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# THE NORTH ATLANTIC TREATY AND ITS RELATIONSHIP TO OTHER “ENGAGEMENTS” OF ITS PARTIES— A COMMENTARY ON ARTICLE 8

*Károly Végh\**

## Article 8

Each Party declares that none of the international engagements now in force between it and any other of the Parties or any third State is in conflict with the provisions of this Treaty, and undertakes not to enter into any international engagement in conflict with this Treaty.<sup>1</sup>

## INTRODUCTION

With a purpose seemingly distinct from that of the core Articles on collective defence and security cooperation, Article 8 is one of the more rarely referenced provisions of the North Atlantic Treaty.<sup>2</sup> Article 8—in short terms—regulates the relationship between the obligations of the Parties under the Treaty and other obligations of the Allied Nations.<sup>3</sup> Though the Article is a concise, two-part sentence, its exact role and importance is often under-appreciated within the system of the North Atlantic Treaty. While it might be assessed as a standard “treaty conflict” clause, its wording stipulates far wider obligations for the Allies.

This Article briefly discusses the historical background and explores the many layers of this provision, while highlighting its relevance in the current function of the North Atlantic Treaty Organization (NATO). The article places the provision in a 21st century legal and political context, offering an assessment on the legal and other implications Article 8 may have on the Allies’ commitments towards each other, seventy years later.

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<sup>1</sup> North Atlantic Treaty art. 8, Apr. 4, 1949, 63 Stat. 2241, U.N.T.S. 243.

<sup>2</sup> *See id.*

<sup>3</sup> *Id.*

## I. HISTORICAL BACKGROUND

### A. *The Birth of Article 8—A Short Overview*

Though a comprehensive description of the negotiating history of the Treaty is beyond the scope of this article, it is noted here that the draft Articles in the Annex to the “Memorandum by the Participants in the Washington Security Talks, July 6 to September 9, submitted to Their Respective Governments for Study and Comment,” the so-called “Washington Paper” did not envisage the current text of Article 8.<sup>4</sup> Hence, it is logical to conclude that Article 8 was incorporated into the text during the final phase of the formal negotiations on the Treaty.

As an outcome of the “Exploratory Talks,” an International Working Group (IWG) was set up to study, negotiate, and finalize the draft in the Washington Paper.<sup>5</sup> The IWG submitted its Report to the “Ambassadors’ Committee” on December 24, 1948 with four Annexes, including Annex A with the revised draft Treaty text and Annex B summarizing some preliminary comments to each of the provisions.<sup>6</sup> Article 7 of the draft Treaty in Annex A already contained provisions on conflicting obligations, using almost identical terms as the first part of the final Article 8.<sup>7</sup> Indeed, the first appearance of the text only referred to the declaration of the Parties on their existing “engagements.”<sup>8</sup> The commentary in Annex B note that it was the United Kingdom representative who proposed the inclusion of this Article, together with a sentence obliging member States not to “conclude any alliance or participate in any coalition directed against any other of the Parties . . . .”<sup>9</sup>

A telegram from the British Secretary of State for Foreign Affairs, Mr. Ernest Bevin, to the Ambassador of the U.K. to the U.S. dated November 29, 1948 demonstrates that it was indeed the explicit requirement of His Majesty’s

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<sup>4</sup> See Memorandum by Participants in the Washington Security Talks, July 6 to September 9, Submitted to Their Respective Governments for Study and Comment, in FOREIGN RELATIONS OF THE UNITED STATES, 1948, WESTERN EUROPE, III, 237–42 (1975) [hereinafter FOREIGN RELATIONS].

<sup>5</sup> See LAWRENCE S. KAPLAN, NATO 1948: THE BIRTH OF THE TRANSATLANTIC ALLIANCE, 105–38 (2007); Minutes of the Ninth Meeting of the Washington Exploratory Talks on Security, December 13, 1948, 2:30 p. m., in FOREIGN RELATIONS *supra* note 5, at 315–16. The negotiations leading to the finalization of the North Atlantic Treaty are referred to as “Exploratory Talks” the available historical documents. *Id.*

<sup>6</sup> See Report of the Int’l Working Group to the Ambassadors’ Committee, in FOREIGN RELATIONS *supra* note 5, at 333–34.

