

NATO COUNTERTERRORISM AND ARTICLE 5: HAMMER OF THE NORTH ATLANTIC OR PAPER TIGER?

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I. INTRODUCTION

In November 2002, leaders of the North Atlantic Treaty Organization (NATO) assembled for their annual summit in Prague, Czech Republic.¹ This, however, was no ordinary summit. The meeting was billed as a “transformation Summit,”² and it provided an opportunity for NATO to announce a series of important changes designed to maximize NATO’s twenty-first century military effectiveness and to reiterate NATO’s resolve to combat terrorism.³ Then NATO Secretary-General Lord Robertson commented that the Prague Summit “is not business as usual, but the emergence of a new and modernised NATO, fit for the challenges of the new century.”⁴ Additionally, the occasion prompted President Bush to remark that, “[a]t the [Prague] summit, we’ll make the most significant reforms in NATO since 1949— reforms which will allow our Alliance to effectively confront new dangers.”⁵ With the Prague Summit leaders unequivocally

¹ NATO Update November 2002 *at* <http://www.nato.int/docu/update/2002/11-november/e1121e.htm> (Nov. 21, 2002).

² NATO Speech, Prague Summit Press Conference *at* <http://www.nato.int/docu/speech/2002/s021120g.htm> (Nov. 20, 2002).

³ NATO Update November 2002 *at* <http://www.nato.int/docu/update/2002/11-november/e1121e.htm> (Nov. 21, 2002). In addition to the military restructuring, the Prague Summit provided a forum for the announcement of the accession of seven, new member states to NATO: Bulgaria, Estonia, Latvia, Lithuania, Romania, Slovakia and Slovenia. *Id.* These countries officially joined NATO on March 29, 2004. NATO Topics, Enlargement *at* <http://www.nato.int/issues/enlargement/index.html> (last updated Feb. 18, 2005). NATO also issued a joint statement on the then-ongoing, pre-invasion Iraq debate. NATO Update November 2002 *at* <http://www.nato.int/docu/update/2002/11-november/e1121e.htm> (Nov. 21, 2002).

⁴ NATO Speech, Press Statement by Lord Robertson, NATO Secretary General following the Meeting of the North Atlantic Council at the level of Heads of State and Government *at* <http://www.nato.int/docu/speech/2002/s021121n.htm> (Nov. 21, 2002).

⁵ NATO Speech, Remarks by the President of the United States, George W. Bush to the Atlantic Student Summit *at* <http://www.nato.int/docu/speech/2002/s021120f.htm> (Nov. 20, 2002).

committed to “transforming” and “reforming” NATO to confront the “new dangers” and “challenges of the new century,” the NATO leaders were just as explicit in identifying international terrorism as NATO’s principal twenty-first century security threat.⁶

⁶ NATO Press Release, Prague Summit Declaration at <http://www.nato.int/docu/pr/2002/p02-127e.htm> (Nov. 21, 2002) [hereinafter Prague Declaration]. The Prague Declaration was the NATO Heads of State’s official press release, and several pertinent portions of the Prague Declaration underscore the central role counterterrorism is playing in NATO’ strategic thinking:

1. We, the Heads of State and Government of the member countries of the North Atlantic Alliance, met today to enlarge our Alliance and further strengthen NATO to meet the grave new threats and profound security challenges of the 21st century.
2. Recalling the tragic events of 11 September 2001 and our subsequent decision to invoke Article 5 of the Washington Treaty, we have approved a comprehensive package of measures, based on NATO’s Strategic Concept, to strengthen our ability to meet the challenges to the security of our forces, populations and territory, from wherever they may come. Today’s decisions will provide for balanced and effective capabilities within the Alliance so that NATO can better carry out the full range of its missions and respond collectively to those challenges, including the threat posed by *terrorism* and by the proliferation of weapons of mass destruction and their means of delivery.

.....

4. We underscore that our efforts to transform and adapt NATO should not be perceived as a threat by any country or organisation, but rather as a demonstration of our determination to protect our populations, territory and forces from any armed attack, including *terrorist* attack, directed from abroad.

.....

- e. Endorse the agreed military concept for defence against *terrorism*. The concept is part of a package of measures to strengthen NATO’s capabilities in this area, which also includes improved intelligence sharing and crisis response arrangements. *Terrorism*, which we categorically reject and condemn in all its forms and manifestations, poses a grave and growing threat to Alliance populations, forces and territory, as well as to international security. We are determined to combat this scourge for as long as necessary. To combat *terrorism*

Reflecting back upon the 2002 Prague Summit, NATO's strident anti-terrorism rhetoric hardly seems shocking. The Prague Summit occurred just one year after NATO, for the first time in its history,⁷ invoked Article 5⁸ of the North Atlantic Treaty.⁹ NATO's invocation of

effectively, our response must be multi-faceted and comprehensive. We are committed, in cooperation with our partners, to fully implement the Civil Emergency Planning (CEP) Action Plan for the improvement of civil preparedness against possible attacks against the civilian population with chemical, biological or radiological (CBR) agents. We will enhance our ability to provide support, when requested, to help national authorities to deal with the consequences of *terrorist attacks*, including attacks with CBRN against critical infrastructure, as foreseen in the CEP Action Plan.

....

7. The Euro-Atlantic Partnership Council (EAPC) and the Partnership for Peace (PfP) have greatly enhanced security and stability throughout the Euro-Atlantic area. . . . We welcome the resolve of Partners to undertake all efforts to combat *terrorism*, including through the *Partnership Action Plan against Terrorism*.
8. We welcome the significant achievements of the NATO-Russia Council since the historic NATO-Russia Summit meeting in Rome. . . . NATO member states and Russia are working together in the NATO-Russia Council as equal partners, making progress in areas such as . . . the struggle against *terrorism* . . .
10. We reaffirm that security in Europe is closely linked to security and stability in the Mediterranean. We therefore decide to upgrade substantially the political and practical dimensions of our Mediterranean Dialogue as an integral part of the Alliance's cooperative approach to security. In this respect, we encourage intensified practical cooperation and effective interaction on security matters of common concern, including *terrorism*-related issues, as appropriate, where NATO can provide added value.

Id. (emphasis added).

⁷ CNN.com, *NATO: U.S. evidence 'compelling' at* <http://archives.cnn.com/2001/WORLD/europe/10/02/inv.nato.if/> (October 2, 2001).

⁸ The text of Article 5 reads as follows:
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

Article 5 was in response to the September 11, 2001 terrorist attacks on New York and Washington, D.C. (September 11th Terrorist Attacks).¹⁰ As embodied in the Prague Declaration,¹¹ NATO's swift and serious response to the grave danger posed by international terrorism can certainly be described as both pragmatic and proactive. Yet, what remains unclear is how well NATO's counterterrorism¹² programme conforms to the spirit of the North Atlantic

right of individual or collective self-defence recognised 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. Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246 *available at* <http://www.nato.int/docu/basicxt/treaty.htm>.

⁹ NATO Topics, NATO's contribution to the fight against terrorism *at* <http://www.nato.int/docu/update/2001/1001/e1002a.htm> (last updated Feb. 24, 2005).

¹⁰ *Id.* NATO invoked Article 5 after United States' investigations confirmed that the world-wide terrorist network headed by Osama bin Laden, Al Qaeda, was responsible for the September 11th Terrorist Attacks. *Id.* NATO's invocation of Article 5 came just twenty days after the North Atlantic Council meetings in which "[t]he Council agreed that if it is determined that this attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the Washington Treaty" <http://www.nato.int/docu/pr/2001/p01-124e.htm>. *See also* CNN.com, *NATO: U.S. evidence 'compelling'* *at* <http://archives.cnn.com/2001/WORLD/europe/10/02/inv.nato.if/> (October 2, 2001).

¹¹ See Prague Declaration, *supra* note 7 and accompanying text.

¹² NATO defines counterterrorism as "offensive military action designed to reduce terrorists' capabilities." NATO Issues, NATO's military Concept For Defence Against Terrorism *at* <http://www.nato.int/ims/docu/terrorism.htm> (last updated Apr., 14, 2005). Similarly, the United States Department of Defense defines counterterrorism as "[o]perations that include the offensive measures taken to prevent, deter, preempt, and respond to terrorism." DOD Dictionary of Military and Associated Terms, *at* <http://www.dtic.mil/doctrine/jel/doddict/data/c/01366.html> (last visited June 1, 2005).

Treaty, in particular Article 5?¹³ This question becomes even more compelling when one considers that the 2002 Prague Summit also provided the occasion for the formal unveiling of NATO's newest weapon for twenty-first century combat operations: The NATO Response Force (NRF)¹⁴—a unit which NATO planners intend to have worldwide deployment capability¹⁵

¹³ Some commentators have suggested that NATO's organizational structure, as devised in the North Atlantic Treaty, ill equips NATO for counterterrorism operations. See Michael M. Gallagher, Comment, *Declaring Victory And Getting Out [Of Europe]: Why The North Atlantic Treaty Organization Should Disband*, 25 Hous. J. Int'l L. 341, 359 (2003) (opining that "NATO cannot contribute much to the fight against international terrorism."); Michael A. Goldberg, Note, *Mirage Of Defense: Reexamining Article Five Of The North Atlantic Treaty After The Terrorist Attacks On The United States*, 26 B.C. Int'l & Comp. L. Rev. 77 (2003); Broderick C. Grady, Note, *Article 5 Of The North Atlantic Treaty: Past, Present, And Uncertain Future*, Ga. J. Int'l & Comp. L. 167, 198 (2002) (asserting that "NATO should realize that Article 5 is simply not an effective tool for countering terrorism.").

¹⁴ Prague Declaration, *supra* note 7. Paragraph 4(a) of the Prague declaration states that NATO has decided to:

Create a NATO Response Force (NRF) consisting of a technologically advanced, flexible, deployable, interoperable and sustainable force including land, sea, and air elements ready to move quickly to *wherever needed*, as decided by the Council. The NRF will also be a catalyst for focusing and promoting improvements in the Alliance's military capabilities. We gave directions for the development of a comprehensive concept for such a force, which will have its initial operational capability as soon as possible, but not later than October 2004 and its full operational capability not later than October 2006, and for a report to Defence Ministers in Spring 2003. The NRF and the related work of the EU Headline Goal should be mutually reinforcing while respecting the autonomy of both organisations.

Id. (emphasis added). On October 13, 2004, NATO announced that the Response Force had reached initial operational capability. NATO Update, Response Force ready for missions at <http://www.nato.int/docu/update/2004/10-october/e1013a.htm> (Oct. 13, 2004). The NRF forms an integral part of NATO's transformation agenda. NATO Topics, The NATO Response Force at <http://www.nato.int/issues/nrf/index.html> (last updated Apr. 14, 2005); see *supra* notes 5–6.

¹⁵ SHAPE Issues, The NATO Response Force—NRF: Role at http://www.nato.int/shape/issues/shape_nrf/nrfb.htm (last updated Sept. 26, 2003). SHAPE is

and which has been expressly earmarked for counterterrorism operations.¹⁶ Thus, two questions must be addressed: 1.) whether this aggressive, global operations capable counterterrorism programme is consistent with NATO's historic role as a collective defense organization, and 2.) whether Article 5 is an effective mechanism for authorizing and employing NATO's counterterrorism assets?

