard our security. Unfortunately, in recent years, the U.S has been withdrawing from our existing arms control treaties at a rapid pace based on concerns about other parties cheating on those agreements. In the past three years, the U.S has withdrawn from the 1987 Intermediate Range Nuclear Forces treaty with Russia, from the 2015 U.S Iran Nuclear Weapons Agreement, and most recently from the 1992 Open Skies treaty. So, in this context, I'm going to talk very briefly today about two aspects of arms control.

The first of these is arms control treaty compliance. I'm also going to review the approach to arms control that we practiced, and that Jonathan described, during the Clinton administration. That approach was used with great success, and it doesn't require formal government to government arms control treaties to accomplish mutual goals with other countries to reduce the threat of nuclear weapons.

So, first of all, on arms control compliance, as you all know from other aspects of the law, as difficult and prolonged as it often is, the negotiation of agreements is only the first step in their efficacy. Any agreement negotiated must be supported by mechanisms for dispute resolution, and those mechanisms must be actively used for an agreement to be a living and effective document. Most arms control treaties over the years have been negotiated with compliance and dispute resolution mechanisms built in, ranging from onsite inspection rights to institutions like the Standing Consultative Commission, or the SCC, that was established to support the SALT or Strategic Arms Limitation Treaties process by providing a forum to raise and resolve compliance issues.

It's inevitable that disputes will arise about the terms of treaties and in some cases, such as major abrogations of treaty provisions, withdrawal from those treaties is certainly justified. But for some years now I don't think the dispute resolution provisions of arms control treaties have been effectively utilized. To do so is very hard. It can be done, and it's worked in the past. The past three years isn't the first time the U.S. has complained about other countries' non-compliance with arms control agreements, and, indeed, where we've experienced some difficulties with compliance. It's also not the first time we have not used all of the dispute resolution and compliance mechanisms at our disposal.

A similar scenario took place early in the Reagan administration when the new administration was concerned about Soviet non-compliance with arms control treaties and threatened to pull out of several of them. Together, with a group of colleagues based at Stanford in the mid-1980s, we reviewed all the then current disputes about arms control compliance. In a book titled, *Compliance and the Future of Arms Control*, we made some recommendations for better use of the dispute resolution mechanisms that existed to support them. There was a hearing on our report and the compliance issues by the House Foreign Affairs Committee in 1987. We testified about the status of the complaints about noncompliance with existing treaties and the opportunities to resolve the concerns through the existing dispute resolution mechanisms. We also made some recommendations about how to improve the process of resolving arms control disputes. In the end,

not only did the Reagan administration work to resolve the existing disputes, but they decided to keep the existing arms control treaties in effect, and they negotiated and completed the INF treaty and began negotiations on a START agreement. Similarly, the process of arms control can continue now with efforts to resolve disputes concerning old treaties and possible negotiation of new arms control treaties, supported by dispute resolution mechanisms. The second comment I'd like to make is that formal arms control treaties are not always necessary for solving pressing international security problems, including those involving nuclear threat.

I'd like to take us back to the breakup of the Soviet Union in 1991. Sam Nunn, former Democratic Senator and chairman of the Senate Arm Services Committee visited the Soviet Union during the summer of '91. He found Mikhail Gorbachev on house arrest in the Crimea during a coup attempt. He wondered who had the nuclear command authority at that time with nuclear weapons spread all around the former Soviet Union. He came back and with his Republican colleague, Dick Lugar, chairman of the Senate Foreign Relations Committee, wrote the Cooperative Threat Reduction Act. Congress passed the act with bipartisan support in record time, and it became what was known as the Nunn-Lugar program. I was privileged to work on this at the defense department, as Jonathan mentioned, once the legislation existed and the program was up and running. This legislation gave the U.S the authority to use our defense department funds and other kinds of assistance to reduce the threat to ourselves from weapons of mass destruction in the former Soviet Union by directly working with the former Soviet countries that had weapons of mass destruction.

