

1985

## Collective Security Treaties and the Ability of Allies to Limit the Movement of United States' Military Forces - New Zealand's Nuclear Ban

Ricky K. Jones

Follow this and additional works at: <http://elibrary.law.psu.edu/psilr>



Part of the [International Law Commons](#), and the [Military, War, and Peace Commons](#)

---

### Recommended Citation

Jones, Ricky K. (1985) "Collective Security Treaties and the Ability of Allies to Limit the Movement of United States' Military Forces - New Zealand's Nuclear Ban," *Penn State International Law Review*: Vol. 4: No. 1, Article 7.  
Available at: <http://elibrary.law.psu.edu/psilr/vol4/iss1/7>

This Comment is brought to you for free and open access by Penn State Law eLibrary. It has been accepted for inclusion in Penn State International Law Review by an authorized administrator of Penn State Law eLibrary. For more information, please contact [ram6023@psu.edu](mailto:ram6023@psu.edu).

# Collective Security Treaties and the Ability of Allies to Limit the Movement of United States' Military Forces — New Zealand's Nuclear Ban

## I. Introduction

### A. Background

'Tis our true policy to steer clear of permanent alliances, with any portion of the foreign world. There can be no greater error than to expect, or calculate upon real favours from Nation to Nation.<sup>1</sup>

It was in this manner that George Washington in his Farewell Address warned the new United States of the debility in the nature of agreements between nations.

By the end of World War II, however, presidential views regarding international agreements had changed. Indeed, in 1947 President Harry S Truman advocated that the United States become involved in alliances to help "free peoples everywhere . . . maintain their institutions and their national integrity against aggressive movements that [attempt] to impose on them totalitarian government."<sup>2</sup> As a result, in 1948 with the support of Congress and within the framework of the United Nations Charter, the United States adopted an alliance policy<sup>3</sup> for the purpose of protecting itself and

---

1. Farewell Address by George Washington (Sept. 19, 1796) in 35 THE WRITINGS OF GEORGE WASHINGTON 234, 235-36 (J. Fitzpatrick ed. 1940). Washington elaborated on the problems he saw in the nature of alliances:

Harmony, liberal intercourse with all Nations, are recommended by policy, humanity and interest . . . constantly keeping in view, that 'tis folly in one Nation to look for disinterested favours from another; that it must pay with a portion of its Independence for whatever it may accept under that character; that by such acceptance, it may place itself in the condition of having given equivalents for nominal favours and yet being reproached with ingratitude for not giving more.

*Id.* at 235.

2. J. GRENVILLE, THE MAJOR INTERNATIONAL TREATIES 1914-1973 at 306 (1974) [hereinafter cited as GRENVILLE]. Truman's statement was triggered by the preponderance of Soviet troops in Europe and the aid the communists were giving to Greek guerrillas in the Greek Civil War. *Id.* at 305.

3. See T. IRELAND, CREATING THE ENTANGLING ALLIANCE 92-100 (1981). The United States Senate was not too comfortable with the idea of involving the United States in the "entangling" alliance then being proposed for the North Atlantic area. The Vandenberg Resolution of 1948 embodied the spirit of that noncommittal attitude. Senator Vandenberg

others against potential future military threats.

As part of this overall pro-alliance policy, the United States in 1951 negotiated a treaty with Australia and New Zealand for the purpose of securing peace in the Pacific area. This treaty, known as the ANZUS Treaty,<sup>4</sup> is characteristic of the collective security agreements entered into by the United States since the end of World War II.

### B. *The Problem*

On February 4, 1985, the U.S.S. Buchanan, a conventionally powered United States Navy destroyer, was denied port access by New Zealand.<sup>5</sup> The denial was pursuant to a policy adopted by New Zealand's Labor Party forbidding any nuclear armed or nuclear propelled ships from entering its waters.<sup>6</sup> The Buchanan was denied access because the United States would not reveal if the ship was carrying nuclear arms.<sup>7</sup>

The United States immediately considered retaliatory measures against New Zealand.<sup>8</sup> In addition, and in direct protest against New Zealand's treatment of her ally, the United States and Australia agreed to postpone the annual meeting of the ANZUS Council.<sup>9</sup> New Zealand's action with regard to the U.S.S. Buchanan and the responses from the United States and Australia raised grave questions regarding the continued validity of the ANZUS Treaty.<sup>10</sup>

---

stated, "I think the great gain to us on the one hand is that we have moved forward into the field of security without involving ourselves in any permanent obligations of any nature." *Id.* at 93; *see also infra* text accompanying note 104.

4. Security Treaty between Australia, New Zealand and the United States, Sept. 1, 1951, Australia-New Zealand-United States, 3 U.S.T. 3421, T.I.A.S. No. 2493. *See also infra* notes 43-54 and accompanying text.

5. N.Y. Times Feb. 5, 1985, at A1, col. 1.

6. *Id.* The Labor Party was elected to office in July 1984 on a platform of a nuclear-free South Pacific. The Labor Parties in both Australia and New Zealand have long been antinuclear advocates. *See infra* notes 135-37 and accompanying text.

7. N.Y. Times, *supra* note 5.

8. The United States cut back and proposed suspending the sharing of intelligence and other security information, ending preferential treatment for New Zealand lamb, wool, and casein, and releasing for sale on the world market of surplus American dairy products, which could hurt New Zealand's sale of those products. *See* N.Y. Times, Feb. 27, 1985, at A8, col. 4; N.Y. Times, Feb. 12, 1985 at A13, col. 1; N.Y. Times, Feb. 6, 1985, at A1, col. 1.

9. N.Y. Times, Mar. 5, 1985, at A3, col. 6. The ANZUS Council was established under Article VII of the ANZUS Treaty and generally met on an annual basis at either Canberra, Australia, Wellington, New Zealand, or Washington, D.C. Meetings were informal and dealt with a variety of issues, usually concerning peace and security in the Pacific area.

The Reagan Administration was concerned with the effect of New Zealand's actions on other allied countries, especially countries maintaining policies concerning nuclear weapons. N.Y. Times, Feb. 6, 1985, at A1, col. 1; N.Y. Times, Feb. 5, 1985, at A1, col. 1. For example, Japan maintains a policy stating that it will not 1) produce; 2) possess; or 3) introduce nuclear weapons. Included under "introduction" is the storage of nuclear weapons at U.S. military bases in Japan, port calls or landings by U.S. ships or planes carrying nuclear arms, and the transit of nuclear-armed ships and planes through Japan's territorial seas and air space. *The Nuclear Policy of the Japanese Government*, 28 JAPAN Q. 461 at 461, 463 (1981).

10. Secretary of Defense Caspar W. Weinberger stated that New Zealand's action

### C. *Scope*

Using the ANZUS Treaty as an example, this comment will determine the extent of a state's ability to limit the movements of the military forces of an ally in the face of a collective security agreement that appears to contemplate the mobilization of military forces in preparation for the exercise of the defensive rights of both the state and the ally. The comment will begin by giving some background on the general nature of collective security treaties. It will also describe the events that led up to the signing of the ANZUS Treaty. In the next section the rules of interpretation applied to treaties will be outlined. Finally, those rules will be applied to the text included in most collective security agreements, as exemplified by the ANZUS Treaty. From this application and analysis the extent of a state's power under a collective security agreement with an ally to limit within its own territory the movements of that ally's forces will be determined.

## II. The Collective Security Treaty

### A. *Nature of Treaties in General*

A treaty, as a generic term, is an agreement.<sup>11</sup> By nature, each treaty as an agreement consists of three distinct aspects.<sup>12</sup> The first is that of a contractual agreement which is entered into through the creation of the treaty. Therefore in most respects the general principles of contracts apply.<sup>13</sup> Second, the agreement must be concluded

---

"constitutes a serious attack upon the alliance." N.Y. Times, Feb. 5, 1985 at A1, Col. 1. Congressman Stephen J. Solarz agreed by stating that New Zealand's action "raised the gravest questions concerning the future of the alliance." N.Y. Times, Feb. 12, 1985, at A13, col. 1.

