

“DISARMAMENT” UNDER THE NPT: ARTICLE VI IN THE 21ST CENTURY

*Paul M. Kiernan**

INTRODUCTION	382
I. BACKGROUND.....	384
A. The Basic Bargain in the NPT	384
B. The Meaning of “nuclear disarmament” in Article VI	384
C. Implications for Nonproliferation Initiatives	385
D. Implications for International Security Arrangements.....	387
II. DISCUSSION	388
A. Applicability and Rules of the Vienna Convention	389
B. VCLT Article 31—Ordinary Meaning and Context.....	391
C. Object and Purpose	392
D. Subsequent Agreement of the Parties	393
E. VCLT Article 32—Supplementary Means	396
F. Summary.....	398
G. ICJ Advisory Opinion on Threat or Use of Nuclear Weapons ...	399
CONCLUSION.....	399

ABSTRACT

This Article examines the term “nuclear disarmament” within Art. VI of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons, and it offers a new interpretation that accepts as compliance a full spectrum of partial disarmament steps. Historically, the U.S. legal position has emphasized the view that the NPT fails to require more than the pursuit of nuclear disarmament talks. This view has contributed to a disarmament process that many states characterize as too slow and too slight. This Article proposes that a shift in emphasis, from an occasional pursuit of negotiations, to a more ongoing and detailed discussion of potential measures, should neutralize this complaint and yet preserve U.S. flexibility. This outcome would better position the U.S. to address its most urgent nonproliferation

* LL.M., Energy & Environmental Law, George Washington University Law School. J.D., Comparative and International Law, Catholic University, Columbus School of Law. B.A., Pomona College. The Author is a Member of the Program for Emerging Leaders within the Project on Nuclear Issues at the Center for Strategic and International Studies (CSIS). For his valuable comments and insight, the Author expresses his deepest gratitude to Professor David S. Jonas, Director of Legal Strategy and Analysis, U.S. Department of Energy.

concerns. In short, this Article examines a term that American scholars and practitioners have neglected in an important respect, and it provides an understanding of that term beyond what other legal writers have offered, with significant diplomatic and strategic implications.

INTRODUCTION

From the vantage point of 2011, a torrent of nuclear arms curtailment proposals now surges forth from a series of news articles penned by four distinguished statesmen.¹ Though radical, the principles enumerated therein have since gained currency across the political spectrum, in the U.S. and abroad.² Such momentum³ offers perhaps some hope for movement on our most urgent nonproliferation matters.⁴ This paper explores the important linkage between the success of U.S. nonproliferation efforts and the perception of U.S. conduct under the Nuclear Non-Proliferation Treaty (NPT).⁵

This linkage has two aspects. First, other states find it difficult to support U.S. nonproliferation efforts, because America is perceived as avoiding its

1. See MICHAEL E. O'HANLON, A SKEPTIC'S CASE FOR NUCLEAR DISARMAMENT 1-2, 145 n.1 (2010) (describing the Global Zero movement initiated by one hundred signatories in Paris in 2009, President Obama's 2009 speech on in Prague, U.S. and Russian reductions under the New START Treaty, and an arguably lesser reliance on nuclear forces in the April 2010 U.S. Nuclear Posture Review). See, e.g., 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; Shultz et al., *Toward A Nuclear-Free World*, WALL ST. J., Jan. 15, 2008, at A13; Shultz, et al., *How to Protect Our Nuclear Deterrent*, WALL ST. J., Jan. 19, 2010, at A17; Shultz et al., *Deterrence In The Age of Nuclear Proliferation*, WALL ST. J., Mar. 7, 2011, at A15.

2. See Strobe Talbot, *Foreword* to O'HANLON, *supra* note 1, at 3.

3. See Compliance and Growth—NPT Review Conferences—2010 REVIEW Conference, NUCLEAR THREAT INITIATIVE, http://www.nti.org/h_learnmore/npttutorial/chapter04_01.html#2010 (last visited April 6, 2011) (“While some disappointment continues to exist . . . with regard to lack of a more concrete commitment . . . , it was obvious that the change of U.S. policy was directly reflected in the result of the disarmament action agenda. Moreover, pursuing policies to achieve a world without nuclear weapons was articulated in the first action item.”).

4. See, e.g., Karen DeYoung, *Pakistan Doubles Its Arsenal: As India is Surpassed by Rival, U.S. Faces a Diplomatic Quandary*, WASH. POST, Jan. 31, 2011, A1, 10 (discussing the South Asian arms race; U.S. economic, political, and defense ties with India; the Pakistani role in the U.S. war in Afghanistan; and U.S. nonproliferation concerns) (“Adoption of . . . the ‘fissile materials cutoff treaty’ . . . requires international consensus . . . [and] [p]atience is running out.”).

5. Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter NPT]. See PHILIP BOBBITT, TERROR AND CONTEST: THE WARS FOR THE TWENTY-FIRST CENTURY 529 (2008) (“The states of consent must conform their strategic behavior to the rule of law; and the law to which they conform must be reformed to take into account changes in the strategic context.”). This linkage reflects “the growing union of strategy and law,” despite the emphasis, here, on clarification rather than reform. *Id.* at 545.

own disarmament obligations under NPT Article VI.⁶ Second, negotiated reductions and other measures not only satisfy such obligations, but diminish the probability of accidental, mistaken, or unauthorized use.⁷ Thus, properly understood, Article VI contains the key not only to removal of this diplomatic stumbling block but to an improved security environment.⁸ Indeed, this paper will consider the impact of such measures on U.S. alliances and security guarantees, recalling that the status quo carries its own pronounced risks.⁹

Here, it is necessary to emphasize four limitations to the scope of this undertaking. First, this paper does not argue that satisfaction of the complaint of U.S. non-performance under the NPT will beget automatic progress on U.S. nonproliferation concerns. However, it should neutralize that complaint, which has been used with some success to deflect U.S. nonproliferation concerns.¹⁰ Thus, to the extent that the U.S. can be seen as living up to its obligations under the NPT, the odds of addressing U.S. nonproliferation concerns necessarily improve.

Second, this paper's investigation into the meaning and interpretation of Article VI is not, in an important sense, complete. Though authoritative, the sources canvassed in support of this interpretation are limited to those printed in the English language, while the Chinese, French, Russian, and Spanish versions of the treaty are equally authoritative.¹¹ Nevertheless, the interpretation set forth here must inform subsequent Article VI analysis.¹²

Third, though the "nuclear disarmament" prong of Art. VI has not received intense scrutiny, the same cannot be said for Article VI as a whole.¹³ Rather than recast the entire provision, this paper seeks instead to clarify this particular facet. Fourth, the conclusions reached in this paper are

6. Andrew Grotto, *Why Do States That Oppose Nuclear Proliferation Resist New Nonproliferation Obligations?: Three Logics of Nonproliferation Decision-making*, 18 CARDOZO J. INT'L & COMP. L. 1, 5 (2010); Graham Allison, *Thinking About Zero*, in NUCLEAR DISARMAMENT AND NONPROLIFERATION 5, 10 (2010) Shultz et al., *Deterrence In The Age of Nuclear Proliferation*, *supra* note 1, at 2.

