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THE NORTH ATLANTIC ALLIANCE AND COLLECTIVE DEFENSE AT 70: CONFESSION AND RESPONSE REVISITED

Michael N. Schmitt[*]

On the birth of the North Atlantic Alliance seven decades ago,[1] Georg Schwarzenberger, the great British legal scholar, observed:

> The North Atlantic Pact is a confession and a response. It is a confession of the constitutional inability of the United Nations to achieve its avowed main purpose of maintaining world order. It is a response to the insidious attempts of the Soviet Union to gain the fruits of another major war by all measures short of open war with the Western powers.[2]

Article 5 of the North Atlantic Treaty—also known as the Washington Treaty,[3] which provides for the collective defense of the Alliance, was the practical response to that confession. Yet by the turn of the 21st century, the need for confession and response seemed to be fading away. The Soviet Union had collapsed, the Warsaw Pact was gone, democracy was on the rise throughout Eastern Europe and the former Soviet space, and the global security environment had become unipolar, with the United States exercising apparently benign

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[1] *See* North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 224, 34 U.N.T.S. 243. The North Atlantic Treaty established a grouping of States known as the North Atlantic Alliance (or North Atlantic Pact). The title "North Atlantic Treaty Organization" was coined in the North Atlantic Council Final Communiqué of September 17, 1949. Final Communiqué, Sept. 17, 1949. NATO was established two years later with adoption of the NATO Status of Forces Agreement, and then the Paris Protocol and the Ottawa Agreement. *See* Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67; Protocol on the Status of International Military Headquarters set up Pursuant to the North Atlantic Treaty, Aug. 28, 1952, 5 U.S.T. 870, 200 U.N.T.S. 340; Agreement on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff, Sept. 20, 1951, 5 U.S. T. 1087, 200 U.N.T.S 3.

[2] Georg Schwarzenberger, *The North Atlantic Pact*, 2 WESTERN POLITICAL QUARTERLY 309, 309 (1949). On announcing the text of the proposed North Atlantic Treaty in March 1949, Secretary of State Dean Acheson noted with reference to the United Nations, "The system is not working as effectively as we hoped because one of its members has attempted to prevent it from working. By obstructive tactics and the misuse of the veto, the Soviet Union has seriously interfered with the work of the Security Council in maintaining international peace and security." Dean Acheson, Broadcast on Atlantic Accord, Radio Address to the Nation (March 18, 1949), *in* N.Y. TIMES, March 19, 1949, http://movies2.nytimes.com/library/world/global/031949nato-acheson-text.html [hereinafter Acheson Address].

[3] North Atlantic Treaty, *supra* note 1, art. 5.

supremacy.[4] In light of these tectonic shifts, it appeared that the United Nations was on the verge of finally having assumed its intended collective security—as distinct from collective defense—role, as it had been in the process of doing for a number of years, most notably in the Balkans.[5] In the eyes of many, there was no longer an existential threat against which the West was forced to organize in preparation for aggression. Although the Alliance continued to espouse its core mission of collective defense, the organization realized it had to transform.[6] Some questioned the need for NATO at all.[7]

Predictions of an "end of history" and expectations of an impending "peace dividend" proved premature.[8] New threats emerged on the security horizon, especially transnational terrorism. Indeed, the North Atlantic Treaty's Article 5 collective defense provision would for the first time in its history be invoked not in response to an attack by Warsaw Pact forces, but rather one mounted by a transnational terrorist group operating from within Alliance territory and employing rudimentary weapons, such as box cutters.[9] In the aftermath of the tragic events of September 11, 2001, NATO would play a central role in the

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[4] *See generally, A Short History of NATO*, NORTH ATLANTIC TREATY ORG., https://www.nato.int/cps/en/natohq/declassified_139339.htm?selectedLocale=en.

[5] "Collective defense" refers to the right of one or more States to come to the assistance of a State (or States) that is the object of an armed attack pursuant to Article 51 of the U.N. Charter and customary international law. *See* U.N. Charter art. 51. "Collective security," in contrast, refers to a mechanism by which security in general is maintained. In the U.N. Charter context, the collective security arrangement is set forth in Chapter VII, which allows the Security Council to authorize or mandate action pursuant to Article 42, including the use of force, once the Security Council has identified a situation as a "threat to the peace, breach of the peace, or act of aggression" in accordance with Article 39. *Id.* at ch. VII, art. 39, 42 An armed attack would qualify as such, but Article 39 is not limited to its occurrence. Rather, the Security Council action may either be designed to "restore international peace and security" in the event of a breach of the peace or of aggression or maintain it in the face of a threat to the peace. *Id.* at arts. 39–42, 51. An organization may have both purposes, as is the case with the Organization of American States. Inter-American Treaty of Reciprocal Assistance (Rio Treaty), art. 5, Sept. 2, 1947, T.I.A.S. No. 1838, 21 U.N.T.S. 77 [hereinafter Rio Treaty]; Charter of the Organization of American States, arts. 28–29, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3.

[6] *London Declaration on a Transformed North Atlantic Alliance*, NATO: ON-LINE LIBRARY (Oct. 27, 2000), https://www.nato.int/docu/comm/49-95/c900706a.htm.

[7] *See, e.g.*, John Mearsheimer, *Back to the Future: Instability in Europe after the Cold War*, 15(1) INT'L SECURITY 5, 52 (1990); Statement of Kenneth N. Waltz, *Conditions for Security in a Multipolar World in* RELATIONS IN A MULTIPOLAR WORLD: HEARINGS BEFORE THE COMMITTEE ON FOREIGN RELATIONS, 101ST CONG., 2ND SESS. (1991).

[8] FRANCIS FUKIYAMA, THE END OF HISTORY AND THE LAST MAN (1992); Ann Masrkusen, *How We Lost the Peace Dividend*, 33 AM. PROSPECT 86 (1997).

[9] *See* A SHORT HISTORY OF NATO *supra* note 4.

effort to secure peace and maintain international security, even beyond the organization's borders.[10]

Today, NATO is at another inflection point in its history. Still the preeminent military alliance in the world, it faces unprecedented external and internal threats. Externally, a revanchist Russia is in belligerent occupation of territory on NATO's border in Ukraine, a country that has had a special relationship with the Alliance since 1991, when Ukraine joined the Atlantic Cooperation Council.[11] In light of the ongoing international armed conflict between Russia and Ukraine, the Baltic nations that border Russia rightly worry that, given their size and significant ethnic Russian populations, they could be next.[12] In light of the Russian veto on the Security Council, this menace cannot be left to the United Nations to handle.

The threats to the Alliance's members ("Allies") today are not limited to classic attack by the armed forces of another State—or States. As noted by the NATO Heads of State and Government in their 2018 Brussels Summit Declaration, stability and security is also endangered by hostile cyber operations; "crises across the Middle East and Africa [that] are fueling terrorism" and "contribute to irregular migration and human trafficking;" the crisis in Syria which "has a direct effect on the stability of the region and the security of the Alliance as a whole;" "hybrid challenges, including disinformation campaigns and malicious cyber activities;" and "proliferation of weapons of mass destruction and advanced missile technology."[13] In 2016, at the Warsaw Summit, NATO leaders had also noted that the "trafficking of arms, drugs, and human being across the Sahel-Sahara region continue to threaten regional and our own security" and highlighted the continuing threat posed by piracy.[14]

Nevertheless, collective defense pursuant to Article 5 of the North Atlantic Treaty remains the foundational and motivational purpose of the Alliance. This was confirmed by NATO member States during the Brussels Summit, which observed that "[t]he greatest responsibility of the Alliance is to protect and

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[10] *Id.*

[11] *Relations with Ukraine*, NORTH ATLANTIC TREATY ORG. (Jul. 1, 2009), https://www.nato.int/cps/en/natohq/topics_37750.htm?selectedLocale=en#.

[12] *See, e.g. Estonia's Defense Minister Juri Luik on Russian Threats and Defending the Baltics*, DEFENSE NEWS (Sept. 17, 2018) (discussing this worry), https://www.defensenews.com/interviews/2018/09/17/estonias-defense-minister-on-russian-threats-and-defending-the-baltics/.

[13] *Id.*

[14] Warsaw Summit Communiqué, July 9, 2016, ¶¶ 31, 90 [hereinafter Warsaw Summit Communiqué].

defend our territory and our populations against attack, as set out in Article 5 of the Washington Treaty. No one should doubt NATO's resolve if the security of any of its members were to be threatened."[15]

This article, together with the others in this special issue of the *Emory International Law Review*, celebrates the 70th anniversary of the Alliance. Survival of the world's most effective military alliance over seven decades is best explained by the shared and continuing commitment of the Allies to the collective defense of the Euro–Atlantic States that is provided for in Article 5 of the North Atlantic Treaty.[16] The focus here is on that single provision, without which there would be no Alliance. It begins with a review of the genesis and history of the Article 5 commitment. The foundation laid, the wording of the provision is normatively deconstructed. In particular, this contribution raises and comments upon issues in the application of Article 5 with regard to which a degree of uncertainty remains. Finally, thoughts as to the significance of collective defense within the Alliance are offered.

I. THE GENESIS OF ARTICLE 5

It is sometimes forgotten that the prohibition on the use of force is of relatively recent vintage in modern international law.[17] Only in the mid-20th century did it emerge fully formed. Along with that prohibition, a corresponding *sine qua non* exception for situations necessitating self-defense was also codified.[18]

Some tentative progress was made towards a use of force prohibition in the 1899 and 1907 Hague Conventions (I), Article 2 Common of which provided for reference to good offices or mediation in the event of an "appeal to arms."[19] Parallel progress was made in Article 1 of the 1907 Hague Convention (II), which banned the use of force, except in certain specified circumstances, for the

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[15] Press Release, NATO, Brussels Summit Declaration, ¶ 33 (JULY 11, 2018) [hereinafter Brussels Summit].

[16] North Atlantic Treaty, *supra* note 1, art. 5.

[17] *See* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE, chs. 3–4 (6th ed. 2017); *see* Roberto Ago, ILC Special Rapporteur, Addendum: *Eighth Report on State Responsibility*, U.N. Doc. A/CN.4/318/Add. 5-7, II(1), *reprinted in* 1980 ILC Y.B. 13, 51–52.

[18] *See generally* DINSTEIN, *supra* note 17.