<sup>7</sup> See *id.* at Annex A; North Atlantic Treaty, *supra* note 1, art. 8.

<sup>8</sup> Report of the Int’l Working Group to the Ambassadors’ Committee *supra* note 6 at Annex A, art. 7.

<sup>9</sup> *Id.* at Annex B, art. 7.

Government to include an article on avoiding the possibility of conflicts between the North Atlantic Pact and other engagements, including the Dunkirk and Brussels Treaties and also the Anglo-Soviet and Franco-Soviet Treaties from World War II.<sup>10</sup> Interestingly, though, the British proposal consisted of both the declaration on existing obligations and the undertaking for the future; the latter part was considered as having less importance, only being recommended for inclusion.<sup>11</sup> As the draft in Annex A referred to above shows, the latter sentence was not accepted at this stage.<sup>12</sup>

Discussions on the then Article 7, later Article 8 of the Treaty rarely appear in the minutes of the final negotiations. Close to the final discussions, the minutes of a meeting on March 15, 1949 briefly refer to the then Article 8, summarizing its intended meaning as follows, “with reference to Article 8, it is understood that no previous international engagements to which any of the participating states are parties would in any way interfere with the carrying out of their obligations under this Treaty.”<sup>13</sup>

This gives the impression that Article 8 at that time consisted only of a declaration on existing commitments, without referring to future engagements. However, there was a significant, though less exposed discussion in the background on one separate issue; there were proposals for a provision on expulsion from the Alliance if a member State would change its political direction in contravention to the scope of the Pact.<sup>14</sup> During the final phase of the negotiations, as none of the other Parties supported the proposal, the U.S. State Department proposed the inclusion of the previously rejected second sentence to Article 7—introduced by the U.K.—with some amendments, to serve as a substitute for the original draft expulsion clause.<sup>15</sup> Though it was understood that the clause on future undertakings not to establish conflicting engagements would not *per se* mean automatic expulsion, it is nevertheless

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<sup>10</sup> Telegram from Mr. Bevin to Sir O. Franks (Washington), 29 November 1948, in DOCUMENTS ON BRITISH POLICY OVERSEAS, SERIES I, VOL. X, THE BRUSSELS AND NORTH ATLANTIC TREATIES 1947–1949, 290 (Tony Insall & Patrick Salmon eds., 2015) [hereinafter BRITISH POLICY OVERSEAS].

<sup>11</sup> *Id.*

<sup>12</sup> See Report of the Int’l Working Group to the Ambassadors’ Committee *supra* note 6, at Annex A.

<sup>13</sup> See Minutes of the Eighteenth Meeting of the Washington Exploratory Talks on Security, March 15, 1949, in FOREIGN RELATIONS OF THE UNITED STATES, 1949, WESTERN EUROPE, IV, 222–23 (1975) [hereinafter FOREIGN RELATIONS, IV].

<sup>14</sup> Telegram from Mr. Bevin to Sir O. Franks (Washington), 12 January 1949, 4 p.m., in BRITISH POLICY OVERSEAS *supra* note 10, at 335.

<sup>15</sup> See Foreign Office Brief for the Fourth Meeting of the Consultative Council of the Brussels Treaty Powers, 27 January 1949, in BRITISH POLICY OVERSEAS *supra* note 10, at 360; Letter from Mr. Henderson (Washington) to Mr. Russell, 2 February 1949, in BRITISH POLICY OVERSEAS *supra* note 10, at 367–68.

remarkable that such a potential scope was associated with this additional provision.<sup>16</sup>

Thus, as no other Party objected this late addition of text, when the U.S. Department of State released the finalized draft Treaty on March 18, 1949, Article 8 already contained the final wording of the North Atlantic Treaty.<sup>17</sup>

If any conclusion can be drawn from the above, it is undeniable that as several other provisions of the Treaty, Article 8 was subject to modifications and development until the last weeks before the signature.