In order to answer these questions, Part II of this article will provide a detailed discussion of NATO's history and an analysis of the motivations which led to the formation of the alliance. Part III offers an examination of Article 5, the North Atlantic Treaty's collective defense provision. Part IV seeks to provide a detailed analysis of NATO's counterterrorism programme, with particular emphasis on the new NATO Response Force. Finally, Part V asserts, and ultimately concludes, that Article 5 of the North Atlantic Treaty is sufficiently flexible to encompass NATO's counterterrorism programme and that NATO's counterterrorism programme is consistent with NATO's historical role as a collective defense organization.

the acronym for Supreme Headquarters Allied Powers Europe. SHAPE Information, Overview at <http://www.nato.int/shape/about/overview.htm> (last updated Sept. 16 2004).

¹⁶ SHAPE Issues, The NATO Response Force—NRF: Role at http://www.nato.int/shape/issues/shape_nrf/nrfb.htm (last updated Sept. 26, 2003); see NATO Issues, NATO's military Concept For Defence Against Terrorism at <http://www.nato.int/ims/docu/terrorism.htm> (last updated Apr., 14, 2005). In addition to counterterrorism, NATO has manifested its desire to utilize the NRF for a variety of potential missions: conflict prevention, non-combatant evacuation operations, crisis response, humanitarian, peacekeeping, and embargo operations. SHAPE Issues, The NATO Response Force—NRF: Role at http://www.nato.int/shape/issues/shape_nrf/nrfb.htm (last updated Sept. 26, 2003).

II. HISTORICAL FRAMEWORK

A. *Formation of the North Atlantic Treaty Organization*¹⁷

1. The Soviet Menace

From Stettin in the Baltic to Trieste in the Adriatic an iron curtain has descended across the Continent. Behind that line lie all the capitals of the ancient states of Central and Eastern Europe. Warsaw, Berlin, Prague, Vienna, Budapest, Belgrade, Bucharest and Sofia; all these famous cities and the populations around them lie in what I must call the Soviet sphere, and all are subject, in one form or another, not only to Soviet influence but to a very high and in some cases increasing measure of control from Moscow.¹⁸

Less than a year after the end of World War Two in Europe, Sir Winston Churchill uttered these, now famous lines, prophetically perceiving that the Soviet Union posed the greatest threat to post-war global stability and peace.

Still, many in the West did not possess Churchill's perspicacity and either refused to accept or were unable to recognize the threat posed by Soviet foreign policy and ideological

¹⁷ This author seeks to avoid the mistakes of other commentators who too frequently engage in cursory historical examination and offer the prosaic version of the reasons for the formation of NATO: the relationship between the Soviet Union and the West deteriorated; thus, NATO was formed. While technically correct on the most basic, macro level, proceeding from such an oversimplified premise often leads to the mistaken conclusion that NATO was formed for the sole purpose of defending against the threat posed by the Soviet Union, which, in turn, leads to the equally mistaken conclusion that NATO has lost its relevance now that the sole reason for its existence has disappeared. Therefore, this author seeks to provide an in-depth historical analysis of the reasons behind NATO's formation in order to demonstrate that NATO was created to combat any threat to the security of the North Atlantic area.

¹⁸ Sir Winston Churchill, *Sinews of Peace (Iron Curtain)*, Speech Delivered at Westminster College in Fulton, Missouri (Mar. 5, 1946), at <http://www.winstonchurchill.org/i4a/pages/index.cfm?pageid=429> (last visited June 1, 2005). Some scholars have referred to Churchill's Iron Curtain speech as the informal declaration of the Cold War. See Walter La Feber, *America, Russia, and the Cold War 1945-1975* 39 (New York: John Wiley and Sons) (1976); Timothy P. Ireland, *Creating The Entangling Alliance—The Origins of the North Atlantic Treaty Organization* 19 (Greenwood Press) (1981).

objectives.¹⁹ The Western allies, weary from six years of war, were anxious to demobilize and begin the task of rebuilding Europe.²⁰ Moreover, the signing of the United Nations Charter on June 26, 1945 prompted many to conclude that the framework for the peaceful resolution of all future disputes had been firmly established.²¹ Yet, the West's nascent, post-war optimism proved short-lived as the course of world events exposed that optimism as an idyllic delusion.

Perhaps the fog of war had clouded the judgment of the Western allies vis a vis the Soviet Union; however, the Kremlin's Machiavellian predisposition had been on display long before the guns of the Second World War fell silent.²² By the end of the war, Soviet territorial expansion

¹⁹ See Lord Ismay, *NATO: The First Five Years 1949–1954* 4 (1955); see also Prince Hubertus zu Löwenstein & Volkmar von Zühlsdorff, *NATO AND THE DEFENSE OF THE WEST* 41 (Andre Deutsch LTD 1963) (1960) (observing that the Soviet Union was unwilling to halt the spread of the world communist revolution for the sake of treaty obligations).

²⁰ Ismay, *supra* note 18, at 4. On May 8, 1945 (VE Day), the United States had 3,100,000 men in Europe, and, one year later, that number was 391,000. *Id.* Similarly, Great Britain had 1,321,000 men in continental Europe on VE Day and only 488,000 one year later. *Id.* Canadian armed strength in Europe amounted to 299,000 men on the day of Germany's surrender and, in less than a year, they had all returned to Canada. *Id.*

²¹ Ismay, *supra* note 18, at 3–4; zu Löwenstein & von Zühlsdorff, *supra* note 19, at 40. In his book, Lord Ismay noted that [t]he Charter was founded on two assumptions. First, that the five Powers holding permanent seats in the Security Council – China, France, the United Kingdom, the United States, and the Soviet Union – would be able to reach lasting agreement on major matters. Secondly, that apart from Russia's known claims on Japan, none of these Powers sought any territorial aggrandizement. Unfortunately, neither of these assumptions proved correct. Isamy, *supra* note 18, at 3.

²² Pursuant to the secret protocols of the German-Soviet Non-Aggression Pact of 1939, the Germans and Soviets agreed to divide Poland, with the U.S.S.R. occupying the eastern half of the country. zu Löwenstein & von Zühlsdorff, *supra* note 19, at 43. The secret protocols of the Non-Aggression Pact also gave the Soviet Union free reign over the Baltic states, and, by war's end, Estonia, Latvia, and Lithuania were incorporated into the U.S.S.R. *Id.* Additionally, the Soviet Union used the war to annex Karelia from Finland, East Prussia from Germany, Ruthenia from Czechoslovakia, and Bessarabia and Northern Bukovina from Romania. *Id.*

had extended to include an additional 124,000 square miles and 23,000,000 people.²³ During the immediate post-war period, Moscow continued to expand its hegemony. After “liberating” Eastern Europe from the Nazis, the Soviet Union, through a combination of political terror²⁴ and the overwhelming strength of the occupying Red Army, brought Albania, Bulgaria, Czechoslovakia, Eastern Germany, Hungary, Poland, and Romania under Soviet domination.²⁵ In Asia, the Soviets attempted to detach southern Azerbaijan from Iran²⁶ and occupied Manchuria and the northern Korean peninsula.²⁷ The Soviet Union also used its power and influence in the Far East to enable Mao Zedong and his communist forces to take power in China and to establish a communist republic in North Korea.²⁸ In addition to their naked aggression and sponsorship of a growing number of communist regimes, the Soviet Union did not demobilize and disarm its military after World War Two; instead, the Red Army, numbering over 4,000,000 men, remained in the field, and the Soviet armaments industry continued

²³ *Id.* at 43–44. Speaking before the United Nations General Assembly in 1948, Paul-Henri Spaak, Belgian statesman and second NATO Secretary-General, declared that “[o]nly one power emerged from the war with additional territory, and that power is the Soviet Union.” *Id.* at 44.

²⁴ *Id.* at 44. With Moscow’s support, communists murdered, imprisoned, and exiled opposition leaders in Bulgaria, Czechoslovakia, Estonia, Hungary, Latvia, Lithuania, Poland, and Romania. *Id.*

²⁵ Ismay, *supra* note 18, at 5.

²⁶ zu Löwenstein & von Zühlsdorff, *supra* note 19, at 46.

²⁷ Ismay, *supra* note 18, at 6.

²⁸ zu Löwenstein & von Zühlsdorff, *supra* note 19, at 46. Additionally, Soviet sponsorship of communist agitation in Asia also helped create an ideal environment for communist insurrections throughout Indochina. *Id.*

producing at maximum capacity.²⁹ These developments would prove to be harbingers of discord among the war-time allies.

The rift between the Soviet Union and the West began developing shortly before the close of hostilities in the Second World War. One of the first disagreements came at the San Francisco Conference of 1945 when Poland was prevented from participating because the Soviet Union and the Western Powers could not agree upon the composition of Poland's provisional government.³⁰ The following autumn in London,³¹ Soviet inflexibility and obstruction temporarily paralyzed the Council of Foreign Ministers'³² preparations for peace treaty negotiations with the lesser World War Two adversaries.³³ In a Soviet radio address four months later, Stalin announced that "armed conflict remained an inherent part of the western capitalist

²⁹ Ismay, *supra* note 18, at 4; zu Löwenstein & von Zühlendorff, *supra* note 19, at 41–42.

³⁰ Ismay, *supra* not 18, at 4.

³¹ See Report on First Session Of The Council Of Foreign Ministers, London, September 11–October 2, 1945, Department of State Bulletin, October 7, 1945 at 507–12 [hereinafter 1945 London Council of Foreign Ministers Report] *available at* <http://www.yale.edu/lawweb/avalon/decade/decade18.htm>; Isamy, *supra* not 18, at 4. Secretary Byrnes' report details the inflexible and obstinate behavior exhibited by the Soviet delegation at the London Conference. 1945 London Council of Foreign Ministers Report.

³² At the Potsdam Conference in 1945, the United States, United Kingdom, and the Soviet Union agreed to create a Council of Foreign Ministers whose task was to make the necessary preparations for the peace settlements. PROTOCOL OF THE PROCEEDINGS OF THE BERLIN CONFERENCE, Article I, United States Department of State, Foreign Relations of the United States, 1945, vol.2, Conference of Berlin (Potsdam), at 1478 [hereinafter Potsdam Protocol] *available at* <http://www.yale.edu/lawweb/avalon/decade/decade17.htm>. The Council was to be comprised of the foreign ministers from the United States, United Kingdom, Soviet Union, France, and China. *Id.*

³³ Ismay, *supra* not 18, at 4–5. The Paris Peace Treaties were signed with Italy, Finland, Bulgaria, Hungary, and Romania on February 10, 1947. *Id.* at 5.

system and that future wars could be expected.”³⁴ Soviet diplomatic intransigence persisted at the March 1947 Council of Foreign Ministers meetings in Moscow where the Council faced serious disagreements concerning the future of Germany.³⁵ At the Council meeting seven months later in London, the Soviets remained intractable and, again, the Council was deadlocked on the many questions regarding the future of Germany.³⁶ On March 28, 1948, the Soviet delegation quit the Allied Control Council in Berlin.³⁷ Three days later, the deterioration of the relationship between the Soviet Union and the West culminated in the Soviet blockade of Berlin.³⁸ Not only did the Berlin crisis of 1948 cement the schism between the World War Two

³⁴ Ireland *supra* note 18.