7. Shultz, et al., *Deterrence In The Age of Nuclear Proliferation*, *supra* note 1, at 2.

8. See Allison, *Thinking About Zero*, *supra* note 6, at 11 ("To be preferable to the current path, an alternative has only to have a higher expected value than the near certainty of the spread and use of nuclear weapons in regional wars and by terrorists . . .").

9. See Shultz et al., *Deterrence in the Age of Nuclear Proliferation*, *supra* note 1, at 1 ("It is not possible to replicate the high-risk stability that prevailed between the two nuclear superpowers during the Cold War The growing number of nations with nuclear arms and differing motives, aims and ambitions poses very high and unpredictable risks and increased instability.").

10. See Allison, *supra* note 6, at 10.

11. NPT, *supra* note 5, art. XI.

12. The English version is, after all, authoritative in its own right.

13. See, e.g., Christopher A. Ford, *Debating Disarmament: Interpreting Article VI of the NPT*, 14 NONPROLIFERATION REV. 3 (2007); David Koplow, *Parsing Good Faith: Has the United States Violated Article VI of the Nuclear Non-Proliferation Treaty?*, 1993 WIS. L. REV. 301 (1993).

aimed to encourage, but not resolve, the inquiry into how much nonproliferation progress to expect in return for reductions of varying sizes.

With these objectives and limits in mind, Part II will introduce the NPT, posit an interpretation of Article VI, and summarize the implications of this interpretation for recent and longstanding nonproliferation initiatives, U.S. security guarantees, and U.S. strategy going forward. Part III subjects this interpretation to legal analysis under relevant principles of international law. Part IV concludes with a final, overarching policy rationale for accepting some meaningful reduction in the U.S. nuclear arsenal.

I. BACKGROUND

A. The Basic Bargain in the NPT

Signed in 1968, the NPT entered into force in 1970. “The basic pact is simple: 183 nations have pledged never to acquire nuclear weapons; in addition, the five nuclear powers recognized by the treaty . . . have committed to reduce and eventually eliminate their arsenals.”¹⁴ Though the draft originally tabled by the U.S. and the U.S.S.R. lacked a provision so committing the nuclear-weapon-states (NWS), Mexico and other non-nuclear-weapon-states (NNWS) insisted on the inclusion of one.¹⁵ Thus, both NWS and NNWS have obligations under the treaty.¹⁶

B. The Meaning of “nuclear disarmament” in Article VI

Article VI provides that “[e]ach of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a Treaty on general and complete disarmament under strict and effective international control.”¹⁷ On its face, Article VI applies to all states parties, which undertake to pursue negotiations in good faith on effective measures relating to, among other things, “nuclear disarmament.” As a state party to the NPT, therefore, the U.S. must pursue talks on measures relating to nuclear disarmament.¹⁸ To the extent it does not, America will find itself in

14. JOSEPH CIRINCIONE, *BOMB SCARE: THE HISTORY AND FUTURE OF NUCLEAR WEAPONS* 30 (2007); *but c.f.* Memorandum from Spurgeon Keeny for Dr. Henry Kissinger (Jan. 24, 1969) (on file with U.S. Dept. of State, Office of the Historian), <http://history.state.gov/historicaldocuments/frus1969-76ve02/d2> (describing Article VI as “an essentially hortatory statement”).

15. CIRINCIONE, *supra* note 14, at 30-31.

16. *See id.*

17. NPT *supra* note 5, art. VI.

18. “Negotiations” and “good faith” are terms of art in this context. *See generally* Scott Sagan, *Good Faith and Nuclear Disarmament Negotiations*, in *ABOLISHING NUCLEAR WEAPONS: A DEBATE* 203 (George Perkovich and James Acton eds., Carnegie Endowment for International Peace 2009).

potentially unsanctioned noncompliance, availing its opponents of a similar foothold. The task, then, is to determine the meaning of “nuclear disarmament” and what conduct will satisfy its strictures, to deprive states parties of such traction.

In usual parlance, “nuclear disarmament” is susceptible to at least two meanings: it can refer to one or more acts of partial disarmament, or to an end state of total disarmament. Article VI allows for both, for the following reasons. Total disarmament requires, as a practical matter, prior acts of partial disarmament.¹⁹ Moreover, the notion that partial measures might be recognized as necessary but insufficient to satisfy Article VI contravenes its very text, which merely requires the good faith negotiation of “effective measures relating to . . . nuclear disarmament.” One cannot well argue that “measures relating to . . . nuclear disarmament” exclude negotiated, effective partial disarmament steps.

This paper provides legal grounds for ensuring satisfaction of Article VI through negotiated reductions in nuclear armament. Such reductions might aim for fewer total warheads, fewer weapons on alert status, and lower overkill ratios. Compliance with Article VI does not demand total disarmament. To be sure, total disarmament would satisfy the “nuclear disarmament” prong of Article VI, but other disarmament measures can do so as well. With such common-sense legal support, and the prospect of further reductions, a political commitment to achieve greater progress in this area, and the current record of U.S. disarmament,²⁰ this interpretation should enjoy a substantial probability of widespread acceptance by other states.

Part III subjects this interpretation to the necessary legal analysis, but for now it is useful to acknowledge its security and policy implications. Besides contributing to the disposal of unwanted diplomatic baggage, these measures hold additional strategic implications that deserve mention. They doubtless affect recent and longstanding nonproliferation efforts, bi- and multilateral security relationships, and U.S. grand strategy. It should go without saying that the wisdom of the proposals enumerated here depends on whether the benefit they stand to produce overwhelms any detriment in these areas.

C. Implications for Nonproliferation Initiatives

To begin with, the impact of reductions and this interpretation of Article VI on longstanding nonproliferation efforts, such as the Comprehensive

19. Logically, the former cannot occur without the latter.

20. Allison, *Thinking About Zero*, at 13 (“Since these arsenals peaked at more than 68,000 during the Cold War, they have been cut by almost two-thirds to approximately 23,000 warheads today. The New START Treaty . . . will reduce active strategic warheads to 1,550 on each side. . . .”).