### *B. Historical Predecessors—Treaties that Influenced Article 8*

Both the Annex to the Washington Paper on the framework of the future Pact, and the historical documents of the Exploratory Talks demonstrate the North Atlantic Treaty was largely based upon the 1948 Brussels Treaty and the 1947 Rio Pact.<sup>18</sup>

A brief comparison of Article 8 of the Treaty with Article VI of the 1948 Brussels Treaty reveals two key similarities; a declaration on compliance and a commitment not to enter into conflicting alliances. Article 8 consists of one sentence; Article VI divides the provision into two. The first parts of both texts are largely identical, apart from minor wording variations.<sup>19</sup>

The second part of the provision in Article 8, obliging members to refrain from entering into other international engagements in conflict with the Treaty, is a diversion from the text of the Brussels Treaty.<sup>20</sup> Article VI of the Brussels Treaty expressly refers to restraining its Parties to “conclude any alliance or participate in any coalition” against the others, while Article 8 is rather vague in its determination on “international engagements.”<sup>21</sup> Looking at the 1947 Treaty

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<sup>16</sup> See *id.*

<sup>17</sup> See NORTH ATLANTIC TREATY PROPOSED FOR SIGNATURE DURING FIRST WEEK IN APRIL 1949, DEPARTMENT OF STATE BULLETIN, Vol. XX (1949), [https://archive.org/details/departmentofstat201949unit\\_0/page/340](https://archive.org/details/departmentofstat201949unit_0/page/340).

<sup>18</sup> See Treaty of Economic, Social and Cultural Collaboration and Collective Self-Defence, Mar. 17, 1948, 19 U.N.T.S. 51 [hereinafter Brussels Treaty]; Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1942 [hereinafter Rio Pact]. Cf. Charles G. Fenwick, *The Atlantic Pact*, 43 AM. J. INT'L L. 312–16 (1949).

<sup>19</sup> See North Atlantic Treaty, *supra* note 1; Brussels Treaty, *supra* note 18.

<sup>20</sup> See North Atlantic Treaty, *supra* note 1; Brussels Treaty, *supra* note 18, art. VI.

<sup>21</sup> See *id.* Article VI reads, “The High Contracting Parties declare, each so far as he is concerned, that none of the international engagements now in force between him and any other of the High Contracting Parties or any third State is in conflict with the provisions of the present Treaty. None of the High Contracting Parties will conclude any alliance or participate in any coalition directed against any other of the High Contracting

of Dunkirk, concluded between France and the U.K., which arguably influenced several provisions of the Brussels Treaty, the concise structure of the provision and linking of the declaration to a future undertaking are mirrored in Article 8.<sup>22</sup> In particular, comparing the second part of Article 8 of the North Atlantic Treaty with paragraph (2) of Article V of the Dunkirk Treaty, the textual resemblance becomes more apparent, though the provisions are not identical.<sup>23</sup>

Whilst no direct reference seems obvious, it is notable that Article 20 of the Covenant of the League of Nations also contains a clause on conflicting commitments.<sup>24</sup> Moreover, in Article 20 of the Covenant the state Parties, “solemnly undertake that they will not hereafter *enter into any engagements inconsistent with the terms . . . [of the Covenant].*”<sup>25</sup>

In sum, one may well conclude that the inclusion of Article 8 into the draft North Atlantic Pact, as finally proposed by the U.K., was based primarily upon Western European traditions in concluding alliances and agreements on mutual assistance.

## II. COMMENTARY

Based on this historical context of the provision, let us turn now to its textual analysis, disassembling Article 8 into its constituent elements.

The two statements in Article 8 together have four core elements: (1) a declaration on the existing commitments of the Parties, and an undertaking in relation to; (2) engagements towards; (3) other Parties or to third states which shall not be; (4) in conflict with this Treaty.<sup>26</sup>

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Parties.” Brussels Treaty, *supra* note 18, art. VI.

<sup>22</sup> Treaty of Alliance and Mutual Assistance between the United Kingdom and France (Dunkirk, 4 March 1947), 9 U.N.T.S. 187 [hereinafter Dunkirk Treaty]; see John Baylis, *Britain and the Dunkirk Treaty: The Origins of NATO*, 5 J. OF STRATEGIC STUD. 236–47 (1982). See also John Baylis, *Britain, the Brussels Pact and the Continental Commitment*, 60 INT’L AFF., 615–29 (1984).