11. See United Nations Conference on the Law of Treaties, Official Records, second session at 3, U.N. Doc. A/Conf. 39/11 add. 1 [hereinafter cited as Law of Treaties]; E. BODEHEIMER, JURISPRUDENCE 334 (1974); J. BRIERLY, THE LAW OF NATIONS 195 (2d ed. 1936) [hereinafter cited as BRIERLY]; L. MCNAIR, THE LAW OF TREATIES 3 (1961) [hereinafter cited as MCNAIR]; 1 L. OPPENHEIM, INTERNATIONAL LAW 877 (H. Lauterpacht ed. 1948) [hereinafter cited as OPPENHEIM]; *Draft Articles on the Law of Treaties*, 61 AM. J. INT'L L., 263 (1967) [hereinafter cited as *Draft Articles*]; Jessup, *Modernization of the Law of International Contractual Agreements*, 41 AM. J. INT'L L. 378, 392 (1947); Harvard Research in International Law, *Draft Convention on the Law of Treaties*, 29 AM. J. INT'L L. Supp. 653 (1935).

The International Law Commission (ILC) was created by the General Assembly of the United Nations on November 21, 1947 pursuant to Article 13, para. 1(a) of the Charter of the United Nations. G.A. Res. 174 (II), U.N. Doc. A/519, at 105 (1947). The function of the ILC is two-fold. It promotes both the progressive development and the codification of international law. Statute of the International Law Commission, G.H. Res. 174 (II), art. 1 Doc. A/519 at 105 (1947); see also *id.* arts. 15-24, at 107-09. The *Draft Articles* and the Law of Treaties *supra*, are codifications by the ILC of the international law of treaties. These codifications are used throughout this comment as being representational of the international law of treaties. For a more in depth explanation of the ILC see generally H. BRIGGS, THE INTERNATIONAL LAW COMMISSION (1965).

12. See generally *supra* note 11.

13. BRIERLY, *supra* note 11, at 195; MCNAIR, *supra* note 11; Read, *International Agreements*, 26 CAN. B. REV. 520, 521 (1948).

between states.<sup>14</sup> Only states are considered to be international persons with the capacity to conclude treaties. The third aspect is that the agreement entered into through the treaty and the relationship created by it must be established under international law.<sup>15</sup> This last aspect distinguishes a treaty from agreements regulated by private international law and from agreements regulated by the national law of one of the parties to the agreement.<sup>16</sup> This aspect also establishes international law as the law governing the validity, binding force, interpretation, application, and termination of the treaty.<sup>17</sup>

Another maxim of international law applicable to treaties is that both parties are bound by a principle of good faith known as *pacta sunt servanda*.<sup>18</sup> The preamble of the United Nations Charter, for example, speaks of "obligations arising from treaties,"<sup>19</sup> obligations which the Charter states shall be fulfilled in "good faith"<sup>20</sup> by all members.

The scope of *pacta sunt servanda*, as the maxim was originally developed, extended to all parts of the treaty with no part being more or less important than any other.<sup>21</sup> This scope, however, has been limited to the material parts of treaties.<sup>22</sup>

*Pacta sunt servanda* also extends to those treaties which indicate an intention by the parties to create legal rights and obligations or to establish relations governed by international law.<sup>23</sup> The parties' intent may be expressly or inferentially determined.

By contrast, if no intent exists the treaty is without legal effect. By definition, therefore, a non-binding treaty is outside the scope of

14. See generally *supra* note 11. Among the classes of treaties not falling within the scope of this criterion were agreements concluded between states and international organizations or between two or more international organizations. Law of Treaties, *supra* note 11.

15. See generally *supra* note 11.

16. *Draft Articles*, *supra* note 11, at 289.

17. W. FRIEDMANN, INTERNATIONAL LAW 301 (1969).

18. See BRIERLY, *supra* note 11, at 201; MCNAIR, *supra* note 11, at 493; OPPENHEIM, *supra* note 11, at 794. Lord McNair explained it as such:

In every uncoded legal system there are certain elementary and Universally agreed principles for which it is almost impossible to find specific authority. In the Common Law of England and the United States of America, where can you find specific authority for the principle that a man must perform his contracts? Yet almost every decision on a contract presupposes the existence of that principle. The same is true of international law.

MCNAIR, *supra* note 11, at 493.

19. U.N. CHARTER preamble.

20. *Id.* at art. 2, para. 2.

21. OPPENHEIM, *supra* note 11, at 829.

22. See Law of Treaties, *supra* note 11, art. 57 at 111; *Draft Articles*, *supra* note 11, art. 57 at 279. As part of the *pacta sunt servanda* principle the Commission also considers it implicit that the parties refrain from acts calculated to frustrate the object and purpose of the treaty. *Draft Articles*, *supra* note 11, at 335 (commentary on article 23 of the Draft Articles of the Law of Treaties).

23. *The Twilight Existence of Non-Binding International Agreements*, 71 AM. J. INT'L L. 296, 296 (1977).

*pacta sunt servanda.*<sup>24</sup>

The key to understanding treaties is that they are created by the intent of the parties, and exist through good faith. Therefore, the sole objective of treaty interpretation is to give effect to the intention of the parties.<sup>25</sup>

*B. Development of the Collective Security Treaty*

A collective security treaty is an agreement that seeks to create peaceful relations among party states and provides for collective participation in preventing threats to the peace of the nations which are party to the agreement.<sup>26</sup>

There are three principal United Nations theories in support of the existence of collective security treaties. First, they are justified as collective measures undertaken by groups of individual states in order to maintain international peace and security pursuant to article 1(1) of the United Nations Charter;<sup>27</sup> second, they are justified as measures of individual or collective self-defense within the meaning of article 51;<sup>28</sup> and third, they are considered to be within the definition of "regional arrangements" established to maintain international peace and security under articles 52 through 54.<sup>29</sup>

24. *Id.* at 296, 300. The parties have the ability to make the language as precise as they would like and therefore vague language may reasonably be indicative of an intention to avoid legal effect. *Id.* at 297; see MCNAIR, *supra* note 11 arts. 43-49, at 85-92.

25. BRIERLY, *supra* note 11, at 199; MCNAIR, *supra* note 11, at 365; see *infra* notes 57-100 and accompanying text.

26. Fenwick, *Collective Security and the London Agreements*, 49 AM. J. INT'L L. 54, 54 (1955); see *infra* notes 30-41 and accompanying text. The collective security treaty as it has developed since World War II must be distinguished from the military alliance. The military alliance is a treaty of union between two or more states which bind those states to military cooperation to defend against the attack of a specific state or states or for jointly attacking their states. OPPENHEIM, *supra* note 11, at 864; R. Osgood, *The Nature of Alliances 2* (available in the United States Army War College Library of Military History). For example, the alliance created between Germany and Turkey in 1914 was expressly directed against Russia and it obligated each party to defend Ottoman territory by force of arms. Secret Treaty of Alliance between Germany and the Ottoman Empire, Aug. 2, 1914, *reprinted in* GRENVILLE, *supra* note 2, at 24.

27. R. CHOWDHURY, *MILITARY ALLIANCES AND NEUTRALITY IN WAR AND PEACE 65* (1966) [hereinafter cited as CHOWDHURY]; see N. BENTWICH & A. MARTIN, *COMMENTARY ON THE CHARTER OF THE UNITED NATIONS 5-6* (1950) [hereinafter cited as BENTWICH & MARTIN]. In pertinent part the Charter states, "The Purposes of the United Nations are: 1. To maintain peace and security and to that end: to take effective collective measures for the prevention and removal of threats to the peace." U.N. CHARTER art. 1, para. 1.

28. CHOWDHURY, *supra* note 27; see BENTWICH & MARTIN, *supra* note 27, at 106-08. In pertinent part the Charter states, "Nothing in this present Charter shall impair the inherent right of individual or collective self-defense." U.N. CHARTER art. 51.

29. CHOWDHURY, *supra* note 27; see BENTWICH & MARTIN, *supra* note 27 at 109-15. Article 52 states, "Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security." U.N. CHARTER art. 52, para. 1. Article 53 provides for the use of such regional arrangements by the Security Council. See BENTWICH & MARTIN, *supra* note 27, at 113.

Article 54 simply creates an obligation on the part of regional organizations to keep the Security Council fully informed of regional activities. *Id.* at 115.