Test Ban Treaty²¹ and the proposed Fissile Material Cutoff Treaty,²² should prove positive. Following through on partial reductions should help sustain momentum. Moreover, the prospect of concluding these treaties should take some pressure off of total nuclear disarmament for a meaningful period of time. However, balance is critical. The faster that reductions take place, the more reluctant states may grow with respect to progress on the CTBT and FMCT, for the simple reason that governments may prefer to preserve flexibility.²³ This tension takes on special significance for those trying to chart a course to a world without nuclear weapons.²⁴

The interpretation of Article VI espoused in this paper should not negatively impact the thrust of Shultz, Perry, Kissinger, and Nunn's proposal, for the simple reason that both are realistic, pragmatic, and carefully wrought. Indeed, a trajectory of partial disarmament steps and reductions is most of what these statesmen seek.²⁵ Moreover, their "vision" of zero nuclear weapons is better understood as a vehicle for lessening present danger than as a short-term objective.²⁶

In addition, they wish to ensure the quality of existing nuclear stockpiles, which grows all the more important as reductions occur.²⁷ Further, the difficulty of practical maneuvers that must occur closer to zero should not

21. Comprehensive Nuclear Test Ban Treaty, Sept. 24, 1996, 35 I.L.M. 1439 [hereinafter CTBT].

22. See, e.g., Fissile Material Cutoff Treaty (FMCT), NUCLEAR THREAT INITIATIVE, <http://www.nti.org/db/china/fmctorg.htm> [hereinafter FMCT].

23. Fred C. Iklé, *Nuclear Abolition, A Reverie*, NATIONAL INTEREST, Aug. 25, 2009, at 4-5, ("[O]nce the largest nuclear arsenals have been shrunk so much, the small arsenals of North Korea, Iran and other countries will become a more powerful military asset.").

24. Indeed, Shultz, Perry, Kissinger, and Nunn state that "as long as nuclear weapons exist, America must retain a safe, secure and reliable nuclear stockpile primarily to deter attack and to reassure our allies through extended deterrence." Shultz et al., *Deterrence In The Age of Nuclear Proliferation*, *supra* note 1. Admittedly, this statement creates some circularity: nuclear weapons will exist as long as America retains such a stockpile, and as long as America retains a stockpile, nuclear weapons will exist. To be fair, prior liquidation of others' nuclear weapons dismisses this conceptual difficulty, but not the practical one.

25. Shultz et al., *A World Free of Nuclear Weapons*, *supra* note 1 ("Although Reagan and Mr. Gorbachev failed at Reykjavik to achieve the goal of an agreement to get rid of all nuclear weapons, they did . . . initiate[] steps leading to significant reductions in deployed long- and intermediate-range nuclear forces, including the elimination of an entire class of threatening missiles. What will it take to rekindle the vision shared by Reagan and Mr. Gorbachev? Can a world-wide consensus be forged that defines a series of practical steps leading to major reductions in the nuclear danger? There is an urgent need to address the challenge posed by these two questions." *Id.*

26. *Id.* ("Without the bold vision, the actions will not be perceived as fair or urgent."); see also Shultz et al., *Toward A Nuclear-Free World*, *supra* note 1 (quoting then-Foreign Secretary of the U.K. Margaret Beckett: "What we need is both a vision—a scenario for a world free of nuclear weapons—and action—progressive steps to reduce warhead numbers and to limit the role of nuclear weapons in security policy. These two strands are separate but they are mutually reinforcing.").

27. If we have fewer on which to depend, they better function well. See generally Shultz et al., *How To Protect Our Nuclear Deterrent*, *supra* note 1.

stall current progress on the margins.²⁸ Finally, their observation that nuclear weapons failed to deter major wars during the Cold War, and their concordant willingness to explore “[t]he role of non- nuclear means of deterrence to ... prevent conflict and increase stability in troubled regions . . . [,]” demonstrate a clear-eyed appreciation for the importance of security relationships and other means of projecting power to international relations, and by extension, this endeavor.²⁹ Forewarning that the U.S. “must not reduce its nuclear forces too fast” is hardly inconsistent with this proposal.³⁰

D. Implications for International Security Arrangements

The implications of reductions and Article VI compliance are perhaps more significant regarding security relationships. U.S. security guarantees and alliances played a leading role in persuading other states to forego nuclear weapons in the first place.³¹ For states in strategically important regions plagued by violent conflict, a diminution in U.S. nuclear capabilities could reverse this state of affairs.³² Reductions must not risk the tremendous worth of these relationships.³³ However, extending security guarantees to problem states could spur progress in key regions, such as South Asia, Northeast Asia, the Persian Gulf, and the Middle East.³⁴ That said, such an extension could stress existing relationships, perhaps to their breaking point.

As such, the value of reductions and the value of additional security guarantee vary directly with how successful existing and emerging great powers are in coordinating their efforts.³⁵ Also, increasing multi-polarity could very well complicate matters.³⁶ Great powers will tend to avoid

28. See *supra* notes 23-25; see generally Shultz et al., *Deterrence in the Age of Nuclear Proliferation*, *supra* note 1 (discussing the importance of fewer nuclear materials across the board to: diminished first-strike incentives; and lower probability of catastrophe due to accident, mistake, and terror).

29. Shultz et al., *Deterrence in the Age of Nuclear Proliferation*, *supra* note 1.

30. Iklé, *supra* note 23, at 3; see *infra* text accompanying note 116.

31. See CIRINCIONE, *supra* note 14, at 31, 54, 104.

32. See Joseph Nye, Jr., Op-Ed., *Obama's Nuclear Agenda*, DAILY TIMES (Pakistan), Oct. 13, 2009.

33. See CIRINCIONE, *supra* note 14, at 54-55.

34. See Iklé, *supra* note 23, at 3 (“Our diplomacy might have to insulate states from nuclear warfare.”).

35. See HENRY KISSINGER, DIPLOMACY 79 (1994) (describing Great Power coordination after the Congress of Vienna, where “Europe experienced the longest period of peace it had ever known. No war at all took place among the Great Powers for forty years, and after the Crimean War in 1854, no general war for another sixty.”); see also Shultz et al., *Deterrence in the Age of Nuclear Proliferation*, *supra* note 1 (“Achieving deterrence with assured security will require work by leaders and citizens on a range of issues Changes to extended deterrence must be developed over time by the U.S. and allies working closely together. Reconciling national perspectives on nuclear deterrence is a challenging problem, and comprehensive solutions must be developed.”).