In the end, we were able to dismantle thousands of nuclear weapons in Ukraine, Kazakhstan, Belarus, and Russia. Ukraine, Belarus, and Russia became nuclear free. They joined the Nonproliferation Treaty. We disposed of other weapons of mass destruction, such as chemical weapons in Russia. We were able to re-employ weapons scientists on civilian projects. We did some things to close bioweapons capabilities in the former Soviet Union, and otherwise reorient defense production capabilities. I'm going to screen share for a second, a scorecard that was kept by the late and wonderful Senator Dick Lugar, as of I think 2013 on some of the accomplishments of this program. You can see 13,300 nuclear

warheads deactivated; 1,473 ICBMs destroyed. These were in the four countries that had nuclear weapons in the former Soviet Union. It's sometimes said that a new area of international law was created by the Nunn-Lugar program.

There were no major international treaties involved. With each country, we concluded what was called an umbrella agreement that we negotiated with the leadership of the state department. For each project under the umbrella agreement, there was what was called an implementing agreement. That was negotiated with the leadership of the defense department, with the help of the state department, but the leadership of the defense department. I was the person who signed those agreements on behalf of the secretary of defense. We had individual implementing agreements on each task involved in the Nunn-Lugar program, removing warheads from Ukraine, cutting up long range bombers in Russia, removing weapons grade uranium from Kazakhstan and so forth. I was personally involved in over 50 of these agreements. Each implementing agreement had provisions for what were called audits and inspections. This legal framework was created by our general counsel at the defense department, the late Jack McNeil and by his deputy and my friend Jack Beard, who now teaches law at the University of Nebraska.

Jack Beard and I were joined at the hip, working very closely together, traveling back and forth to the former Soviet countries to negotiate these agreements. There was an intensive process involved in each of the agreements. We had technical teams which met with the analogous teams from the other countries. They had some amazing experiences with transparency. I will just say that some of our team members were astonished by the access they got in the process of creating these agreements and trying to look on the ground at what was necessary for dismantling weapons of mass destruction in the former Soviet countries. So, we worked with each country to identify their needs and then signed an agreement with them to implement that. I think this was remarkably successful. I think perhaps in part, because all these many agreements did not go before the Senate for ratification. We had a process where we notified each agreement that we were planning to sign to the U.S Congress.

And we notified where the funds were going to come from at the defense department before we signed the agreements. I had

some amazing late-night calls back to Washington when I was about to sign agreements in Kazakhstan and elsewhere to make sure that we had notified and identified the funds before the pen was put to paper. Congress gave the defense department what was called transfer authority, where we could take funds from other programs to fund this effort, and then we got an annual appropriation from Congress. So, the process for the most part did not become a political football. The process required intensive, dedicated work by large numbers of people on the U.S side. Hundreds of people were involved in the teams and the negotiations, and it was a well-supported effort within the U.S Government, by all branches of government.

This process, I don't think has been utilized to its full potential. There are remaining tasks to do in the former Soviet Union and in other countries regarding the dismantlement of nuclear weapons. The process hasn't been utilized effectively for a number of years. Not surprisingly, there was a request for a cut in the funds for the Cooperative Threat Reduction program in the 2021 budget. There are a number of ideas around about how this program could be applied in other countries, besides the former Soviet Union. We need to return to creative thinking on this model. Again, other dangers of proliferation that could be addressed if this issue were given priority, concentration, dedication, funding, commitment, skill, and experience.

So, I hope that soon we are able to focus more on these approaches. And with that, I am afraid I have to leave the matter. I wish I had a chance to discuss with you, but I'm actually hosting a conference for another organization in just a few minutes in LA, not on arms control. So, thank you very much for your attention, Tom, Jonathan and Dr. Ford, all due respect for all the work that you've done in the past few years.