<sup>23</sup> See North Atlantic Treaty, *supra* note 1, art. 8; Dunkirk Treaty, *supra* note 22, art. V(2). Paragraph (2) of Article V of the Dunkirk Treaty reads, “Neither of the High Contracting Parties will conclude any alliance or take part in any coalition directed against the other High Contracting Party; nor will they enter into any obligation inconsistent with the provisions of the present Treaty.” *Id.*

<sup>24</sup> See League of Nations art. 20.

<sup>25</sup> *Id.* (emphasis added).

<sup>26</sup> See Treaty, *supra* note 1, art. 8.

### A. *A Declaration on Existing Commitments*

The first part of Article 8 reads as a solemn declaration by each Party on the compatibility of their existing international engagements with the provisions of the Treaty. The exact role and legal effect of this statement is, however, obscured within the context of the complete Treaty, and there are diverging opinions on its function. Hans Kelsen in his seminal book on the principles of international law, summarizes his assessment as follows, “If the declaration is true, it is superfluous; if it is not true, it has no legal effect.”<sup>27</sup>

Whether it is indeed superfluous, will be discussed below, but let us first analyze its legal effects, or the lack thereof. In 1952, Kelsen argued that such a declaration lacks any legal effect under international law.<sup>28</sup> Whilst the provision is formulated in the form of a declaration, it shall be clearly distinguished from unilateral declarations of states which may have legal effects under international law.<sup>29</sup> The crucial difference here is that unilateral declarations of states manifest the recognition or interpretation of a legal obligation and the will to be bound; while the present statement refers to facts, it is a statement on existing facts without inferring further obligations. Hence, as Kelsen notes, even if the statements are incorrect as a matter of fact, as no further legal obligations stem from them, the declaring states bear no legal responsibility under international law for their mere truthfulness.<sup>30</sup>

The declaration has nevertheless a definite temporal aspect with respect to the state of facts. Obviously, the statement is only made once, when the declaring state becomes a Party to the Treaty. This is underpinned by the second part of the provision which is forward-looking at possible future engagements of that State Party—being already a member.

Therefore, the declaration in Article 8 is rather a reminder for any state becoming a member to the Treaty. Any state aspiring for membership shall revise its existing commitments and ensure that those are not in conflict with the Treaty at the time of joining. Is it a legal obligation for a candidate state? As the statement has no direct legal effects, it is safer to conclude that it is rather a political and ethical obligation for the joining state. From another perspective, the statement that is made through becoming a Party to the Treaty represents a

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<sup>27</sup> HANS KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 362–63 (1952).

<sup>28</sup> *Id.*

<sup>29</sup> *See, e.g.* U.N. GA 58th Sess. U.N. Doc. A/61/10 (2006).

<sup>30</sup> KELSEN, *supra* note 27, at 362–63. In comparison, Article 20 of the Covenant of the League of Nations expressly obligates its members to denounce existing conflicting commitments. *See* League of Nations, *supra* note 24, art. 20.

loyalty declaration towards the Alliance. It expresses the commitment of the joining Party towards its new allied partners and towards the Atlantic community. Though legally not enforceable, from the perspective of the overall spirit of the Treaty, such a statement should not be considered as superfluous, at least not in a political sense.

### B. “Engagements”

Returning to Kelsen, his assessment of Article 8 of the Treaty focuses on its role in norm-conflict avoidance under the law of international treaties.<sup>31</sup> Kelsen views these “engagements” primarily as international treaties.<sup>32</sup> While it is undisputed that international treaties are a manifestation of certain international engagements, the wording used here shall have a broader meaning. When comparing Article 8 with the above-mentioned agreements that influenced its drafting, one may observe that those treaties focused on “alliances” and “coalitions” that are directed against the other members. The establishment of such alliances or coalitions, while historically concluded in pacts, does not necessarily require a formal international treaty.<sup>33</sup> The text of Article 20 of the Covenant uses the term “engagements” as juxtaposed to “obligations or understandings” which implies a wider scope of conflicting commitments than those stemming from formal treaties.<sup>34</sup> Furthermore, the change to “engagements” from the classic notions of “alliances and coalitions” logically implies that the material scope of potential conflicting commitments extends beyond the realm of strict military cooperation. Referring back to the negotiating history, it is also visible that the aim was to set a broad obligation to member States to keep their national policies and commitments in line with the scope of the Treaty.