[19] Hague Convention for the Pacific Settlement of International Disputes, art. 2, 36 Stat. 2199 (1907); Hague Convention for the Pacific Settlement of International Disputes, art. 2, 32 Stat. 1779, 1 Bevans 230 (1899).

purpose of recovering contractual debts owed to a State's nationals.[20] However, it was not until the adoption of the 1919 Covenant of the League of Nations that a broad prohibition appeared. Article 10 of that instrument required League members to "respect and preserve as against external aggression the territorial integrity and existing political independence of Members of the League."[21]

Yet this prohibition was far from absolute. For instance, should a circumstance arise that was likely to lead to a resort to arms, member States were obligated to submit the matter to arbitration, judicial settlement, or an inquiry by the Council of the League.[22] For three months following consideration of the matter, they were prohibited from going to war.[23] Other provisions further narrowed the prohibition's scope.[24] Perhaps most importantly, the Covenant applied only between members, except when a non-member accepted the obligations set forth therein with respect to the settlement of a particular dispute.[25]

During the interwar years, a number of attempts to extend these limited prohibitions were made; none bore fruit.[26] Most significant was the 1928 Kellogg–Briand Pact, which encompassed sixty-three States by the outbreak of World War II. Article 1 of the three-article treaty provided that the Parties "condemn[ed] recourse to war for the solution of international controversies, and renounce[ed] it as an instrument of national policy in their relations with one another."[27] By Article 2, they agreed that disputes "shall never be sought except

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[20] Hague Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, art. 1, 36 Stat. 2241, 1 Bevans 607 (1907).

[21] League of Nations Covenant, art. 10.

[22] *Id.* at arts. 13, 17.

[23] *Id.* at art. 12.

[24] *Id.* at arts. 13, 15.

[25] *Id.* at art. 17.

[26] *See, e.g.*, Geneva Protocol on the Pacific Settlement of International Disputes, art. 22, 2 INT. LEG. 1378, 1379 (1924). The Geneva Protocol on the Pacific Settlement of International Disputes was adopted by the Assembly of the League of Nations in 1924 but never entered into force. *Id.*

[27] General Treaty for Renunciation of War as an Instrument of National Policy ("Kellogg-Briand Pact"), art. 1, 94 L.N.T.S. 57 (1928) [hereinafter Kellogg-Briand Pact]; *See* 33 AM. J. INT'L L. Sp. Supp., 865 (1939) (for a list of the States that ratified or adhered to the Pact by the end of 1938.).

by pacific means."[28] Like the Covenant, the Pact applied only between States Party.[29]

Prior to the 20th century, assertions that actions were being taken for defensive reasons were primarily political in character.[30] But if the resort to force was generally to be prohibited by international law, it would be necessary to allow States to employ force defensively, including collectively, in certain circumstances. Thus, for example, Article 16 of the Covenant of the League of Nations provided, "should any Member of the League resort to war in disregard of its covenants…it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League."[31] Hans Morgenthau labeled the article "the pioneering attempt at putting a system of collective security into effect."[32]

Similarly, by the 1925 Locarno Pact, Belgium and Germany, and France and Germany, agreed to refrain from going to war against each other; Great Britain and Italy served as guarantors.[33] However, the pledge was subject to a number of exceptions. These included "the right of legitimate defence" in the face of a violation of the pledge or of specified conditions set forth in the 1919 Treaty of Versailles that ended World War I, collective action as provided for in Article 16 of the Covenant of the League of Nations, and, in the event of failure to implement collective action, such action as is "necessary for the maintenance of right and justice."[34]

Although the 1928 Kellogg-Briand Pact had failed to expressly provide for a right of self-defense, a number of Parties thereto asserted that right in reservations.[35] Moreover, pursuant to the Pact's Preamble, a Party that resorted to war was denied the benefits of the treaty, that is, the right to be free from acts of war directed against it.[36] Effectively, this meant that a State was not bound by

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[28] Kellogg-Briand Pact, *supra* note 27, art. 2.

[29] *Id.*

[30] Georg Nolte & Albrecht Randelzhofer, *Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, Article 51*, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1397, 1399 (Bruno Simma et. al. eds., 2012).

[31] League of Nations Covenant, *supra* note 21, art. 16.

[32] HANS MORGENTHAU, POLITICS AMONG NATIONS 232 (1949).

[33] Treaty of Mutual Guarantee, art. 1, Oct. 16, 1925, 54 L.N.T.S. 289.

[34] Treaty of Peace between the Allied and Associated Powers and Germany, June 28, 1919, 225 Consol. T.S. 188; Treaty of Mutual Guarantee, *supra* note 28, art. 2; Treaty of Mutual Guarantee, *supra* note 35, art. 2; League of Nations Covenant *supra* note 21, art. 15.

[35] *See* Identical Notes of the United States to other Governments in Relation to the Pact, *reprinted in* 22 AM. J. INT'L L., Supp., 109–13 (1928); replies at 23 AM. J. INT'L L., Supp., 1–13 (1929).

[36] Kellogg-Briand Pact, *supra* note 27, pmbl. ("… any signatory Power which shall hereafter seek to

the prohibition so long as it was employing force defensively against another Party. It would not be until adoption of the Charter of the United Nations in 1945, however, that the right of self-defense as we know it today was codified in a multi-national instrument.[37]

In light of the tragic conflagration that ravaged the international community during World War II, the drafters of the U.N. Charter were intent on ruling out the resort to force. The result was Article 2(4): "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[38]

The Charter provided for two exceptions to this prohibition. The first allowed for uses of force authorized or mandated by the Security Council pursuant to Chapter VII of the instrument in order to "maintain or restore international peace or security."[39] Such collective security action had to be based on a finding by the Council that a "threat to the peace, breach of the peace, or act of aggression" exists.[40] Today, there is no question that NATO may act, including through the use of force, pursuant to a Security Council Chapter VII resolution, as it has done on numerous occasions without meaningful objection from the international community.[41]

However, States were understandably uneasy about relying entirely on a collective security mechanism for, after all, the League of Nations had failed

promote its national interests by resort to war a should be denied the benefits furnished by this Treaty.").

[37] *See* U.N. Charter *supra* note 5.

[38] *Id.* art. 2(4).

[39] *Id*. art. 39. Pursuant to Article 53(1) of the Charter, the Security Council may authorize "regional arrangements or agencies" to take enforcement action under Chapter VII. *Id.* art. 53(1). NATO does not consider itself such an entity. *See, e.g.* NATO Secretary General, Minute Interpreting the North Atlantic Treaty, NATO Doc. PO/55/431 April 12, 1955, Annex A, Excerpt from Minutes of the 18th Meeting of the Washington Exploratory Talks on Security, ¶ 7, March 15, 1949 (on file with author); Statement of Deputy Assistant Secretary-General for Political Affairs of NATO, Mr. Robert F. Simmons, U.N.S.C. 5007th meeting (20 July 2004), S/PV.5007. By contrast, the Organization for Security and Cooperation in Europe, formerly the Conference on Security and Cooperation in Europe, is, for instance, a regional arrangement. Conference on Security and Co-operation in Europe: Declarations and Decisions from Helsinki Summit, 10 July 1992, 31 I.L.M. 1392, 1400 (1992). Other regional arrangements as envisioned under Article 53 include the OAS and Commonwealth of Independent States. *See* Charter of the Organization of American States, *supra* note 5; Charter of the Commonwealth of Independent States, Jan. 22, 1993.

[40] U.N. Charter, *supra* note 5, art. 39.

[41] *See id.* at ch. VII. In 1992, the NAC expressed "the preparedness of our Alliance to support, on a case-by-case basis and in accordance with our own procedures, peacekeeping operations under the authority of the U.N. Security Council, which has the primary responsibility for international peace and security." Final Communiqué, Dec. 17, 1992. Since then, it has participated in numerous operations under this authority, most

miserably. Therefore, the U.N. Charter expressly set forth, at the insistence of the United States, a right to self-defense in Article 51.[42]

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[43]

Following adoption of the Charter in 1945, the alliance that had been formed to fight the Axis powers quickly unraveled. Indeed, less than a year later, former Prime Minister Winston Churchill would warn, in his "Sinews of Peace" speech, that:

> there is nothing [the Russians] admire so much as strength, and there is nothing for which they have less respect than for weakness, especially military weakness… If the Western Democracies stand together in strict adherence to the principles of the United Nations Charter, their influence for furthering those principles will be immense and no one is likely to molest them.[44]

His warning was prophetic. In late 1946, Greece alleged before the U.N. Security Council that neighboring States were interfering in its internal affairs by providing arms and equipment to insurgents.[45] A commission tasked by the Council with investigating the situation concluded that support by Albania, Bulgaria and Yugoslavia qualified as a "threat to the peace."[46] Meanwhile, the Soviet Union made claims to parts of eastern Turkey and sought a degree of

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notably in the International Security Assistance Mission in Afghanistan that was originally established pursuant to U.N. S.C. Res. 1386 (Dec. 20, 2001). From 2003, it led the operation. *ISAF's Mission in Afghanistan (2001–2014)*, NORTH ATLANTIC TREATY ORGANIZATION, (Sept. 1, 2015), https://www.nato.int/cps/en/natohq/topics_69366.htm.

[42] LORD ISMAY, NATO: THE FIRST FIVE YEARS 1949–1954 12 (1954).

[43] U.N. Charter *supra* note 5, art. 51.

[44] Winston S. Churchill, Address at Westminster College in Fulton, Missouri: The Sinews of Peace (Mar. 5, 1946) *in The Sinews of Peace*, NORTH ATLANTIC TREATY ORG. (Mar. 5, 1946), https://www.nato.int/cps/en/natohq/news_16942.htm?selectedLocale=en.

[45] Arthur L. Goodhart, *The North Atlantic Treaty of 1949*, *in* 79 RECUIEL DES COURS 183, 211–12 (1951).

[46] *Id.*

control over the Dardanelles.[47] By early 1948, the Communist Party had gained or seized power throughout Eastern Europe—the Soviet "sphere of influence"—despite the 1945 Declaration of Liberated Europe issued by Roosevelt, Churchill and Stalin at the Yalta Conference, according to which the three committed themselves to free elections.[48]

To address such situations of international instability, the U.N. Charter had called for the establishment of a United Nations armed force pursuant to Articles 43 through 48. But discussions in the U.N. Military Staff regarding that force led nowhere.[49] In its absence, and given the growing tension between East and West, the right of self-defense took on new meaning.

President Truman, in response to tension with the Soviet Union, set forth the so-called Truman Doctrine in a March 1947 speech to Congress.[50] The Truman Doctrine provided for the delivery of aid to both Greece and Turkey on the basis that "it must be the policy of the United States to support free peoples who are resisting attempted subjugation by armed minorities or by outside pressures."[51] Truman's address marked the commencement of the Cold War. That June, U.S. Secretary of State George Marshall announced aid to Europe that would become known as the Marshall Plan.[52] Sixteen European States, as well as the French, British, and American zones of occupation in Germany, took advantage of the Plan; the Communist States did not.[53]

Europe was now divided intractably between two competing blocs. As a result, the United States adopted a policy of "containment," so-named because it was designed to contain the "expansive tendencies" of the Soviet Union.[54] The

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[47] *Id.*

[48] Yalta Conference Agreement, Declaration of a Liberated Europe, Feb. 11, 1945.

[49] *See* U.N. Charter *supra* note 5, arts. 43–48.

[50] Harry S. Truman, Address Before a Joint Session of Congress (March 12, 1947), *in Truman Doctrine,* YALE AVALON PROJECT (1947), http://avalon.law.yale.edu/20th_century/trudoc.asp.

