NOTES

ARTICLE 5 OF THE NORTH ATLANTIC TREATY: PAST, PRESENT, AND UNCERTAIN FUTURE

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TABLE OF CONTENTS

I. INTRODUCTION ................................................................. 169

II. THE NORTH ATLANTIC TREATY: ITS ORIGINS AND PRECEDENTS .... 171
A. The Atlantic Charter .................................................. 171
B. The Brussels Treaty .................................................. 173
C. The Rio Pact .......................................................... 174
D. The Formation of the North Atlantic Treaty .................. 175

III. ARTICLE 5: CONTEXT AND MEANING .................................. 177

IV. THE LIMITATIONS ON ARTICLE 5: ARTICLE 6 AND THE UN CHARTER ........ 180

V. ARTICLE 5: THE PRESENT: SEPTEMBER 11 AND THE INVOCATION OF
   ARTICLE 5 ................................................................. 185
A. Problems with the Invocation After 9/11 .......................... 185
B. Difficulties in Invoking Article 5 Against
   Terrorist Groups .................................................. 187
C. Did Article 5 Need to Be Invoked at All? ....................... 188

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167
VI. THE UNCERTAIN FUTURE OF ARTICLE 5: CONCLUSIONS ............. 193
A. Does the Invocation of Article 5 Have any
   Value as Legal Precedent? ......................... 193
B. Invoking Article 5 in the Future .................... 197
I. INTRODUCTION

In the aftermath of the September 11, 2001 terrorist attacks, the United States government acted to combat terrorism and bring those who supported the perpetrators of the attacks to justice. President George W. Bush created the position of Director of Homeland Security, naming former Pennsylvania Governor Tom Ridge to the post; Congress passed the USA PATRIOT Act, containing several anti-terrorism provisions; and throughout the country, officials took steps to tighten security at likely targets, including airports, sporting events, and government buildings.

The United States was not alone, however, in responding to the tragedy of September 11. On September 12, 2001, the North Atlantic Council met and issued a press release announcing NATO's intention to invoke Article 5 of the North Atlantic Treaty upon a showing that the attack came from outside the United States. By early October, NATO became convinced that an international terrorist group, Al Qaeda, headed by Osama bin Laden, was behind the attacks, thereby confirming the decision to invoke Article 5. This was the first time in the history of the North Atlantic Treaty that NATO has invoked Article 5 in response to an attack on a member state.

Subsequent to the invocation of Article 5, NATO took two significant actions. First, NATO dispatched Airborne Warning And Control System
a aircraft (AWACS) to the United States to assist in its anti-terrorism efforts;\(^\text{10}\) second, and it pledged its support\(^\text{11}\) to a U.S.-led military campaign in Afghanistan, which included aerial bombing, cruise missile attacks, and Special Forces missions.\(^\text{12}\) This military campaign has focused both on the training camps and other assets of Al Queida within Afghanistan, and at Afghanistan’s ruling regime, the Taliban.\(^\text{13}\)

This Note will examine Article 5 of the North Atlantic Treaty; its history, formation, relationship to the Treaty as a whole, and function within the boundaries set by the Charter of the United Nations. Furthermore, it will consider the question of what should, or should not, trigger an invocation of Article 5, focusing on the intent of the drafting parties of the Treaty, as well as the nature of the alliance itself. It will also examine the potential legal and political problems of invoking Article 5. Finally, it will consider whether Article 5 is the most efficient method by which NATO member states can respond to a terrorist attack, or whether the same results can be achieved without invoking Article 5.

This Note will show that NATO invoked Article 5 under a set of circumstances that were completely different from those envisioned in the drafting of the Treaty. It will also show that Article 5 was not designed to deal with this type of attack. Furthermore, it will illustrate the many potential pitfalls in using Article 5 to deal with terrorist attacks. Finally, it will propose that NATO reserve Article 5 for large-scale attacks on NATO by the armed forces of sovereign states, and use current and future anti-terrorist agreements and partnerships to combat attacks like those on September 11.

\(^\text{10}\) See id.

\(^\text{11}\) See infra notes 114-15 and accompanying text. NATO support of the military campaign in Afghanistan did not extend to active participation; only the United Kingdom participated in the military campaign along with the United States.


\(^\text{13}\) The Taliban were not recognized by the United States as the legitimate government of Afghanistan; moreover, they gave refuge to Osama bin Laden, the leader of the Al Queida terrorist network. Despite requests by the US to turn over bin Laden, the Taliban refused to do so absent clear proof that bin Laden and Al Queida were responsible for the September 11 attacks. See Taliban Leader: Prepare for Holy War, Sept. 14, 2001, at http://www.cnn.com/2001/WORLD/asiapcf/central/09/14/afghan.denial/index.html.
II. THE NORTH ATLANTIC TREATY: ITS ORIGINS AND PRECEDENTS

Even before America’s entry into World War II, some Western countries began to recognize the need for cooperation and collaboration with respect to security and territorial integrity. Through the aggressive actions taken by Nazi Germany both before and immediately after the beginning of the war in Europe, the Western democracies came to understand the price of isolationism and "appeasement" as practiced by Great Britain in the 1930s. Largely in response to this worldwide threat posed by the Nazis and the other Axis powers, on August 14, 1941, U.S. President Franklin D. Roosevelt and British Prime Minister Winston S. Churchill issued a "Declaration of Principles issued by the President of the United States and the Prime Minister of the United Kingdom," which soon became known as "The Atlantic Charter."

A. The Atlantic Charter

The Atlantic Charter was a joint statement outlining eight common principles, and while some of these directly or indirectly dealt with the Nazi menace, two of the stated principles in the Atlantic Charter looked ahead to the post-war world:

6. After the final destruction of Nazi tyranny, they hope to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all the men in all the lands may live out their lives in freedom from fear and want; . . .

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14 These actions included the annexation of Austria, Czechoslovakia, and the Sudetenland; see Appeasement, SECOND WORLD WAR ENCYCLOPEDIA, at http://www.spartacus.schoolnet.co.uk/2WWappeasement.htm (last visited Oct. 15, 2002).

15 See id.

16 See NATO Basic Documents, available at http://www.nato.int/docu/basicext/b410814a.htm (on its official website, NATO refers to the Atlantic Charter as one of the "Antecedents of the Alliance").