Moreover, it is fair to conclude that, as long as they bind the government of a member State, even private legal or commercial engagements, for example, in the field of military technology or capability development should also be understood under this term. Hence, one may well argue that Member States do not enjoy a complete freedom in their political, commercial, or other engagements when it comes to their compatibility with the provisions of the Treaty.

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<sup>31</sup> KELSEN, *supra* note 27, at 363.

<sup>32</sup> *Id.*

<sup>33</sup> See, e.g. Stefan Bergsmann *The Concept of Military Alliance*. in ERICH REITER, SMALL STATES & ALLIANCES 35 (Heinz Gärtner eds. 2001); Brett V. Benson and Joshua D. Clinton, *Assessing the Variation of Formal Military Alliances*, 60 J. CONFLICT RESOL. 867–69 (2014).

<sup>34</sup> See League of Nations, *supra* note 24, art. 20; Treaty, *supra* note 1, art. 8.

If interpreted within the context and the purpose of the whole Treaty, the term “engagements” encompasses any formal or informal, written or other, legally binding or non-binding commitments or undertakings, including those of political or economic nature, incompatible with the fulfilment of the legal obligations under the Treaty. The exact nature of this incompatibility will be examined below in more detail.

The fact that such engagements may extend beyond legally binding obligations gives Article 8 a unique political dimension in which member States have both legal and political responsibilities towards each other. This approach has far wider implications than it appears from the mere text of the provision. However, in fact, the Treaty establishes a special political and military Alliance where cohesion is key to fulfil its original mandate outlined in Articles 3 through 6 of the Treaty.<sup>35</sup> From that perspective, the wider angle of engagements, extending beyond conflicting treaties is well justified and stands in line with the nature of the commitments the Treaty requires from its state Parties.

### C. *Other Parties or Third States—and Others?*

In the first part of Article 8, the Parties to existing engagements may include present Treaty members or third states.<sup>36</sup> This *ratione personae* is aimed to secure both the internal and external coherence of the Alliance. Accordingly, engagements between any two or more Members that are inconsistent with the Treaty are to be considered here, as well as treaties, alliances, or other engagements between any Member State and any third State.<sup>37</sup>

By its textual interpretation, treaties between states and international organizations or other non-state entities are not covered by the first part of Article 8. However, as treaties establishing international organizations are primarily concluded among states, extant commitments stemming from being a member in another international organization whose purpose and activities are in conflict with those of NATO arguably falls under this provision.<sup>38</sup>

In terms of future engagements, it is notable that the second part of the provision on the Parties’ undertakings has an open-ended, undefined personal scope of application. One might argue that such future “engagements” are

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<sup>35</sup> See Treaty, *supra* note 1, arts. 3–6.

<sup>36</sup> See *id.* art. 8.

<sup>37</sup> *Id.*

<sup>38</sup> See, e.g. HENRY G. SCHERMERS & NIELS BLOKKER, INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY 39 (Martinus Nijhoff eds., 5th ed. 2011) (going into more detail on the subject).

identical in their nature to existing ones; however, this would run against the structure and purpose of Article 8. This undertaking for the future shall rather be viewed as a separate, independent obligation. Thus, it is fair to conclude that state Parties to the Treaty shall observe the Treaty in their future commitments irrespective of the legal nature of the other party. Logically, this is only relevant with regard to third parties which in this sense may as well be non-state entities.

While such an interpretation was probably not envisaged in 1949, its text and the purpose of the provision support a broader scope of application regarding future undertakings, as the primary role of Article 8 should be maintaining Alliance coherence. Seventy years after the conclusion of the Treaty, this broader interpretation of the scope of future engagements has a significant practical value, especially in light of the growing role and proliferation of non-state entities in the international community.