[51] *Id.*

[52] George C. Marshall, The Marshall Plan Speech, Harvard University (June 5, 1947), *in The Marshall Plan Speech*, NORTH ATLANTIC TREATY ORG. (1947), https://www.nato.int/docu/speech/1947/s470605a_e.htm.

[53] To implement the Marshall Plan, the States receiving aid and the Commanders of the French, U.S. and U.K. occupation zones established the Organisation for European Economic Cooperation on April 16, 1948. *See Organisation for European Economic Co-operation*, OECD, https://www.oecd.org/general/organisationforeuropeaneconomicco-operation.htm.

[54] The term "containment" and the reference to "expansive tendencies" are drawn from the famous "X Article," which appeared in the journal *Foreign Affairs*. Drawn from the February 1946 "Long Telegram" by the Moscow Deputy Chief of Mission, George Kennan, the X Article was originally a report written for Secretary of Defense James Forrestal in January 1947. Kennan published it under the pseudonym "X" in July 1946. *See* X, *The Sources of Soviet Conduct*, 25 FOREIGN AFF. 566, 575 (July 1947); Telegram, George Kennan to George

confrontation between East and West would soon play out militarily with the Soviet blockade of Berlin between June 1948 and May 1949.[55] The specter of U.S. and Soviet forces facing each other across Checkpoint Charlie brought the use of force and self-defense provisions that had been set forth in the Charter into stark relief.

The immediate postwar period was also characterized by the establishment of a number of treaty-based defensive arrangements. In 1947 the Inter-American Treaty of Reciprocal Assistance was adopted in Rio de Janeiro.[56] Article 3 of the Rio Treaty provided that:

> an armed attack by any State against an American State shall be considered as an attack against all the American States, and consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations.[57]

A careful parsing of the text confirms that Article 3's collective defense arrangement applied not only to armed attacks by non-Party States, but also to those that might be launched by one of the Parties to the instrument against another.

In Europe, the United Kingdom and France agreed to come to each other's assistance against any future German aggression in the 1947 Treaty of Dunkirk, which referred in its preamble to Article 51 of the U.N. Charter.[58] The following year the United Kingdom, France, and the Benelux countries adopted the Brussels Treaty, described in its preamble as, *inter alia*, a treaty for "collective defense."[59] Article IV provided, "If any of the High Contracting Parties should be the object of an armed attack in Europe, the other High Contracting Parties will, in accordance with the provisions of Article 51 of the Charter of the United Nations, afford the Party so attacked all the military and other aid and assistance

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Marshall, Feb. 22, 1946, https://www.trumanlibrary.org/whistlestop/study_collections/coldwar/documents/pdf/6-6.pdf [hereinafter Long Telegram].

[55] *The Berlin Blockade*, NORTH ATLANTIC TREATY ORG., https://www.nato.int/cps/en/natohq/declassified_136188.htm?selectedLocale=en.

[56] Rio Treaty, *supra* note 5.

[57] *Id*. art. 3.

[58] Treaty of Alliance and Mutual Assistance between the United Kingdom and France, pmbl. & art. II, Mar. 4, 1947, 9 U.N.T.S. 187 [hereinafter Treaty of Dunkirk].

[59] *See* The Treaty of Economic, Social and Cultural Collaboration and Collective Self-Defence, Mar. 17, 1948, 19 U.N.T.S. 51 [hereinafter Brussels Treaty].

in their power."[60] The agreement demonstrated the extent to which the West was eyeing the Soviet Union and its Eastern Europe satellites as possible authors of an armed attack meriting application of the self and collective defense provisions of the U.N. Charter.[61] Belgian Prime Minister, and future NATO Secretary General, Henri Spaak confirmed this concern in his September 1948 "Speech of Fear" to the U.N. General Assembly:

> La délégation soviétique ne doit pas chercher d'explications compliquées à notre politique.
> …
> Savez-vous quelle est la base de notre politique ? C'est la peur. La peur de vous, la peur de votre Gouvernement, la peur de votre politique.
> …
> Savez-vous pourquoi nous avons peur? Nous avons peur parce que vous parlez souvent d'impérialisme. Quelle est la définition de l'impérialisme? Quelle est la notion courante de l'impérialisme? C'est celle d'un peuple - généralement d'un grand pays - qui fait des conquêtes et qui augmente, à travers le monde, son influence.[62]

On the heels of the Brussels Treaty's adoption, the United States, United Kingdom, Canada, and the Benelux countries began secret talks designed to enhance collective defense.[63] Following the introduction by Senator Arthur Vandenberg of a Senate Resolution authorizing the development of collective defense arrangements—without committing the United States to engage in defensive measures except in accordance with US constitutional processes—open negotiations with European States commenced. [64] In April 1949, the North Atlantic Treaty was signed by Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, the United Kingdom, and the United States.[65] By the preamble to the instrument, the Parties resolved "to unite their efforts for collective defence and for the preservation of peace and

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[60] *Id.* art. 4.

[61] In 1954 the treaty was amended to create the Western European Union. Protocol Modifying Treaty for Collaboration in Economic, Social and Cultural Matters and for Collective Self-Defence, Oct. 23, 1954, 211 U.N.T.S. 342; Protocol on Forces of Western European Union, Oct. 23, 1954, 211 U.N.T.S. 358.

[62] Paul-Henri Spaak, Speech to the U.N. General Assembly, Washington (Sept. 28, 1948).

[63] These were known as the Washington Exploratory Talks on Security. The Records of the talks, since declassified, are available on the website of the Department of State's Office of the Historian, https://history.state.gov/. The French were intentionally excluded. Alex Danchev, *Taking the Pledge: Oliver Franks and the Negotiation of the North Atlantic Treaty*, 15(2) DIPLOMATIC HIST. 199, 201 (1991). *See generally* Cees Wiebes & Bert Zeeman, *The Pentagon Negotiations March 1948: The Launching of the North Atlantic Treaty*, 59(3) INT'L AFF. 351 (1983) (discussing the negotiations).

[64] S. Res. 239, 80th Cong., 2d. Sess. (1948).

[65] North Atlantic Treaty, *supra* note 1.

security."[66] The North Atlantic Treaty was ratified by the U.S. Senate in July and came into force on August 24, 1949.[67]

Moscow was not amused. The Soviet Union claimed that the treaty "contradicts the principles and aims of the United Nations organisation and the commitments which the Governments of the United States of America, Great Britain and France have assumed under other treaties and agreements."[68] It further pointed out that "[o]f the great powers only the Soviet Union is excluded from among the parties to this treaty," alleging that this "can be explained only by the fact that this treaty is directed against the Soviet Union."[69]

In response Secretary of State, Dean Acheson, declared that the treaty was purely defensive in nature.[70] According to Acheson, "[t]his country is not planning to make war against anyone … allegations that aggressive designs lie behind this country's signature of the Atlantic [P]act can rest only on a malicious misrepresentation or a fantastic misunderstanding of the nature and aims of American Society."[71] Indeed, the operative fulcrum upon which agreement rested was Article 5, a collective *defense* provision.[72] Article 5 states that:

> The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.[73]
>
> Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall

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66 *Id.* at pmbl.

67 Richard H. Heindel, Thorsten V. Kalijarvi, & Francis O. Wilcox, *The North Atlantic Treat in the United States Senate*, 43 AM. J. INT'L L. 633, 649–51 (1949).

68 *Text of the Soviet Memorandum on the Atlantic Pact*, N.Y. TIMES, Apr. 1, 1949, http://movies2.nytimes.com/library/world/global/040149nato-soviet-text.html.

69 *Id.*

70 Acheson Address, *supra* note 2.

71 *Id.; See* Vojtech Mastny, *NATO in the Beholder's Eye: Soviet Perceptions and Policies, 1949–56*, (Woodrow Wilson International Center for Scholars Working Paper No. 35 2002) (on the Soviet Union's view of NATO's establishment).

72 *See* North Atlantic Treaty, *supra* note 1, art. 5.

73 *Id.* During consideration of the treaty, the Senate treated the article as the instrument's most significant provision. Heindel, *supra* note 67, at 645.

> be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.[74]

Importantly, the drafters followed the Rio Pact's collective defense format rather than that of the Brussels Treaty.[75] As with the former, Article 5 did not unconditionally commit Parties to come to the defense of another Party.[76] This represented a victory in the negotiations for North Americans who were hesitant to agree in advance to participate in another European conflict.[77] Instead, parties to the North Atlantic Treaty only committed themselves to those measures in collective defense that they deemed necessary in the attendant circumstances.[78] As Acheson explained, "this does not mean that the United States would be automatically at war if one of the nations covered by the pact is subject to armed attack. Under our Constitution the Congress alone has the power to declare war."[79] Nevertheless, lest the wrong conclusion be drawn, the Secretary accentuated the US pledge to act in collective defense:

> It is a simple fact, proved by experience, that an outside attack on one member of this community is an attack upon all members. We have also learned that if free nations do not stand together, they will fall one by one…. We and the free nations of Europe are determined that history shall not repeat itself in that melancholy particular.[80]

By 2019, Article 5 bound twenty-nine nations as member States of the North Atlantic Alliance.[81]

A. The North Atlantic Treaty Deconstructed

The North Atlantic Council (NAC) has only approved collective defense of an Ally once. On September 12, 2001, the Alliance invoked Article 5 in response to the Al Qaeda attacks against the United States the previous day.[82] The

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[74] North Atlantic Treaty, *supra* note 1, art. 5.

[75] *See Id.;* Rio Treaty, *supra* note 5; Brussels Treaty, *supra* note 59.

[76] Schwarzenberger, *supra* note 2, at 313–14.

[77] *See* Sylvain Fournier & Sherrod Lewis Bumgardner, *Article 5 of the North Atlantic Treaty: The Cornerstone of the Alliance*, 34 NATO LEGAL GAZETTE 10–11 (2014).

[78] North Atlantic Treaty, *supra* note 1, art. 5.

[79] Acheson Address, *supra* note 2.

[80] *Id*.

[81] *See Montenegro Joins NATO as 29th Ally*, NORTH ATLANTIC TREATY ORG. (Jun. 5, 2017), https://www.nato.int/cps/en/natohq/news_144647.htm?selectedLocale=en.