JONATHAN GRANOFF:

Gloria, thank you very much. And we'll miss you. And you'll miss Ambassador Graham. Ambassador Graham is really an exceptional figure of our time. There is a web of treaties, relationships between nations, that have arguably been essential to our survival. If you look at the counterfactual, if we didn't have these relationships, if we didn't have these treaties, God knows where we would be. He was in either a principle legal or diplomatic

capacity, a principal involved in the SALT Treaty, the START I Treaty, the START II Treaty, the INF Treaty, the Chemical Weapons Convention, the Biological Weapons Convention, the Anti-Ballistic Missile Treaty, the Indefinite Extension of the Nuclear Nonproliferation Treaty, and the creation and signing of United States of the Comprehensive Test Ban Treaty.

In addition, he has been a prolific author and written numerous books. The last one that really has impressed me was his book on advancing and strengthening the nuclear weapons free zones, the nuclear weapons free zones of Latin America, Africa, the South Pacific, central Asia, and Southeast Asia. He is a board member of the Global Security Institute, and I don't believe that he sleeps. Ambassador Graham, please.

THOMAS GRAHAM:

Thank you, Jonathan, for that introduction and mentioning all the books. And yes, of course I did give up sleeping years ago, I just wanted time to write. And thank you to the New York State Bar Association for the opportunity to come here and talk about the important subject of nuclear weapons and international treaties. And it's great to be on the panel with Chris and Gloria. My subject is the international treaty structure. I will speak more generally than specifically for the most part. I will begin by noting that we've been on this planet, as human beings, that is, for about 200,000 years. And in the last 10,000 years after many, many thousands of years, as hunter gatherers we began to live together in villages and towns and eventually cities, ultimately many cities. Civilization began probably five or 6,000 years ago.

What was discovered very early was that a system of laws to preserve peace and stability was essential, was at the very essence of civilization and then later on between cities, eventually between states. There is nothing without the rule of law. It's what permits civilization. And it must always be protected. And then in the course of the evolution of the international legal system, it became desirable to limit weapons. One of the early attempts was in the Middle Ages, when the Pope outlawed the cross bow. He said it was hateful to God. I don't think the ban lasted too long, but it was effective for a short time. And then later, much later, the Hague Convention of 1899 and 1907, I believe, took the first steps in



controlling chemical and biological weapons along with other things.

Some years after that, the nuclear age arrived and humanity had developed a weapon that had the capability of destroying the world. But it also had the capability of saving the world, fueling the world, in the time of climate change. So it was important not only to limit weapons as much as possible, but also draw a clear line between the weapons and peaceful uses. In 1963, President Kennedy held a press conference. During the discussion nuclear disarmament progress in Geneva was addressed. He said, what keeps me up at night and what I worry about most is that by the 1970s, there'll be 10 nuclear weapons states in the world with weapons fully integrated into their arsenals

And by 1975, 15 or 20 such states. And this is an exact quote, "I would regard that as the greatest possible danger and hazard." Not long after that, the Nuclear Non-Proliferation Treaty, because many other people around the world shared President Kennedy's view, was negotiated in Geneva. It was signed in 1968, entered into force in 1970. The structure of the Treaty is to permit the five states that had nuclear weapons before 1967 to retain those weapons under certain conditions, and the rest of the world that signed up to this Treaty, eventually over 190 countries, would agree that they would never have such weapons. And this Treaty has been very, very successful. Only four countries, Israel, India, Pakistan, and North Korea are not party to this Treaty and have developed weapons outside of the Treaty.

The rest of the world is nuclear weapon free beyond the five permitted weapon states as they one by one joined the treaty as non-nuclear weapon states. However, the arrangement should not be thought of as a gift from the world to the nuclear weapon states in exchange for the good things that they do. It was a strategic bargain. And in exchange for giving up the most destructive weapon ever created, the Non-Nuclear Weapon States agreed with the five nuclear weapon states that they would end the nuclear arms race, and ultimately eliminate their arsenals as well. Also they would pursue interim steps as well as create a separate arrangement for the use of peaceful power. The interim steps included a number of things that people are familiar with, but the most important element, the most important part of that was the prospective negotiation of a comprehensive test ban treaty. The

thinking was at the time that eliminating nuclear weapons in the depth of the cold war would be difficult, but at least the nuclear weapon states could stop testing the weapons.