36. See Shultz, et al., *Deterrence In The Age of Nuclear Proliferation*, *supra* note 1.

security arrangements that impinge on what they perceive as their spheres of interest. Furthermore, great powers' regional security interests are not always reconcilable. To the extent such tendencies block desirable security arrangements in a particular region, limited NWS arms reductions may prove the ceiling—and not a gateway—for nonproliferation progress.³⁷

Multi-polarity also begs serious questions as to the wisdom of nuclear arms curtailment in general. One might plausibly wonder how America can afford to relinquish any nuclear weapons when and as the potential for great power conflict may be increasing.³⁸ Yet, the differential between American and competing nuclear arsenals is, as of this moment, so wide that the U.S. can presently afford to trade weapons for the opportunity to favorably circumscribe the future nuclear field of action.³⁹ Therefore, limited reductions should proceed in the near-term, with the prospect of deeper reductions in the future depending, among other things, on the effectiveness of great power coordination.⁴⁰

As stated at the outset, this section has posited a general interpretation of Article VI, and paused to consider its implications for various nonproliferation initiatives, recent and longstanding. In addition, it has touched upon concerns that reductions pose for existing U.S. security guarantees. Part III subjects Article VI to interpretation under international law, and it is that discussion to which we now turn.

II. DISCUSSION

Preliminarily, the objective of any attempt to interpret a provision of an international convention is to decide, as would an independent international tribunal.⁴¹ Of course, for the purpose of achieving some level of certainty with respect to an agreed upon provision, states parties would generally not wish to place the full weight of their respective obligations on the discretion

37. This is not to say that grounds do not exist for such progress. See PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* 312 (2002) (“More than any other state in the world, [China] has grounds for alarm at the proliferation of weapons of mass destruction.”).

38. Although what states are and are not so-called “great powers” is susceptible to reasoned disagreement, Michael Klare considers the following either existing or evolving great powers: China, the European Union, India, Japan, Russia, the U.S. See generally MICHAEL T. KLARE, *RISE OF POWERS, SHRINKING PLANET* (2008).

39. This is arguably the most fundamental point made by Shultz, Perry, Kissinger, and Nunn. It might be argued further that U.S. superiority will not prove so enduring as to recommend against looking for ways to convert it into real security gain. See *infra* text accompanying note 116.

40. See BOBBITT, *supra* note 37, at 160-75; see also KISSINGER, *supra* note 35, at 76-77, 78-102.

41. RICHARD K. GARDINER, *TREATY INTERPRETATION* 110 (2008) (“The test which many lawyers use in giving advice on matters of international law is what an independent tribunal would find the law to be.”).

of such a tribunal.⁴² It would be preferable that the content of a provision would flow as much as possible from the direct application of settled principles of treaty interpretation.⁴³ Though elusive, this ideal should prove useful to bear in mind while applying the rules of interpretation found in the Vienna Convention on the Law of Treaties (VCLT).⁴⁴

A. Applicability and Rules of the Vienna Convention

Although applicability of the VCLT to agreements concluded by the U.S. government is not in every case a certainty, it is generally perceived as such.⁴⁵ The VCLT provides that *pacta sunt servanda*: “treaties are binding on the parties and must be performed in good faith.”⁴⁶ Further, Articles 31 and 32 set forth explicit rules of interpretation. Article 31 provides, in relevant part, the general rule that a treaty must be interpreted “in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁴⁷ The “context” comprises the treaty’s text, preamble, and annexes.⁴⁸ In addition, “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions . . . shall be taken into account, together with the context.”⁴⁹

For its part, Article 32 lists “supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.”⁵⁰ Such means may be used to either “confirm the meaning resulting from . . . Article 31, or to determine the meaning when the interpretation according to Article 31 . . . leaves [it] ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable.”⁵¹ Notably, parties’ preference for certainty corresponds with an implicit partiality

42. See *id.* at 29 (describing the VCLT as providing a nuanced “single route” to a hard conclusion, as regards treaty interpretation).

43. See *id.*

44. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. Notably, the U.S. is not party to the VCLT; however, the U.S. views much of it as customary international law. Office of the Legal Advisor, *Vienna Convention on the Law of Treaties*, U.S. DEPT. OF STATE, <http://www.state.gov/s/l/treaty/faqs/70139.htm> (last visited July 13, 2011).

45. See BARRY E. CARTER, PHILLIP R. TRIMBLE & CURTIS A. BRADLEY, *INTERNATIONAL LAW* 95-96 (4th ed., 2003) [hereinafter CARTER ET AL., *INTERNATIONAL LAW*]. Moreover, applicability of the VCLT is “axiomatic” in cases before the International Court of Justice (ICJ), the World Trade Organization (WTO), as well as arbitral bodies constituted under the North American Free Trade Agreement (NAFTA). See GARDINER, *supra* note 41, at 15.

46. See CARTER ET AL., *INTERNATIONAL LAW*, at 104 (citing VCLT art. 26).

47. VCLT *supra* note 44, art. 31.

48. *Id.*

49. *Id.*

50. *Id.*, art. 32.

51. *Id.*

within the VCLT for relying principally on the general rule in Article 31.⁵² To that end, the operation of Article 31 is one of “progressive encirclement,”⁵³ or a cycle through considerations of ordinary meaning, context, and the treaty’s object and purpose, which iteratively closes in upon the proper interpretation.⁵⁴ Thus, the terms and their ordinary meaning are “the starting point” the context “moderat[es] selection of that meaning;” and “the object and purpose illuminat[e] the process.”⁵⁵

Returning to the provision at hand, Article VI provides: “Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a Treaty on general and complete disarmament under strict and effective international control.”⁵⁶ A natural reading reveals an undertaking with the following structure:⁵⁷

Each of the Parties to the Treaty undertakes to pursue negotiations in good faith

- on effective measures relating
 - to cessation of the nuclear arms race at an early date and
 - to nuclear disarmament, and
- on a Treaty on general and complete disarmament under strict and effective international control.

The use of the prepositions “to” and “on” renders this sensible.⁵⁸ In addition, that a comma separates out the undertaking to pursue negotiations in good faith “on a Treaty on general and complete disarmament” means that that undertaking must be distinguished from the pursuit of good faith negotiations “on effective measures relating to . . . nuclear disarmament.” Though the meaning of Article VI in its entirety is in one sense beyond the

52. The VCLT does not in all cases privilege any of the factors within Article 31 or 32, except that Article 31 provides the initial inquiry, while Article 32 provides secondary “supplementary means.” See GARDINER, *supra* note 41, at 10; see also *infra* text accompanying notes 91-92.

53. GARDINER, *supra* note 41, at 141-42.

54. *Id.*

55. *Id.* at 144.

56. NPT, *supra* note 5, art. VI.

57. According to the principle of “actuality” or “textuality,” treaties are to be interpreted primarily as they stand, and on the basis of their actual texts. GARDINER, *supra* note 41, at 63-64. Similarly, “the principle of natural and ordinary meaning” provides for words and phrases to be given their normal, natural and unstrained meaning. *Id.*

58. Though not to be exclusively relied upon, grammar and syntax can prove essential to interpretation. See *id.* at 178, 187. Cf. Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, May 5-30, 1975, *Final Document*, at 7, U.N. Doc. NPT/CONF /35/I, Annex I (May 30, 1975), <http://www.un.org/disarmament/WMD/Nuclear/pdf/finaldocs/1975%20-%20Geneva%20-%20NPT%20Review%20Conference%20-%20Final%20Document%20Part%20I.pdf> [hereinafter NPT 1975 Final Document].

scope of this paper, the relation of the term “nuclear disarmament” to the Article as a whole nonetheless affects its meaning.