### C. *Purposes and Principles*

The overriding purpose and principle of collective security treaties is the maintenance of international peace and security.<sup>30</sup> For those collective security agreements concluded in light of the purposes and principles of the United Nations Charter the maintenance of peace necessarily must be a fundamental principle, because absent the existence of peace, no other aspect of the agreements could be attained.<sup>31</sup>

There exist two corollaries to the principle of maintaining international peace and security. The first requires the coordination of the defense efforts of the contracting states.<sup>32</sup> The second requires the assurance of the peaceful settlement of any disputes which may arise among the contracting states.<sup>33</sup>

The coordination of defense efforts is manifested by a commitment among the contracting states to take action in the event of a threat to one of the states.<sup>34</sup> A threat, termed *casus foederis*, generally arises in the form of an armed attack.<sup>35</sup>

Defense efforts also include measures taken in preparation for the exercise of the right to collective security.<sup>36</sup> For example, collective security agreements have established security through the mu-

30. See Treaty of Mutual Cooperation and Security, Jan. 19, 1960, United States-Japan, preamble, paras. 1, 3, 1 U.S.T. 1632, T.I.A.S. No. 4509 [hereinafter cited as U.S.-Japan Security Treaty]; South East Asia Collective Defense Treaty, Sept. 8, 1954, preamble, paras. 2, 4, 6 at 6 U.S.T. 81 T.I.A.S. No. 3170, 209 U.N.T.S. 23 [hereinafter cited as SEATO Treaty]; Pacific Charter, Sept. 8, 1954, preamble, para. 2 at 6 U.S.T. 91, T.I.A.S. No. 3171, 209 U.N.T.S. 23; Security Treaty between Australia, New Zealand and the United States, Sept. 1, 1951, Australia-New Zealand-United States, preamble, paras. 1, 2, 5 at 3 U.S.T. 3421, T.I.A.S. No. 2493 [hereinafter cited as ANZUS Treaty]; North Atlantic Treaty, Apr. 4, 1949, preamble, paras. 1, 4, 63 Stat. 2241, T.I.A.S. No. 1964, 34 U.N.T.S. 243; Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, preamble, para. 7, 62 Stat. 1681, T.I.A.S. No. 1838, 21 U.N.T.S. 77 [hereinafter cited as Rio Treaty]; cf. Treaty of Friendship, Cooperation and Mutual Assistance, May 15, 1955, preamble, paras. 1, 3, 5, 219 U.N.T.S. 3 [hereinafter cited as Warsaw Pact].

31. The Charter of the United Nations states as its first purpose "to maintain international peace and security." U.N. CHARTER art. 1, para. 1. See BENTWICH & MARTIN, *supra* note 27, at 5-6.

32. SEATO Treaty, *supra* note 30, at preamble, para. 6; ANZUS Treaty, *supra* note 30, at preamble, para. 5; North Atlantic Treaty, *supra* note 30, at preamble, para. 4; see also U.S.-Japan Security Treaty, *supra* note 30, at preamble, paras. 4, 5 (recognizing an inherent right of collective self-defense); Pacific Charter, *supra* note 30, at preamble, para. 2 (establishing a basis for common action to maintain peace and security); Rio Treaty, *supra* note 32, at preamble, para. 7 (providing for effective reciprocal assistance to meet armed attacks).

33. U.S.-Japan Security Treaty, *supra* note 30, at art. I; SEATO Treaty, *supra* note 30, at art. I; Pacific Charter, *supra* note 30, at procl. 1; ANZUS Treaty, *supra* note 30, at art. 1; North Atlantic Treaty, *supra* note 30, at art. 1; Rio Treaty, *supra* note 30, at preamble, para. 4, art. 2.

34. U.S.-Japan Security Treaty, *supra* note 30, at art. V; SEATO Treaty, *supra* note 30, at art. IV; Pacific Charter, *supra* note 30, at procl. 4; ANZUS Treaty, *supra* note 30, at art. IV; North Atlantic Treaty, *supra* note 30, at art. 5; Rio Treaty, *supra* note 30, at art. 3.

35. See *supra* note 34; OPPENHEIM, *supra* note 11, at 868.

36. U.S.-Japan Security Treaty, *supra* note 30, at art. III; SEATO Treaty, *supra* note 30, at art. II; ANZUS Treaty, *supra* note 30, at art. II; North Atlantic Treaty, *supra* note 30, at art. 3.

tual provision of economic assistance among contracting states.<sup>37</sup> Thus the concept of defense includes more than military assistance.

The commitment to peaceful settlement of disputes among contracting states as required by article 1(1) of the United Nations Charter is manifested in two ways: either by the establishment of consultative status<sup>38</sup> or by agreement between the contracting states to submit every interstate controversy to some method of peaceful settlement.<sup>39</sup> This commitment to peaceful settlement is the key factor which distinguishes collective security agreements from military alliances.<sup>40</sup>

It is important to recognize that the division of the principle of maintaining peace is two-pronged. Actions among contracting states must be analyzed both in relation to preventing external threats and also in relation to promoting internal harmony within the contracting group. Specifically, the ANZUS Treaty clearly exemplifies this idea that maintaining peace, through collective security treaties, is a double pronged principle.<sup>41</sup>

#### D. ANZUS

The Security Treaty between Australia, New Zealand, and the United States, signed on September 1, 1951, is a short document<sup>42</sup> that seeks to "strengthen the fabric of peace in the Pacific."<sup>43</sup> While the desire for a Pacific Pact had existed for some time,<sup>44</sup> the ANZUS treaty was generally viewed as a method of allaying those factions in New Zealand and Australia which opposed a softened peace treaty with Japan following World War II.<sup>45</sup> At the signing of the ANZUS Treaty World War II had been over for only six years. Australia and New Zealand were therefore reluctant to sign a peace treaty with Japan without some assurance from the United States that peace would be preserved in the Pacific.<sup>46</sup> This reluctance ex-

---

37. U.S.-Japan Security Treaty, *supra* note 30, at preamble, para. 2; SEATO Treaty, *supra* note 30, at art. III; Pacific Charter, *supra* note 30, at procl. 3.

38. "Consultative status" denotes a relationship wherein the contracting parties confer among themselves in discussing and solving problems whether internal or external. *See, e.g.*, U.S.-Japan Security Treaty, *supra* note 30, at art. IV; ANZUS Treaty, *supra* note 30, at arts. III, VII, VIII; North Atlantic Treaty, *supra* note 30, at arts. 4, 9.

39. Rio Treaty, *supra* note 30, at art. 2.

40. *See supra* note 26 and accompanying text.

41. For more details concerning these characteristics see *infra* text accompanying notes 48-54.

42. The ANZUS Treaty contains only eleven articles.

43. ANZUS Treaty, *supra* note 30, at preamble, 1st recital.

44. In 1936 a sub-committee of the Australian Cabinet sought to promote a regional agreement and pact of nonaggression in the Pacific area. J. STARKE, THE ANZUS TREATY ALLIANCE 4 (1965); *see generally id.* at 4-27.

45. *See id.* at 63-64; STEBBINS, THE UNITED STATES IN WORLD AFFAIRS 1951, at 183, 199-200 (1952).

46. *See supra* note 147 and accompanying text. There was no provision within the twenty-six articles of the Peace Treaty with Japan which limited its ability to rearm. *See*



plains why the Peace Treaty with Japan was signed by Australia and New Zealand only after the ANZUS Treaty was concluded with the United States.<sup>47</sup>

The operative article of the ANZUS Treaty provides that an "armed attack in the Pacific on any of the Parties" is to be considered a threat to the peace and safety of the remaining parties.<sup>48</sup> In the event of such an attack each Party "declares that it would act to meet the common danger."<sup>49</sup>

The ANZUS Treaty also established a council "to consider matters concerning the implementation of [the] Treaty."<sup>50</sup> The council is one aspect of the consultative relationship created by the agreement that was a key element of the ANZUS Treaty. Other provisions of the Treaty further define the consultive relationship. Article III provided that the Parties "will consult"<sup>51</sup> at times when "in the opinion of"<sup>52</sup> the Parties the peace and security in the Pacific has been threatened. Regarding the internal harmony of the relationship created, the Parties agreed to the peaceful settlement of disputes in which they may be involved,<sup>53</sup> and obligated themselves to provide "self-help and mutual aid" in developing their defense capacity.<sup>54</sup>

### III. The Ability to Act

#### A. *The Quest for Intent*

Conceptually, treaties are agreements,<sup>55</sup> agreements that are products of discussions and negotiations among contracting states. Through communications the parties seek to reach a common ground of interests and objectives. The nature of the word "treaty" is that of a meeting of the minds, or an expression of common intention between two or more parties.<sup>56</sup> In interpreting treaties the objective must therefore be to give effect to the common intention of the parties<sup>57</sup> in light of the surrounding circumstances.<sup>58</sup> Strict adherence to

---

Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, T.I.A.S. No. 2490. Cf. Treaty of Peace between the Allied and Associated Powers and Germany, June 28, 1919, at arts. 159-98, reprinted in GRENVILLE, *supra* note 2, at 59 [hereinafter cited as Treaty of Versailles] (expressly demobilizing Germany's military forces).