And that was the bargain. That was the underlying bargain that established the legal regime that I would submit is the centerpiece of international security, in the past, in the present, and hopefully in the future. The Treaty also was given a 25-year life at the end of which there would be a conference with a one-time opportunity to extend the treaty for a fixed period or permanently. The Review Conferences that took place every five years, four of them, before the Review Conference, all more or less ended in failure because of the inability of the nuclear weapon states to commit to a comprehensive test ban treaty. And then we come to the 25<sup>th</sup> anniversary 1995. It was agreed by the parties that the treaty would be extended permanently or indefinitely, giving us the security of the NPT forever, as long as it lasts, as long as civilization permits it. And the principal price for that was the commitment to a comprehensive test ban treaty, but within one year, was agreed in 1995. That was achieved in New York at the United Nations in 1995.

The test ban treaty was negotiated in one year, and about two months later it was signed at the United Nations by a number of countries, the United States being the first to sign, Bill Clinton, doing the signing for the U.S. However, because of opposition in the U.S. Senate in 1999, the United States has never ratified the Comprehensive Test Ban Treaty (CTBT), even though some 170 other countries, including France, Great Britain, Russia, Japan, and a number of others have ratified it.

And so, CTBT was one of the major commitments of the NPT and its extension but there is no prospect in the near future of its entry into force taking place. The nuclear weapon states did make an effort to live up to their disarmament obligations under the NPT that I just described, most importantly the effort on nuclear weapon testing. In 1993, the United States adopted a moratorium on nuclear weapon tests. That is an informal

Thomas Graham: policy that there would be no more tests. And gradually that concept has spread all over the world and the tests by India and Pakistan in 1998 were the last anywhere except for North Korea which was regarded as somewhat of an outlier. But in 2019, that country announced that it would do no more tests.

Hopefully all will remain committed to Moratorium, but time will tell. But as of right now, no nuclear weapon tests are being conducted anywhere. The Strategic Arms Limitation process, SALT, START, those treaties, and ending up with the New START Treaty did end the arms race and created a huge reduction in the number of nuclear weapons that exist in the world. The United States at the beginning of the Cold War was producing nuclear weapons at what the French called an industrial rhythm. The U.S. built 72,000 over time and the Soviets built 55,000. We had 32,500 in our arsenal at the peak time and the Soviets had 45,000 in their arsenal for some years. Now there's only 13,000 nuclear weapons in the world, to a large degree because of this series of treaties which reduced the arsenals.

The Intermediate Range Nuclear Forces (INF) Treaty was also negotiated which alleviated the threat of medium range ballistic missiles, particularly the land mobile SS-20, which surrounded Europe and also threatened Japan. There were 1200 at the peak deployed in the Soviet Union. Short range ballistic missile systems and cruise missile systems were also regulated by the IMF Treaty. Pursuant to the Treaty, all these systems were eliminated as well as comparable systems possessed by United States. Regretfully, the U.S. recently withdrew from that INF Treaty. I thought it was a mistake because the principal benefits we were getting, that is no SS-20s on Europe's border, and we weren't really doing anything. But in any case, it happened. There's been an issue with nuclear weapon free zones. The Israeli nuclear arsenal has led the Arabs to insist on a weapons of mass destruction free zone in the Middle East and the NPT community thus far has been unable to effectively address that. Undoubtedly, it caused the last review conference to fail and it undoubtedly will come up again.

I'm nearing the end of my time now. So I would ask the question, can the NPT survive? Does it have a medium to long-range future? And without it, you can forget any further nuclear weapon disarmament if we were to lose the NPT. All this time the outcome is very much in doubt because the world community has not done what it should do with respect to climate change and the damage it causes is increasing. As climate change advances, many countries are going to lose much of their arable land. It will become desert and they'll lose water sources, fresh water sources. These two things human beings have been fighting about for over 3000

years. Small states that have some arable land or some fresh water sources left that aren't too far away from large states with big armies that are losing theirs are going, quite possibly, to look to nuclear weapons to protect themselves.