³⁵ Ismay, *supra* note 18, at 4–5. In Moscow, the Soviets and the Western ministers disagreed over the structure of the future German government, the structure of the German economy, the amount of reparations owed by Germany, the demarcation of the boundary between Germany and Poland, the procedure for drafting the German peace treaty, the Four Power Pact proposal, and the Austrian peace treaty. Moscow Meeting Of The Council of Foreign Ministers, March 10–April 24, 1947, Address By Secretary of State General George C. Marshall, Department of State Bulletin, May 11, 1947 at 919–24[hereinafter 1947 Moscow Council of Foreign Ministers Report] *available at* <http://www.yale.edu/lawweb/avalon/decade/decade23.htm>; *see also* Ireland *supra* note 18, at 22–23 (discussing the unsuccessful results of the Moscow Conference).

³⁶ Ismay, *supra* note 18, at 5.

³⁷ *Id.* The Allied Control Council was established at the Potsdam Conference and functioned as the post-war, military government of Germany. Potsdam Protocol, *supra* note 31, at Article II. The headquarters of the Allied Control Council was in Berlin, and from there the military governments of the United States, United Kingdom, France, and the Soviet Union administered their respective zones of occupation. http://en.wikipedia.org/wiki/Allied_Control_Council. It was this headquarters building in Berlin that the Soviets vacated on March 28, 1948, and the American, British, and French military legations departed shortly thereafter. *Id.*

³⁸ *See* zu Löwenstein & von Zühlendorff, *supra* note 19, at 54. The Soviet Blockade of Berlin lasted for 323 days but was defeated by the courage demonstrated by the Western Allies—the United States, Great Britain, and France—in undertaking the famous Berlin Airlift. Ismay, *supra* note 18, at 9.

allies, but Berlin itself symbolized the division of the world into two armed camps and, for forty-one years, was the epicenter of suspicion and enmity between East and West.

2. The Response of the West: The Advent of Collective Defense

Although the war-weary nations of the West initially balked at the prospect of confronting their increasingly belligerent former ally,³⁹ Soviet bellicosity engendered a rapid change of attitude among the Western allies. Thus, it was principally⁴⁰ the threat posed by the Soviet Union that would cause the United States, which led the way, and the nations of western Europe to conclude that the best guarantee of their future security lay in mutual assistance and cooperation with one another—a policy of collective defense that would ultimately result in the formation of the North Atlantic Treaty Organization.

³⁹ See Ismay, *supra* note 18 for a discussion of the West's reluctance to counter the Soviet Union's aggressive foreign policy during the immediate post-war period.

⁴⁰ Ismay, *supra* note 18, at 3. Lord Ismay observed that “[t]he history of the immediate post-war period is largely that of how the Kremlin, aided by exceptionally favourable circumstances, used the combined strength of the Red Army and world Communism to carry forward expansionist policies, and of how the rest of the world reacted.” *Id.* See Ireland *supra* note 18. Ireland's book explores the multiple, historical motivations which culminated in the creation of the North Atlantic Treaty Organization but acknowledges that NATO was formed, primarily, as a counterpoise against the Soviet military presence in Europe. *Id.* See also NATO Handbook, The Origins of the Alliance, available at <http://www.nato.int/docu/handbook/2001/hb0101.htm> (identifying the threat of Soviet aggression the resulting need for a bulwark to defend against that threat as the principal reason for the formation of the Alliance). Cf. John J. McCloy, *The Atlantic Alliance: its origin and its future* 23–25 (Carnegie Mellon University 1969). McCloy commented that the principal reason for the formation of the alliance was not the threat of Soviet military aggression but rather the ideological threat posed by the Soviet desire to bring the militarily and economically weakened areas of Western Europe under communist hegemony. *Id.*

a. The American Response

American discontent with the Soviets manifested itself on the diplomatic front as early as 1945.⁴¹ At the London conference of the Council of Foreign Ministers in the autumn of 1945, Secretary of State James Byrnes reported that the Americans and Soviets had disagreed sharply over the nature of decisions made the previous summer at the Potsdam conference.⁴² In early 1946, shortly after Stalin's February 1946 radio address in which he announced that warfare between capitalist and communist societies was inevitable,⁴³ George F. Keenan, the American *charge d'affaires* at the U.S. Embassy in Moscow, sent his famous "Long Telegram"⁴⁴ wherein he "presented a dark picture of the motivations behind Soviet foreign policy"⁴⁵ and recommended a policy of containment that would guide the United States' Soviet policy for almost fifty years.⁴⁶ The diplomatic situation continued to deteriorate throughout 1946. At the Paris Foreign Ministers Conference held in the spring of 1946, lack of cooperation between the Soviets and the Western Allies—the United States, Great Britain, and France—over the administration of occupied Germany caused Secretary of State Byrnes to suggest a four-power

⁴¹ Ismay, *supra* note 18, at 4.

⁴² See 1945 London Council of Foreign Ministers Report, *supra* note 30; Potsdam Protocol, *supra* note 31.

⁴³ See *supra* note 33.

⁴⁴ The cable was referred to as the "Long Telegram" because it contained over 8,000 words of detailed, comprehensive analysis on the historical underpinnings of and projections for the likely course of Soviet foreign policy. *available at* <http://www.cnn.com/SPECIALS/cold.war/episodes/02/documents/kennan/>.

⁴⁵ Ireland *supra* note 18.

⁴⁶ *Id.* at 19–28.

treaty solution to the German problem.⁴⁷ The Soviets, initially non-committal, formally rejected the proposal two months later.⁴⁸ The relationship continued to worsen in 1947. In an address to Congress on March, 12, 1947, President Truman announced the future course of American foreign policy—American commitment to a policy of containment of totalitarianism and Soviet communism—which became known as the Truman Doctrine.⁴⁹ Unsurprisingly, the Moscow Council of Foreign Ministers Conference, which had begun two days earlier,⁵⁰ ended in failure as

⁴⁷ Ireland, *supra* note 18.

⁴⁸ *Id.* at 20. The principal reason for the rejection of the proposal was the Soviet demand that reparations shipments be completed before making long-term decisions on Germany's future. *Id.* at 19–21.

⁴⁹ President Harry S. Truman's Address Before A Joint Session Of Congress, March 12, 1947 available at <http://www.yale.edu/lawweb/avalon/trudoc.htm> [hereinafter Truman Doctrine Address]. Truman's speech was precipitated by political developments in the eastern Mediterranean. Ireland, *supra* note 18, at 23–29. In February of 1947, the British government informed the United States that financial considerations compelled the United Kingdom to cease its provision of assistance to the Greek monarchy in its struggle against Communist rebels and to the Turkish government's attempts to withstand Soviet political coercion. *Id.* at 23–24. Truman proclaimed "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" and that the United States should do its utmost to aid Greece and Turkey in their efforts to resist communist subversion, and, thus, he requested that Congress authorize both economic and military aid. Truman Doctrine Address, *supra*. Although not specifically mentioning them, the intended recipient of Truman's declaration was clearly the Soviet Union, and the speech represented an unmistakable warning to the Soviets that, henceforth, the United States would ostensibly oppose the spread of communism anywhere in the world. Truman Doctrine Address, *supra*. *But see* Ireland, *supra* note 18, at 27 (suggesting the propriety of a more limited interpretation of Truman's speech and observing that the Truman administration arguably backed away from the global implications of the Truman doctrine toward a "less ambitious . . . [goal] of restoring the balance of power in Europe.") (quoting John Lewis Gaddis, *Was the Truman Doctrine a Turning Point?* *Foreign Affairs* 52, 2 (January 1974): 386–402).

⁵⁰ Ireland, *supra* note 18, at 22.

the Council was unable to agree on a plan for Germany's future.⁵¹ On June 5, 1947, Secretary of State George Marshall gave the commencement address at Harvard University.⁵² In his speech, which proclaimed what became known as the Marshall Plan, Marshall stressed the importance of European recovery to the American and world economies, and it marked the beginning of an American led initiative to oversee and shepherd European recovery from World War Two.⁵³ A

⁵¹ See *supra* note 34 and accompanying text; *see also* Ireland, *supra* note 18, at 22 (observing that Secretary of State Marshall's pessimism regarding the chances for success at the Moscow Conference was well founded).

⁵² Ireland *supra* note 18, at 36.

⁵³ See Ireland, *supra* note 18, at 36. Although Marshall ultimately asserted that the initiative must come from the Europeans, he stated that

[t]he truth of the matter is that Europe's requirements for the next 3 or 4 years of foreign food and other essential products—principally from America—are so much greater than her present ability to pay that she must have substantial additional help, or face economic, social, and political deterioration of a very grave character. The remedy lies in breaking the vicious circle and restoring the confidence of the European people in the economic future of their own countries and of Europe as a whole. . . . Aside from the demoralizing effect on the world at large and the possibilities of disturbances arising as a result of the desperation of the people concerned, the consequences to the economy of the United States should be apparent to all. It is logical that the United States should do whatever it is able to do to assist in the return of normal economic health in the world, without which there can be no political stability and no assured peace. Our policy is directed not against any country or doctrine but against hunger, poverty, desperation, and chaos. Its purpose should be the revival of working economy in the world so as to permit the emergence of political and social conditions in which free institutions can exist. Such assistance, I am convinced, must not be on a piecemeal basis as various crises develop. Any assistance that this Government may render in the future should provide a cure rather than a mere palliative. Any government that is willing to assist in the task of recovery will find full cooperation, I am sure, on the part of the United States Government. *Any government which maneuvers to block the recovery of other countries cannot expect help from us. Furthermore, governments, political parties, or groups which seek*

corollary of the American-led European recovery program was an exacerbation of the U.S.-Soviet relationship which, in turn, facilitated the growing American realization that a greater U.S. investment in European security was required.⁵⁴

Actually, serious discussion regarding active American involvement in the European security framework had begun one month earlier with a report issued by the Joint Chiefs of Staff (JCS).⁵⁵ In their support, the JCS identified the Soviet military as the principal threat to U.S. security, and, as such, the thrust of the JCS position was the argument that western Europe was an essential component in the United States' global strategy to counterbalance Soviet military power.⁵⁶ Thus, "by linking U.S. security to that of western Europe, the Joint Chiefs emphasized the growing concept of *Atlantic* security."⁵⁷

*to perpetuate human misery in order to profit therefrom politically
or otherwise will encounter the opposition of the United States.*

Secretary of State George C. Marshall, Marshall Plan Speech, June 5, 1947

available at

<http://www.cnn.com/SPECIALS/cold.war/episodes/03/documents/marshall.plan/>(
emphasis added).