[82] *See* Press Release, North Atlantic Treaty Organization, Statement by the North Atlantic Council (Sept. 12, 2001). Similarly, the Organization of American States invoked the collective self-defense provisions of the Rio Treaty following its finding that "these terrorist attacks against the United States are attacks against all American States." Terrorist Threat to the Americas, OEA/Ser.F/II.24, RC.24/RES.1/01 (Sep. 21, 2001).

invocation was conditioned on the premise that the attacks had been directed from outside the United States, a fact confirmed on October 2, 2001.[83] On October 4, the Allies agreed on a package of eight measures requested by the United States, to be taken individually and collectively.[84] They ranged from enhanced intelligence sharing to the deployment of a NATO Airborne Warning and Control System (AWACS) aircraft to monitor U.S. airspace in Operation Eagle Assist.[85] Later that month, NATO launched Operation Active Endeavor, a maritime counter-terrorism operation in the Eastern Mediterranean that was also based on the invocation of Article 5 by the NAC.[86] Active Endeavor continued until November 2016, when Operation Sea Guardian, a non-Article 5 maritime security operation, replaced it.[87]

Similarly, NATO has taken "enhanced collective defense" measures pursuant to Article 4 of the North Atlantic Treaty when threatening situations arise. These are designed to deter aggression and facilitate the exercise of collective defense under Article 5 should it become necessary.[88] For instance, NATO deployed Patriot missiles to Turkey in 1991 during the first Gulf War, as well as in 2012 to provide counter-missile capabilities in light of the Syrian conflict.[89] In 2003, it also conducted Operation Display Deterrence in Turkey as the situation in Iraq heated up.[90] NATO is presently engaged in an air policing

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"Australia did likewise, citing Article IV of the ANZUS Treaty in offering to deploy military forces." Press Conference, Prime Minister John Howard, Government Invokes ANZUS Treaty (Sep. 14, 2001), https://australianpolitics.com/2001/09/14/howard-government-invokes-anzus-treaty.html. [hereinafter Government Invokes ANZUS]. Article VI of the ANZUS Treaty provides: "Each Party recognizes that an armed attack in the Pacific Area on any of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes." Security Treaty (Aust., N.Z., U.S.), art. IV, Sep. 1, 1951, 3 U.S.T. 3420, 3422, 131 U.N.T.S. 83, 84.

[83] *Invocation of Article 5 Confirmed*, NATO UPDATE (Oct. 2, 2001), https://www.nato.int/docu/update/2001/1001/e1002a.htm#FN1; *see* Fournier & Bumgardner, *supra* note 77, at 18 (for a view inside NATO's assessment and decision).

[84] NATO, Statement to the Press by NATO Secretary General, Lord Robertson, on the North Atlantic Council Decision on Implementation of Article 5 of the Washington Treaty following the 11 September Attacks against the United States, Oct. 4, 2001, *in Statement to the Press*, NORTH ATLANTIC TREATY ORG. (Oct. 4,2001), https://www.nato.int/docu/speech/2001/s011004b.htm.

[85] *Id.*

[86] *Operation Active Endeavour*, NORTH ATLANTIC TREATY ORG. (Oct. 27, 2016), https://www.nato.int/cps/en/natohq/topics_7932.htm.

[87] Warsaw Summit Communiqué, *supra* note 14, ¶ 91.

[88] North Atlantic Treaty, *supra* note 1, art. 4 ("The Parties will consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened.").

[89] *See Collective Defence–Article 5*, NORTH ATLANTIC TREATY ORG. (Jun. 12, 2018), https://www.nato.int/cps/fr/natohq/topics_110496.htm?selectedLocale=en.

[90] The operation consisted of the deployment of AWACS aircraft, missile defenses, and chemical and biological defense equipment. *See* Press Release, NATO, Conclusion of Operation Display Deterrence and

mission over the Baltic Sea to deter Russian aggression and has deployed multinational battle groups to establish an "enhanced forward presence" in Estonia, Latvia, Lithuania, and Poland.[91] At the 2016 Warsaw Summit, NATO also identified cyberspace as an operational domain.[92] Presently, it is moving to enhance its capability to defend against cyber-attacks, by establishing a Cyberspace Operations Centre.[93]

Despite only being invoked once, self-defense has always lain at the heart of the Alliance's strategic vision. The first strategy document approved by the NAC was the December 1949 "Strategic Concept for the Defence of the North Atlantic Area."[94] In setting forth the "general principles [that] are recognized as underlying the North Atlantic Treaty defensive organisation," it observed, "[t]he main principle is common action in defense against armed attack through self-help and mutual aid.[95] The immediate objective is the achievement of arrangements for collective self-defense among the Atlantic Treaty nations."[96] Four decades later, the 1991 Strategic Concept reiterated that "[t]he Alliance is purely defensive in purpose: none of its weapons will ever be used except in self-defence."[97]

The most recent strategic concept, "Active Engagement, Modern Defense," which was issued at the Lisbon Summit, likewise notes the centrality of Article 5.[98] Although the 2010 document cites crisis management and cooperative security as NATO core tasks, it stresses that "[t]he greatest responsibility of the Alliance is to protect and defend our territory and our populations against attack, as set out in Article 5 of the Washington Treaty."[99] In this regard, the concept treats collective defense broadly to include defending against chemical,

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Article 4 Security Consultations, Apr. 16, 2003.

91 *See NATO's Enhanced Forward Presence*, NORTH ATLANTIC TREATY ORG. (Feb. 2019), https://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2019_02/20190213_1902-factsheet_efp_en.pdf; *NATO Air Policing*, NATO ALLIED AIR COMMAND, https://ac.nato.int/page5931922/-nato-air-policing.

92 Warsaw Summit Communiqué, *supra* note 14, ¶ 70.

93 *Cyber Defense*, NORTH ATLANTIC TREATY ORG. (Sept. 6, 2019), https://www.nato.int/cps/en/natohq/topics_78170.htm.

94 THE STRATEGIC CONCEPT FOR THE DEFENCE OF THE NORTH ATLANTIC AREA, NATO, Enclosure (D/C 6/1), ¶ 5 & 5(a), (1949).

95 *Id.*

96 *Id.*

97 *The Alliance's New Strategic Concept*, NORTH ATLANTIC TREATY ORG. (Nov. 8, 1991) ¶ 35, [hereinafter *New Strategic Concept*], https://www.nato.int/cps/en/natohq/official_texts_23847.htm.

98 *Active Engagement, Modern Defence: Strategic Concept for the Defence and Security of the Members of the North Atlantic Treaty Organization*, NATO SUMMIT (Nov. 19–20, 2010), https://www.nato.int/strategic-concept/pdf/Strat_Concept_web_en.pdf.

99 *Id.* ¶ 5.

biological, radiological and nuclear weapons, cyber-attacks and terrorism.[100] Leaders of the Alliance again echoed the keystone role of collective defense at the 2018 Brussels Summit, emphasizing its applicability to situations involving hybrid warfare.[101]

1. The Notion of "Collective Defence"

As a matter of international law, collective defense is an exceptional measure. It is a circumstance that "precludes the wrongfulness" of a use of force by a State acting defensively, as well as any States coming to its defense.[102] In other words, it renders lawful what would otherwise be a violation of a the most fundamental prohibition of international law. Article 5 of the North Atlantic Treaty is a manifestation of this ground for the preclusion of wrongfulness vis-à-vis both the use of force against another State and non-compliance with other international law prohibitions and obligations, such as the obligation to respect the sovereignty of other States.[103]

The International Court of Justice (ICJ) considered the right of collective self-defense in the 1986 *Nicaragua* case.[104] Pointing to the term "inherent right" in the text of Article 51, as well as General Assembly resolutions like the Resolution on Friendly Relations, the Court found the right to be customary in nature.[105] Although Judge Oda questioned the finding in his Dissenting Opinion, there is, as Yoram Dinstein has opined, "hardly any doubt that it constitutes an integral part of customary international law as it stands today." [106] Indeed, it has been invoked on many occasions, some merited, others a subterfuge for intervention. For instance, collective self-defense was the justification for: (1) U.S. action in Lebanon in 1958; (2) US action in Vietnam between 1961 and 1975; (3) Soviet involvement in Czechoslovakia and Afghanistan in 1968 in 1979 respectively; (4) support by the United States and its partners of Kuwait

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[100] *Id.* ¶ 19.

[101] Brussels Summit, *supra* note 15, ¶ 1, 21.

[102] G.A. Res. 56/83 annex, Responsibility of States for Internationally Wrongful Acts, art. 21(Dec. 12, 2001). The Articles on State Responsibility are an authoritative restatement of customary international law on State responsibility prepared the International Law Commission. *See id.*

[103] *See* Island of Palmas (Neth./U.S.), 2 R.I.A.A. 829, 838 (Perm. Ct. Arb. 1928).

[104] *See* Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S), Judgment, 1986 I.C.J. Rep. 14, ¶ 193 (June 27).

[105] *Id.;* G.A. Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (Oct. 24, 1970).

[106] Nicar. v. U.S, 1986 I.C.J. Rep. 14, ¶ 93–95 (Oda J., dissenting) (Judge Oda questioned whether the Court had sufficiently inquired into the pre-Charter existence of self-defense and raising doubt as to its customary status.); U.N. Charter *supra* note 5, art. 51; DINSTEIN, *supra* note 17, ¶ 799.

following Iraq's 1990 invasion; and (5) coalition support of US Operation Enduring Freedom in Afghanistan between 2003 and 2014.[107]

Collective defense may be exercised in a number of ways. It encompasses coming to the assistance of a State that is engaged in self-defense, even to the point of providing the entire defense of that State. Defensive aid may be provided: (1) by a single State; (2) multiple individual States operating separately in support of the victim State; (3) an ad hoc coalition of States operating collaboratively; or (4) a standing multinational military organization, such as NATO. Provision of collective defense by a standing multinational organization offers a number of key benefits. They include the advance training of military forces from member States that may be called upon to operate together, development of joint doctrine, establishment of command-and-control relationships, cooperation in the building of national force structure and the acquisition of equipment, the sharing of military facilities, and joint and combined planning in anticipation of an armed attack. The establishment of NATO and the vesting of it with collective defense responsibilities under Article 5 makes possible realization of these benefits.

2. Armed Attack

The determinative condition precedent to the exercise of either self or collective defense is the occurrence of an "armed attack."[108] Obviously, the meaning of the term as used in Article 5 cannot be broader than that which applies to Article 51 of the U.N. Charter.[109] The question is whether it enjoys a narrower meaning. It would appear not, for the references in the 2010 Strategic Concept and the Brussels Summit Declaration to terrorism, cyber-attacks, and hybrid warfare confirm that Article 51 is understood as extending to all armed attacks, however launched, employing whatever means and of whatever scale.[110]

The dilemma is that no conclusive definition of the term "armed attack," as used in Article 51 or customary law, exists in international law.[111] Nevertheless, in its *Nicaragua* judgment, the ICJ noted that there "appears now to be general

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[107] *See* CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 176 (4th ed. 2018). Operation Enduring Freedom has been replaced by Operation Freedom's Sentinel. *Id.*

[108] *See* North Atlantic Treaty, *supra* note 1, art. 5.

[109] *See id.;* U.N. Charter, *supra* note 5, art. 51.

[110] *See* Brussels Summit, *supra* note 15.