47. Treaty of Peace with Japan, *supra* note 46; ANZUS Treaty, *supra* note 30.

48. ANZUS Treaty, *supra* note 30, at art. IV.

49. *Id.*

50. *Id.* at art. VII.

51. *Id.* at art. III.

52. *Id.*

53. *Id.* at art. I.

54. *Id.* at art. II; see *infra* notes 103-05 and accompanying text.

55. See *supra* notes 11-17 and accompanying text.

56. BLACK'S LAW DICTIONARY 62 (5th ed. 1979).

57. BRIERLY, *supra* note 11, at 199; M. McDUGAL, H. LASSWELL AND J. MILLER, THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER 40 (1967); MCNAIR,

the established rules of interpretation is not enough.

A major caveat in attempting to ascertain a common intention is that one may not exist.<sup>59</sup> There may be a lack of common intention because the parties consciously did not reach a mutual understanding or because the parties mistakenly believed that a common intention existed when in fact it did not.<sup>60</sup> Parties to a treaty may, in good faith, simply attach different meanings to the terms of an agreement or they may have failed to consider the possibility of certain situations occurring. In addition, states may use language in a treaty, not to express a desired common intention, but to conceal the failure of the parties to concur. The states may deliberately assign different meanings to the text or provide that the intentions be determined by subsequent agreements.<sup>61</sup> The strict application of established rules of interpretation in order to ascertain the intention of the parties may therefore assign to a treaty a common intent which did not exist.

### B. *The Plain Meaning*

The common intent of the contracting parties to a treaty is determined by a hierarchic structure of interpretational rules.<sup>62</sup> Foremost is the rule that a treaty is to be interpreted according to the "plain meaning" given its language.<sup>63</sup>

The International Law Commission<sup>64</sup> (ILC) based this rule on

---

*supra* note 11; J. STONE, *OF LAW AND NATIONS* 171 (1974). See also *supra* text accompanying note 25.

58. MCNAIR, *supra* note 11, at 366; STONE, *supra* note 57; Grieg, *The Interpretation of Treaties and Article IV.2 of the Nuclear Non-Proliferation Treaty*, 6 *AUST. Y. B. INT'L L.* 77, 83 (1978).

59. STONE, *supra* note 57. Correspondingly, the concept of treaty interpretation also includes the assumption that if a common intent exists between the contracting parties, it can be ascertained by the interpreter. *Id.*

60. See *id.* at 172; see also Jessup, *supra* note 11, at 391 (in interpreting agreements one must always bear in mind that the parties are free to employ words in any sense they choose). The point of this caveat is that implicit in the term "intention" is the right to intend not to intend.

61. STONE, *supra* note 57, at 172-73. Professor Stone credits Professor Lauterpaucht with listing five situations when parties may lack common intention, and the suggested solution to these situations. These are when 1) there was a good faith attachment of different meanings to the text for which Lauterpaucht suggests that the court's task is to discover the common intention of the treaty taken in its entirety; 2) the parties deliberately designed different meanings to the text for which the court's task is to assume the common intention required by good faith; 3) the divergence of views is to be determined by subsequent agreements for which the courts are bound to assume an effective common intention; 4) the subject matter simply was not present to the minds of the parties, which constitutes *casus omissus* and must also be assumed to involve an effective common intention; and 5) when the parties included terms which are now contradictory in relation to the present subject matter for which effective intention again is to be assumed.

62. See *Law of Treaties*, *supra* note 11, at 57-59; MCNAIR, *supra* note 11, at chs. XIX-XXIX; *Draft Articles*, *supra* note 11, at arts. 27, 28. These rules are analogous to the rules of construction used in interpreting most written documents.

63. See *Draft Articles*, *supra* note 11, at art. 27(1).

64. See *supra* note 11.

the idea that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given the terms of the treaty in their context and in the light of its object and purpose."<sup>65</sup> Looking beyond the language of the treaty, then, is a secondary step in the overall exercise of interpreting a treaty.<sup>66</sup>

It is obvious that in attempting to determine the "plain meaning" of a treaty one must look first to the language. In doing so, it becomes the interpreter's duty to apply the meaning of the text if it is clear on its face.<sup>67</sup> A problem with the "plain meaning" test, however, is that the parties are free to use words in whatever way they wish.<sup>68</sup> In looking for the plain meaning from an interpretational viewpoint one therefore looks for the meaning those terms have "in the mouth of a normal speaker."<sup>69</sup> This approach often leads to problems of semantics.

An additional problem with the "plain meaning" test is that it assumes that each of the words used in a treaty are autonomous in meaning.<sup>70</sup> Such an assumption is erroneous. Each word often has several meanings.<sup>71</sup> To determine which is applicable, the words must be read and interpreted in the context of the treaty as a whole,<sup>72</sup> unless this approach leads to an unreasonable result.<sup>73</sup>

In its Law of Treaties, the ILC adopted the contextual approach to determining the meaning of the language of a treaty. Article 27(2) of the Law of Treaties defines what comprises the "context" for purposes of the interpretation of a treaty.<sup>74</sup> It is important to note that the "context" includes the text, preamble, and an-

65. *Id.*

66. *Id.* at arts. 27(3), 38.

67. The Permanent Court of International Justice stated that in interpreting a treaty, the Court "[h]aving before it a clause which leaves little to be denied in the nature of clearness, it is bound to apply this clause as it stands." Acquisition of Polish Nationality, (Ger.-Pol.), 1923 P.C.I.J., ser. B, No. 7 at 20 (Advisory Opinion of Sept. 15). Article 3, paragraph 2, of the Treaty of Lausanne (Turkey-Iraq), 1925 P.C.I.J., ser. B, No. 12 at 19 (Advisory Opinion of Nov. 12) ("the court must . . . in the first place, endeavor to ascertain from the wording of this clause what the intention of the contracting parties was").

68. STONE, *supra* note 57, at 184.

69. Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417-18 (1899). Justice Holmes stated:

[W]e ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used, and it is to the end of answering this last question that we let in evidence as to what the circumstances were.

70. STONE, *supra* note 57, at 183.

71. Holmes, *supra* note 69, at 417; STONE, *supra* note 57, at 185.

72. *Draft Articles*, *supra* note 11 at art. 27(1).

73. Polish Postal Service in Danzig (Pol. v. Danzig), 1925 P.C.I.J., ser. B, No. 11 at 39 (Advisory Opinion of May 16); International Labor Organization (U.K. v. Fr.) 1922 P.C.I.J., ser. B, Nos. 2 & 3, at 23 (Advisory Opinion of Aug. 12).

74. *Draft Articles*, *supra* note 11, at art. 27(2). According to the ILC, paragraph 2 proposed that related agreements and instruments should not be treated merely as possible evidence in resolving an ambiguity, but as part of the context to which recourse must be had in arriving at the ordinary meaning of the terms of the treaty. *Id.* at 356.

nexes.<sup>75</sup> The Commission stated that two other classes of documents — related agreements and instruments — should also be considered a formative part of the “context.”<sup>76</sup>

### C. *Beyond the Plain Meaning*

Treaty interpretation goes beyond looking to the plain meaning of the terms of an agreement. The second tier of the rules of interpretation requires that the interpreter consider the subsequent conduct of the parties, ascertain the scope of interpretation in light of the relevant rules of international law, and study the preparatory work of the parties.

Article 27(3) of the Law of Treaties states “[t]here shall be taken into account together with the context [a]ny subsequent agreement between the parties regarding the interpretation of the treaty . . . [and] [a]ny subsequent practice in the application of the treaty which establishes the understanding of parties regarding its interpretation.”<sup>77</sup> Conduct must be taken into consideration as an indication of the intention of the parties,<sup>78</sup> for it constitutes objective evidence of the understanding of the parties pertaining to the meaning of the treaty.<sup>79</sup>

The use of subsequent conduct in interpreting treaties, of course, is ancillary to the text. Subsequent conduct serves only as additional evidence regarding the meaning attached to the text and is not, by itself, conclusive.<sup>80</sup> However, a consistent subsequent practice which establishes the common consent of the parties to the application of certain provisions of a treaty in a manner different than that originally established may modify the treaty.<sup>81</sup>

Article 27(3)(c) of the Law of Treaties states “[t]here shall be taken into account together with the context . . . [a]ny relevant rules of international law applicable in the relations between the parties.”<sup>82</sup> Accordingly, the scope of the interpretation of the language is governed by the rules of international law.