⁵⁴ For example, just one month after Secretary of State Marshall's announcement of the European recovery program, Politburo member Andrei Zhdanov exhorted Communist parties across Europe to undermine the Marshall Plan, and, as a result, Communists initiated strikes in France and Italy. Ireland, *supra* note 18, at 54. These Soviet-influenced attempts to subvert the Marshall Plan would lead to a growing consensus on both sides of the Atlantic that bolstering European security was an essential prerequisite to the successful implementation of the European recovery program. Ireland, *supra* note 18, at 54.

⁵⁵ See Ireland, *supra* note 18, at 32.

⁵⁶ See Ireland, *supra* note 18, at 33–32. Specifically, the JCS maintained that in a future "ideological war" the United States would have to utilize the resources of the countries of the "Old World," which were "potentially powerful and also potential allies of the United States." The Joint Chiefs pointed out the fact that two world wars had demonstrated the interdependence of the United States and western Europe in case of war with central or eastern European powers, and they maintained that the western countries were "in mortal peril" if they did not unite their forces.

i. The Inter-American Treaty of Reciprocal Assistance

The Inter-American Treaty of Reciprocal Assistance or Rio Pact, signed on September 2, 1947, in Rio de Janeiro, Brazil, was significant in the historical development of United States' post-World War Two security policy because many of its provisions would serve as models for the North Atlantic Treaty.⁵⁸ The purpose of the Rio Pact was to establish a system of western hemispheric security which would deter acts of aggression directed at any of the signatory nations.⁵⁹ Specifically, Article three of the Rio Pact was the treaty's manifestation of the collective security concept stating "that an armed attack by any State against an American State shall be considered as an attack against all the American States" ⁶⁰ Further, Article four of

Ireland, *supra* note 18, at 33 (quoting U.S. Department of State, Foreign Relations of the United States, 1947, vol. 1, General: United Nations, pp. 734–36; Memorandum by the Joint Chiefs of Staff, enclosure dated April 29, 1947.) (quotations in original).

⁵⁷ See Ireland, *supra* note 18, at 33 (emphasis added).

⁵⁸ See Ireland, *supra* note 18, at 38.

⁵⁹ See Inter-American Treaty of Reciprocal Assistance, Article III (September 2, 1947); see also Ireland, *supra* note 18, at 37 (observing that the purpose of the Rio Pact was remedy the insecurity felt by nations of the western hemisphere as a result of World War Two).

⁶⁰ Inter-American Treaty of Reciprocal Assistance, Article III (September 2, 1947). The pertinent portions of Article three state 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. On the request of the State or States directly attacked . . . each one of the Contracting Parties *may determine* the immediate measures which it may individually take in fulfillment of the obligation contained in the preceding paragraph and in accordance with the principle of continental solidarity. . . .

the treaty defined the territory to which Article three was applicable.⁶¹ Importantly, Article six of the Rio Pact implicitly recognized the increasingly global nature of American security policy.⁶² These provisions of the Rio Pact proved significant because they provided a useful point of reference when the United States and the nations of western Europe convened to establish a collective defense arrangement of their own—the North Atlantic Treaty.

b. The European Response

In the immediate post-war period, the major western European powers, Great Britain and France, viewed the Soviet Union's military and political domination of eastern Europe and diplomatic intransigence with the same unease and discontent as their American ally.⁶³ Yet, unlike the United States, Great Britain and France were less well equipped to combat the Soviet threat because, in contrast to the United States, both nations had sustained two more years of war and the concomitant drain on manpower and resources.⁶⁴ Consequently, both were faced with rebuilding a war-ravaged domestic infrastructure and with the cost of administering the remnants of their respective global empires.⁶⁵ As a result, the United States was able to recognize and react more quickly to the Soviet Union's increasingly hostile foreign policy, and the western

Id. (emphasis added). As the italicized language indicates, the signatory nations retained discretionary authority when determining their response to an invocation of Article III. *See id.*

⁶¹ Article four defined the geographic region covered by the treaty as the continents of North and South America including Greenland, all adjacent waters including the Caribbean, and the polar regions lying north and south of the two continents. *See* Inter-American Treaty of Reciprocal Assistance, Article IV (September 2, 1947).

⁶² Ireland, *supra*, note 18, at 39.

⁶³ zu Löwenstein & von Zühlsdorff, *supra* note 19, at 50.

⁶⁴ *Id.* at 51.

⁶⁵ *Id.*

European powers were forced to rely more heavily on the United States for leadership and material support.⁶⁶ Thus, the response of the western European powers to the Soviet threat is best understood as an extension of the American reaction.

1. The Brussels Treaty

Restoring the balance of power in Europe was an essential aspect of the United States' security policy;⁶⁷ however, European initiative was needed for the accomplishment of that goal.⁶⁸ The genesis of the European initiative began after the failure of the November 1947 Council of Foreign Ministers Conference in London⁶⁹ with a proposal by British Foreign Secretary Ernest Bevin to create a Western Union.⁷⁰ As a basis of his western European security concept, Bevin advocated the formulation of a multilateral treaty between Great Britain, France, and the Benelux

⁶⁶ *See id.*

⁶⁷ *See supra* notes 53–55 and accompanying text.

⁶⁸ U.S. Department of State, *Foreign Relations of the United States, 1947*, vol. 1, General: United Nations, pp. 772; Report of the Policy Planning Staff. This November 6, 1947 report declared that the United States had

borne almost single handed the burden of the international effort to stop the Kremlin's political advance. But this has stretched our resources dangerously far in several respects. . . . In these circumstances it is clearly unwise for us to continue the attempt to carry alone, or largely single handed, the opposition to Soviet expansion. It is urgently necessary for us to restore something of the balance of power in Europe and Asia by strengthening local forces of independence and getting them to assume part of our burden.

Id.

⁶⁹ Ireland, *supra* note 18, at 55; Ismay, *supra* note 18, at 5.

⁷⁰ Ireland, *supra* note 18, at 63.

nations modeled after the Anglo-French Treaty of Dunkirk.⁷¹ Although the British envisaged the eventual participation of Germany in the security arrangement, the plan met with sharp criticism on both sides of the Atlantic.⁷² Specifically, the United States faulted the plan to utilize the Treaty of Dunkirk as a model because they feared alienating Germany, whose eventual participation the United States believed was critical to the success of a European security organization.⁷³ Further, the United States believed that the proposed Western Union should be aimed at containment of the Soviet threat and, therefore, suggested the Rio Pact as a more suitable model.⁷⁴ Thus, “[i]t is important to note that the Rio Pact formula and the eventual inclusion of Germany were emerging as essential prerequisites for American involvement”⁷⁵ in the European security framework.

During the course of these discussions, the Europeans renewed their push for closer American involvement in the proposed European security arrangement.⁷⁶ At that stage,

⁷¹ Ireland, *supra* note 18, at 63. The Treaty of Dunkirk was a bilateral defense agreement signed by Great Britain and France on March 4, 1947 and was designed to protect against a renewal of German aggression. zu Löwenstein & von Zühlsdorff, *supra* note 19, at 48.

⁷² Ireland, *supra* note 18, at 64. Belgian Prime Minister, Paul Henri Spaak, commented “that unless this Pact was meant as a screen behind which to consider defenses against Russia, it was meaningless because of Germany’s present position.” FRUS, 1947, vol. 3, 4–5; Hickerson to Marshall.

⁷³ Ireland, *supra* note 18, at 64.

⁷⁴ Ireland, *supra* note 18, at 64–65. French strategic thinking was neurotically obsessed with the possibility of renewed German aggression, a security perspective which their American and European counterparts believed to be anachronistic. Ireland, *supra* note 18, at 64–74.

⁷⁵ Ireland, *supra* note 18, at 64.

⁷⁶ Ireland, *supra* note 18, at 55–56 & 64–65. Paul Henri Spaak observed “that any defense arrangement which did not include the United States would be without practical value.” FRUS, 1947, vol. 3, 4–5; Hickerson to Marshall.

however, the United States was unwilling to formally commit to a transatlantic security alliance because it feared jeopardizing the passage of Marshall's European recovery program in Congress.⁷⁷ Thus, the onus was on the Europeans to bring the security concept to fruition.

Formal negotiations aimed at solidifying the Western Union concept were scheduled to begin in March of 1947, but, before the talks got underway, events in eastern Europe illuminated the preeminence of the Soviet threat to western European security. On February 25, 1948, Communist forces overthrew the democratically elected government of Czechoslovakia and installed a pro-Soviet regime.⁷⁸ Two weeks later, when the representatives of Great Britain, France, and the Benelux nations convened in Brussels, the Soviet sponsored Prague coup was foremost in their minds.⁷⁹ The delegates agreed upon and signed the Treaty of Economic, Social, and Cultural Collaboration and Collective Self-defense, or Brussels Treaty, on March 17, 1948.⁸⁰ The agreement allayed French insecurity with respect to Germany and laid the groundwork for eventual German participation.⁸¹ Moreover, Article four, the collective self-defense provision,

⁷⁷ Ireland, *supra* note 18, at 65–66. Despite American reluctance to formally associate with the European efforts, a growing number of U.S. officials viewed American involvement as a necessary component for the achievement of a successful European security framework.

⁷⁸ zu Löwenstein & von Zühlsdorff, *supra* note 19, at 48.

⁷⁹ zu Löwenstein & von Zühlsdorff, *supra* note 19, at 50.

⁸⁰ Treaty of Economic, Social, and Cultural Collaboration and Collective Self-defense (March 17, 1948) *available at* <http://www.yale.edu/lawweb/avalon/intdip/westeu/we001.htm>.

⁸¹ *See* Treaty of Economic, Social, and Cultural Collaboration and Collective Self-defense (March 17, 1948) *available at* <http://www.yale.edu/lawweb/avalon/intdip/westeu/we001.htm>. The Treaty's preamble declares that the signatories are committed

[t]o afford assistance to each other, in accordance with the Charter of the United Nations, in maintaining international peace and

contemplated the more serious, overarching threat to European security—the Soviet Union.⁸² Significantly, Article four requires military assistance in the event one of parties to the agreement is attacked; in contrast to the Rio Pact,⁸³ the Brussels Treaty does not afford discretion to its signatories.⁸⁴ The Brussels Treaty was important because it demonstrated to the United States that Europe was prepared to shoulder the burden of its defense and, ultimately, helped facilitate the involvement of the United States in the European system of collective defense.

c. The Unification of Trans-Atlantic Collective Defense

Six days prior to the March 1948 signing of the Brussels Treaty, the process of forging a trans-Atlantic collective defense organization began when the British informed the United States

security and in resisting any policy of aggression; [t]o take such steps as may be held to be necessary in the event of a renewal by Germany of a policy of aggression; [and] [t]o associate progressively in the pursuance of these aims other States inspired by the same ideals and animated by the like determination

Id.

⁸² See Treaty of Economic, Social, and Cultural Collaboration and Collective Self-defense, Article IV, (March 17, 1948) *available at* <http://www.yale.edu/lawweb/avalon/intdip/westeu/we001.htm>. Article four declares:

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 in their power.

Id.

⁸³ See *supra* note 58 and accompanying text.