[111] G.A. Res 3314 (XXIX) (Dec. 14, 1974), Although some point to the Definition of Aggression Resolution the plain text of the instrument confirms that it was not meant to serve this purpose. *See*, *e.g. id.* ¶¶ 2, 4 pmbl., art. 6.

agreement on the nature of the acts which can be treated as constituting armed attacks."[112] Despite the Court's failure to offer guidance as to the content of that agreement, there is broad consensus that an attack resulting in significant physical damage or injury would so qualify.[113]

Beyond that consensus lie two quandaries. The first deals with the requisite gravity of the underlying use of force against which the defensive action is taken. In *Nicaragua*, the Court distinguished between "the most grave forms of the use of force (those constituting an armed attack) [and] other less grave forms."[114] The only example provided to illustrate the difference was that of a "mere frontier incident," which would qualify as a use of force but not an armed attack.[115] This example provoked controversy, and rightfully so since most States would be unlikely to conclude they are prohibited from responding with force to a penetration of their border by another State's armed forces.[116] Further, the Court seemed to signal that the gap between a simple use of force and an armed attack was relatively narrow when, in its 2003 *Oil Platforms* judgment, it was unwilling to exclude the possibility that using naval mines against a single warship would qualify as the latter.[117]

It is accordingly problematic to identify a precise threshold of severity at which the NAC could lawfully invoke Article 5. Further complicating matters is the fact that the United States has long taken the position that no distinction is to be made between the threshold for violation of the use of force prohibition and that applying to the right of self-defense against an armed attack. In its view, every use of force is equally an armed attack, although no other Ally has expressly adopted this position.[118] As a result, it is uncertain how the NAC

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[112] Nicar. v. U.S, 1986 I.C.J. Rep. 14, ¶ 195.

[113] *See, e.g.* TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS, r. 71 and accompanying commentary (Michael N. Schmitt ed. 2017) (supporting this proposition) [hereinafter TALLINN MANUAL 2.0].

[114] Nicar. v. U.S, 1986 I.C.J. Rep. 14, ¶ 191.

[115] *Id.* ¶ 195.

[116] DINSTEIN, *supra* note 17, ¶¶ 550–53.

[117] Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. Rep. 161, ¶ 72 (Nov. 6).

[118] *See, e.g.* OFFICE OF THE GEN. COUNSEL, U.S. DEP'T OF DEF., LAW OF WAR MANUAL, ¶ 16.3.3.1 (Dec. 2016); *see also* Harold Hongju Koh, *International Law in Cyberspace: Remarks as Prepared for Delivery to the USCYBERCOM Inter-Agency Legal Conference* (Sept. 18, 2012), *in* 54 HARV. INT'L L.J. 1, 4 (2012); William H. Taft IV, *Self-Defense and the Oil Platforms Decision*, 29 YALE J. INT'L L. 295, 299–302 (2004); Abraham D. Sofaer, *International Law: Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 93–96 (1989). The three authors served as the U.S. Department of State Legal Adviser.

would respond to a U.S. request to invoke Article 5—or to one by another Ally—in a situation involving a relatively low-level use of force.

This situation might well arise with respect to the second quandary related to the notion of armed attack, the treatment of hostile cyber operations against a member of the Alliance. NATO has adopted the stance that should cyber operations qualify as an armed attack; the victim State would be entitled to request invocation of Article 5 by the NAC.[119] This position is in accord with the generally accepted view that Article 51 of the U.N. Charter applies in the cyber context.[120]

The challenge lies in identifying those cyber operations that would so qualify. General consensus exists that a cyber operation causing significant injurious or physically destructive consequences would amount to an armed attack.[121] The unanswered question is whether one having severe albeit neither injurious nor physically destructive effects could ever constitute an armed attack and, if so, under what circumstances.[122] For instance, may a State treat a cyber operation that causes widespread and severe disruption to its economic system as an armed attack? Or do hostile cyber operations that seriously interfere with the functioning of critical cyber infrastructure qualify as such if the interference has not caused injury or physical damage?

States have been extremely hesitant to express *opinio juris* on the matter. Among the Allies, Dutch Minister of Defence Ank Bijleveld has offered the most direct comment. Speaking at an event to mark the first anniversary of the publication of the *Tallinn Manual 2.0*, the Minister cited cyber operations causing "serious disruption with long-lasting consequences."[123] She explained,

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[119] Press Release, Wales Summit Declaration Issued by the Heads of State and Government Participating in the Meeting of the North Atlantic Council in Wales, ¶ 72, Sept. 5, 2014. *See also* Jens Stoltenberg, NATO Secretary General, Cyber Defence Pledge Conference, Ecole Militaire, Paris, (May 15, 2018), *in Speech by NATO Secretary General Jens Stoltenberg at the Pledge conference (Ecole militaire, Paris*), NORTH ATLANTIC TREATY ORG. (2018), https://www.nato.int/cps/en/natohq/opinions_154462.htm.

[120] *See, e.g.* Rep. of the Group of Governmental Experts on Dev. In the Field of Info. and Telecomm. in the Context of Intl Security, ¶ 24, U.N. Doc. A/70/174 (July 22, 2015). Interestingly, Russia and China, *inter alia*, refused to include mention the right of self-defense in an aborted report of the 6th U.N. Group of Governmental Experts in 2017. *See* Michael N. Schmitt & Liis Vihul, *International Cyber Law Politicized: The U.N. GGE's Failure to Advance Cyber Norms*, JUST SECURITY (June 30, 2017).

[121] TALLINN MANUAL 2.0, *supra* note 113, r. 71, ¶ 8.

[122] *Id.* r. 71, ¶¶ 9–12.

[123] Ank Bijleveld, Minister of Defence of the Kingdom of the Netherlands, *We Have to Steer the Cyber Domain before it Steers Us* (June 21, 2018), *in We Have to Steer the Cyber Domain before it Steers Us*, https://www.defensie.nl/onderwerpen/cyber-security/downloads/toespraken/2018/06/20/toespraak-minister-bijleveld-op-het-symposium-tallinn-manual-2.0.

"for instance, if a cyber-attack targets the entire Dutch financials system…or if it prevents the government from carrying out essential tasks such as policing or taxation…it would qualify as an armed attack…and…trigger a [S]tate's right to defend itself even by force."[124]

As reflected in the Minister's comments, States are likely to focus on the severity of the consequences generated by the hostile cyber operation, rather than their nature—e.g., destructive or nondestructive—or the mechanism causing them—kinetic or cyber—when considering whether to characterize them as an armed attack. But until States start publicly to add texture to the discussion, the NAC will inevitably have to employ a "know it when I see it" approach to invoking Article 5 in cases of cyber incidents lacking injurious or destructive effect.

Further, a question that has animated discourse as to the scope of the right of self-defense is whether a hostile operation launched by non-State actors from abroad—domestic terrorism is not encompassed in the international law right of self-defense—can ever qualify as an "armed attack," such that the victim State may respond at the use of force level on the basis of the law of self-defense. There is no question, as observed in the *Nicaragua* judgment, that "'the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to' (inter alia) an actual armed attack conducted by regular forces, 'or its substantial involvement therein,'" would be an armed attack by the State concerned, thereby permitting a forceful response against both that State and the non-State actors.[125]

But whether Article 51 of the U.N. Charter and customary international law encompass an attack by non-State actors who lack the *Nicaragua* relationship to a State remains unsettled. The better view, in light of the extensive post 9/11 State practice of responding to attacks by non-State groups such as Al Qaeda and Daesh, and the absence of any limitation on the right of self-defense to attacks launched by or attributable to States in the text of Article 51, is that it does.[126] However, on two occasions the ICJ has questioned application of the

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[124] *Id.*

[125] Nicar. v. U.S, 1986 I.C.J. Rep. 14, ¶ 195, *citing* art. 3, ¶ (g), of G.A. Res. 3314 (XXIX), *supra* note 111.

[126] *See* U.S. DEP'T OF JUSTICE, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OF AN ASSOCIATED FORCE 2 (2011) [hereinafter White Paper], http://users.polisci.wisc.edu/kmayer/408/020413_DOJ_White_Paper.pdf. (for the US position on the matter); Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Address at the Annual Meeting of the American

right to non-State actor attacks in situations not meeting the *Nicaragua* standard.[127]

In that Article 5 derives directly from Article 51 of the Charter, the same question presents itself vis-à-vis the former. In this regard, it appears that the Alliance has adopted the position that Article 5 extends to non-State actor attacks.[128] Although there are suggestions that the intent of the drafters might have been to limit Article 5 to armed attacks by States, the only time the NAC has invoked the provision was in response to an attack by a non-State actor, Al Qaeda.[129] Both of the ensuing Article 5 operations were intended to forestall further attacks by the group or other transnational terrorists.[130]

That the Alliance perceives actions by non-State actors, especially terrorists, as a direct threat is a point, as noted above, made in the current NATO strategic doctrine and at the organization's most recent summit.[131] Secretary General Jens Stoltenberg has also emphasized the flexibility of Article 5. Speaking in September 2018 at the 9/11 Memorial, the Secretary General noted that before 9/11, "the whole idea with Article 5 was to defend European Allies against [the] Soviet Union sending the battle tanks over something called the Fulda gap in

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Society of International Law: The Obama Administration and International Law (Mar. 25, 2010); David Kaye, *International Law Issues in the Department of Justice White Paper on Targeted Killing*, 17 ASIL INSIGHTS 8, n.1 (Feb. 15, 2013), http://www.asil.org/insights/volume/17/issue/8/international-lawissues-department-justice-white-paper-targeted-killing#_edn1 (for substantiation of the White Paper); Michael N. Schmitt, *Drone Law: A Reply to U.N. Special Rapporteur Emmerson*, 55 VA. J. INT'L L. DIGEST 13, 16–17 (2014)(on the author's views); Michael N. Schmitt, *Counter-terrorism and the Use of Force in International Law*, 32 ISRAEL Y.B. ON HUM. RTS 53–116 (2002) [hereinafter *Counter-terrorism*] (on the author's views).

[127] Armed Activities on Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. Rep. 168, ¶ 143, 146–47 (Dec. 19, 2019); Legal Consequences of Construction of Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 65, 139, 150 (July 9). Both decisions were controversial, even among members of the Court. *See, e.g*., Congo, 2005 I.C.J. at 337, ¶ 11 (separate opinion of Judge Simma); Wall, 2004 I.C.J. at 215, ¶ 33 (July 9) (separate opinion of Judge Higgins); *id*. at 229–30, ¶ 35 (separate opinion of Judge Kooijmans); *id*. at 242–43, ¶ 6 (declaration of Judge Buergenthal).

[128] In the 1999 Strategic Concept, terrorism had already been identified as a threat to the Alliance. *New Strategic Concept*, *supra* note 97.

[129] Heindel, *supra* note 67, at 645 ("Since the principal objective of the Treaty is to safeguard the security of the North Atlantic area, only such armed attacks as threaten that security are contemplated. This rules out violence of irresponsible groups and refers, as Article 51 of the Charter clearly contemplates, to an armed attack of one state against another."); Note that the Organization of American States and ANZUS also invoked the collective defense provision of their treaties, thereby confirming their view that self-defense extended to non-State actors' armed attacks. *See* Government Invokes ANZUS, *supra* note 82.

[130] *See The Article 5 NATO Medal (Operation Eagle Assist)*, AIR FORCE PERSONNEL CENTER (July 27, 2016), https://www.afpc.af.mil/About/Fact-Sheets/Display/Article/873203/the-article-5-nato-medal-operation-eagle-assist/; *Operation Active Endeavour*, *supra* note 86.