On one end of the international legal spectrum is the rule of international interpretation stating that a document is to be given

---

75. *Id.*

76. *See supra* note 22.

77. *Draft Articles, supra* note 11, at art. 27(3)(a) and (b).

78. Air Transport Arbitration (U.S.-Italy) *reprinted in* 4 INT’L LEGAL MAT. 974, 983 (Sept. 1965).

79. *Draft Articles, supra* note 11, at 356.

80. Air Transport Arbitration, *supra* note 78.

81. *Draft Articles, supra* note 11, at 385-86. Article 38 states: “A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions.” *Id.* at art. 38.

82. *Id.* at art. 27(3)(c).

effect rather than be destroyed.<sup>83</sup> This general rule of interpretation is embodied in Article 27(1) of the Law of Treaties.<sup>84</sup> Article 27 is based on the view that the text is presumed to be the authentic expression of the intention of the parties.<sup>85</sup> Thus the choice allowed under this rule is not between "effectiveness" and "destruction" but between degrees of effectiveness.

On the other end of the spectrum is the principle of restrictive interpretation which states that treaty obligations must be construed restrictively in favor of sovereignty.<sup>86</sup> Where provisions of a treaty might be interpreted as imposing a greater or lesser obligation on a state, those provisions shall be construed as imposing the lesser obligation.<sup>87</sup> Restrictive interpretation is to be applied only when all other methods of interpretation leaves the intention of the parties still unclear.<sup>88</sup>

Last, the second tier of interpretation involves an analysis of the preparatory work surrounding the conclusion of the treaty.<sup>89</sup> Where the plain meaning derived from the text is not clear it may be useful to resort to the preparatory work involved in adopting the agreement to clarify its meaning.<sup>90</sup>

The ILC adopted the use of preparatory work in interpreting treaties under Article 28 of the Law of Treaties.<sup>91</sup> The Commission

83. The principle of "effectiveness" is embodied in the maxim *ut res magis valeat quam pereat* which means "that the thing may rather have effect than be destroyed." BLACK'S LAW DICTIONARY 1386 (5th ed. 1979).

84. *Draft Articles*, *supra* note 11, at art. 27(1).

85. *Id.* at 354.

86. *Free Zones of Upper Savoy and the District of Gex (Fr.-Switz.)* 1932 P.C.I.J., ser. A/B, No. 46, at 167 (Judgment of June 7); STONE, *supra* note 57, at 180.

87. STONE, *supra* note 57, at 180.

88. *International Commission of the River Oder (Czech. v. Den.)*, 1929 P.C.I.J., ser. A, No. 23, at 26 (Judgment of Sept. 10). The need for caution in applying the principle of restrictive interpretation rises out of the fact that a treaty by nature is a document that creates rights and duties among the parties. One party's duties are correlative to the rights of some other party. To the extent treaty interpretation restricts the duties of one party, it also restricts the rights of another. STONE, *supra* note 57, at 181.

89. Resort to preparatory work is embodied in the principle *travaux préparatoires*.

90. *Treatment of Polish Nationals and other Persons of Polish Origin or Speech in the Danzig Territory (Danzig v. Pol.)*, 1932 P.C.I.J., ser. A/B, No. 44, (Advisory Opinion of Feb. 4).

Professor Lauterpaucht explained that it was necessary to resort to *travaux préparatoires* in treaty interpretation because "[a] purely grammatical or logical interpretation is one which leaves [a] larger scope to unfettered judicial reasoning and to [the] freedom of judicial construction than one which takes into account the objective factors as given by extrinsic evidence." Lauterpaucht, *Some Observations on Preparatory Work in the Interpretation of Treaties*, 58 HARV. L. REV. 549, 574 (1935).

Oliver Wendell Holmes, in general explained:

[W]e let in evidence of intention not to help out what theory recognizes as an uncertainty of speech, and to read what the writer meant into what he has tried but failed to say, but, recognizing that he has spoken with theoretical certainty, we inquire what he meant in order to find out what he said.

Holmes, *supra* note 68, at 418.

91. In pertinent part "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion." *Draft*

felt it necessary, however, to limit the use of preparatory work to two purposes. First, preparatory work could be used to confirm the meaning which resulted from applying the rules contained in Article 27.<sup>92</sup> Second, preparatory work could be used for the purpose of determining the meaning of a treaty when application of the rules under Article 27 left that meaning ambiguous or led to absurd or unreasonable results.<sup>93</sup> In either case the resort to preparatory work must be supplementary.<sup>94</sup> It was not to be an autonomous means of interpretation, but an aid to interpretation guided by the principles outlined in Article 27.<sup>95</sup>

The propriety of using preparatory work is still unsettled.<sup>96</sup> It has been argued that preparatory work should never be excluded from the interpretation of treaties as it provides information about the state of minds of the member parties, which in turn aids in discovering their intention.<sup>97</sup> But, there may not always be a direct correlation between the preparatory work and the treaty.<sup>98</sup> Accordingly, international courts have held that they will not resort to the use of preparatory work unless they doubt the plain meaning of the treaty, and must confirm the result.<sup>99</sup> Preparatory work may never be used to change the plain meaning of a text.<sup>100</sup>

These are the rules which constitute the search for intent of the parties when interpreting treaties. The following is a study of how the rules apply in the determination of the intentions of parties who are dealing with a most fundamental aspect of a government's existence — maintaining peace and security, specifically, by means of collective security treaties.

---

*Articles, supra* note 11, at art. 28.

92. *Id.* at cl. 3.

93. *Id.* at cl. 4, (1)-(b).

94. *Id.* at cl. 1.

95. *Draft Articles, supra* note 11 at 360.

96. Professor Jessup explained that the source of this debate is the joint participation of both civil and common law jurists in the development of international law. Jessup, *supra* note 11, at 391.

97. STONE, *supra* note 57, at 176; Lauterpacht, *The Theory of Legal Interpretation*, 48 HARV. L. REV. 549, 571 (1935). This approach is based on the idea that nothing is absolutely clear in itself; words and expressions have many meanings.

98. Sir Eric Beckett found fault with Professor Lauterpacht's stand on *travaux préparatoires* and argued that Lauterpacht's theory failed to account for possible compromises made behind closed doors of which there is no record. See STONE, *supra* note 57, at 176-77.

99. See, e.g., S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J., ser. A, No. 10, at 16 (Judgment of Sept. 7); Jurisdiction of the European Danube Commission between Galatz and Bralia, 1927 P.C.I.J., ser. B, No. 14 at 28 (Advisory Opinion of Dec. 8); Article 3, para. 2, of the Treaty of Lausanne (Turk. v. Iraq), 1925 P.C.I.J., ser. B, No. 12 at 23 (Advisory Opinion of Nov. 12).

100. Jurisdiction of the European Danube Commission between Galatz and Bralia, 1927 P.C.I.J., ser. B, No. 14 (Advisory Opinion of Dec. 8).

#### IV. The Movements of Military Forces

##### A. *In General*

There are two situations in which the movement of military forces can come into play in a collective security agreement. The first arises when the parties prepare to exercise their individual or collective rights to self-defense under the Charter of the United Nations. The second arises when those rights are actually exercised.<sup>101</sup> Provisions in collective security agreements governing both these situations, like other treaty provisions, are subject to interpretation. Thus, the ability of state parties to mobilize their collective military forces and to limit the movements of those forces pursuant to a security treaty must be determined by ascertaining the intentions of the parties as expressed by the language of the treaty.<sup>102</sup>

##### B. *The Plain Meaning — "self help and mutual aid"*

The degree of the United States' involvement in collective security treaties after World War II was based on provisions found in Senate Resolution 239, adopted on June 11, 1948.<sup>103</sup> The Resolution was of a noncommittal nature and provided in part for:

Progressive development of regional and other collective arrangements for individual and collective self-defense in accordance with the purposes, principles and provisions of the Charter [of the United Nations].

Association of the United States with such regional and other collective arrangements as are based on self-help and mutual aid, and affect its national security.<sup>104</sup>

As a consequence of this Resolution, the concept of "self-help and mutual aid" was incorporated into all United States collective security treaties concluded after 1948, including Article II of the ANZUS Treaty between Australia, New Zealand and the United States.