So unless climate change is effectively addressed, it's going to be very difficult to hold the NPT together long term. Shorter term, we should do all that we can to strengthen that Treaty as much as possible, so that is the NPT is better able to resist the climate change pressures. And that means ratifying the CTBT and bringing it into force and solving the Middle East weapons of mass destruction free zone issue. Thank you.

JONATHAN GRANOFF:

Well, Ambassador Graham, thank you for the hard work you did in both the extension of the NPT in leading the delegation and in the work to getting the Test Ban Treaty. I think that the NPT is the third most important legal instrument of the 20th century. The first being the UN Charter, the second being the Universal Declaration of Human Rights, and of course, this treaty that stopped the massive proliferation that both the KGB and the CIA predicted. One of the things I wanted to just segue into this and bring Ambassador Ford in, is that the treaty, as I hope most of the audience knows and I'll just remind you, had within it a provision that after 25 years that it would be reviewed to be determined whether it would be extended indefinitely, terminated, or extended for a period of time.

The Treaty entered into force during the administration of Richard Nixon. And the reason that it had that provision is that a lot of countries didn't trust the nuclear weapon states, the P5, China, France, UK, U.S., and Russia, then the Soviet Union, to fulfill their disarmament obligations. And obviously during the Cold War that wasn't being done, and it only changed when, in Geneva of 1985, Gorbachev and President Reagan said a nuclear war can never be won and must never be fought. And in that commitment, the Geneva Summit of 1985 Statement, they said neither party would seek military advantage over the other. They were opening the door to a different framework, and that change was based on the human element of trust and verification. Trust and verification. And there's a movie that's linked in the program called "The Bomb: Yesterday, Today and Tomorrow" in which there's a big section of

a dialogue between George Schultz, who was instrumental in that change, and President Gorbachev that I commend to everyone's attention.

In 1995, the states parties to the NPT came together and agreed to indefinitely extend the treaty but on conditions: one, progress in the Middle East nuclear weapons free zone; two, progress on a Test Ban Treaty; and, three, every five years the treaty would be reviewed to determine the progress on disarmament and nonproliferation. So in 2000, a set of commitments, all of them strengthening international law, diminishing no country's stability and moving toward the framework to obtain a nuclear weapons free world, and most importantly, the explicit commitment to obtain a world free of nuclear weapons was made. And in 2010 at the review conference even further commitments were made. Well, what are the kinds of commitments? Negotiating a Fissile Material Cut-Off Treaty, stopping the production of any more nuclear capable materials, strengthening the International Atomic Energy Agency's capacity. And these steps were political commitments. They are not hard law in the way the NPT is, but they are the evidence of the good faith compliance with the disarmament commitment under the Treaty. They have not been fulfilled. The nuclear weapon states are all remiss in actually fulfilling them. And they can argue, and I think that we'll probably hear from Dr. Ford that the circumstances have not allowed the fulfillment of these or other reasonable steps that civil society has put forward. Nations without the weapons, especially those in nuclear weapons free zones, are demanding negative security assurance that they will not be attacked by nuclear weapons, de-alerting the weapons, and commencing bona fide negotiations amongst the states with nuclear weapons.

The problem that I have, and then I'm going to hand this over to Dr. Ford, is that I see the NPT at risk because of the failure to live up to the commitments that nuclear weapons states have made. These promises in and of themselves are not an indication of a lack of good faith. However, failure to propose another route, another legal route, another way of advancing toward disarmament in the shadow of failing to live up to the promises, that puts at risk the very foundation of the Treaty because it does indicate a lack of good faith. This failure to find another route to advance nuclear disarmament is a serious matter. Moreover, the modernization

program and the rhetoric that we've heard in the last few years from President Trump has not indicated any serious commitment to fulfilling that legal obligation. And so, I hand it over to you, Chris, to say how are we going to strengthen the NPT and vivify the disarmament commitment in the eyes of the rest of the world?