[131] *See Active Engagement, Modern Defence: Strategic Concept for the Defence and Security of the Members of the North Atlantic Treaty Organization*, *supra* note 98; Brussels Summit, *supra* note 15, ¶¶ 21, 28.

Germany."[132] According to the Secretary-General, 9/11 taught the Alliance to be prepared for the unexpected.[133] In that regard, he cited a "more assertive Russia," terrorism and cyber, although he cautioned that the emphasis should be "less on trying to predict" and "more on how to be able to react to deal with and manage, if and when surprises happen."[134] It is clear that he does not consider the application of Article 5 to either be limited to attacks launched by States or to particular genre of attacks.

Beyond the material scope of the right of self-defense lies temporal uncertainty. The question is whether Article 5 may be invoked anticipatorily, that is, may self or collective defense justify the taking of forceful measures before the armed attack is launched? This is a long-standing point of contention in international law, for the text of Article 51 appears to address only armed attacks that are underway.[135]

Most States and contemporary international law scholars are of the view that Article 51 must necessarily be understood as allowing for anticipatory action.[136] After all, it would be foolhardy for States to believe themselves obliged to "take the first hit" or required to rely solely upon the Security Council to deal with imminent threats of armed attack. The challenge is identifying when a State's anticipatory right matures.[137]

The traditional approach is to consider the issue in terms of temporal proximity. Advocates look to the famous 19th-century exchange of diplomatic notes between the United States and Great Britain over the *Caroline* incident.[138] There, US Secretary of State Daniel Webster suggested that defensive uses of

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[132] Jens Stoltenberg, NATO Secretary General, Remarks by NATO Secretary General Jens Stoltenberg at the National September 11 Memorial & Museum, New York (Sept. 26, 2018) *in Remarks by NATO Secretary General Jens Stoltenberg at the National September 11 Memorial & Museum*, NORTH ATLANTIC TREATY ORG. (2018), https://www.nato.int/cps/en/natohq/opinions_158298.htm.

[133] *Id.*

[134] *Id.*

[135] *See* Nolte & Randelzhofer, *supra* note 30, ¶¶ 49–50.

[136] *Id.*

[137] *See, e.g.* Jeremy Wright, Attorney General, Modern Law of Self-Defence, The International Institute for Strategic Studies, London (Jan. 11, 2017); Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT'L L. 770 (2012).

[138] *See* Nolte & Randelzhofer, *supra* note 30, ¶¶ 49–50.

force are permissible when there is "a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation."[139]

This approach was suitable during a period in which an adversary's aggressive intent and its steps preparatory to an attack were often visible. Examples include the movement of troops to the border, activation of reserve forces, and aircraft "stand down" to permit maintenance and uploading of munitions. Indeed, during the Cold War, NATO regularly monitored Soviet and other Warsaw Pact forces for such "indications and warnings" of attack. Although they might not give the NAC a great deal of warning, there was a general sense that an attack would not manifest as a total "bolt out of the blue."

In the aftermath of the 9/11 attacks, President George Bush issued his 2002 US National Security Strategy.[140] Despite sparking a major controversy over the notions of "preemptive" and "preventive" defense, the strategy perceptively identified two significant changes in the nature of the 21st Century threats many States face.[141] The first is that, as tragically illustrated on September 11, an armed attack is likely to occur with no warning. Indeed, attacking without warning is the objective of terrorist operations, for advance notice would usually allow the victim State to foil the attack. Second, President Bush noted that in light of growing access to weapons of mass destruction, the first blow in an armed attack could be catastrophic.[142] These accurate observations have underpinned reconsideration of the temporal approach. An alternative approach that has gained traction is to treat the right of anticipatory self-defense as having matured upon the occurrence of three conditions.[143] First, the prospective attacker either must have the capability to conduct the attack in question or the acquisition of such capability must be imminent.[144] Second, the attacker must have formed a definitive intent to mount the armed attack.[145] Finally, the State resorting to self-defense may only act during the "last window of opportunity,"

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[139] Correspondence between Great Britain and The United States, Respecting the Arrest and Imprisonment of Mr. McLeod, for the Destruction of the Steamboat Caroline, Letter from Mr. Webster to Mr. Fox, 29 BSP 1129, 1137–38 (1857).

[140] White House, The National Security Strategy of the United States of America (2002) [hereinafter National Security Strategy].

[141] *See generally* Michael N. Schmitt, *Preemptive Strategies and International Law*, 24 MICH. J. INT'L L. 513 (2003) [hereinafter *Preemptive Strategies*].

[142] *See* National Security Strategy, *supra* note 140, at 15.

[143] *Counter-Terrorism*, *supra* note 126, at 65 (the author first proposed the interpretation in 2002); *see* also *Preemptive Strategies*, *supra* note 141, at 534–35.

[144] *Counter-Terrorism*, *supra* note 126, at 65; *see* also *Preemptive Strategies*, *supra* note 141, at 534–35.

[145] *Id.*

that is, at the point when the failure to act defensively would effectively deprive that State of its ability to prevent the forthcoming armed attack.[146] The paradigmatic example is that of a terrorist group intent on conducting attacks against a State. If the State locates the leadership of the group and reasonably concludes that it may not have another opportunity to strike those leaders or otherwise foil the attack before it unfolds, the State may act even though the precise moment and location of the terrorist attack is unknown.

Although the United States has now been adopted this approach to anticipatory self-defense,[147] most other States have not taken a position on the matter. Therefore, it likely would prove contentious if presented to the NAC for action. At least in the immediate future, therefore, it is doubtful that the NAC would invoke Article 5 in such circumstances.

Complicating matters is a degree of uncertainty regarding whether Article 5 itself allows for anticipatory self-defense. Sylvain Fournier and Lewis Bumgardner have perceptively noted, for instance, that the provision does not include the word "inherent" that is found in Article 51 of the Charter.[148] They query whether this signals that Article 5 was intended to be limited to situations fitting squarely within the textual four corners of Articles 5 and 51, even if anticipatory self-defense was permissible under customary—inherent—international law when the North Atlantic Treaty was drafted.[149]

Although such an interpretation is colorable, the better position is that no distinction can be read into Article 5 between the inherent customary right of self-defense and the separate treaty-based right reflected in Article 51, to which Article 5 refers. It must be recalled that two Allies, Italy and Portugal, were not members of the United Nations in 1949—both joined in 1955.[150] If the absence of reference to the "inherent right" in Article 5 had been meant to limit the provision's application to those armed attacks encompassed in Article 51 as read without the term "inherent," those two Alliance members, as non-Parties to the

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146 *Id.*

147 White Paper, *supra* note 126, at 7. Other countries have embraced the last window of opportunity standard. *See* George Brandis, Australian Attorney-General, The Right of Self-Defence Against Imminent Armed Attack in International Law, University of Queensland (Apr. 11, 2017), *in The Right of Self-Defence Against Imminent Armed Attack in International Law*, EJIL: TALK! (2017), https://www.ejiltalk.org/the-right-of-self-defence-against-imminent-armed-attack-in-international-law/; Jeremy Wright, *supra* note 137.

148 Fournier & Bumgardner, *supra* note 77, at 26.

149 *Id.*

150 *See Member states*, UNITED NATIONS, https://www.un.org/en/member-states/index.html

U.N. Charter—with its reference to the inherent right—would have fallen outside Article 5's protective scope altogether.

This cannot have been the drafters' intent; therefore, it seems clear that the Article 5 reference to Article 51 necessarily was meant to encompass defensive rights, including anticipatory self and collective defense, under both Article 51 and customary law. In support of this conclusion, note that the International Court of Justice observed in its *Nicaragua* judgment that the inherent right does not differ materially from its treaty-based analogue.[151] Indeed, the mainstream view in international law remains that both Article 51 and customary international law admit of a right of anticipatory self-defense. For example, this was the position taken by the U.N. High Level Panel on Threats, Challenges and Change in 2004.[152] Accordingly, Article 5 can best be characterized as having included, and still including, a right of anticipatory self and collective defense. NAC authorization of operations on the basis of anticipatory collective defense might be fraught with political obstacles, but the legal basis for doing so resides comfortably within the North Atlantic Treaty.

3. Geographical Scope

The text of Article 5 sets forth its *casus foederis*—the event that activates the duty to render assistance—an armed attack launched against a member of the Alliance "in Europe or North America."[153] Article 6 expounds on the geographical scope:

> For the purpose of Article 5, an armed attack on one or more of the Parties is deemed to include an armed attack:
> - on the territory of any of the Parties in Europe or North America, on the Algerian Departments of France, on the territory of Turkey or on the Islands under the jurisdiction of any of the Parties in the North Atlantic area north of the Tropic of Cancer;
> - on the forces, vessels, or aircraft of any of the Parties, when in or over these territories or any other area in Europe in which occupation forces of any of the Parties were stationed on the date

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[151] Nicar. v. U.S, 1986 I.C.J. Rep. 14, ¶ 176.

[152] U.N. Secretary-General's High-Level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility, ¶ 188, U.N. Doc. A/59/565 (Dec. 2, 2004).

[153] North Atlantic Treaty, *supra* note 1, art. 5.

> when the Treaty entered into force or the Mediterranean Sea or the North Atlantic area north of the Tropic of Cancer.[154]

It is important to note that the qualifying armed attack may be on forces based outside their own State's territory so long as they are located in the area set forth in Article 6, as in the case of the U.S. forces stationed in Europe.[155]

The Alliance has adjusted the geographical scope set forth in Article 6 on multiple occasions. In 1951, the text referring to Turkey was added by means of a Protocol in response to the accession of Greece and Turkey.[156] At the same time, the original 1949 text dealing with occupation forces was slightly modified to clarify Article 5's application to forces in occupied Germany.[157] The modification was a reaction to the 1948 Berlin Blockade and the subsequent increase in tension with the Soviet Union and its satellites.[158]

A dozen years later, the NAC declared that the reference to the Algerian Departments of France was inapplicable as of July 3, 1962, the date France recognized Algerian independence.[159] During the drafting of the North Atlantic Treaty, the United States and Canada objected to a collective defense commitment that extended to the colonies of Alliance members out of concern that NATO might be used to maintain the European colonial relationships.[160] However, at the time Algeria was officially a department of France; hence its inclusion in the original scope of the instrument.[161]

While Article 6 sets out the geographical scope of the *armed attack* that can trigger the NAC's right to invoke Article 5, it does not limit that of NATO Article 5 *operations* or those mounted on any other basis. The difference is subtle but important. For example, an armed attack against U.S. forces in Asia would not trigger Article 5, but an attack from Asia into the United States would

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154 *Id.* art. 6.

155 *See id.*

156 Protocol to the North Atlantic Treaty on the Accession of Greece and Turkey, art. 2, Oct. 17, 1951, 3 U.S.T. 43, 126 U.N.T.S. 350.