Article II of the ANZUS Treaty states "[i]n order more effectively to achieve the objective of this Treaty the parties separately and jointly by means of continuous and effective self-help and mutual aid will maintain and develop their individual and collective capacity to resist armed attack."<sup>105</sup>

---

101. See, e.g., North Atlantic Treaty, *supra* note 30, at arts. 3 and 5.

102. See *supra* notes 55-75 and accompanying text.

103. GRENVILLE, *supra* note 2, at 306.

104. See *supra* note 3.

105. ANZUS Treaty, *supra* note 30, at art. II. For articles similar in nature to Article II of the ANZUS Treaty, see U.S.-Japan Security Treaty, *supra* note 30, at art. III; SEATO Treaty, *supra* note 30, at art. II; Mutual Defense Treaty between the United States and Korea (South), Oct. 10, 1953, United States-Korea, art. II, 5 U.S.T. 2368, T.I.A.S. No. 3097 [herein-

Looking at the language of this Article, its importance lies in three phrases. First, the phrase beginning with "will maintain and develop," is a phrase indicating an obligation to take action. It is a phrase of certainty as "will" is a word of mandatory nature.<sup>106</sup> "Maintain" necessarily involves a certain degree of positive action to keep things in existence or continuance.<sup>107</sup> While "develop" can possibly denote simply bringing something into existence, its placement here after the word "maintain" joined by the conjunctive "and" indicates that in this sense "develop" takes things beyond "maintain" and toward a more advanced or effective state.<sup>108</sup> Under this language, then, the parties would be obligated to take a minimum of positive action.

The rest of the phrase beginning with "will maintain and develop" defines the desired effect of the parties' positive action. The effect of their action is to be on "their individual and collective capacity to resist armed attack." This may be indicative of the parties' recognition of their right to take preparatory action pursuant to their right to self-defense under the Charter of the United Nations.<sup>109</sup> The use of "individual and collective" simply indicates that the obligation to take action is mutual to the parties.<sup>110</sup> "Capacity" indicates that the effect of the parties' action is to develop an ability to do something. Although no degree of ability is prescribed,<sup>111</sup> the "capacity to resist" means, at least, the development of an ability, to a degree, to withstand the effect of an armed attack.<sup>112</sup> The nebulous character of this standard makes a determination of the rights, duties and powers intended to be conferred on the parties by Article II difficult, if not impossible to ascertain.

For the purpose of determining the extent of the parties' powers to dictate movements of military forces, the second key phrase of

after cited as U.S.-Korea Treaty]; North Atlantic Treaty, *supra* note 30 at art. III.

106. "Will, v. An auxiliary verb commonly having the mandatory sense of 'shall' or 'must.'" It is a "word of certainty." BLACK'S LAW DICTIONARY 1433 (5th ed. 1979).

107. See 4 CENTURY DICTIONARY 3584 (1889); VI OXFORD ENGLISH DICTIONARY 52 (1933); II WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1362 (1966).

108. A definition of "develop" is "to bring into being," but the use in Article II of "maintain" presupposes the existence of something. The conjunctive "and" indicates that "develop" is to be with or in addition to "maintenance." It would be contradictory to state that parties agree to "keep in existence" and in addition "to bring into existence," for the first presupposes the second and so the second becomes surplusage. Since language is to be given effect rather than be destroyed, the use of the word "develop" must indicate an intent to take action toward a higher level of existence. See 2 CENTURY DICTIONARY 1577 (1889); III OXFORD ENGLISH DICTIONARY 280 (1933); I WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 330 (1966).

109. See *supra* notes 27-29 and accompanying text.

110. STARKE, *supra* note 44, at 102-03.

111. See 1 CENTURY DICTIONARY 802 (1889); II OXFORD ENGLISH DICTIONARY 89 (1933); I WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1932 (1966).

112. See 5 CENTURY DICTIONARY 5104 (1889); VIII OXFORD ENGLISH DICTIONARY 523 (1933); II WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1932 (1966).



Article II says "by means of continuous and effective self-help and mutual aid." This is clearly an incorporation of the Vandenburg Resolution of 1948, Senate Resolution 239.<sup>113</sup> Even though it precedes the "maintain and develop" phrase, the Vandenburg phrase is subordinate and defines the manner in which the action referred to in the "maintain and develop" clause will be fulfilled.<sup>114</sup> This is the means. "Self-help and mutual aid" recognizes that the obligations under these treaties do not rest solely on the United States. Again, the words "continuous and effective" connote a positive qualification of the aid to be given — it should both go on continually and be of a nature to produce the desired result,<sup>115</sup> i.e., the capacity to resist armed attack.

The importance of analyzing this language is to show its lack of specificity. The obligations under this article are not reducible to specific terms. No party is bound to make any specific contribution to the defense capacity of any other party. There is no specific obligation as to the nature or extent of assistance to be furnished.<sup>116</sup>

The final key phrase of Article II, although last in the analysis of defining the action to be taken, is foremost in defining the intention of the parties. It is the first phrase of Article II and serves to qualify the purpose of the article. This phrase is not common to all United States collective security agreements and it gains its importance through this uniqueness. The phrase states: "in order more effectively to achieve the objective of this Treaty . . . ." This indicates the relation of the article to the objective of the Treaty.

Remembering that parties to a treaty are free to use language however they wish,<sup>117</sup> the qualification of the infinitive "to achieve" stands out.<sup>118</sup> "In order to achieve" would reasonably be the phrasing used to indicate that which is integral to achieve the objective of the Treaty;<sup>119</sup> it is unqualified and absolute. "In order effectively to achieve" qualifies the infinitive "to achieve" to a degree which indicates that achievement is possible through other means, but that this means is an effective one. Then, to say "in order more effectively to

---

113. See *supra* text accompanying note 104.

114. This assumes that absent the "maintain and develop" clause there would be only two interpretations of the manner in which Article II could be carried out. First, it could not be carried out. Action could not exist without a means. Second, it could be carried out by any manner agreed upon in good faith between the parties.

115. See 2 CENTURY DICTIONARY 1229, 1848 (1889); II OXFORD ENGLISH DICTIONARY 910 (1933); III OXFORD ENGLISH DICTIONARY 48 (1933); I WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 494, 724 (1966).

116. STARK, *supra* note 44, at 103.

117. See *supra* notes 59-60 and accompanying text.

118. This is so because the term "to achieve" is not consistently qualified throughout the history of United States collective security agreements. See *infra* notes 120-27 and accompanying text.

119. "In order to" indicates "for the purpose of." See VII OXFORD ENGLISH DICTIONARY 183 (1933); II WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1588 (1966).

achieve" qualifies the already qualified "effectively to achieve" indicating that not only is achievement possible through other means but also through other effective means, relegating the means expressed in the article as simply one among many "effective means" of achieving the objective of the Treaty.

To understand fully the importance of the qualification of the infinitive "to achieve" in determining the scope of the parties intention, it is necessary to compare the ANZUS Treaty with two other treaties. Article III of the U.S.-Japan Security Treaty states "[t]he Parties, individually and in cooperation with each other, by means of continuous and effective self-help and mutual aid will maintain and develop, subject to their constitutional provisions, their capacities to resist armed attack."<sup>120</sup> Article II of the U.S.-Korea Treaty states "separately and jointly, by self-help and mutual aid, the parties will maintain and develop appropriate means to deter armed attack."<sup>121</sup> There was no qualification of the purpose of these clauses. There was not even an explanation of the purpose; the clauses in the U.S.-Japan and U.S.-Korea Treaties were straightforward and mandatory.

Both the U.S.-Japan Security Treaty and the U.S.-Korea Treaty contain another provision which differentiates them from the usual collective security treaties entered into by the United States. This provision grants the United States the right to move its military forces in and about Japan and Korea.<sup>122</sup> Japan granted the United States "the use by its land, air and naval of facilities and areas in Japan."<sup>123</sup> Korea granted the United States the "right to dispose United States land, air and sea forces in and about the Territory of the Republic of Korea as determined by mutual agreement."<sup>124</sup>

By way of comparison, the North Atlantic Treaty does not expressly grant to any state the right to use military facilities. Instead, it says specifically that the development of collective defense capacities through self-help and mutual aid is only "[i]n order more effectively to achieve the objectives of [the] Treaty."<sup>125</sup> The SEATO Treaty<sup>126</sup> and ANZUS Treaty<sup>127</sup> are of a similar nature. They do not grant the use of military facilities and they qualify the purpose of "self-help and mutual aid."