17 See id. ("They [the United States and the United Kingdom] desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned," a statement referring to the pre-war Nazi occupation of several European countries, such as Austria and Czechoslovakia, and the subsequent Nazi military conquest of Poland, the Low Countries, and France).
8. They believe all of the nations of the world, for realistic as well spiritual reasons, must come to the abandonment of the use of force. Since no future peace can be maintained if land, sea, or air armaments continue to be employed by nations which threaten, or may threaten aggression outside of their frontiers, they believe, pending the establishment of a wider and permanent system of general security, that the disarmament of such nations is essential. They will likewise aid and encourage all other practicable measures which will lighten for peace-loving peoples the crushing burden of armament.\(^{18}\)

The latter principle is an early example of the nascent concept of collective self-defense. The language of this principle suggests that the United States and Great Britain recognized, even as World War II was still in its early stages, that they would likely be called upon to assist smaller Western nations with 'the crushing burden of armament' in the post-war world.\(^{19}\) The language of this part of the Charter seems to foreshadows some of the language used in the North Atlantic Treaty.

Exactly one year after the issuance of the Atlantic Charter, President Roosevelt issued another statement in which he reaffirmed the United States' commitment to the principles set forth in the Atlantic Charter.\(^{20}\) The Atlantic Charter demonstrated the resolve of the United States and Great Britain to stand up to the Axis threat,\(^{21}\) but despite this example of solidarity, the Atlantic Charter did not directly lead to a postwar Western alliance with the United States and Great Britain as central members.

\(^{18}\) Id. (emphasis added).

\(^{19}\) Id.

\(^{20}\) See id.

\(^{21}\) In March, 1941, only a few months before the issuing of the Atlantic Charter, the United States enacted the Lend-Lease Act, which gave President Roosevelt the power to aid Great Britain (in the form of military supplies) despite the fact that the United States was still officially neutral in World War II. The Atlantic Charter is therefore part of the larger course of events through which the United States eventually participated in the European Theater as an ally of Great Britain. See, e.g., A DECADE OF AMERICAN FOREIGN POLICY: BASIC DOCUMENTS 1941-1949 3 (1968).
B. The Brussels Treaty

Despite the close ties between the United States and Great Britain evident in the Atlantic Charter, the first major European forerunner to NATO, the Brussels Treaty, did not include the United States as a party. The Brussels Treaty grew out of an earlier agreement, the Dunkirk Treaty of March 4, 1947, between Great Britain and France. The Dunkirk Treaty consisted of a fifty-year alliance between Britain and France, with both nations hoping in vain that the United States and the Soviet Union might also accede to the treaty. Largely due to this failure, Great Britain and France joined with Belgium, the Netherlands, and Luxembourg in creating the Brussels Treaty of March 17, 1948. The Brussels Treaty held great significance for Western Europe in that it laid the groundwork for several of the subsequent organizations devoted to European economic, social, military, and even political unity.

Sections of the Brussels Treaty may have inspired certain elements of the North Atlantic Treaty. The introductory section echoed several major themes found in abundance in the North Atlantic Treaty. It stressed both the collective nature of the agreement and the understanding that this was an agreement signed under the aegis of the United Nations, and not an attempt to refute or even question the authority of the UN:

Resolved to reaffirm their faith in fundamental human rights . . . and in the other ideals proclaimed in the Charter of the United Nations . . . To co-operate loyally and to co-ordinate their efforts to create in Western Europe a firm basis for European economic

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24 See id.

25 See id.

26 See id. at 22-23.


28 See Brussels Treaty, supra note 22, art. 5; but see PETER G. BOYLE, AMERICA'S HESITANT ROAD TO NATO: 1945-1949, 33 (Joseph Smith ed., 1990) (suggesting that the North Atlantic Treaty shows such strong deference to the United Nations less because of the wording of the Brussels Treaty, and more because of American public opinion, which was squarely behind the UN in the late 1940s and would have disapproved of any agreement seen to threaten the authority of the UN).
economic recovery; To afford assistance to each other, in accordance with the Charter of the United Nations, in maintaining international peace and security and in resisting any policy of aggression . . . Desiring for these purposes to conclude a treaty for collaboration in economic, social, and cultural matters and for collective self-defence . . . 29

Article 5 of the Brussels Treaty reiterates the interrelation of the Treaty and the UN; the Article states that if the Treaty members engage in military action in self-defense, "[a]ll measures taken . . . shall be immediately reported to the [UN] Security Council. They shall be terminated as soon as the Security Council has taken the measures necessary to maintain or restore international peace and security." 30

Finally, Article 7 of the Treaty created a Consultative Council, whose duties included promoting economic cooperation and recovery amongst the Treaty countries and examining any threats to peace. 31 Many of the central concepts in the Brussels Treaty, then, seem to have found their way into the North Atlantic Treaty in 1949.

C. The Rio Pact

Though the United States showed some reluctance to participate in any European alliances and never became part of the Brussels Treaty, 32 well before the signing of the Brussels Treaty the United States had shown a keen interest in building a security agreement with its neighbors in the Western Hemisphere. Consequently, the United States was one of twenty American nations to sign the Inter-American Treaty of Reciprocal Assistance, also known as the Rio Pact, in September 1947. 33 While the Pact "was generally regarded in this

29 Brussels Treaty, supra note 22.
30 Id. art. 5.
31 See id. art. 7.
32 See DOUGLAS STUART & WILLIAM TOW, THE LIMITS OF ALLIANCE: NATO OUT-OF-AREA PROBLEMS SINCE 1949 31 (1990) (indicating that American government officials had differing reasons for this reluctance; for example, "George Kennan, director of the State Department's Policy Planning Staff from 1947 till the end of 1949, originally opposed U.S. participation in a North Atlantic alliance on the grounds that the Brussels Pact of 1948 should be allowed to stand on its own merits and develop its own military organization.").
country as being fully in keeping with the spirit of the Monroe Doctrine," it served as an important precursor to the North Atlantic Treaty because it established the precedent that the United States could be involved in an alliance with foreign states without sacrificing its sovereignty. The language of the Pact was also quite similar to that used in the Brussels Treaty and subsequently in the North Atlantic Treaty. It set up the Organ of Consultation, which was similar in scope to the Consultative Council formed in the Brussels Treaty. Further, the Pact took similar pains to stress its compliance with the Charter of the United Nations.

D. The Formation of the North Atlantic Treaty

While several European nations had already banded together under the Brussels Treaty, they knew well that any defensive alliance would be useless against the power of the Soviet Union without the direct involvement of the United States. Unfortunately, for several years after the end of World War II, the American government was deeply divided as to what role, if any, the United States should play in world affairs. The Soviet Union also realized that the United States would provide significant backbone to any Western

34 The Monroe Doctrine refers to the long-standing foreign policy of the United States, first announced in a message to Congress given by President James Monroe on December 2, 1823. Essentially, the Doctrine created a degree of a United States hegemony in the Western Hemisphere. While the Doctrine did not affect existing European colonies in the area, any attempt by the European nations to claim new colonies in the Western Hemisphere (or to reclaim colonies that had achieved independence) was looked upon by the United States as an act of aggression. In turn, the Doctrine reiterated the American pledge not to interfere in European affairs. See generally J. Reuben Clark, U.S. State Dep't Memorandum on the Monroe Doctrine (1930); see also Hoskins, supra note 23, at 14.