#### *D. In Conflict with this Treaty*

Under Article 8, eventually, none of the Parties' international engagements should be in conflict with the Treaty. This obligation raises two major issues, namely (1) whether Article 8 provides for a supremacy of the obligations stemming from the Treaty in relation to other obligations; and (2) how this undertaking affects the legal validity of later, conflicting treaties.

Before turning to these issues, let us underline that, as nothing stipulates to the contrary in the text of the Treaty, the term "undertake" implies a legally binding obligation on all state Parties to the Treaty.<sup>39</sup> Thus, the second part of Article 8 goes beyond a mere declaration and imposes obligations on member States under international law. Furthermore, there is a positive obligation on the State Parties in order to actively avoid establishing conflicting commitments.

The second part of Article 8 does not establish any rule for treaty conflict avoidance. In itself, this provision does not regulate the legal relationship, supremacy or priority of the Treaty to any other engagements of its Parties. Accordingly, Article 8 is not a true conflict resolution clause, despite its use as an example in some studies.<sup>40</sup> The only thing that stems from this part of Article 8 is a legally binding obligation on Allied nations to avoid concluding any

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<sup>39</sup> See Treaty, *supra* note 1, art. 8.

<sup>40</sup> See, e.g. Kelsen, *supra* note 27, at 362–63.; Joost Pauwelyn, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 302 (2003); Christopher J. Borgen, *Resolving Treaty Conflicts*, 37 GEO. WASH. INT'L L. REV. 585 (2005); Martin Reichard, THE EU-NATO RELATIONSHIP: A LEGAL AND POLITICAL PERSPECTIVE 147–49 (1st ed., 2006).

engagements that are in conflict with their obligations under the Treaty. However, Article 8 does not amend, invalidate or prioritize other obligations or commitments of the state Parties. All it does is establish certain legal limitations on the Parties' freedom in concluding other engagements.

Consequently, even if a State Party concludes any conflicting engagement, Article 8 has no direct legal effect on the validity of that engagement, be it a treaty or other contractual commitment. Kelsen's interpretation of Article 8 reinforces this position insofar as the existence of two or more contradicting treaties, absent from an explicit treaty provision would not *per se* invalidate one of the treaties.<sup>41</sup> Particularly from the perspective of the third Party that is also bound by the conflicting engagement, Article 8 does not provide a legal basis to release that third Party from that particular engagement.

Let us focus now on the substantive scope of the undertaking, namely avoiding engagements that are "*in conflict with this Treaty.*"<sup>42</sup> In accordance with a widely used interpretation of the term, a conflict would arise if obligations stemming from the conflicting engagement prevented the state Party concerned from complying with its obligations under the Treaty.<sup>43</sup> In this case, the two commitments would be mutually exclusive; that is, complying with one would inherently lead to the violation of the other.<sup>44</sup>

Here, the position taken is that a "conflict with this Treaty" would only arise if one of its provisions was violated, in the meaning of a breach of an extant *international legal obligation*, through complying with the engagement in question. Observing the wide political scope of Article 2, penetrating the domestic political sphere of the members or the commitments with regard to capacity building in Article 3, it becomes apparent that it is the comprehensive scope of the Treaty that gives the undertaking its true power in order to maintain Alliance coherence.<sup>45</sup>

If, therefore, such a conflict occurs, the Party or Parties whose engagement causes the conflict would be in breach of their international legal obligations arising from the Treaty, invoking the respective Party's responsibility for a

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<sup>41</sup> See KELSEN, *supra* note 27, at 363–64.

<sup>42</sup> See Treaty, *supra* note 1, art. 8 (emphasis added).

<sup>43</sup> See PAUWELYN, *supra* note 40, at 167–74 (for referenced analyses).

<sup>44</sup> *Id.* at 176.

<sup>45</sup> See Treaty, *supra* note 1, art. 2–3.

wrongful act under international law towards all the other state Parties to the Treaty.<sup>46</sup>

The North Atlantic Treaty is nevertheless silent on the legal consequences of such an act which shall be determined under the general rules of state responsibility under international law.<sup>47</sup> Here, we shall recall one of the original intentions to include the undertaking in the text of the Treaty, namely, to substitute an expulsion provision.<sup>48</sup> In this regard, while the text is open, requiring exiting the Treaty by the Party in violation may also be an option eventually.