⁸⁴ Treaty of Economic, Social, and Cultural Collaboration and Collective Self-defense, Article IV, (March 17, 1948) *available at* <http://www.yale.edu/lawweb/avalon/intdip/westeu/we001.htm>.

that the Soviet Union was pressuring Norway to execute a bilateral security agreement.⁸⁵ British Foreign Secretary Bevin perceived the Soviet's Norwegian overture as a threat to both the North Atlantic area and to the ongoing efforts to create a Western Union in Brussels.⁸⁶ Foreign Secretary Bevin proposed that the British and Americans begin immediate consultations in order to develop and implement a trans-Atlantic security framework that would "inspire the necessary confidence to consolidate the West against Soviet infiltration and at the same time inspire the Soviet government with enough respect for the West to remove the temptation from them and insure a long period of peace."⁸⁷ Secretary of State Marshall concurred, and the process which spawned the North Atlantic Treaty Organization was formally conceived.⁸⁸

Nevertheless, the process of transforming the North Atlantic Treaty Organization a reality was fraught with controversy. First, the United States, although certainly anxious to restore the balance of power in Europe, was leery about making entangling, long-term commitments to European security.⁸⁹ The Europeans, in contrast, anxiously and frequently pressed for a formal

⁸⁵ FRUS, 1948, vol. 3, 46–48, the British Embassy to the Department of State. Norway wished to reject the Soviet proposal but sought reassurance that the western powers would support them. *Id.*

⁸⁶ FRUS, 1948, vol. 3, 47, the British Embassy to the Department of State.

⁸⁷ FRUS, 1948, vol. 3, 48, the British Embassy to the Department of State.

⁸⁸ FRUS, 1948, vol. 3, 48, Marshall to Inverchapel. On the same day the Western Union defense pact was signed in Brussels, President Truman apprised Congress of the recent European developments. Ireland, *supra* note 18, at 73–74. Truman expressed his confidence "that the United States will, by appropriate means, extend to the free nations the support which the situation requires." Additionally, Truman confidently added "that the determination of the free countries of Europe to protect themselves will be matched by an equal determination on our part to help them protect themselves." Ismay, *supra* note 18, at 4.

⁸⁹ See Ireland, *supra* note 18, at 80–114.

American commitment to become and stay involved in European security.⁹⁰ Correspondingly, the Europeans advocated a treaty formula as the best method by which to secure the United States' active involvement.⁹¹ However, much to the chagrin of the Europeans, some in the American foreign policy establishment did not favor a treaty; instead, these persons suggested that a Presidential declaration was a more desirable alternative for evincing a formal U.S. commitment to European security.⁹² Despite the disagreement, pro-treaty elements in the American foreign policy community were slowly gaining the upper hand, and, meanwhile, trans-Atlantic consultations continued in earnest with the Europeans doggedly insisting on the treaty format.

On June 11, 1948, Senator Arthur Vandenberg, chairman of the Senate Foreign Relations Committee, proposed a resolution (Vandenberg Resolution), submitting it to the Senate for a floor vote.⁹³ The purpose of the Vandenberg Resolution was to assure the Europeans of the United States' good faith commitment to proceeding on the trans-Atlantic security initiative without undertaking any permanent obligations.⁹⁴ The Vandenberg Resolution was

⁹⁰ Ireland, *supra* note 18, at 80–114. After coming to Europe's aid in World War One, the United States reverted back to their traditional isolationist foreign policy in the interwar period, and the Europeans were anxious to prevent a resurgence of American isolationism.

⁹¹ Ireland, *supra* note 18, at 81.

⁹² Ireland, *supra* note 18, at 82–85.

⁹³ Ireland, *supra* note 18, at 99.

⁹⁴ See S. Res. 239, 90th Cong., 2d sess., June 11, 1948; see also Ireland, *supra* note 18, at 93 (quoting statements made by Senator Vandenberg). Per the Vandenberg Resolution, the Senate recommended, *inter alia*, that the United States pursue the following objectives within the parameters of the United Nations Charter:

- (2) Progressive development of regional and other collective arrangements for individual and collective self-defense in

overwhelmingly approved by the Senate,⁹⁵ but European fears were not assuaged; they continued to insist on a treaty-based trans-Atlantic security pact.⁹⁶

Subsequently, the United States agreed to host representatives from France, Great Britain, Canada, Belgium, and the Netherlands in Washington for the purpose of holding "top-secret exploratory talks pursuant to the Vandenberg Resolution."⁹⁷ The talks were scheduled to start on June 29, but, before they began, Soviet actions again imbued the western nations with a sense of urgency.⁹⁸ Despite the Berlin crisis, the Washington meetings provided an opportunity for the United States to be unyielding—the Americans insisted that any treaty or military aid program must be based on the Vandenberg Resolution and that any collective defense provision be based

accordance with the purposes, principles, and provisions of the Charter.

(3) Association of the United States, by constitutional process, with such regional and other collective arrangements as are based on continuous and effective self-help and mutual aid, and as affect its national security.

(4) Contributing to the maintenance of peace by making clear its determination to exercise the right of individual or collective self-defense under article 51 should any armed attack occur affecting its national security.

S. Res. 239, 90th Cong., 2d sess., June 11, 1948.

⁹⁵ Ireland, *supra* note 18, at 99.

⁹⁶ Ireland, *supra* note 18, at 98.

⁹⁷ Ireland, *supra* note 18, at 100.

⁹⁸ See Ireland, *supra* note 18, at 100–01. On June 24, 1948, the Soviet authorities in Berlin imposed a full blockade of the city, effectively besieging Allied-controlled West Berlin. zu Löwenstein & von Zühlsdorff, *supra* note 19, at 54. The French felt severely threatened by the Soviet blockade of Berlin and, consequently, began requesting immediate U.S. military assistance and the rapid conclusion of the treaty as soon as they arrived in Washington. Ireland, *supra* note 18, at 101–02.

on the Rio Pact.⁹⁹ The Europeans, especially the French, were not pleased; they favored the collective-defense provision of the Brussels Treaty which mandated automatic military response in the event of aggression.¹⁰⁰ However, the United States, which had essentially acceded to the European demands for security arrangement based on a treaty formula, remained firm and predicated their participation in a trans-Atlantic security pact on the adoption of a Rio-Pact-style collective-defense provision.¹⁰¹

Throughout the summer of 1948, the Washington conferees discussed and analyzed the details of the proposed alliance.¹⁰² The parties agreed that invitations to join the envisioned North Atlantic security system be extended to other western European nations.¹⁰³ The conferees also agreed that any collective defense provision must enable the proposed alliance to meet aggression “from whatever quarter and at whatever time.”¹⁰⁴ Yet, the specific wording of the collective-defense provision remained a sticking point.¹⁰⁵ The Europeans preferred the automatic guarantee language of the Brussels Treaty’s article four¹⁰⁶ while the Americans, for

⁹⁹ Ireland, *supra* note 18, at 102.

¹⁰⁰ Ireland, *supra* note 18, at 102–05.

¹⁰¹ Ireland, *supra* note 18, at 102–12.

¹⁰² Ireland, *supra* note 18, at 104–07.

¹⁰³ Ismay, *supra* note 18, at 10.

¹⁰⁴ FRUS, 1948, vol.3, 242; Memorandum by the Participants in the Washington Security Talks, July 6–September 9, Submitted to Their Respective Governments for Study and Comment.

¹⁰⁵ Ireland, *supra* note 18, at 104–07.

¹⁰⁶ See *supra* note 75 and accompanying text.

constitutional reasons,¹⁰⁷ insisted upon the discretionary language contained in article three of the Rio Pact. This time, it was the Europeans who reluctantly acquiesced, and what became Article five of the North Atlantic Treaty included the discretionary language insisted by the United States.¹⁰⁸

Finally, on April 4, 1949, twelve western nations¹⁰⁹ convened in Washington D.C. to sign the North Atlantic Treaty.¹¹⁰ Despite disagreement and after many months of careful deliberation, the nations of the West concluded one of history's greatest compromises. The fourteen articles of the North Atlantic Treaty forged what would become the world's most powerful collective-defense organization. Relying on a common heritage and committed to the principles of democracy, the nations of the West cemented the trans-Atlantic bond and stood united under the aegis of NATO.¹¹¹

¹⁰⁷ Although the President retains certain war powers, U.S. CONST. art. II, § 2, cl. 1, the United States Constitution requires that declaration of war shall come from Congress. U.S. CONST. art. I, § 8, cl. 11.

¹⁰⁸ See North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246.; *supra* note 58 and accompanying text.

¹⁰⁹ The twelve original NATO member states were Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, Netherlands, Norway, Portugal, United Kingdom, and the United States. Ismay, *supra* note 18, at 11.

¹¹⁰ North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246.

¹¹¹ North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246. The Preamble to the North Atlantic Treaty states:

The Parties to this Treaty reaffirm their faith in the purposes and principles of the Charter of the United Nations and their desire to live in peace with all peoples and all governments. They are determined to safeguard the freedom, common heritage and civilisation of their peoples, founded on the principles of democracy, individual liberty and the rule of law. They seek to promote stability and well-being in the North Atlantic area. They are resolved to unite their efforts for collective defence and for the

III. ARTICLE 5

NATO's first Secretary General, Lord Ismay, very succinctly observed that Article 5 is the "core" of the North Atlantic Treaty.¹¹² It is the embodiment of the signatory nations' commitment to collective self-defense. Article 5 states:

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-defence recognised 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. Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.¹¹³

Although Article 5 was conceived with two specific threats in mind,¹¹⁴ the Washington conferees indicated that the provision was designed to meet any threat "from whatever quarter and at whatever time."¹¹⁵ Addressing the Senate on July 6, 1949, Senator Vandenberg declared: "The pledge [Article 5] dependably means that whoever is

preservation of peace and security. They therefore agree to this North Atlantic Treaty.

Id.

¹¹² Ismay, *supra* note 18, at 13.

¹¹³ North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246.

¹¹⁴ Ireland, *supra* note 18, at 101–12. The preeminent threat, feared by all of the signatory nations, was the danger posed by the Soviet Union's aggressive foreign policy and desire to extend their political domination across Europe; however, the French also feared the possibility of German revanchism. Ireland, *supra* note 18, at 101–12.

¹¹⁵ FRUS, 1948, vol.3, 242; Memorandum by the Participants in the Washington Security Talks, July 6–September 9, Submitted to Their Respective Governments for Study and Comment.

attacked will have dependable allies who will do their dependable part, by constitutional process, as swiftly as possible to defeat the aggressor by whatever means necessary.”¹¹⁶ Thus, the text and drafting history of Article 5 clearly elucidates the clause’s strength and flexibility.

For forty-two years, the great strength of Article 5 was its deterrent value. The Article helped enable the West to endure the Cold War while avoiding a military conflict with the Soviet Union. In 1991, the Soviet Union fell with NATO having never once invoked Article 5. With the disintegration of NATO’s chief adversary, many short-sighted critics questioned the future utility of the alliance, and some even recommended its dissolution. Yet, as history has so often demonstrated, potential enemies are never in short supply.