36 See id. at 86-87.

37 See id.

38 See Paul-Henri Spaak, Why NATO? 23 (1959) (Spaak, a former NATO Secretary-General, noted that "[n]obody could reasonably believe that the new allies [of the Brussels Treaty] alone would be capable of setting up an effective bulwark against a possible attack by the Soviet Union . . .").

39 See Stuart & Tow, supra note 32, at 24-46. One work on the period has identified six different "schools of thought on American postwar security," including the 'Europe First' School, the 'Global Strongpoints' Faction, and even the 'Nuclear Reliance' School. While each of these 'schools of thought' contributed something to the overall American security structure in the post-war period, the formation of NATO and the American assets expended on the defense of Western Europe suggest that the 'Europe First' School was at least partially successful in making Western Europe a strategic priority.
military alliance. Consequently an American entrance into alliance with Western Europe could present a serious challenge to Soviet power in Eastern Europe. Accordingly, "[t]he Soviet Union therefore fought bitterly, and during the first years successfully, against any idea of regional organization, particularly in Europe: and it was inevitable that they should do everything possible to prevent the formation of our Alliance."  

The United States eventually realized that despite its isolationist tendencies (and any possible constitutional incompatibilities posed by an alliance with Western Europe), its own interests would be best served by joining the Western European nations in a self-defense agreement against the Soviet bloc, especially since the Soviet use of its Security Council veto threatened to render the UN virtually impotent. The United States Senate announced this fundamental shift in American foreign policy in 1948 in the "Vandenberg Resolution." Soon after the issuance of the Resolution, the United States began formally meeting with member states of the Brussels Treaty in order to facilitate a new defense agreement between America and Europe. On April 4, 1949, the founding member states of NATO signed the North Atlantic Treaty in Washington.

The North Atlantic Treaty (also called the Washington Treaty) consists of fourteen articles, as well as a short preamble that confirms the signatories' faith in, and continued participation in, the United Nations. The Treaty allows for the creation of a Council to facilitate the implementation of Treaty policies, as well as provisions for the ratification of the Treaty by the original

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40 See SPAAK, supra note 38, at 23.
41 See id.
42 Id.
43 See infra note 62 and accompanying text.
44 See HOSKINS, supra note 23, at 91.
45 See A DECADE OF AMERICAN FOREIGN POLICY, supra note 21, at 197 (the "Vandenberg Resolution" of June 11, 1948 was a Senate resolution stating that largely due to frustration with the shortcomings of the United Nations, the United States would associate "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.").
46 See HOSKINS, supra note 23, at 24, 26-27.
47 North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243 (signing the Treaty were Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, the United Kingdom, and the United States).
48 Because the North Atlantic Treaty was signed in Washington, D.C., it is sometimes called the Washington Treaty.
49 See North Atlantic Treaty, supra note 47.
50 See id. art. 9.
III. ARTICLE 5: CONTEXT AND MEANING

The heart of the North Atlantic Treaty, at least as it pertains to the military aspects of the alliance, is Article 5. Article 5 reads:

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.52

The central language of this Article, 'an armed attack against one or more of them . . . shall be considered an attack against them all . . .', is strikingly similar to language in both the Rio Pact and the Brussels Treaty.53 The differences in wording in the three agreements suggest, however, that the drafters of the Washington Treaty were interested in exactly how Article 5 would operate and what obligations and responsibilities it would place on member states. Article 3 of the Rio Pact includes the same provision as does Article 5 of the North Atlantic Treaty, namely that an attack on a member state is to be considered an attack on all member states.54 Until the Organ of

51 See id. art. 10-13.
52 Id. art. 5.
53 See Brussels Treaty, supra note 22, art. 4; see Rio Pact, supra note 33, art. 3.
54 See Rio Pact, supra note 33, art. 3 (the relevant wording of the Article in the Rio Pact, namely "an attack . . . against an American State shall be considered as an attack against all the American States" [italics added], might suggest a significant difference between the Rio Pact and
Consultation of the Inter-American System gives direction on the situation, however, the members of the alliance under the Rio Pact have great latitude in deciding what measures to take, if any, in response to the attack on a member state. Unlike the later North Atlantic Treaty, the Rio Pact did not have France or Great Britain too act as a counter balance to the United States; this fact may have led to the major differences between Article 3 of the Rio Pact and Article 5 of the North Atlantic Treaty. Since the Rio Pact had no member states with the economic or military capabilities of NATO member nations such as France or Great Britain, and since the Monroe Doctrine had guided U.S. relations with other American states for over a century, the more discretionary nature of the Rio Pact provision might have appealed to the United States because it could give the United States the ability to choose its response to an attack without a great deal of interference from other Rio Pact members.

In addition to the unique features of Article 3, the Rio Pact contained a far-reaching provision in Article 6, which stated:

If the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an aggression which is not an armed attack or by an extra-continental or intra-continental conflict, or by any other fact or situation that might endanger the peace of America, the Organ of Consultation shall meet immediately in order to agree on the measures which must be taken in case of aggression to assist the victim of the aggression . . .

The language of this Article implies that the Rio Pact members could be proactive in countering aggression that did not amount to an armed attack. Theoretically, the Rio Pact members could use Article 6 as a legal justification for preemptively attacking a potential aggressor, even if the aggressor had not yet committed an armed attack on any Rio Pact member state.

the other two alliances if, by the wording of the Article, the members of the Rio Pact could act in defense of an American state that was not a signatory to the Rio Pact, such as Canada).

55 See id. ("[E]ach one of the Contracting Parties may determine the immediate measures which it may individually take in fulfillment of the obligation . . . in accordance with the principle of continental solidarity.").

