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# FOREWORD

## NATO AT 70: THE NATO LEGAL COMMUNITY'S CONTRIBUTION<sup>†</sup>

*Steven Hill\**

The North Atlantic Treaty (“Treaty”)<sup>1</sup> was signed on April 4, 1949 by the representatives of the first twelve Allies<sup>2</sup> of the North Atlantic Treaty Organization (NATO). April 2019 marks the seventieth anniversary of this landmark treaty, which is also known as the Washington Treaty after the city in which it was signed.<sup>3</sup> Seventy years later, NATO Secretary General Jens Stoltenberg and the foreign ministers of the NATO Allies gathered in Washington, D.C. to celebrate this anniversary. By 2019, the ranks of NATO Allies have grown to twenty-nine countries,<sup>4</sup> with North Macedonia poised to become the thirtieth soon.<sup>5</sup>

The foreign ministers gathered in the Andrew W. Mellon Auditorium, the very place where the treaty was signed.<sup>6</sup> The auditorium has a large hall inside an imposing neoclassical building overlooking the National Mall. The original copy of the Treaty was on display in a glass case under the watchful eye of personnel from the National Archives of the United States, which serves as the Treaty’s depository.<sup>7</sup> The Treaty was on special public display during the week

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<sup>†</sup> This Article contains views provided in the author’s personal capacity and may not reflect agreed upon policy or views of the NATO International Staff or the North Atlantic Treaty Organization.

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<sup>1</sup> North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

<sup>2</sup> See *Member Countries*, NORTH ATLANTIC TREATY ORG. (May 14, 2019), [https://www.nato.int/cps/en/natohq/topics\\_52044.htm](https://www.nato.int/cps/en/natohq/topics_52044.htm). The first twelve NATO Allies were Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, Netherlands, Norway, Portugal, United Kingdom, and United States. *Id.*

<sup>3</sup> See *Founding Treaty*, NORTH ATLANTIC TREATY ORG. (Jan. 30, 2017), [https://www.nato.int/cps/ua/natohq/topics\\_67656.htm](https://www.nato.int/cps/ua/natohq/topics_67656.htm).

<sup>4</sup> *Id.* The Allies that acceded to the North Atlantic Treaty following its entry into force on August 24, 1949 are: Greece and Turkey (1952), Germany (1955), Spain (1982), Czech Republic, Hungary, and Poland (1999), Bulgaria, Estonia, Latvia, Lithuania, Romania, Slovakia, and Slovenia (2004), Albania and Croatia (2009), and Montenegro (2017). *Id.* The procedure for the Parties to the Treaty to invite new Allies is set forth in Article 10 of the Treaty. See North Atlantic Treaty, *supra* note 2, art. 10.

<sup>5</sup> See *NATO Allies Sign Accession Protocol for the Future Republic of North Macedonia*, NORTH ATLANTIC TREATY ORG. (Feb. 6, 2019), [https://www.nato.int/cps/en/natohq/news\\_163078.htm](https://www.nato.int/cps/en/natohq/news_163078.htm).

<sup>6</sup> *Washington Ceremony Marks 70th Anniversary of NATO*, NORTH ATLANTIC TREATY ORGANIZATION (Apr. 4, 2019) [https://www.nato.int/cps/en/natohq/news\\_165252.htm](https://www.nato.int/cps/en/natohq/news_165252.htm).

<sup>7</sup> See *Reception to Commemorate the 70th Anniversary of the Founding of the Alliance*, NORTH ATLANTIC TREATY ORG. (Apr. 4, 2019), [https://www.nato.int/cps/en/natohq/photos\\_165215.htm](https://www.nato.int/cps/en/natohq/photos_165215.htm)?

leading up to the ceremony.<sup>8</sup> Over the course of the evening, many of the curious diplomats, military officers, and other friends of NATO could be seen peering into the glass case that night. The Treaty was opened up to the text of Article 5, the collective self-defense clause, which is certainly its most well-known provision.