157 *See id.* The original text of Article 6 read "on the occupation forces of any Party in Europe." *The Original North Atlantic Treaty*, NORTH ATLANTIC TREATY ORG., art. 6 (1949), https://www.nato.int/nato_static_fl2014/assets/pdf/history_pdf/20161122_E1-founding-treaty-original-treaty_NN-en.pdf. Note that the revised text focuses on the territory concerned, not the forces themselves. *See* North Atlantic Treaty, *supra* note 1, art. 5.

158 *See* Fournier & Bumgardner, *supra* note 77, at 13–14.

159 Summary Record, North Atlantic Council, Permanent Headquarters, Paris, XVIe, Jan. 16, 1963, at sect. V, https://www.nato.int/ebookshop/video/declassified/doc_files/C-R(63)2.PDF.

160 *See* Fournier & Bumgardner, *supra* note 77, at 10–11.

161 *Id.* at 13–14.

do so. Should the latter situation occur, NATO forces would not be precluded from engaging the attacker outside the Euro-Atlantic space on the basis of collective defense.

The Alliance itself has observed that this was the case from the beginning, while contemporary NATO summit declarations have confirmed the interpretation on multiple occasions. [162] As an example, the 2002 Reykjavik Summit Communiqué noted, "To carry out the full range of its missions, NATO must be able to field forces that can move quickly to wherever they are needed, sustain operations over distance and time, and achieve their objectives."[163] Similarly, the NATO Heads of State agreed at the 2018 Brussels Summit that "We are committed to strengthening our ability to deploy and sustain our forces and their equipment, throughout the Alliance and beyond…."[164]

It should be cautioned that the Article 6 geographical limitations apply only to Article 5 operations. Since 1999, other NATO operations, known as "Non-Article 5 Crisis Response Operations" (NA5CRO), have been common.[165] These have ranged from providing assistance to the United States following Hurricane Katrina to engaging in combat in Libya and Afghanistan.[166] The legal basis for such operations, including those in which force is employed, is on firm footing when mandated or authorized by a U.N. Security Council resolution under Chapter VII of the Charter, as was the case with respect to operations in Libya and Afghanistan.[167] By contrast, the legality of Operation Allied Force, the 1999 NATO bombing campaign against the Federal Republic of Yugoslavia in

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[162] See Collective Defence–Article 5, *supra* note 89. "According to one of the drafters of the Treaty, Theodore C. Achilles, there was no doubt in anybody's mind that NATO operations could also be conducted south of the Tropic of Cancer." *Nato Public Diplomacy Division*, NATO A–Z PAGES, https://www.nato.int/nato_static_fl2014/assets/pdf/pdf_publications/20150316_2014_AZ_pages.pdf.

[163] Final Communiqué, May 14, 2002, ¶ 5.

[164] Brussels Summit, *supra* note 15, ¶ 17.

[165] *The Alliance's Strategic Concept*, NORTH ATLANTIC TREATY ORG., ¶ 24. (Apr. 10, 1999), https://www.nato.int/cps/en/natolive/official_texts_27433.htm.

[166] Petra Ochmannova, *NATO: Evolution and Legal Framework for the Conduct of Operations*, 34 NATO LEGAL GAZETTE 31, 33–34 (2014).

[167] S.C. Res. 1386 (Dec. 20, 2001) (the original resolution establishing the International Security Assistance Force in Afghanistan); S.C. Res. 1973 (March 17, 2011) (the resolution that authorized NATO's Operation Unified Protector).

response to gross human rights abuses in Kosovo, was of uncertain legality, for it was mounted without the Council having adopted such a resolution.[168]

4. The Requisite Agreement

A decision to invoke Article 5 is taken by the NAC, which consists of Permanent Representatives of all the Allies, but that also sometimes meets at the Foreign Minister, Defense Minister or Head of State or Government level.[169] The NAC's decision-making authority does not depend upon the level at which it meets and its decisions are taken by consensus pursuant to a "silence procedure" in which there is no vote on a proposal, but a single objection "breaks the silence" and therefore blocks the decision.[170] In such a decision-making system, individual members exercise exceptional power with respect to the invocation of Article 5, for a single Ally may block NATO from taking action in the face of an unambiguous, even devastating, armed attack on a member of the Alliance. As noted, such discretion was the cost of securing U.S. Congressional support for the North Atlantic Treaty after being drawn into two world wars in Europe in less than half a century.[171]

This risk that an Ally might exercise its authority to block Article 5 action has grown measurably since 1949. Originally, the States that comprised the Alliance were relatively homogenous and faced a single shared existential threat from the Soviet Union and its satellites.[172] Today, the group is geographically, culturally, religiously and politically diverse, having expanded over the years into the Mediterranean region, the Balkans and Eastern Europe.[173] Of course, the more diverse the Alliance in terms of perspective and national interests, the more difficult it will be to achieve consensus on what is the most significant decision a State can take in international relations—the decision to resort to armed force.

Failure of the NAC to achieve consensus regarding whether to invoke Article 5 would not bar the Alliance's members from defending themselves in

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168 *See, e.g.* Bruno Simma, *NATO, the U.N. and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1 (1999).

169 North Atlantic Treaty *supra* note 1, art. 9 (Article 9 establishes the Council).

170 Ochmannova, *supra* note 166, at 35.

171 *See generally*, Aurel Sari, *The Mutual Assistance Clauses of the North Atlantic and EU Treaties: The Challenge of Hybrid Threats* (forthcoming HARV. NAT'L SEC. J. 2019) (analyzing the issue).

172 *A Short History of NATO*, *supra* note 4.

173 *See Member Countries*, NORTH ATLANTIC TREATY ORG. (Jan. 4, 2018), https://www.nato.int/cps/en/natohq/nato_countries.htm.

individual self-defense.[174] Nor would it preclude other Allies from coming to its defense outside the North Atlantic Treaty framework pursuant to Article 51 of the U.N. Charter and customary international law.[175]

But a decision by the NAC that an armed attack has occurred would not release a State from its individual obligation under Article 51 of the Charter to only engage in collective defense if an armed attack is on-going or imminent and the use of force to defend against that attack is both necessary and proportionate.[176] This is because U.N. Charter obligations enjoy primacy over those contained in the other treaties, including the North Atlantic Treaty.[177] Further support for this premise is found in the Vienna Convention on the Law of Treaties, which provides that "[w]hen a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail."[178] In the case of the North Atlantic Treaty, this principle appears in Article 7's confirmation that the provisions of the instrument do not affect the U.N. Charter rights and obligations of its Parties.[179] At least in theory, therefore, a State employing force pursuant to a NAC collective defense decision could be acting unlawfully if the invocation of Article 5 was without basis in international law.

5. Scope of the Commitment

Article 5 requires that Parties to the North Atlantic Treaty consider an attack against one or more of them to be an attack upon them all and assist the victim(s) either by providing assistance directly or in collaboration with other States.[180] However, it caveats this obligation with the phrase "such action as it deems necessary."[181] This is a rather complicated formulation, as the "will assist" text

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174 *See* North Atlantic Treaty, *supra* note 1, art. 5.

175 U.N. Charter, *supra* note 5, art. 51.

176 Nicar. v. U.S, 1986 I.C.J. Rep. 14, ¶ 176, 194; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 41 (July 8); Oil Platforms, *supra* note 117, ¶ 43, 73–74, 76; Judgment of the International Military Tribunal Sitting at Nuremberg, Germany (Sept. 30, 1946), *in* 22 The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany 435 (1950).

177 U.N. Charter, *supra* note 5, art. 103. Interestingly, the Warsaw Pact Treaty also provided for U.N. Charter compliance (the instrument was markedly similar to the North Atlantic Treaty). Treaty of Friendship, Cooperation and Mutual Assistance, arts. 1, 4, Oct. 10, 1955, 219 U.N.T.S. 3.

178 Vienna Convention on the Law of Treaties, art. 30(2), May 23, 1969, 1155 U.N.T.S.

179 North Atlantic Treaty, *supra* note 1, art. 7

180 *See id.* art. 5.

181 Heindel, *supra* note 67, at 636 (the phrase was added to Article 5 following consultation with U.S. Senators).

in the Article 5 is expressed as an obligation, while the decision of how to assist is textually left to individual Allies. The distinction begs the question of whether an Alliance member may agree that an armed attack has occurred and subsequently decide it is not necessary to provide any assistance or that only assistance falling short of that considered necessary by the other Allies is needed.

Article 11 of the North Atlantic Treaty stipulates that the provisions of the instrument are to be "carried out by the Parties in accordance with their respective constitutional processes."[182] Thus, even if a State has not blocked invocation of Article 5 in the NAC, the decision on committing forces and, if so, how to do so, may be subject to domestic law processes and authorities. In the United States, limitations are found, for instance, in Article I of the Constitution, which grants Congress the power of the purse and the rights to declare war, raise armies and maintain a navy, as well as in legislation like the War Powers Act, and Authorization for the Use of Military Force.[183] The precise parameters of these limitations may be the subject of debate, but there is no question that Congress could act, in part, to limit the scope and degree of U.S. collective defense measures in response to the NAC's Article 5 invocation.[184]

U.S. reticence to be irreversibly bound to the defense of other countries was not unique to the North Atlantic Treaty. For example, Article V of the Japan–U.S. Treaty of Mutual Cooperation and Security provides that "Each Party recognizes that an armed attack against either Party in the territories under the administration of Japan would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional provisions and processes."[185] The provision recognizes that to the extent the U.S. Constitution requires the involvement of Congress in an authorization to use military force, that process must be followed irrespective of

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[182] North Atlantic Treaty, *supra* note 1, art. 11. The reference was originally located in the preamble, but during negotiations moved to Article 11 at the suggestion of the Senate Foreign Relations Committee to emphasize the importance of compliance with the constitutional processes of the respective member States; Heindel, *supra* note 67, at 636.

[183] U.S. Const. art. I, §§ 8–9; War Powers Act, 50 U.S.C., §§ 1541-48 (1976); Authorization for Use of Military Force, 115 Stat. 224, 224.

[184] *See, e.g.* Matthew Waxman, *Syria, Threats of Force, and Constitutional War Powers*, 123 YALE L.J. ONLINE 297 (2013); Jennifer Daskal & Stephen I. Vladeck, *After the AUMF*, 5 HARV. NAT'L SEC. J. 115 (2014).

[185] Treaty of Mutual Cooperation and Security (U.S.-Japan), art. V, June 19, 1960, 11 UST 1632, TIAS 4509, 373 U.N.T.S. 186.

the collective defense commitment set forth in the instrument. A similar provision is found in Article III of the Korea-U.S. Mutual Defense Treaty.[186]

Such discretion has led to disagreement over the nature of Article 5 and similar commitments. In response to Michael Glennon's claim that these arrangement represent an "element of non-committal in the commitment," Aurel Sari asserted, "a legal commitment to act nonetheless exists."[187] Perhaps the best view is that a State acting in good faith pursuant to the principle *pacta sunt servanda*, as is required by the law of treaties, must not block invocation of Article 5 when an armed attack unambiguously occurs against a member of the Alliance.[188]

Following invocation, each Ally similarly must act in good faith in seeking to fulfill its collective defense obligation under Article 5 by providing necessary support. This was the sense of Senate Foreign Relations Committee when considering the North Atlantic Treaty in 1949: "These words were included in article 5 to make absolutely clear that each party remains free to exercise its honest judgment in deciding upon the measures it will take to help restore and maintain the security of the North Atlantic area."[189] However, should constitutional or other domestic law obstacles stand in the way of it doing so, an Ally will not be in breach of Article 5 should it fail to offer assistance.