56 See CLARK, supra note 34.

57 Rio Pact, supra note 33, art. 6.
The Brussels Treaty, on the other hand, provided its members no such latitude. Article 4 of the Treaty stated:

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.\(^5\)

The severity of this provision probably reflected the rather desperate nature of Western European defenses in the years immediately following World War II. By one estimate, at the time of the Brussels Treaty, the Soviet Union could field 200 war-ready divisions, far more than the Brussels signatories could ever hope to field.\(^9\) In the face of this vast Soviet military superiority, some of the Brussels signatories, especially the militarily inferior Benelux countries, may have had the very real fear that other member states might avoid committing their forces in a perceived futile defense of another state. The obligatory nature of Article 4 was necessary, then, to assure the smaller member states that they would not be sacrificed.\(^6\)

As the negotiations leading to the North Atlantic Treaty moved along, it became clear that the United States would not accede to any agreement that forced it to automatically commit its forces in the case of an attack on another member state.\(^6\) This longstanding American policy of avoiding military alliance with European nations may have contributed to the U.S. position, but equally important was the fact that such an agreement, inasmuch as it obligated the United States to go to war automatically and without a declaration of war from Congress, might violate the U.S. Constitution.\(^6\) While Article 5 does not, therefore, require NATO member states to attack with all available force, and indeed "each country is thus free to take whatever action it may deem

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\(^{58}\) Brussels Treaty, supra note 22, art. 4.

\(^{59}\) See SPAAK, supra note 38, at 13.

\(^{60}\) See, e.g., HOSKINS, supra note 23.

\(^{61}\) The United States had long favored a policy of isolationism; stretching back before World War I, the United States feared becoming entangled in European affairs. After World War II, even though most Americans supported US involvement in the United Nations, there was still a strong tradition in American foreign policy of keeping afloat from the rest of the world. See HOSKINS, supra note 23.

\(^{62}\) See id. at 34.
necessary,"63 even the smaller European member states understood that the benefits of U.S. membership in NATO far outweighed any devolution of war-making power to the individual member states.64 The smaller NATO states might well have deduced that the mere threat of American military power, as well as the economic benefits of American participation, would render the North Atlantic Treaty more effective and desirable than the old Brussels Treaty, regardless of the wording of Article 5.65

IV. THE LIMITATIONS ON ARTICLE 5: ARTICLE 6 AND THE UN CHARTER

In practice, Article 5 of the North Atlantic Treaty only functions within the boundaries specified in Article 6 of the Treaty.66 Article 6, as modified in 1951 after the accession of Greece and Turkey to the Treaty, reads:

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

1. on the territory of any of the Parties in Europe or North America, on the Algerian Departments of France, on the territory of Turkey or on the islands under the jurisdiction of any of the Parties in the North Atlantic area north of the Tropic of Cancer;67

2. 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.68

Article 6 both expands and limits the power of the Washington Treaty and specifically Article 5. It expands the power of the Treaty in that an attack on

63 North Atlantic Treaty, supra note 47, art. 5.
64 See Hoskins, supra note 23, at 28.
65 See id.
66 See North Atlantic Treaty, supra note 47, art. 6.
67 Prior to Algerian independence, France considered Algeria a part of France. However, since Algeria gained its independence, Algeria is no longer part of the Treaty area as defined in Article 6. See NATO Basic Texts, available at http://www.nato.int/docu/basic txt/treaty.htm#FN2 (last visited Oct. 14, 2002).
68 North Atlantic Treaty, supra note 47, art. 6.
a member state outside the geographical territory of the state can still trigger Article 5 if it occurs within the area defined in Article 6. It limits the power of the Treaty, however, in that military forces of member states may be attacked in other areas of the world without triggering Article 5.69 The limited geographical nature of the Treaty was largely an American creation; though the United States eventually saw the wisdom in allying itself with the Western European nations, it recognized the potential for disaster if Article 5 could be invoked as a result of an attack on the many colonial territories then held by the European Member States throughout the world.70 As a result of American influence, strict geographical limits were placed on Article 5; the final version of Article 6 excluded virtually all European colonial territory except the Algerian departments, and then only after considerable pressure from France.71

The geographical constraints placed on Article 5 by Article 6 raises an important question: how should NATO deal with 'out-of-area' questions?72 This question is as old as the alliance itself; events such as the Suez Crisis of 1956 and the French military conflict with the Vietminh in Indochina clearly affected the interests of several NATO member states, regardless of whether they took place within the treaty area defined in Article 6.73 As previously mentioned, the United States was largely responsible for the inclusion of geographical limits in the North Atlantic Treaty,74 but by the 1980s, the tables had turned. American foreign policy had become much more global in scope, and the revival of the Cold War (coupled with increased defense spending) under President Reagan meant that American security interests in non-European areas became much more important than before.75 As a result, the

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69 See id. In contrast, the Rio Pact approached the problem of how to manage out-of-area attacks on member forces quite differently. As mentioned previously, Article 6 of the Rio Pact gave its members considerable discretion in responding to situations that did not meet the requirements for invoking Article 3 of the Pact. However, some of the language of Article 3 specifically realized the problem posed by outside attacks on Rio Pact forces, and very deliberately applied Article 6 to them, stating: "The provisions of this Article [Article 3] shall be applied in case of any armed attack which takes place...within the territory of an American State. When the attack takes place outside of the said areas, the provisions of Article 6 shall be applied." See Rio Pact, supra note 33, art. 6.
71 See id.
73 See STUART & TOW, supra note 32, at 58, 180.
74 See supra note 70 and accompanying text.
75 See MARC BENTNICK, NATO'S OUT OF AREA PROBLEM 4 (Adelphia Papers 211, Autumn
United States has pushed for more NATO involvement (on a planning or consultative level, if not a military one) in areas outside of the Article 6 boundaries. When Article 5 is properly invoked pursuant to the geographical limits set by Article 6, however, the out-of-area question becomes all but moot for future action outside Article 6 geography.

The other major limitation on Article 5 is the United Nations Charter itself. Article 5, in acknowledging its subordinate role vis-à-vis the UN, contains a specific reference to Article 51 of the United Nations Charter. Article 51 states,

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

Under Article 51, then, any actions taken by NATO or its member states under Article 5 of the North Atlantic Treaty must be reported to the UN Security Council.

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76 See id.

77 See supra note 72. A strong policy argument can be made that once Article 5 is invoked, the limits in Article 6 no longer apply. If, for example, the Soviet Union had attacked NATO in Western Europe, this would have been a classic case for invocation of Article 5. Once Article 5 had been invoked in this type of situation, however, NATO could not be expected to confine its military operations to Western Europe. Certainly the military forces of NATO member states that were stationed in other parts of the world might have participated in actions against the Soviets. To hold otherwise would pose a grave danger; for example, if the Soviets had launched a small-scale attack on purely European forces in Western Europe while simultaneously massing huge numbers of forces in the Bering Straits for an attack on Alaska, NATO would have been justified in using force in Western Europe, but NATO would not have been justified in using force in the Bering Straits. Similarly, the United States could not use force in the Bering Straits by itself under Article 51 of the UN Charter because its forces were not attacked!