B. VCLT Article 31—Ordinary Meaning and Context

Applying Article 31, the ordinary meaning of “nuclear disarmament” could be two different things: (1) disarmament of the entirety of the parties’ nuclear weapons arsenals; or (2) the act of disarming such arsenals.⁵⁹ “Nuclear disarmament” could therefore require negotiations of total nuclear disarmament, partial disarmament steps, or both. If both, then the good faith pursuit of negotiations on effective measures relating to either one could satisfy the “nuclear disarmament” component of Article VI.⁶⁰ Here, therefore, is the VCLT’s “starting point.”⁶¹ The next task is to examine as context the remaining treaty language to “moderate” that meaning.⁶²

Looking to the remainder of the NPT, no other article sheds light on the meaning of “nuclear disarmament.” Article VII provides that nothing in the NPT affects the right of any states parties to conclude other regional treaties “to assure the total absence of nuclear weapons in their respective territories.”⁶³ “Total absence” indicates a permissible objective but of other treaties, not the NPT or Article VI in particular. While it would be strange to permit an objective inconsistent with the purposes of the NPT, the conclusion of regional nuclear-free zones is not necessarily inconsistent with a requirement that states parties engage in disarmament steps. Thus, we are left with the Preamble.⁶⁴

59. GARDINER, *supra* note 41, at 161 (“The difficulty [with ordinary meaning] is that almost any word has more than one meaning. The word ‘meaning’ itself has at least sixteen different meanings.”). Nevertheless, “[o]ne has to start somewhere . . . [and this] almost axiomatically involves giving them the meaning which the reader takes to be usual.” *Id.* at 162.

60. That “nuclear disarmament” is a disjunctive requirement that obliges states to engage in either partial or total disarmament is crucial in this regard. If the term were conjunctive, that is, if both total disarmament and partial disarmament were necessary to satisfy this requirement, there would be no point in allowing room for partial disarmament in the first place. Accordingly, the very allowance of partial disarmament measures entails that either total or partial measures satisfy this prong of Article VI.

61. See *supra* text accompanying note 55.

62. See *id.*; see also GARDINER, *supra* note 41, 59-60, 63 (discussing the primacy of the text, and, the context as extending beyond a particular part of the instrument to the whole instrument).

63. NPT, *supra* note 5, art. VII.

64. The NPT itself lacks annexes, rendering that source of interpretation under VCLT Article 31 inapplicable in this case. It is also important to note that a preamble typically lacks specific, legally binding obligations, containing instead aspirational statements relating to performance of the obligations set forth in the body of the treaty. See VCLT, *supra* note 44, art. 31(2); see also DANIEL H. JOYNER, INTERPRETING THE NUCLEAR NON-PROLIFERATION TREATY 29 (2011).

The pertinent preambular language includes a declaration of “intention to achieve at the earliest possible date the cessation of the arms race and to undertake effective measures *in the direction of* nuclear disarmament.”⁶⁵ Thus, the states parties declared their intent to stop the arms race and to take measures “in the direction of nuclear disarmament.” Certainly, “measures in the direction of nuclear disarmament” cannot be read to exclude reductions in nuclear armament. More broadly, this declaration of intent cannot but reflect a precise understanding of the states parties at signing, that intermediate steps would be required before reaching an end state of total nuclear disarmament. Finally, although “nuclear disarmament,” here, could very well refer exclusively to this end state, it could just as well refer to partial reductions.

The preamble also includes a desire to “facilitate . . . the liquidation of all . . . existing stockpiles, and the elimination from national arsenals of nuclear weapons and the means of their delivery pursuant to a Treaty on general and complete disarmament under strict and effective international control” To be sure, this language provides much to analyze, but for now it suffices to observe (1) that the states parties explicitly included their desire to achieve total nuclear disarmament, and (2) that this statement used terms other than “nuclear disarmament.” Thus, this language provides for a desirable trajectory and end state, but not necessarily anything more.⁶⁶

Furthermore, the very different—and physically separate—treatment given to “nuclear disarmament” versus “liquidation,” “elimination,” and “general and complete disarmament” indicates that these could be overlapping but not coextensive or coterminous concepts. Any divergence would provide “context” for understanding Article VI, and reflect the two-fold meaning of “nuclear disarmament” in Article VI. Indeed, this aspect of the Preamble could demonstrate that the states parties intended partial disarmament steps to satisfy the “nuclear disarmament prong of Article VI.

C. Object and Purpose

The object and purpose of the NPT must now be considered to shed further light on the ordinary meaning of “nuclear disarmament.” Object and purpose are in fact two different things: the former involves the legal rights and obligations created under a provision; the latter, the general result that the parties want to achieve.⁶⁷ In divining object and purpose, the whole text of the treaty is taken into account.⁶⁸ To bear on the interpretation of “nuclear

65. NPT, *supra* note 5, pmb. ¶ 8 (emphasis added).

66. See JOYNER, *supra* note 64 (citing VCLT).

67. GARDINER, *supra* note 41, at 191-92. Importantly, the U.S. does not subscribe to this division, viewing the object and purpose as a single, unified consideration. See David S. Jonas & Thomas N. Saunders, *The Object and Purpose of a Treaty: Three Interpretive Methods*, 43 VAND. J. TRANSNAT'L L. 565 (2010).

68. GARDINER, *supra* note 41, at 192.

disarmament,” an exhaustive inquiry into the NPT’s purpose should prove unnecessary. The sole question is whether the proposed interpretation of “nuclear disarmament” clearly runs afoul of the general result the states parties wished to achieve. Here, partial nuclear disarmament would not contradict any of the relevant preambular language.⁶⁹ The question posed with regard to the treaty’s object is not so easily disposed of, however.

A treaty’s object involves the legal bundle of rights and obligations agreed to in the particular provisions of a treaty.⁷⁰ Here, the states parties have agreed to some notion of “nuclear disarmament” in Article VI. Because this aspect of Article VI is squarely at issue, as an analytical matter, consideration of its object within the treaty is too circular to be of much use. Put differently, leveraging the nature of an obligation to provide context for understanding a particular provision is of no help if the initial problem is uncertainty regarding the nature of the obligation. In this instance, the uncertainty-generating problem is linguistic: “disarmament” cannot be used to clarify the meaning of “disarmament;” we do not yet know disarmament’s meaning. Thus, we turn to the final consideration under VCLT Article 31.