CHRISTOPHER FORD:

Thanks, Jonathan . . . Just a couple of things, first of all. That is, a couple of points of clarification in light of Gloria's remarks. I would like to point out that we actually did extensively use the compliance, adjudication, contestation, and dispute resolution mechanisms of the treaties in question. Certainly, the Special Verification Commission of the INF Treaty was one in which we very clearly engaged the Russians, in addition to literally dozens and dozens of bilateral engagements and multilateral engagements with NATO partners to try to bring Russia's violation of that treaty under control. They refused to do that, of course, but let the record be clear that we spent an enormous amount of time under two different U.S. administrations using those very same mechanisms that she was describing. The problem wasn't that we didn't try to use them. The problem was that when we did, the Russians were repeatedly not interested. And to Tom's point about getting the principal benefit of the INF Treaty, that of thereafter being no SS-20s in Eastern Europe, well, that's certainly true today, since that's now an outmoded missile and Eastern Europe has thankfully thrown off its Soviet imperial Yoke. But we've got lots of new SSC-8s, battalion by battalion, being produced and deployed in Russia, in violation of the treaty.

So clearly the substantive benefit that we once got out of the INF Treaty eroded, and Russia expected us to continue to hold ourselves in the position of refraining from doing things that Moscow felt free to entirely comfortably do itself, in violation of its legal obligations. Also, just for the record here, we also used the compliance mechanisms within the Open Skies Treaty. There was quite a bit of engagement over this last summer, in fact, to try to resolve Russia's compliance problems with the Open Skies Treaty between us and many of our NATO and other Open Skies partners. But the Russians similarly were not interested in that; they kept right on track with their violations. On CTR, Gloria is quite right about the amazing things that CTR accomplished back in the day.

And indeed, we still do a fair amount of CTR programming in other areas of the world. I've got an entire office in my bureau, for example, that-

JONATHAN GRANOFF:

CTR, Cooperative Threat Reduction?

CHRISTOPHER FORD:

Correct. Yes. Otherwise known as Nunn-Lugar. Quite correct. So she's quite correct to point out the really good work that has been done in that area. And indeed we certainly hope to do more of that. I've got an entire contingency fund standing ready to provide the seed money and the technical expertise for verifying and implementing denuclearization in North Korea should the North Koreans ever agree to such a thing. Those mechanisms are great mechanisms, but I guess the point that I really want to make is about the broader context.

And as much as I enjoy hearing stories of all the amazing progress that was done in treaty building as Thomas mentioned – and in dismantling threat systems, that Gloria has told us about from the early post-Cold War period – I would urge everyone to remember that context, especially in light of what you were saying a moment ago, Jonathan, about the Reagan-Gorbachev statement. We didn't have the end of the Cold War and the reduction of all of those threats and the opening up of all those treaty possibilities because Reagan and Gorbachev made their statement. The Cold War didn't wane because of their statement. The statement came because the Cold War was waning and wouldn't have happened or meant anything otherwise. So you've got to avoid putting the cart in front of the horse here because the key point then was that the strategic context of geopolitical rivalry was ameliorated in ways that made possible those enormous, wonderful, world-historically important things.

But just to say that because we could and did do these in the 1990s, it is possible to do more now – and that we are therefore remiss for not doing so – entirely misses the geo strategic point. That point is that the world that we're in now is a very different one, unfortunately, from the security environment that made possible that progress then. I wish it were otherwise, but to point to post-Cold War circumstances and say that we need to do exactly

that tomorrow in today's world is just insane. This is not a world that makes that possible. And if there is a route to resolving these problems and moving towards the world of disarmament that we all very much want, that route has to go through engaging with all those real-world security challenges that this world faces. It's not simply to reminisce about how, "Gosh, it would be so great if we were back in 1994." We aren't there anymore. And getting us to a place that is analogous to that environment, in which we can make forward progress once again, that's the real agenda for the international security community. The mere fact that things happened before and were great then doesn't actually help us with the dilemmas we face today. If anything, it's a distraction.