78 See North Atlantic Treaty, supra note 47, art. 5 ("[E]ach of them, in exercise of the right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations. . . ").

79 U.N. CHARTER art. 51.
More importantly, Article 51 plainly asserts the right of the Security Council to step into a conflict and take action, with or without the approval of NATO.

Since its inception, scholars have questioned whether NATO is simply an alliance of 'collective self-defence' as stated in Article 51, or whether instead NATO is a regional alliance. The difference is crucial, because under Chapter VIII of the United Nations Charter (Articles 52-54, entitled "Regional Arrangements"), a 'regional arrangement or agency' is subject to further Security Council controls. Lord Ismay, the first Secretary General of NATO, addressed the differences:

The failure to distinguish between associations of nations linked by a community of interests on the one hand, and the regional associations determined primarily by geographic considerations on the other, has led to misunderstanding in the past. The distinction is that under the Charter measures of self-defence, whether individual or collective, do not require the prior authorization of the Security Council, while, on the other hand, enforcement action by regional agencies (as contemplated under Article 53 of Chapter VIII [of the UN Charter]) do require this authorization. The Atlantic Treaty provides insurance against a situation which the Security Council might be unable to control, but it in no manner impugns the Council's authority.

Additionally, as far back as the formation of the United Nations, United States Senator Vandenberg had suggested that "a community of interests could exist between nations not situated in the same geographic area, and that the [UN] Charter should sanction the establishment of such communities, which may not be strictly 'Regional Arrangements,' as provided under Article 53."

Perhaps the more salient reason why NATO considers itself to be simply a collective self-defense organization dates back to the early post-war years.

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80 See id.
81 See id.
83 See U.N. CHARTER arts. 52-54.
84 ISMAY, supra note 70, at 12-13.
85 The namesake of the "Vandenberg Resolution"; see supra note 45.
86 ISMAY, supra note 70, at 12.
From the founding of the United Nations, the Soviet Union had used its Security Council veto quite frequently.\(^7\) The Soviet proclivity towards blocking any Western moves with its veto gave the drafters of the Washington Treaty ample incentive to classify the alliance as a self-defense alliance, because NATO as a regional arrangement would have been virtually powerless if it needed Security Council approval (which the Soviets could essentially deny at will) before it could take military action.\(^8\) Accordingly, the drafters of the North Atlantic Treaty took great pains to avoid any language that would suggest that NATO was intended to be a regional arrangement.\(^9\) In the end, the alliance became known as a collective self-defense alliance and not a regional arrangement, simply because the member states, while reluctantly acknowledging the regional nature of the Organization, claimed that the only action they would take was collective self-defense and not enforcement action.\(^9\)

While this regional question was hotly debated during the formation and early years of the alliance, NATO has continuously claimed that it is not a regional organization as envisioned under Chapter VIII of the United Nations Charter.\(^9\) Though this claim has its weaknesses,\(^9\) the subsequent additions to the alliance of Turkey and Greece (not to mention the Eastern European countries that have joined in recent years) has weakened the regional argument, since it would be hard to consider either nation as being within the North Atlantic region.\(^9\)

\(^7\) See supra note 44 and accompanying text.


\(^9\) See id. at 35, 161.

\(^9\) See id. at 190-91.

\(^9\) See, e.g., ISMAY, supra note 70, at 12-13.

\(^9\) In comparison, the Rio Pact addressed the regional question in a more direct manner. Article 5 of the Rio Pact states,

> The High Contracting Parties shall immediately send to the Security Council of the United Nations, in conformity with Articles 51 and 54 of the Charter of the United Nations, complete information concerning the activities undertaken or in contemplation in the exercise of the right of self-defense or for the purpose of maintaining inter-American peace and security.

\(\text{Rio Pact, supra note 33, art. 5.} \) Apparently, then, the Rio Pact member states would have to wait for Security Council approval before commencing enforcement actions—but not in the case of self-defense, which is the right of all nations (or groups of nations) under Article 51 of the United Nations Charter. See id.; see also UN CHARTER art. 51.

\(^9\) While this subject is indeed largely settled, the recent invocation of Article 5 in response to the September 11, 2001 terrorist attacks might well have proceeded differently had NATO
V. ARTICLE 5: THE PRESENT—SEPTEMBER 11 AND THE INVOCATION OF ARTICLE 5

A. Problems with the Invocation After 9/11

When considering the events of September 11 and the subsequent military actions in Afghanistan, the first question that must be addressed is whether Article 5 was properly invoked. The military operations against Afghanistan have been a qualified success, and the natural inclination is to assume, ex post facto, that the invocation of Article 5 must have been proper. The difficulty in invoking Article 5 for an attack such as the United States suffered on September 11, however, is that Article 5 was likely designed for a situation very different from a terrorist attack.

The North Atlantic Treaty, as well as the treaties that preceded it in the 1940s, used some variation of the phrase 'armed attack' to describe the condition on which collective or regional self-defense would be invoked. In reality, this phrase, at least in the North Atlantic Treaty, could simply have read "armed attack by the Soviet Union and/or its allies." Since the purpose of NATO was to counter perceived Soviet aggression in Europe, it seems likely that the purpose of Article 5 was to provide the NATO Member States a vehicle through which they could react if Soviet aggression ever gave way to military attack.

That the final version of Article 5 is purpose-driven is borne out in several ways, including the geographical limits in Article 6 and the lack of specificity

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been classified as a regional arrangement. If NATO was a regional arrangement under Chapter VIII of the UN Charter, it could undertake enforcement actions through Article 53, but unlike self-defense actions, these enforcement actions would be subject to UN approval. The important question here is whether the military actions in Afghanistan are in the nature of 'enforcement' or self-defense, but the answer to this does not seem clear.

94 The bombings and ground operations, in coordination with attacks from the Northern Alliance (the Afghans who resisted Taliban rule), have resulted in the collapse of the Taliban regime, but at present, Osama bin Laden remains at large. See, e.g., Rumsfeld: Hunt for Bin Laden far from Over, CNN.com, at http://www.cnn.com/2001/US/11/19/ret.us.binladen/index.html (Nov. 19, 2001).

95 One can argue that the invocation of Article 5 was legal, since it was in response to an attack on a NATO member state. The remaining question, however, is whether Article 5 was intended to encompass such attacks.

96 See North Atlantic Treaty, supra note 47, art. 5; see Brussels Treaty, supra note 22, art. 4; see Rio Pact, supra note 33, art. 3.