D. Subsequent Agreement of the Parties

A subsequent agreement of the parties can in certain circumstances derive an authentic interpretation that must thereafter be read into the initial treaty.⁷¹ In this case, a review conference has taken place every five years since the NPT’s entry into force in 1970. Though states parties did not reach consensus in 1980, 1990, 1995, or 2005,⁷² the documents agreed to in 1975, 1985, 2000, and 2010 are instructive at least to show political commitment, and to “moderate” the ordinary meaning described *supra*, in addition to the NPT’s context and object and purpose.⁷³

The 1975 review conference resulted in various references to Article VI. First, the conference expressed its conviction that the objective of preventing proliferation remained relevant to averting nuclear war, and that “more rapid progress was required towards cessation of the arms race and the ‘*limitation and reduction*’ of existing nuclear weapons with a view to their *eventual* elimination, pursuant to a treaty on general and complete disarmament”⁷⁴ Confirming that the parties clearly envisioned partial reduction steps in order to reach an end state of nuclear disarmament, the conference reaffirmed the undertaking of “effective measures *in the*

69. See NPT, *supra* note 5, pmbl.

70. See GARDINER, *supra* note 41, at 191-92.

71. *Id.* at 204-05.

72. See Nuclear Threat Initiative, Compliance and Growth—NPT Review Conferences, *supra* note 3.

73. See *supra* text accompanying note 49.

74. NPT 1975 Final Document, *supra* note 58, at 1 (emphasis added).

direction of nuclear disarmament."⁷⁵ Third, the conference "welcom[ing] the various agreements on arms limitation and disarmament . . . over the last few years as steps contributing to the implementation of Article VI" ⁷⁶

The 1985 review conference called for the "progressive and balanced reduction of stockpiles . . . leading to their ultimate and complete elimination."⁷⁷ In addition, the conference "welcome[d] . . . bilateral negotiations . . . [and] hope[d] that these negotiations will lead to early and effective agreements aimed at . . . limiting and reducing nuclear arms, and at strengthening strategic stability."⁷⁸ The conference thus evinced an appreciation for the logical progression of partial disarmament reductions ultimately leading to total disarmament, as well as an understanding of the relevance of strategic stability.

Although the 1995 review conference failed to yield a consensus-based final document, it did produce a "decision" on nuclear disarmament.⁷⁹ At least as a political matter, the conference found important to the full implementation of Article VI, "[t]he determined pursuit . . . of systematic and progressive efforts to reduce nuclear weapons . . . with the ultimate goals of eliminating those weapons" ⁸⁰ Thus, the conference considered "progressive efforts to *reduce* nuclear weapons" critical to "implementation" or satisfaction of Article VI. Importantly, this relationship of disarmament steps to Article VI compliance received recognition again in 2000, where the conference took the unusual step of agreeing upon "practical steps for the systematic and progressive efforts to implement article VI" ⁸¹

75. *Id.* at 2 (emphasis added).

76. *Id.* at 7.

77. Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Aug. 27-Sept. 21, 1985, *Final Document*, at 11, U.N. Doc. NPT/CONF.III/64/I, Annex I, (Sept. 25, 1985), <http://www.un.org/disarmament/WMD/Nuclear/pdf/finaldocs/1985%20-%20Geneva%20-%20NPT%20Review%20Conference%20-%20Final%20Document%20Part%20I.pdf> [hereinafter NPT 1985 Final Document].

78. *Id.* at 13.

79. *See* Compliance and Growth—NPT Review Conferences—1995 Review and Extension Conference, NUCLEAR THREAT INITIATIVE, http://www.nti.org/h_learnmore/npttutorial/chapter04_01.html#1995 (last visited April 6, 2011) (discussing "Decision 2, [the] 'Principles and Objectives for Nuclear Non-Proliferation and Disarmament'").

80. 1995 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Apr. 17-May 12, 1995, *Final Document*, at 10, U.N. Doc. NPT/CONF.1995/32 (Part I), Annex I, Decision 2 (June 1995), <http://www.un.org/disarmament/WMD/Nuclear/pdf/finaldocs/1995%20-%20NY%20-%20NPT%20Review%20Conference%20-%20Final%20Document%20Part%20I.pdf> [hereinafter NPT 1995 Final Document].

81. 2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, April 24-May 19, 2000, *Final Document*, at 13-15, U.N. Doc. NPT/CONF.2000/28, (Parts I and II) (2000),

Welcoming what it termed “significant progress achieved in nuclear weapons reductions made unilaterally or bilaterally under the Strategic Arms Reduction Treaty (START) process, as steps towards nuclear disarmament,”⁸² the conference expressed “deep concern” with the fact that “despite the achievements in bilateral and unilateral arms reduction, the total number of nuclear weapons deployed and in stockpile still amounts to many thousands.”⁸³ More pointedly, however, the conference unveiled a disarmament wish list that included thirteen steps, four of which dealt with disarmament directly.⁸⁴ Generally speaking, the conference restated the states parties’ “unequivocal undertaking . . . to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament,” while calling for “further reduction” and a “process leading to the total elimination of . . . nuclear weapons.”⁸⁵

Finally, the 2010 conference noted again “with concern that the total estimated number of nuclear weapons deployed and stockpiled still amounts to several thousands.”⁸⁶ On this issue, however, the conference failed to achieve consensus on disarmament progress.⁸⁷ Thus, the Secretary-General appended a five-point proposal,⁸⁸ which included: (1) multilateral disarmament efforts, a resumption of U.S.-Russia negotiations aimed at achieving deeper and verifiable reductions, and verification research and development; (2) P5 discussions of security issues pertinent to the disarmament process, such as security assurances for NNWS; (3) effectiveness of CTBT, FMCT and IAEA safeguards;⁸⁹ (4) increased accountability and transparency; and (5) complementary measures regarding other WMD, terrorism, and conventional arms.⁹⁰ Clearly undergirding this

<http://www.un.org/disarmament/WMD/Nuclear/pdf/finaldocs/2000%20%20NY%20-%20NPT%20Review%20Conference%20-%20Final%20Document%20Parts%20I%20and%20II.pdf> [hereinafter NPT 2000 Final Document].

82. *Id.* at 14.

83. *Id.* at 13.

84. *See generally id.* at 14-15.

85. *Id.* at 14, 15.

86. 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, May 3-28, 2010, *Final Document*, at 12, U.N. Doc. NPT/CONF.2010/50 (Vol. I), Part I (Jun. 18, 2010), [http://www.un.org/ga/search/view_doc.asp?symbol=NPT/CONF.2010/50%20\(VOL.I\)](http://www.un.org/ga/search/view_doc.asp?symbol=NPT/CONF.2010/50%20(VOL.I)) [hereinafter NPT 2010 Final Document].