As early as 1999, NATO strategic planners specifically mentioned terrorism as one of the emerging security threats facing the alliance in the twenty-first century.¹¹⁷ Consonant with that assessment, the 1999 Strategic Concept reiterated that “[a]ny armed attack on the territory of the Allies, from whatever direction, would be covered by Articles 5 and 6 of the Washington Treaty.”¹¹⁸ Unfortunately, NATO’s strategic planners could not predict the dire accuracy of their analysis. Barely twenty-nine months after issuing the 1999 Strategic Concept, NATO came face to face with its newest enemy: international terrorism. As a result of the September 11 Terrorist Attacks on New York

¹¹⁶ Ismay, *supra* note 18, at 13.

¹¹⁷ See The Alliance’s Strategic Concept, paragraph 24 (1999) *available at* <http://www.nato.int/docu/pr/1999/p99-065e.htm>.

¹¹⁸ The 1999 Strategic Concept further stated that “alliance security must also take account of the global context. . . .” *Id.*

and Washington, NATO invoked Article 5 for the first time in its fifty-three year history, and the era of NATO counterterrorism officially began.

IV. NATO COUNTERTERRORISM

On October 2, 2001, the North Atlantic Council¹¹⁹ invoked Article 5 and, thus, became involved in assisting the United States' military campaign in Afghanistan.¹²⁰ Since that time, NATO has continued to contribute to the fight against terrorism, and their support is well documented.¹²¹ However, NATO's most significant and lasting contribution may be yet to come. In the aftermath of September 11, NATO committed to develop and implement an aggressive counterterrorism programme—an unprecedented step for a collective defense organization.

A. NATO'S Military Concept for Defense Against Terrorism

On December 18, 2001, NATO Defense Ministers requested that NATO Military planners create a Military Concept for Defense Against Terrorism (Terrorism Defense Concept).¹²² The North Atlantic Council and the NATO Heads of State approved the Terrorism Defense Concept at the Prague Summit on November 21, 2002.¹²³ In

¹¹⁹ The North Atlantic Council is NATO's governing body and possesses "effective political authority and powers of decision" over alliance actions. NATO Handbook, Chapter 7: Policy and Decision Making: The North Atlantic Council, *available at* <http://www.nato.int/docu/handbook/2001/hb070101.htm>.

¹²⁰ NATO Press Release, October 2, 2001 *available at* <http://www.nato.int/docu/update/2001/1001/e1002a.htm>.

¹²¹ See NATO Issues *available at* <http://www.nato.int/terrorism/index.htm#a>.

¹²² NATO Press Release, December 18, 2001 *available at* <http://www.nato.int/docu/pr/2001/p01-173e.htm>.

¹²³ NATO Press Release, Prague Summit Declaration, November 21, 2002 *available at* <http://www.nato.int/docu/pr/2002/p02-127e.htm>.

developing the Terrorism Defense Concept, the military planners were guided by the North Atlantic Treaty, the 1999 Strategic Concept,¹²⁴ and NATO's terrorism threat assessment.¹²⁵ Further, the North Atlantic Council advised that any actions recommended by NATO's Terrorism Defense Concept should "have a sound legal basis and fully conform to the relevant provisions of the UN Charter and all relevant international norms"¹²⁶ The resulting Terrorism Defense Concept provides a comprehensive framework for combating the scourge of terrorism.¹²⁷

The most revolutionary element of the Terrorism Defense Concept is undoubtedly NATO's counterterrorism programme.¹²⁸ As NATO defines it, counterterrorism is "offensive

¹²⁴ See *supra* notes 109–10 and accompanying text.

¹²⁵ NATO Issues, Military Concept for Defence Against Terrorism, *available at* <http://www.nato.int/ims/docu/terrorism.htm>. NATO's terrorism threat assessment concluded:

- Although religious extremism is likely to be the source of the most immediate terrorist threats to the Alliance, other motivations for terrorism could emerge from economic, social, demographic and political causes derived from unresolved conflicts or emerging ideologies.
- In addition, although state sponsorship of terrorism is currently in decline, political circumstances could lead to its rise, providing terrorists with safe havens and considerable resources.
- Although the predominant form of terrorist attack remains the creative use of conventional weapons and explosives, terrorist groups are expected to strive for the most destructive means available, including Weapons of Mass Destruction.

Id.

¹²⁶ *Id.*

¹²⁷ See NATO Issues, Military Concept for Defence Against Terrorism, <http://www.nato.int/ims/docu/terrorism.htm>.

¹²⁸ The Terrorism Defense Concept's counterterrorism component declares that "[a]llied nations agree that terrorists should not be allowed to base, train, plan, stage and execute terrorist actions and that the threat may be severe enough to justify acting against these terrorists

military action designed to reduce terrorists' capabilities."¹²⁹ The Terrorism Defense Concept contemplates a two-pronged approach to counterterrorism: *NATO in the lead*¹³⁰ and *NATO in support*.¹³¹ Of the two, the concept of *NATO in the lead* most effectively demonstrates NATO's

and those who harbour them, as and where required, as decided by the North Atlantic Council." *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* The Terrorism Defense Concept's description of *NATO in the lead* envisions an aggressive, leading role for NATO forces in counterterrorism operations. *Id.* Accordingly, the Terrorism Defense Concept observed that the following planning aspects required special attention:

- Procedures and capabilities that support accelerated decision cycles, in order to be successful in detecting and attacking time sensitive targets in the Counter Terrorist environment.
- Access to flexible and capable Joint-Fires, ranging from precision-guided stand-off weapons to direct conventional fires.
- The need for more specialised anti-terrorist forces

¹³¹ *Id.* The Terrorism Defense Concept's description of *NATO in support* envisions the use of NATO forces in a secondary or support role such as NATO cooperation with the counterterrorism operations of other entities including possibly the European Union and coalitions of NATO members. *Id.* The Terrorism Defense Concept suggests that potential NATO counterterrorism support operations may include:

- A role as coalition enabler and interoperability provider.
- The ability to back-fill national requirements. An example of this was when NATO deployed to the United States in order to free US Airborne Warning and Control Systems (AWACS) to deploy to Afghanistan.
- Forward deploying of forces in support of the broader coalition efforts. An example of this was the deployment of NATO maritime forces to the eastern Mediterranean.
- The expression of political and military commitment.
- Practical support as manifested by Host Nation Support and logistic assistance, including over flight and basing rights.
- The use of NATO's operational planning and force generation capabilities to plan a mission and generate a force for a coalition of like-minded NATO members, and also help to support and sustain that operation.

Id.

commitment to pursuing and executing aggressive counterterrorism operations,¹³² and, henceforth, references to NATO counterterrorism will be devoted to a discussion of the *NATO in the lead* concept.

However, at the time the *NATO in the lead* concept was approved in November 2002, NATO military planners recognized that NATO did not possess the capabilities required to execute effective counterterrorism missions.¹³³ Therefore, the drafters of the Terrorism Defense Concept recommended several changes which they deemed necessary for improving the capability of NATO forces to conduct successful counterterrorism operations.¹³⁴ The Terrorism Defense Concept proposed that NATO focus on developing “[p]rocedures and capabilities that support accelerated decision cycles, in order to be successful in detecting and attacking time sensitive targets in the Counter Terrorist environment. . . [and] more specialised anti-terrorist forces.”¹³⁵ In 2002, these two recommendations were mere proposals; today one of them is a bona fide reality.

B. NATO RESPONSE FORCE

The idea of a NATO rapid reaction force was first suggested by U.S. Secretary of Defense, Donald Rumsfeld, at the Warsaw NATO Defense Ministers meetings held in September 2002.¹³⁶ Two months later, NATO leaders, recognizing that the NATO

¹³² *See id.*

¹³³ *See id.*

¹³⁴ *See id.* The architects of the Terrorism Defense Concept also suggested that NATO upgrade its command and control and intelligence infrastructure and maintain forces at optimal readiness levels. *Id.*

¹³⁵ *Id.*

¹³⁶ NATO Speeches, Address by U.S. Secretary of State Donald Rumsfeld, (September 25, 2002) available at <http://www.nato.int/docu/speech/2002/s020925c.htm>.

military structure was “overburdened by excessive and inflexible Cold War era infrastructure . . . designed for traditional 20th century defence and warfare,”¹³⁷ announced that the theme of the Prague Summit was transforming NATO to meet the security challenges of the twenty-first century,¹³⁸ especially terrorism.¹³⁹ Consequently, NATO leaders formally recommended the creation of the NATO Response Force (NRF), and the Prague Declaration listed the development of the NRF as the first step toward the accomplishment of NATO’s military transformation.¹⁴⁰

On October 13, 2004, the alliance completed the first major step toward the realization of its transformation goal as NATO proclaimed that the NRF had “reached initial operational capability and . . . [was] ready to take on the full range of missions

¹³⁷ Supreme Headquarters Allied Powers Europe (SHAPE) Statement, NATO Response Force – Background, available at http://www.nato.int/shape/issues/shape_nrf/nrfa.htm.

¹³⁸ NATO Press Release, Prague Summit Declaration, paragraph 1, (November 21, 2002) *available at* <http://www.nato.int/docu/pr/2002/p02-127e.htm>.

¹³⁹ See Prague Declaration, *supra* note 7 and accompanying text. In Prague, then Secretary-General Lord Robertson commented that “NATO must change radically if it is to be effective. . . . It must modernise or be marginalized.” Supreme Headquarters Allied Powers Europe (SHAPE) Statement, NATO Response Force – Background, available at http://www.nato.int/shape/issues/shape_nrf/nrfa.htm.

¹⁴⁰ NATO Press Release, Prague Summit Declaration, paragraph 4(a), (November 21, 2002) *available at* <http://www.nato.int/docu/pr/2002/p02-127e.htm>. Indeed, the Prague Declaration asserted that the NRF would “be a catalyst for focusing and promoting improvements in the Alliance’s military capabilities.” *Id.* Appropriately, NATO tasked General James L. Jones, the Supreme Allied Commander Europe and the thirty-second Commandant of the United States Marine Corps, with the job of making the NRF a reality. Supreme Headquarters Allied Powers Europe (SHAPE) Statement, NATO Response Force – Background, *available at* http://www.nato.int/shape/issues/shape_nrf/nrfa.htm. The choice of a distinguished Marine Corps General for the task of developing and implementing the NRF is hardly surprising since the NRF represents the embodiment of the Marine Corps philosophy. **NEED CITE.**

where and when the Alliance decides to use it.”¹⁴¹ The NRF combines air, ground, sea, intelligence, logistics, combat services, and support elements into one cohesive force.¹⁴² Presently, the NRF is comprised of 17,000 troops, and that number is expected to reach 21,000 by the time the NRF attains full operational capability.¹⁴³ NATO cautions that the NRF will not be a standing force; rather, it will be comprised of troop contributions from NATO countries “which will rotate through periods of training and certification as a joint force.”¹⁴⁴ Further, the alliance anticipates that, when the NRF reaches full operational capability, it will possess the capacity to deploy anywhere in the world within five days and will have the ability to sustain itself for one month or longer if re-supplied.¹⁴⁵ With such formidable assets and capabilities, the NRF certainly appears “prepared to tackle the full spectrum of military missions.”¹⁴⁶ Yet, the question remains: which missions?