At the ceremony, Secretary General Stoltenberg remarked that the Treaty “is one of the shortest international treaties.”<sup>9</sup> This point is striking when one compares its spare fourteen articles to the lengthy agreements that founded other international institutions, both at the time and subsequently.<sup>10</sup> However, as the Secretary General noted, “its reach is vast, and it has stood the test of time because we have united around our core commitment to protect and defend one another.”<sup>11</sup> Since 1949, the Treaty has proven to be a remarkably versatile foundation for the Alliance. It has been the framework for NATO’s adaptation from the Cold War years of deterrence and defense against the Soviet Union and its Warsaw Pact, to the 1990s era of “out of area” operations in the Western Balkans, to the transatlantic response to the September 11, 2001 attacks, and now to today’s challenging security environment.<sup>12</sup> The Treaty has underpinned and enabled all of these changes. And as North Macedonia’s forthcoming accession illustrates, it is still very much a living document.

The ceremony in Washington was one of many commemorations of the seventy-year anniversary of the transatlantic Alliance. There have been reports issued, public diplomacy events organized, and even books written. In December 2019, there will be a special meeting of the Heads of State and Government in London, which is where the Alliance had its first permanent home.<sup>13</sup> As part of these events, the NATO legal community, a grouping of some

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<sup>8</sup> See *Rare Chance to View Original NATO Treaty*, NATIONAL ARCHIVES (Mar. 27, 2019) <https://www.archives.gov/press/press-releases/2019/nr19-42>.

<sup>9</sup> *Opening remarks by US Secretary of State Mike Pompeo and NATO Secretary General Jens Stoltenberg at the reception to celebrate the 70th Anniversary of NATO*, NORTH ATLANTIC TREATY ORG. (Apr. 3, 2019) [https://www.nato.int/cps/en/natohq/opinions\\_165208.htm?selectedLocale=en](https://www.nato.int/cps/en/natohq/opinions_165208.htm?selectedLocale=en) [hereinafter Stoltenberg].

<sup>10</sup> See, e.g. U.N. Charter (comprising of 111 articles); Treaty on European Union, Feb. 7, 1992, O.J. (C 224) 1 (comprising of 55 articles).

<sup>11</sup> Stoltenberg, *supra* note 9.

<sup>12</sup> See generally North Atlantic Treaty Organization, *NATO in Focus: An Introduction to the Transatlantic Alliance* (2013) (discussing these moments in NATO history).

<sup>13</sup> *Secretary General Announces NATO Heads of State and Government will Meet in London*, U.S. EMBASSY & CONSULATES IN THE UNITED KINGDOM (Feb. 6, 2019) <https://uk.usembassy.gov/secretary-general-announces-nato-heads-of-state-and-government-will-meet-in-london/>.

200 legal advisers in around seventy civilian and military legal offices stationed throughout the Alliance and beyond, has sought to make its own special contribution to NATO's seventieth anniversary celebrations. This is the motivation behind this issue of the *Emory International Law Review*.

This issue began several years ago in a series of informal conversations among legal advisers at NATO Headquarters, located in Brussels, Belgium; Allied Command Operations (ACO), based at the Supreme Headquarters Allied Powers Europe (SHAPE) near Mons, Belgium; and Allied Command Transformation (ACT), headquartered in Norfolk, Virginia.<sup>14</sup> One of the themes of those early conversations was the observation that despite its venerable history as one of the pillars of the post-World War II international order, there is remarkably little written about the Treaty. Of course, over the years Allies have made statements about the Treaty, either on an individual or collective basis, that are highly relevant and might constitute State practice that could be relevant to the interpretation of the Treaty. Some national governments have also declassified or otherwise made available various documents about the negotiations, including a particularly rich trove of materials at the Harry S. Truman Presidential Library and Museum prepared for NATO's fiftieth anniversary.<sup>15</sup> NATO itself has declassified and publicly released several relevant documents about the negotiations.<sup>16</sup> There have been a few accounts by officials who were involved with the negotiations or who supervised them. However, there is no unified collection of the *travaux préparatoires*—such as official records of negotiation—for the Treaty, nor is there an article-by-article scholarly commentary about the Treaty as has been produced for other treaties.