---

120. U.S.-Japan Security Treaty, *supra* note 30, at art. III.

121. U.S.-Korea Treaty, *supra* note 105, at art. II.

122. One explanation for Japan's actions is that the Japanese government renounced war as a sovereign right of their nation and also the threat of use of force as a means for settling disputes. Japan's Constitution declares that "land, sea, and air forces, as well as other war potential, will never be maintained." KENPO (Constitution) art. IX (Japan).

123. U.S.-Japan Security Treaty, *supra* note 30, at art. VI.

124. U.S.-Korea Treaty, *supra* note 105, at art. IV.

125. North Atlantic Treaty, *supra* note 30, at art. III (1st clause).

126. SEATO Treaty, *supra* note 30, at art. II.

127. ANZUS Treaty, *supra* note 30, at art. II; see *supra* notes 116-18 and accompanying text.

To reconcile these inconsistent developments in the United States collective security treaties it is necessary to utilize a five step analysis. First, assuming that the use of military facilities aids in developing the capacity to resist armed attack, the act of granting the right to use military facilities may be included as part of the concept of "self-help and mutual aid." Second, to qualify the existence of "self-help and mutual aid" while granting an unqualified use of military facilities would be a contradiction. Third, an unqualified grant of the right to use military facilities defines that use as integral to the achievement of the objective of the treaty, in the minds of the parties. Fourth, where the grant of the right to use military facilities is unqualified, the existence of "self-help and mutual aid" must be unqualified. Last, then, where "self-help and mutual aid" is qualified, the right to use military facilities cannot be integral to the achievement of the objectives of the treaty but must be considered as only one possible means toward that end.

It may be argued that denying the use of military facilities by allies would be contrary to the essential purpose of collective security treaties. In this respect it must be remembered that the purpose of collective security treaties is the maintenance of international peace and security, not the establishment of military alliances.<sup>128</sup> The role of the military in achieving that objective can clearly be expressed through the use of appropriate language in the treaty. To assume that the use of the military is the only means by which international peace and security may be achieved is naive.

From the above analysis it is evident that the language of the ANZUS Treaty is not specific in the obligations it creates. At a minimum it requires that the parties take action the specifics of which are not defined. Allowing free movement of military forces may conceivably be a part of the "self-help and mutual aid" clause, but it does not rise to the level of an "obligation." According to the plain meaning of the text of the Treaty, permitting the free movement of military forces is merely one possible means toward achieving peace and security.

### *C. Beyond the Plain Meaning — Implementing the Treaty*

A textual analysis of the ANZUS Treaty reveals that the three parties agreed to take action for the purpose of maintaining peace and security in the Pacific area. But the specifics of that action were not defined. It therefore becomes necessary to look beyond the language of the Treaty to determine what the parties intended.<sup>129</sup> This

---

128. See *supra* text accompanying note 30. The military alliance seeks coordination of military efforts between nations.

129. See *supra* notes 77-100 and accompanying text. The process of looking beyond the

analysis involves two steps: first, a look at the subsequent conduct of the three parties as evidenced by the meetings of the ANZUS Council and subsequent agreements entered into by the parties in reference to the ANZUS Treaty, and second, a study of the documentation surrounding the conclusion of the Treaty.

1. *Subsequent Conduct.*—In analyzing the subsequent conduct it is necessary to look closely at the meetings of the ANZUS Council and subsequent agreements between the parties.

(a) *The ANZUS Council.*—The council established under the ANZUS Treaty was consultative in nature.<sup>130</sup> The Treaty states that the Council was “to consider matters concerning the implementation of [the] Treaty.”<sup>131</sup> “To consider” implies “to examine” or “to inspect” but not “to decide.” Therefore, the Council meetings were not formal conferences but a medium for informal discussions between the parties.<sup>132</sup> It is difficult from the Council meeting documents to determine with specificity the intentions of the parties concerning the movement of military forces. Records and other formal documents of the meetings were kept to a minimum.<sup>133</sup>

It is clear, though, that the intention of the parties involved a role for the military in implementing the Treaty. The Council regularly received advice from high-level military representatives from each of the three countries.<sup>134</sup> There is also documentation to the effect that the Council considered it an overall objective of the parties to strengthen their relationship at both the political and military levels.<sup>135</sup>

The parties' relationship was not always a strong one, however.<sup>136</sup> In 1976 United States nuclear-powered vessels were allowed to dock in Australia for the first time in four years, and in New

---

plain meaning of the text aids in the analysis of the text; it does not replace the text.

130. See *supra* note 38.

131. ANZUS Treaty, *supra* note 30, at art. VII; see also SEATO Treaty, *supra* note 30 at art. V (establishing the SEATO Council); North Atlantic Treaty, *supra* note 30 at art. 9 (establishing the North Atlantic Treaty Organization Council).

132. STARKE, *supra* note 44, at 165.

133. *Id.* at 163, 167. The communiqués are published in various issues of DEP'T ST. BULL.

134. *Council of ANZUS Communique*, 27 DEP'T ST. BULL. 244, 245 (1952); see STARKE, *supra* note 44, at 163.

135. *ANZUS Council Discusses Security Problems of Pacific Area*, 29 DEP'T ST. BULL. 414, 415 (1953).

136. Protest over United States military presence traces back to 1961. In that year there was a large demonstration at the United States consulate in Australia protesting the possible establishment of a Polaris missile submarine base in Western Australia. N.Y. Times, May 4, 1961, at A14, col. 8. In 1971 the United States found it necessary to open one of its classified atmospheric observation stations to newsmen and student representatives in order to quell the belief that the site's function was related to a worldwide American system for waging nuclear war. N.Y. Times, Feb. 1, 1971, at A2, col. 4.

Zealand for the first time in ten years.<sup>137</sup> In responding to these problems, the ANZUS Council's reference to port calls may be summarized by the word "cooperation." The Council members "expressed satisfaction at the degree of cooperation which existed between their armed forces."<sup>138</sup> In addition, it was agreed that the resumption of port calls was a "natural part of the *cooperation* under the ANZUS Treaty."<sup>139</sup>

The key word there is "cooperation." To state that one is *obligated* to *cooperate* would be a contradiction of terms. Cooperation entails a willingness; obligation entails a duty. A duty to be willing cannot be. Therefore, the language of the above-quoted communique is evidence that permitting the movement of military forces cannot be an obligation under the ANZUS Treaty in the minds of the parties.

(b) *Subsequent Agreements.*—The second facet of the analysis of subsequent conduct involves a study of subsequent agreements. To the extent an agreement was concluded in reference to a treaty, it may aid in determining the parties' intentions.<sup>140</sup> Very few subsequent agreements, however, were concluded between the parties as a means of implementing the terms of the ANZUS Treaty.

While the terms of ANZUS were only infrequently implemented through subsequent agreements, the SEATO Treaty has, to date, resulted in no such implementation by subsequent agreement. The North Atlantic Treaty, on the other hand, has involved extensive implementation. Specific agreements have been entered into, pursuant to Article 3<sup>141</sup> of the North Atlantic Treaty, however, concerning the stationing of forces within countries,<sup>142</sup> the use of military facilities,<sup>143</sup> and the status of forces.<sup>144</sup> These agreements were

137. See N.Y. Times, Aug. 30, 1976, at A3, col. 1; N.Y. Times, Aug. 15, 1976, at A5, col. 1. The Labor parties in power for those four and ten-year periods, respectively, had instituted bans against nuclear ships.

138. *Communique - 25th ANZUS*, 75 DEP'T ST. BULL. 289, 290 (1976).

139. *Id.* at 291 (emphasis supplied).

140. See *supra* notes 77-81 and accompanying text. This represents objective evidence as to the intention of the parties under the language of the treaty. For subsequent agreements under the ANZUS Treaty, see e.g., Naval Communications Station, May 9, 1963, United States-Australia, 14 U.S.T. 908, T.I.A.S. No. 5377; Status of Forces, May 9, 1963 United States-Australia, 14 U.S.T. 506, T.I.A.S. No. 5349; Loan of Vessel, June 8, 1962, United States-New Zealand, 13 U.S.T. 1273, T.I.A.S. No. 5075; Mutual Defense Assistance, June 19, 1952, United States-New Zealand, 3 U.S.T. 4408, T.I.A.S. No. 2509.

141. "In order more effectively to achieve the objectives of this Treaty, the Parties, separately and jointly, by means of continuous and effective self-help and mutual aid, will maintain and develop their individual and collective capacity to resist armed attack." North Atlantic Treaty, *supra* note 30, at art. 3.