¹⁴¹ NATO Update, Response Force Ready For Missions, (October 13, 2004) *available at* <http://www.nato.int/docu/update/2004/10-october/e1013a.htm>.

¹⁴² Supreme Headquarters Allied Powers Europe (SHAPE) Statement, The NATO Response Force – NRF, *available at* http://www.nato.int/shape/issues/shape_nrf/nrf_intro.htm. In fact, NATO lauds the NRF as “a coherent, high readiness, joint, multinational force package, technologically advanced, flexible, deployable, interoperable and sustainable.” NATO Issues, The NATO Response Force, *available at* <http://www.nato.int/issues/nrf/index.html>.

¹⁴³ NATO Update, Response Force Ready For Missions, (October 13, 2004) *available at* <http://www.nato.int/docu/update/2004/10-october/e1013a.htm>. NATO expects the NRF to reach full operational capability by October 2006. *Id.*

¹⁴⁴ NATO Issues, The NATO Response Force, *available at* <http://www.nato.int/issues/nrf/index.html>.

¹⁴⁵ NATO Update, Response Force Ready For Missions, (October 13, 2004) *available at* <http://www.nato.int/docu/update/2004/10-october/e1013a.htm>.

¹⁴⁶ Supreme Headquarters Allied Powers Europe (SHAPE) Statement, The NATO Response Force – NRF, *available at* http://www.nato.int/shape/issues/shape_nrf/nrf_intro.htm. Regarding the NRF, General Jones observed that “[t]hrough successful integration, you get a more capable force that can accomplish more things. The symmetry gained from the cohesion of

Although NATO envisages the utilization of the NRF for a variety of potential missions,¹⁴⁷ it appears that NRF is intended to be one of the linchpins of NATO's counterterrorism programme. The first and most obvious indication is that NATO has, on more than one occasion, expressly stated that the NRF will be utilized for counterterrorism operations.¹⁴⁸ Second, the Terrorism Defense Concept's counterterrorism component, which was approved contemporaneously with the approval for the creation of the NRF,¹⁴⁹ specifically recommended the development of "more specialised anti-terrorist forces."¹⁵⁰ Such simultaneity further supports the inference that the decision to create the NRF was, at least in part, a response to the recommendation made in the Terrorism Defense Concept's counterterrorism component. A final indication that NATO developed the NRF for its potent counterterrorism potential is the

the sea, land and air resources allows forces to operate at greater distances, more efficiently and more successfully than operating in isolation or parallel situations." Supreme Headquarters Allied Powers Europe (SHAPE) Statement, The NATO Response Force – Challenges, *available at* http://www.nato.int/shape/issues/shape_nrf/nrfe.htm.

¹⁴⁷ NATO Issues, The NATO Response Force, *available at* <http://www.nato.int/issues/nrf/index.html>; Supreme Headquarters Allied Powers Europe (SHAPE) Statement, NATO Response Force – Role, *available at* http://www.nato.int/shape/issues/shape_nrf/nrfa.htm.

¹⁴⁸ Supreme Headquarters Allied Powers Europe (SHAPE) Statement, NATO Response Force – Role, *available at* http://www.nato.int/shape/issues/shape_nrf/nrfa.htm; *see also* NATO Press Release, Prague Summit Declaration, paragraph 4(a), (November 21, 2002) *available at* <http://www.nato.int/docu/pr/2002/p02-127e.htm> (evincing an intent to utilize the NRF to combat terrorism); Supreme Headquarters Allied Powers Europe (SHAPE) Statement, NATO Response Force – Background, *available at* http://www.nato.int/shape/issues/shape_nrf/nrfa.htm (indicating that the NRF will be used for counterterrorism operations).

¹⁴⁹ NATO Press Release, Prague Summit Declaration, paragraph 4(a) & (d), (November 21, 2002) *available at* <http://www.nato.int/docu/pr/2002/p02-127e.htm>.

¹⁵⁰ NATO Issues, Military Concept for Defence Against Terrorism, <http://www.nato.int/ims/docu/terrorism.htm>.

fact the NRF's first training operation involved a counterterrorism scenario.¹⁵¹ Based on the foregoing, it is clear that NATO intends the NRF to be the vanguard of the alliance's military transformation and constitutes the manifestation of NATO's recognition "that modern, flexible, rapidly deployable joint, meaning sea, land and air forces are required to meet and defeat today's asymmetrical threats, *the most notable one being terrorism.*"¹⁵² Moreover, the aggregate effect of these facts reveals that enhancing NATO's counterterrorism capabilities was one of the primary reasons for the creation of the NRF.¹⁵³

In addition to significantly enhancing NATO's capacity to conduct counterterrorism operations, the NRF provides NATO with unprecedented global reach.¹⁵⁴ For example, part of the mission in the NRF's first training exercise was the conduct of counterterrorism operations outside the Euro-Atlantic area.¹⁵⁵ The NRF's

¹⁵¹ Supreme Headquarters Allied Powers Europe (SHAPE) Statement, NATO Response Force First Exercise, *available at* <http://www.nato.int/shape/news/2003/11/i031121a.htm>. At a November 2003 training operation in Turkey, the NRF was "deployed by air, sea and land to counter a fictional threat to UN staff and civilians from terrorists and hostile soldiers in a country *outside the Euro-Atlantic area*. The forces rescued and evacuated the UN staff and civilians, established an embargo, *engaged in counter-terrorist operations* and a show of force." *Id.* (emphasis added).

¹⁵² Supreme Headquarters Allied Powers Europe (SHAPE) Statement, NATO Response Force – Background, *available at* http://www.nato.int/shape/issues/shape_nrf/nrfa.htm (emphasis added).

¹⁵³ In fact, at the NRF's first operational exercise, General Jones observed that the decision to develop the NRF "marks an important recognition on the part of the Alliance that the international security environment has changed dramatically." Supreme Headquarters Allied Powers Europe (SHAPE) Statement, NATO Response Force First Exercise, *available at* <http://www.nato.int/shape/news/2003/11/i031121a.htm>.

¹⁵⁴ 1991 Gulf War or ISAF deployment to Afghanistan - - NEED TIMETABLE

¹⁵⁵ See *supra* note 143 and accompanying text.

rapid worldwide deployment capability is by design,¹⁵⁶ and NATO anticipates that, when called upon, the NRF will be able to deploy anywhere in the world within five days.¹⁵⁷

From the outset, NATO has evinced its intent to utilize the NRF as a tool for projecting substantial force across the globe,¹⁵⁸ and a review of the NRF's evolution demonstrates that NATO expects counterterrorism to be one of the NRF's operational specialties.¹⁵⁹ Further, NATO has frequently emphasized that the NRF is “[a]t the centre of NATO transformation.”¹⁶⁰ Thus, it seems clear that alliance intends an aggressive counterterrorism programme to be a key facet of NATO's twenty-first century security strategy. However, the question then becomes: can NATO, a collective defense organization, justify its counterterrorism programme under the provisions of the North Atlantic Treaty, and, if so, do the terms of the treaty foreclose NATO's ability to conduct effective counterterrorism operations?

¹⁵⁶ See NATO Press Release, Prague Summit Declaration, paragraph 4(a), (November 21, 2002) available at <http://www.nato.int/docu/pr/2002/p02-127e.htm>.

¹⁵⁷ Supreme Headquarters Allied Powers Europe (SHAPE) Statement, The NATO Response Force – NRF, available at http://www.nato.int/shape/issues/shape_nrf/nrf_intro.htm. SHAPE has commented that “[t]he NRF provides the Alliance with a comprehensive set of sea, land and air resources, highly trained and capable of immediate response *wherever and whenever* they are required.” Supreme Headquarters Allied Powers Europe (SHAPE) Statement, The NATO Response Force – Challenges, available at http://www.nato.int/shape/issues/shape_nrf/nrfe.htm.

¹⁵⁸ See *supra* note 14 and accompanying text.

¹⁵⁹ See *supra* p. 32–36 and notes 129–49.

¹⁶⁰ E.g., NATO Issues, The NATO Response Force, available at <http://www.nato.int/issues/nrf/index.html>; NATO Speeches, Remarks by NATO Secretary General, Jaap de Hoop Scheffer at the 2004 Istanbul Summit (June 27, 2004), available at <http://www.nato.int/docu/speech/2004/s040627b.htm>.

V. THE PROPRIETY OF NATO'S COUNTERTERRORISM PROGRAM UNDER
ARTICLE 5 OF THE NORTH ATLANTIC TREATY

Regardless of the mindless, sociopathic rhetoric of terrorists, it must first be recognized that terrorism poses a threat to the entire international community and, indeed, civilized society.¹⁶¹ Precisely because it is a global problem, NATO's decision to become involved in aggressively combating the scourge of terrorism is highly commendable. The decision reflects the alliance's deep sense of social responsibility, and, as an international organization, it is, in essence, NATO's civic duty to become involved.

Nonetheless, NATO counterterrorism is a different matter. Since, by NATO's definition, counterterrorism involves offensive military action,¹⁶² NATO must receive the authority to engage in counterterrorism operations from the North Atlantic Treaty itself. If the text of the North Atlantic Treaty does not grant such authority, NATO's conduct of counterterrorism operations would be illegal under international law. Thus, the first, apposite inquiry is whether the North Atlantic Treaty permits NATO's aggressive, global operations capable counterterrorism programme? The answer is a resounding yes.

First, NATO's counterterrorism programme is not inconsistent with NATO's historic role as a collective defense organization.¹⁶³ Article 5, which embodies the principle of collective self-

¹⁶¹ U.N Security Council Resolution 1368 (September 12, 2001).

¹⁶² See *supra* p. 30 and note 121.

¹⁶³ Citing a report produced by the Cato Institute, at least one commentator has suggested that NATO's efforts to combat terrorism by invoking Article Five do violence to NATO's historical purpose: collective defense. See Michael A. Goldberg, Note, *Mirage Of Defense: Reexamining Article Five Of The North Atlantic Treaty After The Terrorist Attacks On*

defense, is the core of the North Atlantic Treaty,¹⁶⁴ and, contrary to popular belief, Article 5 was not adopted *solely* to counter the Soviet threat.¹⁶⁵ Rather, the drafters of the North Atlantic Treaty intended Article 5 to provide NATO with the flexibility to meet any threat “from whatever quarter and at whatever time.”¹⁶⁶ No interpretational gymnastics are required to see that this founding principle of flexible, collective self-defense sufficiently encompasses NATO’s counterterrorism programme.