This is not to say that there is no legal commentary on the Treaty. The years following the Treaty's entry into force saw some academic commentary. This included several articles by the famous legal theorist Hans Kelsen.<sup>17</sup> A variety of law review articles were also published following the invocation of Article 5 following the September 11, 2001 attacks—the only time this article has been invoked.<sup>18</sup> Of course, NATO legal advisers have spoken and written about

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<sup>14</sup> See, e.g. *The Role of NATO's Legal Adviser*, in Andraž Zidar and Jean-Pierre Gauci, eds., *THE ROLE OF LEGAL ADVISERS IN INTERNATIONAL LAW* (2017) (describing the NATO legal community in more detail).

<sup>15</sup> See *Truman Library NATO Documents*, HARRY S. TRUMAN PRESIDENTIAL LIBR. & MUSEUM, <https://www.trumanlibrary.org/nato/natodocs.htm>.

<sup>16</sup> See *NATO Archives Online*, NORTH ATLANTIC TREATY ORG., [archives.nato.int](http://archives.nato.int).

<sup>17</sup> See, e.g. Hans Kelsen, *Is the North Atlantic Treaty A Regional Arrangement?*, 45 AM. J. INT'L L. 162 (1951) (commenting on the North Atlantic Treaty).

<sup>18</sup> See, e.g. Sheng Li, *When Does Internet Denial Trigger the Right of Armed Self-Defense?*, 38 YALE J. INT'L L. 179 (2013)(discussing Article 5 post 9/11); Aurel Sari, *The Mutual Assistance Clauses of the North*

various aspects of the Treaty. For example, the twice-a-year legal advisers' course at the NATO School in Oberammergau includes discussion of the basic structure of the Treaty.<sup>19</sup> Several articles have appeared over the years in the *NATO Legal Gazette*, ACT's in-house legal journal that is also available to the public.<sup>20</sup> As a result, those practicing law in NATO or national posts—and those interested in NATO more generally—have not had many published writings to which to refer.

In addition to helping celebrate NATO's anniversary, this issue seeks to address the relative paucity of legal writing about the Treaty. Most of the authors are either serving or have served in legal positions within the Alliance. They are writing here in their personal capacity, and their views do not constitute those of the Alliance or of the particular NATO body with which they are associated. Some of the authors have been solicited from outside of the NATO legal community, including through an open call for papers published in 2017, in an effort to bring outside perspectives. Their views are also independent of their respective organizations.

This issue is structured to both highlight cross-cutting themes relevant to the Treaty and to examine specific articles of the Treaty in a more detailed way. After this introduction, Professor Lawrence S. Kaplan, an eminent historian of NATO in the United States, provides a historical introduction to the Treaty and explains the environment in which it was negotiated and entered into force. Professor Niels Blokker of Leiden University provides some observations about NATO's evolution as an international organization, a process that began with the North Atlantic Treaty and proceeded through the conclusion of two other significant multilateral treaties associated with the Alliance, which are commonly referred to as the Ottawa Agreement<sup>21</sup> and the Paris Protocol.<sup>22</sup>

Although Article 5 with its self-defense provisions is certainly the best-known article in the Treaty, reading the Treaty from start to finish shows how the self-defense pact at the core of the Alliance is part of a much more

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*Atlantic and EU Treaties: The Challenge of Hybrid Threats*, 10 HARV. NAT'L SEC. J. 405 (2019) (discussing Article 5 post 9/11).

<sup>19</sup> See *Academic Course Guide 2019*, NATO SCHOOL OBERAMMERGAU (Feb. 20, 2019), [https://www.natoschool.nato.int/Portals/0/Files/2\\_ACAD/20190220\\_NU\\_NSO\\_2019\\_Academic\\_Course\\_Guide.pdf](https://www.natoschool.nato.int/Portals/0/Files/2_ACAD/20190220_NU_NSO_2019_Academic_Course_Guide.pdf).

<sup>20</sup> *Legal Gazette*, NORTH ATLANTIC TREATY ORG., <https://www.act.nato.int/publications-lg>.

<sup>21</sup> Agreement on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff, Sep. 20, 1951, 5 U.S.T. 1087.