6. Other Collective Defense Requirements

In light of the fact that action pursuant to Article 5 of the North Atlantic Treaty is an expression of U.N. Charter Article 51, any action taken pursuant to the latter is subject to the full panoply of limitations and requirements thereon. For instance, it is widely accepted that a condition precedent to exercise of collective defense under customary law and Article 51 is a request for assistance by the State facing the armed attack.[190] As noted by the International Court of Justice in its *Nicaragua* judgment, "It is also clear that it is the State which is the victim of an armed attack which must form and declare the view that it has been so attacked. There is no rule in customary international law permitting another State to exercise the right of collective self-defense on the basis of its own

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[186] Mutual Defense Treaty (U.S.-Korea), art. III, Oct. 1, 1953, 5 UST 2368; TIAS 3097; 238 U.N.T.S. 199.

[187] Michael J. Glennon, CONSTITUTIONAL DIPLOMACY 214 (1990); Sari, *supra* note 171 at 149.

[188] Vienna Convention on the Law of Treaties, *supra* note 178, art. 26.

[189] SENATE EXEC. REP. NO. 8, 81st Cong., 1st sess., 1949, at 13–14.

[190] *See* Nicar. v. U.S, 1986 I.C.J. Rep. 14, ¶ 195.; U.N. Charter, *supra* note 5, art. 51.

assessment of the situation."[191] In light of the NAC decision-making system, should the possibility of invoking Article 5 arise in other than a request by the victim State—an unlikely scenario—the presence of the victim State at the NAC session considering the matter, and its decision not to object in order to block action, could reasonably be interpreted as such a request.

Before invoking Article 5, the criterion of necessity must be satisfied, and any action taken has to be proportionate.[192] Necessity requires that non-forceful measures be insufficient to address the ongoing armed attack or prevent one that is imminent, whereas proportionality limits the scale and scope of defensive force employed to that required to meet or prevent the attack.[193] The International Court of Justice set forth these twin criteria in the *Nicaragua*, *Oil Platforms* and *Armed Activities* judgments, as well as the *Nuclear Weapons* advisory opinion.[194] Importantly, the NAC's invocation of Article 5 does not release individual members of the Alliance that are acting in collective defense from independently assessing necessity and proportionality or relieve them of any responsibility for having wrongfully used force in violation of Article 2(4) and customary international law in the event the criteria were not satisfied.[195]

Article 5 only authorizes collective defense in order "to restore or maintain the security of the North Atlantic area."[196] The "restore and maintain . . . security" text is drawn from the U.N. Charter.[197] Indeed, maintenance of international peace and security is the first of the purposes set forth for the United Nations in Article 1 of that instrument.[198] Additionally, the Charter limits actions authorized by the Security Council under Chapter VII, such as the use of force in the face of a "threat to the peace, breach of the peace, or act of

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191 Nicar. v. U.S, 1986 I.C.J. Rep. 14, ¶ 195.

192 *See* North Atlantic Treaty, *supra* note 1, art. 5.

193 Nicar. v. U.S, 1986 I.C.J. Rep. 14, ¶ 194; Oil Platforms, *supra* note 117, ¶¶¶ 43, 51, 73–77; Armed Activities, *supra* note 103, ¶ 127; Nuclear Weapons, *supra* note 176, ¶ 41.

194 *Id.*

195 *See* North Atlantic Treaty, *supra* note 1, arts. 5, 2(4).

196 *Id.*, art. 5.

197 U.N. Charter, *supra* note 5, art. 39 ("The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."*); Id.* art. 42 ("Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.").

198 U.N. Charter, *supra* note 5, art. 1(1).

aggression," to those necessary to "maintain or restore international peace and security."[199]

Yet the U.N. Charter imposes no requirement that action in individual or collective self-defense serve to restore peace and security that has been breached or maintain it in situations where they are at risk.[200] For instance, a State is entitled to defend itself, and other States are entitled to come to its defense, even if defensive action is likely to be destabilizing for the international community, perhaps by broadening a conflict, than surrender to an aggressor. By the text of Article 5, however, NATO is not entitled to resort to defensive force in support of an Ally unless doing so would contribute to the restoration and maintenance of security in the region.[201] Theoretically, this would bar defensive action necessary to defend an Ally if it would be escalatory or otherwise destabilizing in the circumstances at hand.

For instance, a robust NATO response to a low-level armed attack on one of the Baltic States arguably could be seen as broadly destabilizing in the East-West context. Fears of such a strict textual reading of Article 5 barring a response would be misplaced. First, to comply with the proportionality criterion of collective defense, any NATO action would have to be limited to the force required to repel the armed attack, thereby tempering the risk of destabilization or escalation. Second, even if a State were to rely upon this highly legalistic interpretation to justify an objection to Article 5's invocation, all other Allies would remain permitted to individually, or in concert with other States, come to the collective defense of the victim State outside the NATO command structure.[202] And a failure to respond forcefully to any armed aggression against an Alliance member would itself be destabilizing in that it would encourage further aggression. This was, after all, one of the key lessons of World War II.

Finally, Article 5 requires that any action taken be immediately reported to the Security Council, as was done in the one case in which the provision was invoked by the NAC.[203] The requirement to notify is drawn directly from the

199 *Id*. arts. 39, 42.
200 *See id.*
201 *See* North Atlantic Treaty, *supra* note 1, art. 5.
202 *See id.*
203 *Id.*

text of U.N. Charter Article 51. Accordingly, its presence in Article 5 mandates no heavier burden than already shouldered pursuant to that article.[204]

In the case of the 9/11 attacks, the notification came in a letter from NATO Secretary-General Lord Robertson passed to the Security Council through the U.N. Secretary-General. It provided, in part,

> Article 5 has thus been invoked, but no determination has yet been made whether the attack against the United States was directed from abroad. If such a determination is made, each Ally will then consider what assistance it should provide. In practice, there will be consultations among the Allies. Any collective action by NATO will be decided by the North Atlantic Council. The United States can also carry out independent actions, consistent with its rights and obligations under the U.N. Charter.
>
> Allies can provide any form of assistance they deem necessary to respond to the situation. This assistance is not necessarily military and depends on the material resources of each country. Each individual member determines how it will contribute and will consult with the other members, bearing in mind that the ultimate aim is to "to restore and maintain the security of the North Atlantic area."
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> …
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> If the conditions are met for the application of Article 5, NATO Allies will decide how to assist the United States. (Many Allies have clearly offered emergency assistance). Each Ally is obliged to assist the United States by taking forward, individually and in concert with other Allies, such action as it deems necessary. This is an individual obligation on each Ally and each Ally is responsible for determining what it deems necessary in these particular circumstances.
>
> No collective action will be taken by NATO until further consultations are held and further decisions are made by the North Atlantic Council.[205]

Reflecting the key points made earlier, the Alliance insisted on confirming that the incident to which it was responding was an armed attack mounted from outside the United States. It did so because NATO is not entitled to act in collective defense against domestic terrorism. As noted above, the requisite confirmation of the attack emanating from abroad was provided the NAC on

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[204] U.N. Charter, *supra* note 5, art. 51; *see* North Atlantic Treaty, *supra* note 1, art. 5.

[205] *See What is Article 5?*, NORTH ATLANTIC TREATY ORG. (Jan. 26, 2016), https://www.nato.int/terrorism/five-archive.htm.

October 2. The Secretary-General's notification also pointed out that all the members of the Alliance bore the obligation of assisting the United States, although each State was entitled to determine for itself the assistance that was necessary.[206] Lastly, although collective action required the approval of the NAC, the notification acknowledged that the United States remained free to exercise its right of individual self-defense irrespective of NAC action—or inaction. Although not expressly contained in the notification, this would necessary include requesting assistance in collective defense from individual members of the Alliance or non-NATO States—outside the NATO framework.

CONCLUDING THOUGHTS

President Donald Trump has at times questioned U.S. participation in NATO.[207] Such short-sighted musing is highly destabilizing, for the collective defense commitment resident in Article 5 of the North Atlantic Treaty is today no less a *confession* that the U.N. Security Council cannot ensure the security of Europe, Canada, and the United States than was the case seven decades ago. And the article continues to play a role as a *response* to Russia's insidious actions in that region, as well as that of other actors, especially transnational terrorist groups.

However, understanding the scope and content of Article 5 has proven increasingly challenging over the past seventy years as the regional and global security environment became ever more complex and multifaceted. At its inception, Article 5 was most likely to operate in an environment in which war clouds would appear on the horizon well in advance of an armed attack and in which conflict would occur conventionally across geopolitical borders. That is no longer the case. The attack to which Article 5 action responds may come without warning; the first blow could be cataclysmic; non-State actors may attack without the involvement of any State; an attack could involve weapons of

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206 *Id.*

207 For instance, in advance of the Brussels Summit, he sent letters to the leaders of several NATO States complaining about their lack of defense spending and questioning U.S. participation in NATO. In the letter to Chancellor Angela Merkel, as an example, he warned, "It will, however, become increasingly difficult to justify to American citizens why some countries do not share NATO's collective security burden while American soldiers continue to sacrifice their lives overseas or come home gravely wounded." Julie Hirschfeld Davis, *Trump Warns NATO Allies to Spend More on Defense, or Else*, N.Y. TIMES (July 2, 2018), https://www.nytimes.com/2018/07/02/world/europe/trump-nato.html; *see also, e.g.* Julian E. Barnes & Helene Cooper, *Trump Discussed Pulling U.S. From NATO, Aides Say Amid New Concerns Over Russia*, N.Y. TIMES, https://www.nytimes.com/2019/01/14/us/politics/nato-president-trump.html. Paradoxically, Parties to the North Atlantic Treaty may leave the Alliance one year after notice of their denunciation is provided to the United States. North Atlantic Treaty, *supra* note 1, art. 13.

mass destruction; the conflict might commence, or even remain entirely within, a virtual domain; and the decision-making structure of the Alliance requires consensus among more than double the original number of Allies, and that group of States has become far more diverse. Such transformations have rendered a common legal understanding of the parameters and content of Article 5 ever more elusive; they do not inspire sanguinity.

Nevertheless, optimism may be drawn from the fact that Article 5 has served as an effective, albeit imperfect, deterrent against aggression in the region, one that likewise has had a counter-escalatory effect. So long as the Allies, especially the United States, do not undercut the credibility of the collective defense commitment represented by the provision, Article 5 is likely to serve the same purposes very effectively well into the foreseeable future.