Moreover, the alliance’s historic role as a collective defense organization *currently* provides NATO with the legal authority to conduct counterterrorism operations

The United States, 26 B.C. Int’l & Comp. L. Rev. 77 (2003). Mr. Goldberg associates counterterrorism with the principle of collective security and asserts that invocations of Article 5 are appropriate only for collective defense. *Id.* Thus, Goldberg concludes that Article 5 is an inappropriate legal basis upon which to ground NATO counterterrorism operations. *See id.* Yet, even if there were some subtle semantic difference between the concept of collective defense and collective security, it appears to be a distinction without a difference because the former necessarily begets the latter. In fact, the preamble to the North Atlantic Treaty expressly states that one of NATO’s purposes is to preserve security through collective defense: “[t]hey [the parties to the treaty] are resolved to unite their efforts for collective defence and for the preservation of peace and security.” North Atlantic Treaty, Apr. 4, 1949, Preamble, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246. Further, there does not seem to be any incongruence between pursuing security objectives and the establishment of a collective defense organization pursuant to Article 51 of the U.N. Charter. *See* Article 51 United Nations Charter.

¹⁶⁴ See *supra* Part III.

¹⁶⁵ See *supra* Part II. Referring to the Cold War and the Soviet Union, one observer has commented that NATO “remains a creature of its time. It is a collective defense organization whose sole adversary no longer exists.” Michael M. Gallagher, Comment, *Declaring Victory And Getting Out [Of Europe]: Why The North Atlantic Treaty Organization Should Disband*, 25 Hous. J. Int’l L. 341, 359 (2003). The drafting history of the North Atlantic Treaty demonstrates that Article Five was intended to be flexible enough to counter any threat. See *supra* p. 25 and note 97. True, the treaty was formulated at a time when the United States and most of western Europe viewed the Soviet Union as the primary threat to global stability; however, at the same time, the French were equally, if not more so, concerned about the possibility of a resurgent, belligerent Germany. See *supra* Part II.(b)–(c).

¹⁶⁶ See *supra* p. 25 and note 97.

anywhere in the world. In the last three years alone, terrorism's impact on the nations of NATO has been devastating. On September 11, 2001, an estimated 3,000 persons died as a result of the terrorist attacks on New York, Washington, and the hijacking of United Airlines flight # 93 which crashed in Pennsylvania.¹⁶⁷ During one week in November 2003, deadly suicide bombings killed fifty persons and wounded at least 753 in Istanbul, Turkey.¹⁶⁸ Less than four months later, on March 11, 2004, terrorists bombed commuter trains in Madrid, Spain; the attacks claimed the lives of 191 people and an additional 1,800 were wounded.¹⁶⁹ It is well documented that NATO invoked Article 5 after the September 11 terrorist attacks, but each of these horrific, cowardly attacks on innocent civilians undoubtedly qualify as "armed attacks" under Article 5 of the North Atlantic Treaty.¹⁷⁰ Because these tragic events give NATO the power to invoke Article 5, NATO has the legal authority to unleash its counterterrorism weapons against those responsible¹⁷¹ wherever in the world they may be found.¹⁷²

¹⁶⁷ ***Cite 9/11 Commission Report***

¹⁶⁸ Anonymous, *Imperial Hubris* 98 (Brassey's Inc. 2004). Al Qaida claimed responsibility for the attacks. *Id.* at 91.

¹⁶⁹ *Id.* at 100. Al Qaida claimed responsibility for the Madrid attacks. *Id.*

¹⁷⁰ *See supra* p. 26 and note 106.

¹⁷¹ Al Qaeda was responsible for the September 11, 2001 attacks and has been implicated in the other two. *See supra* p. 39 and notes 160–62. Therefore, under Article Five, NATO has the authority to use armed force to destroy Al Qaeda or any other terrorist group complicit in those three attacks.

¹⁷² United Nations Security Council Resolution 1373 (September 28, 2001); *see* North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246. As long as Article Five is properly invoked, the North Atlantic Treaty gives NATO the authority to use armed force anywhere in the world its enemies may be found. *See id.*; *see also* Broderick C. Grady, Note, *Article 5 Of The North Atlantic Treaty: Past, Present, And Uncertain Future*, Ga. J. Int'l & Comp. L. 167, 182 (2002) (observing that "[w]hen Article 5 is properly invoked pursuant

In addition to the legal authority provided by the North Atlantic Treaty, NATO's aggressive counterterrorism programme may also be sanctioned by United Nations Security Council Resolution 1373 (Resolution 1373).¹⁷³ Resolution 1373 specifically reaffirms "the need *to combat by all means*, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts"¹⁷⁴ Further, Resolution 1373 "[c]alls upon all States to: . . . [c]ooperate, particularly through bilateral and *multilateral arrangements* and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts."¹⁷⁵ The language of Resolution 1373 provides unambiguous legal authorization for any future NATO counterterrorism operations conducted in accordance with Article 51 of the United Nations Charter.¹⁷⁶

to the geographical limits set by Article 6 . . . the out-of-area question becomes all but moot for future action outside Article 6 geography."). Of course, there is the obvious problem that terrorist groups may be harbored by sovereign states. If that is the case, NATO's ability to roam the globe and engage in counterterrorism operations *may* be curtailed. *See* United Nations Charter Art. 2 § 4 (1945).

¹⁷³ *See* United Nations Security Council Resolution 1373 (September 28, 2001).

¹⁷⁴ *Id.* This statement clearly permits the use of force against terrorists. *Id.* However, Resolution 1373's authorization for the use of force is limited to situations involving self defense or collective self defense. *See* United Nations Charter Art. 2 § 4 & Art. 51 (1945).

¹⁷⁵ United Nations Security Council Resolution 1373(3)(c) (September 28, 2001) (emphasis added).

¹⁷⁶ *See* United Nations Charter Art. 2 § 4 & Art. 51 (1945); United Nations Security Council Resolution 1373 (September 28, 2001); *see also* United Nations Security Council Counter-Terrorism Committee at <http://www.un.org/Docs/sc/committees/1373/>. Article 51 provides:

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

VI. CONCLUSION

Bloodshed and the loss of innocent lives have forced NATO to recognize that terrorism is one of the most dangerous threats to the security of the alliance nations in the twenty-first century. As a result, NATO has spent the last twenty-six months developing a counterterrorism programme that appears both aggressive and potent. Further, NATO has provided its counterterrorism assets with the capability to conduct operations anywhere on the globe. Most importantly, however, NATO has present, legal authority to undertake and execute counterterrorism missions. Critics incorrectly argue that NATO is incapable of aiding in the fight against international terrorism and that Article 5 provides insufficient support for NATO's counterterrorism efforts.¹⁷⁷ The drafters of the North Atlantic treaty intended Article 5 to enable NATO to meet and resist any threat. In the last three years, terrorists have attacked NATO member nations three times. Clearly, terrorism represents a continuing threat to the alliance, and, Article 5, as it has for the last forty-four years, continues to provide a remedy. Additionally, Resolution 1373 reinforces the propriety of future NATO counterterrorism operations conducted in accordance with Article 51 of the United Nations Charter. Resolution 1373 strongly forbids U.N. member states from supporting or harboring terrorist groups. Any state which ignores that mandate will be in violation of international law and, therefore, may find themselves targets of a NATO counterterrorism operation backed by the authority of the United Nations.

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.

United Nations Charter Art. 51 (1945).

¹⁷⁷ See *supra* note 13.

Yet, despite NATO's determined efforts to develop an aggressive counterterrorism programme, the ultimate effectiveness of these efforts may be overshadowed by lingering, institutional problems facing the alliance. The first and most serious problem is NATO's present decision making process which requires unanimity¹⁷⁸ to take military action. This decision making process is incompatible with NATO's goal of providing the alliance with credible counterterrorism capabilities because success in the counterterrorism context will require NATO to enhance its ability to make rapid decisions.¹⁷⁹ At its present size of twenty-six member nations, NATO's capacity for rapid decision making is seriously impaired,¹⁸⁰ and any future expansion will only make unanimity on military decisions more difficult to attain. Thus, NATO's arcane, protracted decision making process will need to be reformed if NATO's aggressive counterterrorism programme is to be successful.¹⁸¹

Another problem which may confront any future deployment of NATO counterterrorism forces under the aegis of Article 5 is whether the international community can agree upon a

¹⁷⁸ NATO Handbook, Chapter 7: Policy and Decision Making: The North Atlantic Council, available at <http://www.nato.int/docu/handbook/2001/hb070101.htm>.

¹⁷⁹ The United States' war in Afghanistan clearly demonstrates the need for swift decision making as well as rapid military deployment capability. The U.S. military deployed to Afghanistan less than a month after September 11, 2001 and was still not quick enough to capture Osama bin Laden and other top Al Qaeda leaders.

¹⁸⁰ Although NATO was unified with respect to the U.S. led war in Afghanistan, the alliance was deeply divided over the United States' war in Iraq. See Aaron D. Lindstrom, *Consensus Decision Making in NATO: French Unilateralism and the Decision to Defend Turkey*, 4 U. CHI. J. INT'L L. 579–81 (2003). In fact, the Iraq war so divided NATO that the NAC was unable to act on Turkey's invocation of Article 4 of the North Atlantic Treaty. *Id.*

¹⁸¹ The Terrorism Defense Concept recommends that NATO develop procedures which support "accelerated decision making cycles;" however, NATO has yet to implement this proposal. See *supra* text accompanying note 135.

definition of terrorism. Presently, there is no universally accepted definition of terrorism,¹⁸² and, although the United Nations General Assembly's Sixth Committee is currently considering a draft Comprehensive Convention on International Terrorism that would include a definition of terrorism, this convention has yet to be adopted.¹⁸³ This lack of international consensus on defining what actions constitute terrorism has the potential to pose problems for the utilization of NATO counterterrorism assets. If there is an attack, less dramatic and devastating than September 11th, on a NATO member nation; it is at least possible that alliance members could disagree as to whether that act constitutes terrorism of a kind sufficient to support an invocation of Article 5. If such a situation were to occur, NATO's cumbersome decision making process could again encumber the alliance's ability to deploy its counterterrorism forces.

These potential problems, however, may prove more theoretical than real. In the aftermath of September 11th, NATO was unified in condemning the terrorist attacks and supporting the invocation of Article 5. Since that time, the alliance has consistently and frequently reaffirmed its commitment to combat international terrorism. NATO leaders have developed and are in the process of implementing an aggressive, global operations capable counterterrorism programme. Consequently, NATO currently possesses both the legal authority and the firepower to become a formidable combatant in the fight against terrorism. Thus, if NATO's tough anti-terrorism rhetoric is indeed as strong as its resolve to act should the need arise, the world will likely witness the stark contrast between the NATO of 2005 and the NATO

¹⁸² See United Nations Office of Drugs and Crime: Definitions of Terrorism at http://www.unodc.org/unodc/terrorism_definitions.html.

¹⁸³ United Nations Security Council Counter-Terrorism Committee: International Cooperation on Counter-Terrorism at <http://www.un.org/Docs/sc/committees/1373/definition.html>. The proposed definition defines terrorism as "any action intended to cause death or serious bodily harm to civilians or non-combatants with the purpose of intimidating a population or compelling a government or an international organization to do or abstain from doing any act." *Id.*

of 2001. Where the NATO of 2001 could only provide moral and logistical support to the war against terrorism, today's NATO possesses a more potent counterterrorism arsenal and, more importantly, the ability to go on the offensive against terrorism.