<sup>22</sup> Protocol on the Status of International Military Headquarters Set Up Pursuant to the North Atlantic Treaty, Aug. 28, 1952, 5 U.S.T. 871.

comprehensive picture of the Alliance's goals and the tools that are available. Mette Hartov of the ACT legal office has contributed an article on the Treaty's preamble and the principles upon which the Treaty is based that illustrates this point in useful detail. Particularly dear to NATO legal advisers is the fact that the Treaty's preamble makes it clear that NATO is an Alliance "founded on the principles of democracy, individual liberty and the rule of law."<sup>23</sup> Article 1 with its undertaking on the peaceful settlement of disputes and the non-recourse to the threat or use of force in any manner inconsistent with the purposes of the United Nations is another example of how the Alliance is anchored in a broader framework of international order, in this case the United Nations Charter.<sup>24</sup>

In line with the observation that a full reading of the Treaty gives a comprehensive sense of why NATO exists, the issue then moves on to an article-by-article approach. Matjaž Kačič of the NATO International Staff provides an analysis of Articles 2 and 3. Article 2 focuses on the need to "bring about a better understanding of the principles upon which these institutions are founded, and by promoting conditions of stability and well-being."<sup>25</sup> It goes on to provide that the Parties "will seek to eliminate conflict in their international economic policies and will encourage economic collaboration between any or all of them."<sup>26</sup> This focus on the fundamental conditions for security may be surprising to an outside observer of the Alliance. Article 3 complements the preceding article, providing that "the Parties, separately and jointly, by means of continuous and effective self-help and mutual aid, will maintain and develop their individual and collective capacity to resist armed attack."<sup>27</sup> In many ways, Article 3 is the foundation for the vast majority of NATO's work. It has experienced a renaissance of sorts in recent years with an increased focus on better burden sharing among Allies within the Alliance.

Lewis Bumgardner of ACT's Staff Element Europe then discusses Article 4, which provides that "[t]he Parties will consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened."<sup>28</sup> This article has not been used frequently in NATO's history, but has been used more in recent years. Professor Michael Schmitt, an eminent scholar of the law of armed conflict and general editor of the Tallinn Manual on the international law of cyber operations, then provides a

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<sup>23</sup> North Atlantic Treaty, *supra* note 2.

<sup>24</sup> *See id.* art. 1.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* art. 2.

<sup>27</sup> *Id.* art. 3.

<sup>28</sup> *Id.* art. 4.

detailed discussion of Article 5, including its applicability to new technologies such as in the cyber domain. Ivan Novotny and Antoaneta Boeva, both formerly of the Office of Legal Affairs (OLA) on the NATO International Staff, then provide an overview of the scope and historical development of Article 6, which defines the geographical application of the self-defense provisions in Article 5.

Károly Végh of the Headquarters of NATO's Allied Joint Force Command Brunssum in the Netherlands then provides a detailed analysis of one of the lesser-known provisions of the Treaty, Article 8 on the relationship between obligations under the Treaty and other international instruments. In the context of Article 9, which both establishes a Council and serves as the basis for "such subsidiary bodies as may be necessary."<sup>29</sup> Andrés Muñoz Mosquera, Legal Adviser and Director of the ACO legal office, provides an account of NATO's institutional development over the years.<sup>30</sup> This contribution makes useful linkages to other articles of the Treaty as well as its negotiating history and practice under it. Finally, Nick Minogue of OLA explains Article 10, which governs the accession of new members of the Alliance.

In sum, while this issue covers almost all the Treaty, it is not meant to be a comprehensive commentary or authoritative interpretation. Rather, it seeks to provide a window into questions that NATO legal practitioners and close outside observers of the Alliance encounter when working with the Treaty. It will also hopefully encourage more legal commentators to research and write in this area. It is in this way that the NATO legal community and outside scholars who have chosen to join this project can contribute to this year's celebration of NATO's seventieth anniversary.

#### THE NORTH ATLANTIC TREATY

*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.*

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<sup>29</sup> North Atlantic Treaty, *supra* note 2, art. 9. Now known as the North Atlantic Council. *See generally* History, ATLANTIC COUNCIL, <https://www.atlanticcouncil.org/about/history>.

<sup>30</sup> North Atlantic Treaty, *supra* note 2, art. 9.

*They are resolved to unite their efforts for collective defence and for the preservation of peace and security.*

*They therefore agree to this North Atlantic Treaty:*

#### Article 1

The Parties undertake, as set forth in the Charter of the United Nations, to settle any international dispute in which they may be involved by peaceful means in such a manner that international peace and security and justice are not endangered, and to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations.