97 See SPAAK, supra note 38 and accompanying text.
in the language of Article 5. While Article 6 is fairly detailed as to where an attack must occur, there is no real guidance in the Treaty as to what types of actions constitute an attack. This omission is also present in the Rio Pact and the Brussels Treaty, although probably for somewhat different reasons; if the United States wanted to use the Rio Pact as a vehicle for de facto enforcement of the Monroe Doctrine, vagueness in terms of what constituted an attack would make it easier for them to invoke the Pact and protect their interests in the Americas.99

It also seems doubtful that the Member States of the Brussels Treaty felt any need for specificity in terms of what constituted an attack. Because of the post-World War II political and military situation in Western Europe, even those who believed in the Brussels Treaty recognized that it was wholly inadequate to meet the Soviet threat.100 In this desperate situation, therefore, a Soviet attack on one or more members of the Brussels Treaty would likely be so devastating and threatening to the continued survival of the Treaty members that defining ‘attack’ seemed unnecessary.

Finally, the North Atlantic Treaty includes this same undefined ‘attack’ language.101 Despite the participation of the United States in NATO, however, the military situation in Western Europe was still critical at the time of the Washington Treaty, and had not changed fundamentally from the time of the Brussels Treaty.102 The language of Article 5, then, was likely kept vague so that any Soviet military action against NATO would constitute an attack.

Article 5 is by its design, best suited for combating an attack on a NATO member state by a sovereign nation or nations with well-defined armed forces and territorial boundaries. The attacks of September 11, on the other hand, were committed by a terrorist organization without sovereign status and with no single nationality uniting its members. Indeed, members of Al Queida hail from all over the Islamic world103 and reside in virtually every country in the

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98 The Rio Pact, however, does modify the word “attack” in its Article 3 with “by any state.” This suggests that an attack by a terrorist group without state approval or support might not constitute an Article 3 attack. See Rio Pact, supra note 33, art. 3.

99 See generally CLARK, supra note 34; see also supra note 56 and accompanying text.

100 See SPAAK, supra note 38 and accompanying text.

101 See North Atlantic Treaty, supra note 47, art. 5.

102 See SPAAK, supra note 38 and accompanying text.

B. Difficulties in Invoking Article 5 Against Terrorist Groups

The attacks of September 11 may not be the best example of the difficulties inherent in combating terrorism through Article 5. While there was very little doubt after September 11 as to who was responsible, given the sheer number of terrorist groups worldwide, as well as the proclivity for such groups to splinter into smaller groups, knowing which group was responsible might not always be so easy, especially if those responsible decided not to take public credit for the terrorist acts. Even assuming that a NATO member state was able to determine which terrorist group was responsible for a terrorist attack, it is certainly possible that the intelligence agencies of the member states might not know enough about the makeup or membership of the group to mount any successful military operation against the group. More importantly, an illegal regime, the Taliban, harbored Al Qaeda and Osama bin Laden both before and after the attacks of September 11. After the attacks, the Taliban freely admitted that bin Laden was residing in their country and was under their 'protection.' These actions by the Taliban gave the United States the legal justification to commence military operations against both Al Qaeda and the Taliban regime. Because virtually no

107 See id.
109 Prior to September 11, only Pakistan had full diplomatic relations with the Taliban, while Saudi Arabia and the United Arab Emirates had limited official diplomatic contact with the regime. Subsequent to September 11, even these nations broke off their diplomatic relations with the Taliban. See Diplomats Leave Kabul Empty Handed, CNN.com, available at http://www.cnn.com/2001/WORLD/asiapcf/south/08/21/taliban.diplomats/index.html (Aug. 21, 2001).
111 See, e.g., International Convention for the Suppression of Terrorist Bombings [hereinafter
members of the international community recognized the Taliban as the legitimate rulers of Afghanistan, the United States initially received very little international criticism when its operations against Al Qaeda targets in Afghanistan expanded into concerted (and ultimately successful) efforts to destroy the Taliban itself.

C. Did Article 5 Need to Be Invoked at All?

Article 5 may not have been the most efficient way to deal with the crises. This was evidenced by NATO’s subsequent contributions to the operations against Al Qaeda and the Taliban. In the fervor immediately following the attacks, the invocation of Article 5 may have given many Americans a sense of purpose and a feeling of unity with the Western world, but as September gave way to October, the fervor died down somewhat, and reality set in. Consequently, on October 4, 2001, NATO Secretary General Lord Robertson announced eight measures NATO would take to assist the United States in the campaign against terrorism. NATO agreed to:

- enhance intelligence sharing and co-operation, both bilaterally and in the appropriate NATO bodies, relating to the threats posed by terrorism and the actions to be taken against it;
- provide, individually or collectively, as appropriate and according to their capabilities, assistance to Allies and other states which are or may be subject to increased terrorist threats as a result of their support for the campaign against terrorism;
- take necessary measures to provide increased security for facilities of the United States and other Allies on their territory;
- backfill selected Allied assets in NATO’s area of responsibility that are required to directly support operations against terrorism;

Convention on Terrorist Bombings], Jan. 12, 1998, art. 2, S. TREATY DOC. No. 106-6 (1998) (Article 2 (3) of the Convention states that “a person commits an offence if that person . . . participates as an accomplice in an offence . . .” If a person who acts as an accomplice has committed an offense, then by extension, one could argue that a government which has served as an accomplice has also committed an offense.).

112 See supra note 109.


• provide blanket overflight clearances for the United States and other Allies' aircraft, in accordance with the necessary air traffic arrangements and national procedures, for military flights related to operations against terrorism;
• provide access for the United States and other Allies to ports and airfields on the territory of NATO nations for operations against terrorism, including for refuelling, in accordance with national procedures . . . .
• that the Alliance is ready to deploy elements of its Standing Naval Forces to the Eastern Mediterranean in order to provide a NATO presence and demonstrate resolve; and
• that the Alliance is similarly ready to deploy elements of its NATO Airborne Early Warning force to support operations against terrorism.  

The very nature of these provisions underscored the point that NATO did not actively participate as an alliance in the military aspects of the campaign. As if to further de-emphasize NATO's role in the military actions in Afghanistan, the NATO press release of October 8, 2001, the day after the commencement of bombing missions in Afghanistan, noted that "[y]esterday evening, the United States of America and the United Kingdom began military operations as part of the global campaign against terrorism," and "NATO Ambassadors this morning expressed their full support for the actions of the United States and the United Kingdom." In short, NATO seemed to distance itself, allowing the United States and Great Britain to take the bulk of the credit (and if necessary, the bulk of the criticism) for the military campaign. While the NATO contributions of airspace, military bases, et cetera were all quite important to the overall success of the military campaign, they were largely secondary in nature; the United States shouldered the brunt of the load in terms of military force, as the aircraft and ground troops acting in Afghanistan were not under the aegis of NATO.  