87. *See* Compliance and Growth—NPT Review Conferences—2010 Review Conference, NUCLEAR THREAT INITIATIVE, http://www.nti.org/h_learnmore/npttutorial/chapter04_01.html#2010 (last visited April 6, 2011) (discussing the “Review of the operation of the Treaty”).

88. *See id.* (discussing the Secretary-General’s five-point proposal for nuclear disarmament).

89. Ban Ki-moon, U.N. Secretary General, Address to the East-West Institute: The United Nations and Security in a Nuclear-Weapon-Free World (Oct. 24, 2008), <http://www.un.org/disarmament/WMD/Nuclear/sg5point.shtml> [hereinafter Five Point Proposal on Nuclear Disarmament].

90. *Id.*

proposal is a common understanding that disarmament refers to a process as well as an end state.

E. VCLT Article 32—Supplementary Means

Last, supplementary means include the preparatory work and the circumstances of conclusion of a treaty. Recourse to supplementary means of interpretation may be had either in order to confirm a meaning determined in accordance with the general rule in Article 31, or, to determine the meaning if the general rule leaves the term ambiguous.⁹¹ It is important to note that international tribunal decision-making in this area has proven somewhat opaque. While parties often reference preparatory work, and tribunals may call attention to such sources,⁹² the actual extent of tribunals' reliance on such means is far from clear.⁹³

With respect to the NPT, negotiations on disarmament consisted, more or less, of three positions: (1) some states insisted that the treaty list specific disarmament obligations binding on NWS;⁹⁴ (2) other states sought to avoid this at all cost;⁹⁵ and (3) still other states desired to add as much weight to the obligation of nuclear disarmament as they could without jeopardizing conclusion of a nonproliferation treaty.⁹⁶ On disarmament, these camps in

91. As to whether such recourse may be had, "in almost every case involving the interpretation of a treaty, one or both parties seeks to invoke the preparatory work." GARDINER, *supra* note 41, at 301. However, "[t]hat a word has various dictionary definitions, while raising the ordinary notion of ambiguity, does not necessarily mean that there is ambiguity in the sense of article 32 of the Vienna Convention." *Id.* at 328. "The Vienna rules look to ambiguity that remains after the application of the general rule . . . of article 31" *Id.*

92. See GARDINER, *supra* note 41, at 301, 337-39.

93. See *id.*

94. See U. S. ARMS CONTROL AND DISARMAMENT AGENCY, INTERNATIONAL NEGOTIATIONS ON THE TREATY ON THE NONPROLIFERATION OF NUCLEAR WEAPONS xi, xiii (1969) [hereinafter ACDA Negotiations Summary](discussing the original Sept. 15, 1965 ENDC joint memorandum calling for "tangible steps to halt the nuclear arms race"); see also *id.* at 87 (discussing the Burmese-proposed article containing "tangible steps toward nuclear disarmament, including a comprehensive test ban, a fissionable materials production cutoff, a halt to weapons production, a freeze on nuclear delivery vehicles, and the progressive reduction and final destruction of stockpiles").

95. See *id.* at xv (discussing the U.S. and the Soviet Union's Jan. 18, 1968 submission of identical texts of a revised draft treaty with a disarmament article that avoided specific disarmament measures); see also *id.* at 88 (noting the Soviet Ambassador's expressed willingness to negotiate on nuclear disarmament measures, but without linking them to the treaty). Further, in response to other calls for disarmament obligations, the Soviet Ambassador replied "that there would be 'definite negative consequences' in linking nonproliferation to complete nuclear disarmament." *Id.* at 107.

96. See ACDA Negotiations Summary, *supra* note 94, at 86-87 (discussing the Mexican amendment, which, though it listed specific measures, narrowed to an "undertak[ing] to negotiate disarmament agreements in the future"). In the Thirteenth Session of the ENDC, the conference noted the weakness of Article VI of the revised draft treaty, as compared with the Mexican amendment, because it lacked specific disarmament

fact entertained an entire spectrum of disarmament obligations, ranging from the gradual elimination of nuclear delivery vehicles,⁹⁷ to a manufacture ban,⁹⁸ total nuclear disarmament,⁹⁹ and a treaty on general and complete disarmament.¹⁰⁰ How each of the three negotiating positions ultimately came to agree upon the language in the NPT Preamble and Article VI is instructive, since each state proffered measures most in line with its initial position.

Part of the explanation for the compromise owes to the allocation of bargaining power: all states parties wanted to limit the risk of “nuclear catastrophe” that was “bound to increase with every new addition to the nuclear club,”¹⁰¹ but the U.S. and the Soviet Union had to agree to whatever instrument was intended to achieve this.¹⁰² Yet, the nature of disarmament obligations entertained by the parties also mattered a great deal. Individually, proposed obligations ran the gamut from “complete nuclear disarmament”¹⁰³ to an “undertaking of disarmament,”¹⁰⁴ but even states that demanded the former recognized from the outset the effectiveness and legitimacy of partial disarmament and reductions.¹⁰⁵ Thus, such piecemeal measures formed part of the very fabric of the bargain reached on July 1, 1968.

measures. However, the conference concluded that listing such measures would prove “counterproductive.” *See id.* at 106-07. Most fundamentally, U.S. Ambassador de Palma warned against insisting on specific and timely measures to halt vertical proliferation, because “[a]t this late stage in our work it would be a rather serious matter if we were asked to reopen the choice most of us have already made in deciding to pursue seriously . . . the conclusion of this treaty.” *Id.* at 108.

97. *Id.* at 6.

98. *Id.* at 76.

99. ACDA Negotiations Summary, *supra* note 94, at 86.

100. *Id.* at 86.

101. *See id.* at 123 (describing the United Arab Republic representative’s statements) (“Even with the treaty’s limitations, it is rightly assumed that the impact of concluding the treaty would have a favourable and far-reaching implication on all future disarmament negotiations.”).

102. *See id.* at 117 (The Ethiopian representative faulted, for the shortcomings of the treaty, “the world situation” and “the choice . . . ‘between making a little progress or no progress at all.’”).

103. *See id.* at 116.

104. ACDA Negotiations Summary, *supra* note 94, at 115.

105. *See e.g., id.* at 119 (While it did not insist on complete disarmament, India did not consider Article VI sufficiently strict in its requirement of phased disarmament.); *id.* at 118 (The Brazilian Foreign Minister “saw ‘no real tangible commitment’ to nuclear disarmament”); *id.* at 113 (Britain perceived “the preambular declaration of intention on disarmament [as] . . . wider than article VI[,]” and thus asked the ACDA to agree that the review conferences would “consider whether the purposes of the preamble and the provisions of the treaty were [together] being realized.”).