Whether the state Party creating the conflicting engagement has a legal obligation to terminate the conflicting arrangement may be subject to debate. This author takes the position that the obligation not to enter into any such engagement tacitly implies a follow-on obligation to terminate conflicting commitments and return to the previous *status quo*. The view here is that the primary aim of Article 8 is to oblige the State Parties to avoid a case of conflicting commitments. Therefore, it can be inferred from the overall purpose of the provision that state Parties shall do everything in their power to maintain this situation, including the termination of conflicting engagements that arise after the commencement of the membership. This view is not in any way contradicting the above position stating that Article 8 *per se* does not terminate conflicting obligations, as such a termination requires on one hand the invocation of a conflict with the Treaty by at least one affected Party among the Members, and on the other hand a positive act on behalf of the state causing this conflict.

### III. ARTICLE 8 IN PRATICE

One may wonder whether or not declarations under Article 8 have ever been made or was Article 8 designed solely to serve as a political gesture towards each other? There is some historical evidence on its practical application from 1949.

The case at hand is connected to a Memorandum issued by the Government of the Soviet Union (USSR) on March 31, 1949, in response to the release of the

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<sup>46</sup> See *id.* art. 8.

<sup>47</sup> See generally *id.*

<sup>48</sup> *Id.*

draft Treaty by the U.S. Department of State as noted above.<sup>49</sup> In this Memorandum, the USSR, while not expressly referring to Article 8, explicitly invoked the incompatibility of the Treaty with certain bilateral mutual assistance treaties that it concluded with the U.K. and France during World War II—against the Nazi Germany—and the historical arrangements made at Potsdam and Jalta with the U.K., France, and the U.S.<sup>50</sup>

The Memorandum, and separately thereof, the declarations to be made under Article 8 of the Treaty were extensively discussed during the Conference of the Foreign Ministers held on April 2, 1949, just two days before the planned signature.<sup>51</sup>

According to the minutes of the Conference, the Foreign Minister of Portugal raised a question of interpretation on Article 8.<sup>52</sup> More precisely, the interpretation itself as accepted during the March 15th meeting, as discussed *supra*, raised some questions on whether the North Atlantic Treaty should be compatible with earlier commitments or *vice versa*. Indeed, whilst the text of Article 8 is clear, its interpretative guidance was apparently not so much. For our purposes, it is important to note that the Foreign Ministers agreed that they are not in the position to judge the declaration of any other Party on their existing commitments. A declaration on compatibility would be accepted as such.<sup>53</sup> During the same meeting, Portugal's Foreign Minister declared that Portugal considered its Treaty of Friendship and Non-Aggression concluded with Spain in 1939 and the Protocol thereto signed in 1940 being consistent with the North Atlantic Treaty.<sup>54</sup> The other Ministers noted and respected this statement.<sup>55</sup>

In connection with the Soviet Memorandum, while the ministers discussed whether the Soviet allegations of incompatibility should be answered jointly or individually, the Foreign Minister of France made an explicit declaration on the compatibility of the French-Soviet Treaty with the North Atlantic Treaty.<sup>56</sup>

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<sup>49</sup> See Memorandum of the Government of the USSR concerning the North Atlantic Treaty, in FOREIGN RELATIONS, IV, *supra* note 13, at 261–64.

<sup>50</sup> See *id.*

<sup>51</sup> See Minutes of a Conference of Foreign Ministers at Washington, April 2, 1949, 11 a.m., in FOREIGN RELATIONS, IV *supra* note 13, at 271–81.

<sup>52</sup> See *id.*

<sup>53</sup> *Id.* at 276–77. This position is completely in line with the commentary above, stating that the declarations would not themselves have any particular legal effect.

<sup>54</sup> *Id.* at 274.

<sup>55</sup> *Id.* at 276.

<sup>56</sup> *Id.* at 278.