And so offering an alternative route has to involve the disarmament community, as I like to say, learning to speak disarmament in the language of security. Actual solutions aren't just a question of signaling our moral commitment to moving forward. We all have that. The problem here is we are in a world in which major players, and China and Russia most particularly, are not in the place that we imagined them to be, and that we trusted that they would remain when we were making all of those treaties in the 1990s and reducing all of those systems.

There was a brief period when we thought that the world was going to be an enduringly benign place and that Russia and China would become, as the phrase went, "responsible stakeholders." There were even, I think, hubristic but earnestly felt expectations that both of those governments would continue to democratize, grow prosperous middle classes, and ultimately become "just like us" and we would thereafter live together in peace and harmony. The problem is that the ensuing years have shown us a China and a Russia that turned out to have had rather a different agenda. And what they have actually been busily doing is creating a new security environment of ruthless competitiveness and challenge that makes the recreation of that sort of mid-1990s disarmament zeitgeist impossible – or at least impossible without a lot of work on underlying security issues that

I see very few people in the disarmament community being willing to engage about.

And so that's really the crux of a problem here. If there's a way through this, it may be through the sort of thing that we have been trying to encourage through something called the Creating an



Environment for Nuclear Disarmament Initiative (CEND): an engagement on precisely those underlying security issues. CEND is not a negotiating forum in the technical sense, because it's not even clear precisely what the problems that we have to overcome are. What we have been trying to do in this initiative is bring countries together from all around the world, and all sorts of different perspectives on nuclear weaponry, to think through what the most important challenges are that need to be addressed and to start to try to apply creative thinking to those challenges. That's something that hasn't really been done before, especially not multilaterally.

We have been stuck in a conceptual "go-to loop" in disarmament discourse for many, many years. In this unproductive loop, we look back at, say, Decision Two from the NPT review conference, the extension conference in 1995, or the 2000 Final Document or something, and we fixate upon what was said then in that context and imagine that by doubling down on asking for those same things now, in today's context, we are going to find ways to solve today's problems. But that just isn't the case. The 2000 Final Document calls for negotiating START III, implementing START II, and fulfilling START. It calls for the ABM Treaty. It calls for the Trilateral Initiative. But these are not instruments that even exist in the modern world! To fetishistically call for a focus upon fulfilling all those commitments from 2000 is just a fantasy world. It deliberately neglects trying to address the security challenges that we face today.

So what we think should happen is that countries should come together in things like the CEND Initiative to truly struggle with today's challenges and try to find creative ways to overcome them. The NPT Preamble itself talks about the importance of easing tension and strengthening trust between states "in order to facilitate" disarmament. That phrasing is not an accident. You need to ease tension and strengthen trust in order to make disarmament possible. And unless you're setting about trying to do that, and struggling with the real-life security challenges that decision makers face in the world and not just pulling out dust-covered copies of things that we agreed to 35 years ago, you're not going to address today's problems.

So we urgently think it's important for folks to come together and really try to wrestle with these problems and explore ways to get the world to a place where it becomes a real-world-feasible

choice for countries, and a sustainable one, to eliminate nuclear weapons and to find security relationships that don't engender reconstitution races between technology possessors, each in a crisis racing to build bombs again before their neighbor gets them. We can't just pretend that because the Cold War went away in 1991 we therefore in 2021 will be able to recreate that kind of tension-ameliorating magic just because it felt good then. We've got to do a lot better than that. It's going to be a lot harder than that. And buckling down and putting our conceptual energy into finding those kinds of answers really is where the answer is going to come, if it's going to come at all. Just picking up yesterday's documents and saying that they necessarily provide tomorrow's answers just isn't going to do it. I'm sorry.