#### Article 2

The Parties will contribute toward the further development of peaceful and friendly international relations by strengthening their free institutions, by bringing about a better understanding of the principles upon which these institutions are founded, and by promoting conditions of stability and well-being. They will seek to eliminate conflict in their international economic policies and will encourage economic collaboration between any or all of them.

#### Article 3

In order more effectively to achieve the objectives of this Treaty, the Parties, separately and jointly, by means of continuous and effective self-help and mutual aid, will maintain and develop their individual and collective capacity to resist armed attack.

#### Article 4

The Parties will consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened.

#### Article 5

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.

#### Article 6<sup>31</sup>

For the purpose of Article 5, an armed attack on one or more of the Parties is deemed to include an armed attack:

on the territory of any of the Parties in Europe or North America, on the Algerian Departments of France,<sup>32</sup> on the territory of or on the Islands under the jurisdiction of any of the Parties in the North Atlantic area north of the Tropic of Cancer;

on the forces, vessels, or aircraft of any of the Parties, when in or over these territories or any other area in Europe in which occupation forces of any of the Parties were stationed on the date when the Treaty entered into force or the Mediterranean Sea or the North Atlantic area north of the Tropic of Cancer.

#### Article 7

This Treaty does not affect and shall not be interpreted as affecting in any way the rights and obligations under the Charter of the Parties which are members of the United Nations, or the primary responsibility of the Security Council for the maintenance of international peace and security.

#### Article 8

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

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<sup>31</sup> "The definition of the territories to which Article 5 applies was revised by Article 2 of the Protocol to the North Atlantic Treaty on the accession of Greece and Turkey signed on October 20, 1951." North Atlantic Treaty, *supra* note 2, n. 1.

<sup>32</sup> "On January 16, 1963, the North Atlantic Council noted that insofar as the former Algerian Departments of France were concerned, the relevant clauses of this Treaty became inapplicable after July 3, 1962." *Id.* at n. 2.

### Article 9

The Parties hereby establish a Council, on which each of them shall be represented, to consider matters concerning the implementation of this Treaty. The Council shall be so organised as to be able to meet promptly at any time. The Council shall set up such subsidiary bodies as may be necessary; in particular it shall establish immediately a defence committee which shall recommend measures for the implementation of Articles 3 and 5.

### Article 10

The Parties may, by unanimous agreement, invite any other European State in a position to further the principles of this Treaty and to contribute to the security of the North Atlantic area to accede to this Treaty. Any State so invited may become a Party to the Treaty by depositing its instrument of accession with the Government of the United States of America. The Government of the United States of America will inform each of the Parties of the deposit of each such instrument of accession.

### Article 11

This Treaty shall be ratified, and its provisions carried out by the Parties in accordance with their respective constitutional processes. The instruments of ratification shall be deposited as soon as possible with the Government of the United States of America, which will notify all the other signatories of each deposit. The Treaty shall enter into force between the States which have ratified it as soon as the ratifications of the majority of the signatories, including the ratifications of Belgium, Canada, France, Luxembourg, the Netherlands, the United Kingdom and the United States, have been deposited and shall come into effect with respect to other States on the date of the deposit of their ratifications.<sup>33</sup>

### Article 12

After the Treaty has been in force for ten years, or at any time thereafter, the Parties shall, if any of them so requests, consult together for the purpose of reviewing the Treaty, having regard for the factors then affecting peace and security in the North Atlantic area, including the development of universal as well as regional arrangements under the Charter of the United Nations for the maintenance of international peace and security.

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<sup>33</sup> “The Treaty came into force on August 24, 1949, after the ratifications of all signatory states were deposited.” *Id.* at n. 3.

### Article 13

After the Treaty has been in force for twenty years, any Party may cease to be a Party one year after its notice of denunciation has been given to the Government

of the United States of America, which will inform the Governments of the other Parties of the deposit of each notice of denunciation.

### Article 14

This Treaty, of which the English and French texts are equally authentic, shall be deposited in the archives of the Government of the United States of America. Duly certified copies will be transmitted by that Government to the Governments of other signatories.<sup>34</sup>

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<sup>34</sup> North Atlantic Treaty, *supra* note 2.