142. See, e.g., Stationing of United States Armed Forces in the Netherlands, Aug. 13, 1954, United States-Netherlands, 6 U.S.T. 103, T.I.A.S. No. 3174; Defense of Iceland Pursuant to North Atlantic Treaty, May 5, 1951, United States-Iceland, 2 U.S.T. 1195, T.I.A.S. No. 2266.

143. See, e.g., Agreement Between the United States of America and the Kingdom of

concluded with regard to the parties' responsibilities to develop their collective capacity to resist armed attack.<sup>145</sup>

Given that Article 3 of the North Atlantic Treaty is virtually identical to Article II of the ANZUS Treaty,<sup>146</sup> two conclusions may be drawn. First, the movement of military forces under the ANZUS Treaty could be identical to that defined under the North Atlantic Treaty since virtually identical language is used. Alternatively, military movement under the ANZUS Treaty could be interpreted to not be identical to that defined under the North Atlantic Treaty because of the distinct lack of similar subsequent agreements.

The next step in looking beyond the plain meaning to analyze the intentions of the parties to a treaty is the study of the information surrounding the implementation of the treaty.

*2. Information Surrounding the Implementation of the Treaty.*—The overriding concern of the members of the New Zealand Parliament after the signing of the ANZUS Treaty was the possibility of resurgent Japanese militarism.<sup>147</sup> The Treaty was viewed as both offsetting the risk of rearming Japan and as an inducement to those factions that had previously objected to agree to the Japanese Peace Treaty. It was felt also by the members of the New Zealand government that the Treaty would not materially affect, positively or negatively, the status quo in the Pacific.<sup>148</sup>

The record of the New Zealand Parliamentary debates indicates

Greece Concerning Military Facilities, Oct. 12, 1953, United States-Greece, 4 U.S.T. 2189, T.I.A.S. 2868; Defense of Iceland Pursuant to North Atlantic Treaty, *supra* note 142.

144. See, e.g., Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. 2846; 199 U.N.T.S. 67.

145. See *id.* at preamble para. 10.

146. The only difference in the language is that the ANZUS Treaty says "objective" while the North Atlantic Treaty says "objectives."

147. See 297 N.Z. PARL. DEB. (2d ses.) 424 (1952); 295 N.Z. PARL. DEB. (1st ses.) 6, 193-99, 205, 210, 241, 258, 275, 280, 287-88, 339, 349, 463 (1951). See also *supra* notes 46-48 and accompanying text.

148. A member of the New Zealand Parliament stated on October 10, 1951:

It is beyond the wildest hopes that at the present time in the Pacific we could institute a general pact of any real value, but by this small treaty between the three countries directly involved we have had guaranteed by America — the greatest military power on earth today — the safety of our back door. . . .

I believe that the Tripartite Pact [ANZUS Treaty] amply justifies the decision of this Government to take the risk of joining in giving Japan once more her freedom.

295 N.Z. PARL. DEB. (1st ses.) 258 (1951).

On October 9, 1951 Sir Walter Nash, then leader of the opposition Labour Party in New Zealand, stated "[o]n the evidence [the Treaty] does not mean much. It has not the same bite in its clauses as have the clauses in the North Atlantic Treaty." *Id.* at 205. One member of the New Zealand Parliament, added "I think the Tripartite Pact [ANZUS Treaty] is largely a sop given by America to Australia and New Zealand as an additional inducement to sign the peace treaty as it exists. The treaty places no restrictions whatever on Japan, militarily, industrially, or commercially, and it provides no reparations." *Id.* at 210. Another representative, stated "I myself cannot really believe that a treaty between Australia, New Zealand, and America could be superior to the policy of the United Nations . . . ." *Id.* at 241.

that the Parliament believed the ANZUS Treaty was intended as a mutual pledge to render assistance "in event of attack."<sup>149</sup> The Parliament recognized that the Treaty "obligated [the Parties] to do certain things" but did not "obligate [the parties] to use force, as is the case under the North Atlantic Treaty."<sup>150</sup> It was argued that it would not be good to place a heavy emphasis on military means of achieving security.<sup>151</sup> The New Zealand Parliament was hesitant about entering into a close alliance with the United States, fearing that it would diminish New Zealand's relationship with Great Britain.<sup>152</sup> As a result of the above-stated considerations, the ANZUS Treaty was clearly not intended to be as entangling as the North Atlantic Treaty.

#### V. Conclusion<sup>153</sup>

In the final analysis, George Washington's warning that "there can be no greater error than to expect, or calculate upon real favours from Nation to Nation" bears significant relevance to twentieth century collective security treaties. The parties' actions under the collective security relationship are defined not by "favours" expected by one party or granted by another but by the intention of the parties as expressed through the language of the treaty.

149. *Id.* at 7, 195, 241.

150. *Id.* at 205.

151. On October 16, 1951, one member of the New Zealand parliament stated:

It is psychologically a bad moment to put the accent on military means of achieving security in the Pacific. Such emphasis tends to make us think of East Asia as a territory in which it may be necessary for Western soldiers to fight, instead of as a home of new nations with whom it is certainly necessary for us to learn to live.

295 N.Z. PARL. DEB. (1st ses.) 339 (1951).

152. *Id.* at 205, 280, 287-88. *But cf.* 297 N.Z. PARL. DEB. (2d ses.) 3 (1952) (the Treaty will reinforce New Zealand's ability to pursue the well being of the British Commonwealth); 295 N.Z. PARL. DEB. (1st ses.) 7 (1951) (Treaty considered important advance for the partner nations of the British Commonwealth).

153. Since the writing of this comment New Zealand Prime Minister David Lange formally signaled that his country would break away from the ANZUS alliance if that treaty were interpreted to require the presence of nuclear weapons in New Zealand. On September 27, 1985 in a major foreign policy speech to the ruling Labor Party's regional council in Christchurch, Lange stated:

If the ANZUS Treaty requires us to accept nuclear weapons, then it is the treaty which is an obstacle to the maintenance of good relations between New Zealand and the United States.

If the ANZUS alliance is merely a nuclear deterrent and New Zealand's contribution to ANZUS in the form of the presence of nuclear weapons is the price we pay for that deterrent, then the price is too high.

Wash. Post, Sept. 28, 1985, at A16, col. 1.

One attempt at a solution to the port access dispute had already fallen through. The New Zealand government had made a proposal to the United States which would have given Prime Minister Lange the authority to determine whether a visiting ship was nuclear-armed or powered without the need to ask for United States clarification. The United States rejected this proposal and stated that it would review New Zealand's status as an ally if the antinuclear policy was codified into law. *Id.*

As evidenced by this analysis of the ANZUS Treaty and the comparison of the ANZUS Treaty with other major security agreements, the ability of allies to place limits on the movements of United States military forces is defined more by subsequent agreements to the collective security treaties than by the language of the treaties themselves.

The text of the average collective security treaty places no specific obligations on any party absent specific language. As in the cases of Korea and Japan, collective security treaties will not entail a right to the movement of military forces within an ally's territory unless such a right is expressly granted. In all other cases an ally may limit the movements of military forces because they are only one means of achieving the peace and security for which collective security treaties strive.

Accordingly, where there is no specific grant of the right to move military forces within an ally's territory, subsequent agreements, if any, determine that ability. It was at this level of interpretation that the ANZUS Treaty was distinguished from treaties permitting unlimited movement of military forces. Unlike the North Atlantic Treaty, which was supplemented by subsequent agreements granting the United States the right to move military forces within allies' territory, the scope of the ANZUS Treaty was not expanded by analogous subsequent agreements. This absence of supplemental agreements providing for unlimited troop movement evidences a lack of intention on the part of the ANZUS parties to obligate one another to use their military forces. The ability of the United States to move its military within an ally's territory is not prohibited. The Treaty simply does not establish the freedom to move forces into an ally's territory as a specific right.

New Zealand does have the power, under the ANZUS relationship, to deny port access to United States Navy ships. That power exists because the ANZUS Treaty places no specific obligations on the parties. It only obligates them to take some action. The lack of specificity in the language of the Treaty together with the lack of a more specific definition of the parties' obligations by subsequent agreement leads to the conclusion that the parties intended a lack of specificity. While the use of the military action in the North Atlantic areas has been made an integral aspect of the North Atlantic relationship, the United States' use of New Zealand ports was calculated "upon real favours" from New Zealand. "[N]o greater error" indeed.

*Ricky K. Jones*