JONATHAN GRANOFF:

It is clear that part of those commitments need to be reevaluated because there are changed circumstances. What we've learned about the climate since then compels a new level of cooperation. What the pandemic is showing us is a need. Because as far as I can see, the pandemic doesn't carry passports and doesn't care about nations. And I don't want to live in a vaccine apartheid world with walled nation and walled communities and walled people. The fact of the matter is that when the United States makes commitments, we have to show a good faith attempt to live up to them and they're not dusty covered commitments. The FMC, a Fissile Material Cut-Off Treaty, hardly would diminish U.S. security if we entered into that and stop making pits. The point is-

CHRISTOPHER FORD:

Jonathan, we have worked very hard for quite a few years – across three administrations or four administrations now – to bring a Fissile Material Cutoff Treaty (FMCT) into existence. The problem is that Pakistan and China are blocking it. Why don't you talk to them? We are trying to do our bit.

JONATHAN GRANOFF:

Oh, the CD, the Conference on Disarmament . . . This is sort of arcane to most of the audience.

CHRISTOPHER FORD:

Sorry.

JONATHAN GRANOFF:

We've been trying to negotiate it in a particular forum that operates by consensus and India and Pakistan, parties outside of the NPT and outside of that commitment, have been blocking that consensus. My overall issue is absent putting forward more timely framework issues that deal with the actual knowledge we have now, the increased knowledge of the consequences of a small number of nuclear weapons as well as the global threats that we now face, that is the problem that I'm squarely addressing to the administration. That we are neglecting to live up to the promises we've made. And by the way, it's not just this administration. The Obama administration did not move fast enough and fulfill the vision from Prague that President Obama put forward.

And I do think that this initiative you have in creating the environment has to be an ongoing evaluation of how do we create the holistic environment, not just isolating it in terms of a treaty but the relationships between states? How do we define security? What are our core security interests? But that endeavor has to include civil society organizations as well, Ambassador. It's been mainly diplomats only and they do not bring in a holistic approach. That environment would include addressing climate, addressing public health, addressing the sustainable development goals, all of the collective issues that would create a different set of relationships amongst nations. It's odd that the business community has done so much to create a more integrated world. And I see Charlie Moxley jumping in here because the gift of time is not ours. And Charlie, can we let Ambassador Graham have a final word before we hear from the president of the ABA?

CHARLES MOXLEY:

Yes, of course. That would be great.

JONATHAN GRANOFF:

And Chris, I apologize that you can't have a surrebuttal. And last but not least, yes, the World Court did say then they couldn't determine that in all instances International Humanitarian Law

would not be violated by the use of a nuclear weapon, but it did say that in any instances, even a state in exigent circumstances, International Humanitarian Law (IHL) and its constraints would apply. And God knows we need to have a real robust discussion of the relationship between nuclear weapons and IHL. Maybe we have to choose the law of power or the power of law. Let's do this again. Let's do some more.

THOMAS GRAHAM:

Am I supposed to talk now?

JONATHAN GRANOFF:

Yes, please do, Tom.

THOMAS GRAHAM:

My objective is to make the world as safe as possible and arguing over past commitments, what they might or might not have been, is not as much interest to me. I want to make the NPT as strong as possible. We have two existentialist threats facing us: climate change and nuclear weapons. To protect civilization from climate change is going to require cooperation among states at a level we've never known. If we can do that, we can eliminate nuclear weapon as well. But I want to keep the door open for nuclear weapons elimination by protecting the Non-Proliferation Treaty. And unless we deliver on the two points that I mentioned and probably some other related things, it won't be strong enough to last through the first wave of climate change destruction.

So I think the test ban is something that would be relatively easy to accomplish. The Middle East will be very difficult to solve. But we should focus on those issues and see what can be done to preserve the NPT to the era when maximum cooperation against climate change, if it happens, will exist. And then with that atmosphere, maybe we can go all the way to elimination of nuclear weapons. And that situation has to come if civilization is to be saved from climate change.

JONATHAN GRANOFF:

Thank you. We now have the privilege of hearing a prerecording from the President of the American Bar Association.