115 Id.
117 See supra note 114.
118 See id. It is quite possible that the United States has encouraged NATO to take a secondary role in the military campaign. From the American perspective, though more direct NATO involvement would mean greater military assets with which to conduct operations, it would also mean less direct American control over such matters as targets and search missions.
NATO was not the only treaty organization of which the United States is a member that decided to invoke its regional or collective self-defense treaty provision in the wake of September 11. On September 21, through the Organization of American States (commonly called the OAS), the Rio Treaty was activated, and the members of the Rio Pact pledged their support to the United States. This support, while not primarily of a military nature, mirrors some of the same ideas present in the first few measures proposed by Lord Robertson on October 4.

After the military campaign is completed, NATO expects to play a much more active role; indeed, Great Britain has already volunteered to lead a

for Osama bin Laden, as well as greater scrutiny by the international community. Finally, despite all the talk about forming a global coalition to combat terrorism, the United States may want the world’s perception to be that America won this ‘war’ more or less on its own (given how deeply September 11th has affected a great number of Americans, there is certainly something of a revenge factor at play here). See id.

119 See Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394 [hereinafter OAS Treaty]; A regional defense organization under Chapter VIII of the UN Charter, the OAS was founded on April 30, 1948. The original 21 members of the organization were Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, United States, Uruguay, and Venezuela. The OAS now has 35 member states. Id. See also Louis B. Sohn, Expulsion or Forced Withdrawal From an International Organization, 77 HARV. L. REV. 1381, 1417 (1964) (illustrating an earlier invocation of the Rio Pact by the OAS; under Article 25 of the Charter of the Organization of American States, the Rio Pact may be invoked ‘... to agree upon measures against aggression or for ‘the common defense and the maintenance of... peace and security’ ”).


123 See supra note 114 and accompanying text.
peacekeeping force in Afghanistan under NATO. However, the question remains whether the assistance provided to the United States by the other NATO member states required the invocation of Article 5, or whether the same results could have been achieved without taking such drastic steps.

Considering the eight measures NATO has agreed to take in response to the terrorist threat, as well as the overall NATO strategy of combating terrorism after September 11, none of the actions proposed or taken by NATO seem to require the invocation of Article 5. For example, one measure with a more overt military purpose, that of allowing blanket US overflights of the territory of NATO member states, could likely have been achieved via merely informal agreements between the United States and the NATO states involved. Furthermore, since the North Atlantic Council (NAC) has the authority to set military policy for the Alliance, the invocation of Article 5 was almost certainly unnecessary for the deployment of NATO’s Standing Naval Force Mediterranean into the eastern Mediterranean area.

Finally, the necessity of invoking Article 5 after September 11 should be considered in light of past NATO military actions, particularly the NATO bombing campaign in the former Yugoslav province of Kosovo. Because no NATO Member State had been attacked, Article 5 could not be invoked or serve as a justification for the NATO bombing campaign in Kosovo. The NATO Member States therefore had to find a way to justify military action by the Alliance in situations where Article 5 could not be invoked.

On February 4, 1999, while NATO continued its bombing operation in Kosovo, the then-Deputy Secretary of State, Strobe Talbott, delivered a speech...
in Bonn, Germany entitled "The New Europe and the New NATO." In this speech, Secretary Talbott acknowledged the origins and purpose of NATO, and continued to stress that "NATO must maintain its capability, enshrined in Article V of the Treaty of Washington, to deter and if necessary defeat what might be called classic aggression." Secretary Talbott realized, however, that NATO faced many threats that could not be categorized as 'classic aggression.' He addressed this problem by saying, "we also need to recognize that most current and foreseeable European security challenges involve non-Article V missions." Underscoring this point, Secretary Talbott addressed the new NATO Secretary General, Lord Robertson, at NATO Headquarters in December, 1999. In this address, Secretary Talbott reiterated the idea that the future of NATO included defending against "Article 5 threats to our nations' homelands," as well as preparing for non-Article 5 missions, such as in Kosovo.

NATO's experience in Kosovo seemed to have taught the Alliance an important lesson. Because NATO was able to conduct military operations in another country, outside the territory of its Member States (and outside the territorial limits of Article 6), this set the precedent that NATO did not always need to invoke Article 5 in order to conduct military operations. But given the difficulties NATO faced in waging a bombing campaign in Kosovo, perhaps there was another, unintended lesson learned as well—if invoking

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131 See id. ("NATO was founded and designed to deal with the Soviet Union and the Warsaw Pact. That state and that alliance are gone, and so is the threat they posed.").
132 Id.
133 Id.
134 Id.
135 Id. ("NATO was founded and designed to deal with the Soviet Union and the Warsaw Pact. That state and that alliance are gone, and so is the threat they posed.").
136 Id.
138 See North Atlantic Treaty, supra note 47, art. 6.
Article 5 might help deflect international scrutiny away from the legality of a NATO action, then it should be invoked.

VI. THE UNCERTAIN FUTURE OF ARTICLE 5: CONCLUSIONS

A. Does the Invocation of Article 5 Have Any Value as Legal Precedent?

In many ways, the circumstances surrounding the terrorist attacks of September 11 have been quite unusual; consequently, NATO’s first invocation of Article 5 may be of limited precedential value when considering future invocations of the Article in response to a terrorist attack. The success of the United States—led attacks in Afghanistan, as well as the lack of significant international criticism they generated, seem to be directly related to the extraordinary aspects of September 11, including:

- The attacks of September 11 needed to be so heinous as to anger virtually the entire international community;
- The terrorist organization responsible for the attacks needed to be discernible or visible, so that the United States and NATO could direct their efforts onto a tangible target;
- The regime that harbored Al Qaeda before and after the September 11 attacks could not have been the legitimate government of a sovereign nation, recognized by the international community; further, this regime needed to have strong links with Al Qaeda beyond simply harboring the organization, such as providing training camps, men, and materiel;
- Finally, the nation that suffered the terrorist attacks had to have a strong voice on the United Nations Security Council, whether in its own right or through its allies.