F. Summary

Synthesizing the results reached by applying VCLT Articles 31 and 32 to Article VI, the NPT, the product of the review conferences, and the preparatory work,¹⁰⁶ several conclusions follow:

- i. The ordinary meaning of “nuclear disarmament” and Article VI indicate that partial disarmament steps could satisfy Article VI;
- ii. The NPT as context provides evidence that the states parties intended partial disarmament measures, in the direction of nuclear disarmament, to satisfy the “nuclear disarmament” prong of Article VI;
- iii. Partial disarmament measures are implicit in, and not contrary, to the NPT’s purpose;
- iv. Nuclear disarmament refers to a process as well as an end state, and progress on either front helps satisfy Article VI;
- v. Reductions were originally intended as part of the fabric of Article VI and the NPT.

Thus, this paper’s application of international rules of interpretation comes to a close, leaving only the “progressive encirclement” required of an independent tribunal.¹⁰⁷ Even a quick glance at the conclusions derived above reveals but one legitimate interpretation of the term “nuclear disarmament.” It encompasses partial as well as total nuclear disarmament. Therefore, reductions short of total nuclear disarmament fall within its scope and satisfy the “nuclear disarmament” prong of Article VI.¹⁰⁸

106. This section omits reference to “the circumstances of the treaty’s conclusion,” mainly because the variable is so expansive, referring to the “legal, political, and social” background of a treaty. GARDINER, *supra* note 41, at 60. Arguably, the most major circumstance, within this background, was Mexico’s last-minute effort to add substantive disarmament measures to Article VI. That such measures were rebuffed reflects Mexico’s ultimate satisfaction with the prevailing language of the treaty. See “The Impulse towards a Safer World”—40th Anniversary of the Nuclear Nonproliferation Treaty, July 1, 2008, n.13, The Nuclear Vault, National Security Archive, George Washington University, <http://www.gwu.edu/~nsarchiv/nukevault/ebb253/index.htm> (citing MOHAMMED I. SHAKER, *THE NUCLEAR NON-PROLIFERATION TREATY: ORIGIN AND IMPLEMENTATION, 1959-1979* 383 (1980)).

107. See GARDINER, *supra* note 41, at 41, 59-60, 63, 144.

108. See NPT, *supra* note 5, pmbl.

G. ICJ Advisory Opinion on Threat or Use of Nuclear Weapons

Finally, in handling a matter as delicate as the interpretation of a key term in an international agreement, pronouncements of the International Court of Justice (ICJ) on topics relevant to that agreement warrant consideration. Indeed, in an oft-cited 1996 advisory opinion on the Legality of the Threat or Use of Nuclear Weapons,¹⁰⁹ the ICJ offered several such pronouncements, including the following unanimous statement: “There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.”¹¹⁰ Some consider this an “elaboration” on Art. VI;¹¹¹ others, a call for the opinion’s enforcement.¹¹² Regardless of which view prevails, the express objective of “nuclear disarmament in all its aspects” hardly forecloses our interpretation of “disarmament.” To the contrary, “nuclear disarmament in all its aspects” cannot be read to exclude partial disarmament steps that lead to total disarmament.

Moreover, the real contribution this opinion ostensibly makes to nuclear disarmament law is that it “sets forth an obligation to bring the specified negotiations *to a conclusion*.”¹¹³ In addition, the opinion does not touch upon “general and complete disarmament,” the third objective expressed in Art. VI.¹¹⁴ Some leverage this omission to argue that the ICJ intended to remove from the field any argument that general and complete disarmament might somehow condition nuclear disarmament.¹¹⁵ This may be correct as far as it goes, but it merely commences the analysis undertaken in this paper. Nuclear disarmament encompasses partial as well as total disarmament, and achievement of the latter presupposes the former’s occurrence.

CONCLUSION

Thus ends the case giving legal scope for the contention that reductions, followed through upon, should shift diplomatic pressure onto other states. After all, Henry Kissinger once asked, “What in the name of God is strategic superiority? What is the significance of it, politically, militarily,

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

110. *Id.* ¶ 105(F) (cited in NUCLEAR WEAPONS ARE ILLEGAL: THE HISTORIC OPINION OF THE WORLD COURT AND HOW IT WILL BE ENFORCED 76 (Ann Fagan Ginger ed., 1998)).

111. VED P. NANDA & DAVID KRIEGER, NUCLEAR WEAPONS AND THE WORLD COURT 113 (1998).

112. See NUCLEAR WEAPONS ARE ILLEGAL, *supra* note 110, at 12.

113. NANDA & KRIEGER, *supra* note 111, at 113 (emphasis added).

114. *Id.* at 113-14.

115. *Id.*

operationally, *at these levels of numbers?* What do you do with it?”¹¹⁶ This is what you do with it: you exchange it for durable security gain.

Even though strategic superiority can still increase the reluctance of potential adversaries to initiate nuclear or other violent conflict, and can still achieve actual victory in nuclear or other conflict, it is equally true that when the number of nuclear weapons deployed rises high enough, victory in nuclear conflict ceases to carry much meaning. Furthermore, above a certain threshold, large arsenals can actually destabilize relations between nuclear-armed states and defeat the very purpose of their deterrent mission. Thus, the size and characteristics of a nuclear arsenal matter: appropriate limits can preserve victory in some real sense, and they can prevent deterrence from breaking down.

Of course, deterrence and victory still require *ab initio* a lower number of nuclear weapons controlled by hostile entities. The overarching objective is strategic superiority at numbers that both preserve deterrence and avoid nuclear holocaust. Depending on geopolitical realities, and leaving specific numbers for planners, at a minimum, partial disarmament steps should serve both victory and deterrence better than an equal measure of arms build-up or improvement. In response to very real concerns over giving up too much, it is useful to recall that “[w]orld peace [once] hinged on a stable relationship between the U.S. and Soviet arsenals, and . . . on apparently tiny details.”¹¹⁷ Perhaps coordinated, calculated reductions can take us back to an insistence on tiny details, which can drive stability just as it did during the Cold War. If so, then Article VI, properly understood, makes it easier for states to find it in their interests to observe the NPT.

Surveying the terrain from this height, specific caps, reciprocal reduction ratios, and so on seem to lose much of their meaning, when full stock is taken of the sheer magnitude of the geopolitical challenges we confront. Threatening nuclear conflict and outwardly impervious to navigation, these will prove the crux of the twenty-first century. Though other options must not be discounted, clever combinations of nuclear disarmament could open a route through.

116. NICHOLAS THOMPSON, *THE HAWK AND THE DOVE* 245 (2009) (emphasis added) (quoting Henry Kissinger).

117. *Id.* at 230.