Thus, one shall have no doubt that the founding Member States respected Article 8 and were completely aware of their obligations under it. Though not required by Article 8, explicit declarations, where necessary, were made by the respective Ministers.<sup>57</sup>

During the 1990's, in preparation for the upcoming expansion of the Alliance, both the "Study on NATO Enlargement" and the 1999 "Membership Action Plan" contained specific legal chapters, summarizing the expectations towards potential new members.<sup>58</sup> Whilst these legal expectations largely focused on acceding to the core status agreements, their generic terms also encompassed a requirement for aspirant states to scrutinize their legal systems, including their legal obligations, for compatibility with the principles and provisions of the North Atlantic Treaty.

Such compatibility consultations between NATO experts and membership candidates became a standard practice.<sup>59</sup> Arguably, such preparations facilitated the declarations made by the new members through the signing of their accession to the Treaty.

Article 42 of the Treaty on the European Union, outlining the common security and defence policy has a direct reference to the North Atlantic Treaty and contains specific provisions on ensuring the obligations of EU members under this Article always being compatible with the obligations under the North Atlantic Treaty of those nations that are at the same time also NATO members.<sup>60</sup> It has been argued by academic commentators that the primary purpose of the references in Articles 42(2) and 42(7) was to secure the legal compatibility as mandated by Article 8 of the North Atlantic Treaty.<sup>61</sup> Whilst such arguments are plausible, it is notable that the *ratione materiae* of the above two provisions encompasses only collective defense and common defense policy, leaving other

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<sup>57</sup> See North Atlantic Treaty, *supra* note 1, art. 8; Minutes of a Conference of Foreign Ministers at Washington *supra* note 51.

<sup>58</sup> See *Study on NATO Enlargement*, NORTH ATLANTIC TREATY ORG., ¶ 10 (1995), [https://www.nato.int/cps/en/natohq/official\\_texts\\_24733.html](https://www.nato.int/cps/en/natohq/official_texts_24733.html); *Membership Action Plan (MAP)*, NORTH ATLANTIC TREATY ORG., ch. V (1999), [https://www.nato.int/cps/en/natolive/topics\\_37356.htm](https://www.nato.int/cps/en/natolive/topics_37356.htm).

<sup>59</sup> *MAP*, *supra* note 58.

<sup>60</sup> See Treaty on the European Union, December 13, 2007.

<sup>61</sup> See e.g. REICHARD, *supra* note 40, at 148; Dr. Matthias G. Fischer & Dr. Daniel Thym, *Article 42 [CSDP: Goals and Objectives; Mutual Defence] (ex-Article 17 TEU)*, in THE TREATY ON EUROPEAN UNION (TEU): A COMMENTARY 1217 (Hermann-Josef Blanke & Stelio Mangiameli eds. 2013); Steven Blockmans, *The Influence of NATO on the Development of the EU's Common Security and Defence Policy*, in, BETWEEN AUTONOMY AND DEPENDENCE: THE EU LEGAL ORDER UNDER THE INFLUENCE OF INTERNATIONAL ORGANISATIONS 245–50 (Ramses A. Wessel & Steven Blockmans eds. 2013).

areas regulated either by the North Atlantic Treaty or the EU treaties untouched by explicit deconfliction.

#### SUMMARY

What is Article 8 of the Treaty? Is it a solemn undertaking on legal compliance or more than that? In Article 8, Allied Nations declare that none of their international engagements are in conflict with the Treaty and undertake, as a legally binding commitment, to refrain from establishing such future engagements that prevent them from fulfilling their obligations under the Treaty.<sup>62</sup> With a declaration that has no legal effect and an undertaking which may be interpreted with a narrower or a wider meaning, it may be hard to see clearly what role Article 8 has in the system of the Treaty.

Still, when this complex sentence is viewed through the underlying nature and purpose of the Alliance, it becomes apparent that Article 8 represents the legal adhesive that ensures both the internal and external cohesion of the North Atlantic Alliance.

The fact that joining nations are required to sign the Treaty with this declaration and that its scope encompasses both existing members and third-party states aim to ensure Allied Nations keep a constant care of their obligations under the Treaty. The text relies on both individual Members as well as their community as a whole in safeguarding this coherence.

It is the wisely selected wording and the indefinite temporal scope of the undertaking that will ensure its relevance and adaptability to new and emerging legal and political environments through the next seventy years.

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<sup>62</sup> See North Atlantic Treaty, *supra* note 1, art. 8.