In response to the brutality of the September 11 attacks, the United Nations General Assembly strongly denounced them, declaring that it:

> Strongly condemns the heinous acts of terrorism, which have caused enormous loss of human life, destruction and damage in the cities of New York, host city of the United Nations, and Washington, D.C., and in Pennsylvania;
Expresses its condolences and solidarity with the people and Government of the United States of America in these sad and tragic circumstances; Urgently calls for international cooperation to bring to justice the perpetrators, organizers and sponsors of the outrages of 11 September 2001; Also urgently calls for international cooperation to prevent and eradicate acts of terrorism, and stresses that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of such acts will be held accountable.\(^\text{139}\)

Even the nations generally considered the enemies of the United States joined in the condemnation of the attacks and the support of the United States.\(^\text{140}\) This virtually unprecedented outpouring of support created an atmosphere wherein the United States could take aggressive military action against Al Queida and its allies, free from any significant international criticism.

Very quickly after the September 11 attacks, the United States began to suspect that Osama bin Laden, through his Al Queida terrorist organization, had played a role in the attacks.\(^\text{141}\) The result of this early dissemination was that the general public quickly came to see bin Laden as the perpetrator of these attacks.\(^\text{142}\) Consequently, when the United States and Great Britain announced the commencement of hostilities against Al Queida in Afghanistan, there was very little surprise or confusion over the purpose behind the attacks.

Though many Americans were unfamiliar with the Taliban regime in Afghanistan prior to September 11, the Taliban drew criticism from the United Nations long before that date. On December 6, 2001, the Secretary General of the United Nations issued a report in which he outlined UN activities and initiatives in Afghanistan from November 2000 through November 2001.\(^\text{143}\)


\(^{140}\) See supra note 113 (noting that Syria, Cuba, Libya, and Iran all condemned the attacks, as did Pakistan, the only country that had formally recognized the Taliban. Iraq was the only nation to publicly show its support of the attacks.).

\(^{141}\) See Terror Attacks Hit U.S., CNN.com (Sept. 11, 2001), at http://www.cnn.com/2001/US/09/11/worldtrade.crash/index.html (less than 12 hours after the crash, CNN was reporting that "there are good indications that persons linked to Osama bin Laden may be responsible for these attacks").

\(^{142}\) Id.

\(^{143}\) See AFGHANISTAN REPORT, supra note 110.
The report reiterated that the Taliban was outside the international community before September 11. Further, the report stressed that in the months before September 11, UN officials had unsuccessfully attempted to persuade Taliban officials to comply with Security Council resolutions, "particularly with regard to Osama bin Laden and the closure of terrorist camps." These facts clearly establish that the international community knew of the link between the Taliban and Al Queida before September 11, and that the Taliban refused to discontinue its association with Osama bin Laden and Al Queida.

Without this clear link between the Taliban and Al Queida, the United States would not have had so clear a mandate to attack Afghanistan, given the concept under international law that "a State cannot be invaded under the principle of self-defence unless that State had responsibility for the armed attack precipitating the defence." Even in an earlier case where a state had clearly harbored terrorists before and after an attack, the Security Council did not support an attack on the harboring state by the state that suffered the terrorist attack. Because the Taliban did more than simply harbor Osama bin Laden and Al Queida, however, the United States faces significantly fewer legal obstacles in justifying its military actions in Afghanistan.

In the months following September 11, the UN Security Council has issued several Resolutions pertaining to the situation in Afghanistan. These resolutions have touched on several different topics, but none have expressly authorized or approved the use of force in Afghanistan by the United States.

144 See id. at 2.
145 Id.
147 Gregory H. Fox, Addendum to ASIL Insight on Terrorist Attacks, ASIL INSIGHTS (Sept. 2001), available at http://www.asil.org/insights/insigh77.htm (noting that UN Security Council voted 14-0, with U.S. abstaining, to condemn Israeli attack on Palestinian Liberation Organization offices in Tunisia even though Tunisia had harbored terrorists); but see Said Mahmoudi, Comment on Fox Addendum Sept. 24, 2001, ASIL INSIGHTS, available at http://www.asil.org/insights/insigh77.htm (suggesting that because UN Security Council is not bound by precedent, and because facts of this case are quite different from those of the Israeli attack, this prior condemnation would not necessarily lead to a similar condemnation of United States in the present case).
148 In the four months subsequent to the September 11th attacks, the UN Security Council issued six Resolutions dealing with Afghanistan; see http://www.un.org/documents/scres.htm (visited Jan. 30, 2001).
149 In fact, none of these Resolutions have even mentioned that the United States and Great Britain have engaged in military actions in Afghanistan. See id.
Security Council Resolution 1373, in "Reaffirming 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,"\(^{150}\) certainly implies that a state which has been attacked by terrorists may use force in accordance with its right to self-defense under Article 51 of the UN Charter.\(^{151}\) This implication looms larger because the United States is a permanent member of the Security Council, and because as mentioned previously, the Security Council has on one occasion held otherwise.\(^{152}\) Furthermore, the wording of Security Council Resolution 1373, in recognizing that terrorism has become even more prevalent and destructive in recent years, also sets a dangerous precedent, as international scholars have already begun discussing just how far Resolution 1373 allows a state to go in responding to a terrorist attack.\(^{153}\) One conclusion to be drawn from this is that the United States, by virtue of its status as superpower, has come to dominate the UN Security Council to such an extent that it can now dictate policy to the Council.

Given all of the extraordinary circumstances surrounding the post-September 11 events,\(^{154}\) it seems unlikely that a future invocation of Article 5 would occur under similarly unique circumstances. Indeed, it would be far more likely for a terrorist organization to go underground in a country with a legitimate government, and it would also be more likely that this government would have had no direct knowledge of the terrorists' whereabouts. Given that scenario, an invocation of Article 5 might prepare NATO for military operations, but those operations could not commence until NATO uncovered the whereabouts of the terrorists. More importantly, even after the terrorists were located, the larger question of conducting military operations within the territory of another state would need to be answered. In the end, all the NATO member states could likely do (assuming the state in which the terrorists were hiding had not harbored or aided the terrorists) would be to pressure the state


\(\text{See Surya Narayan Sinha, Addendum, ASIL Insights, available at http://www.asil.org/insights/insigh77.htm (November 16, 2001) (arguing that because the right to self-defense is inherent in every sovereign state, a state exercising that right would not need the prior approval of the Security Council; accordingly, the United States did not ask for a specific authorization of force in UN Security Resolution 1373, as it felt it needed no authorization).}^{151}\)

\(\text{See Fox, supra note 147.}^{152}\)

\(\text{See, e.g., Sinha et al., ASIL Insights (Sept. 2001), available at http://www.asil.org/insights/insigh77.htm.}^{153}\)

\(\text{See supra p. 193.}^{154}\)
B. Invoking Article 5 in the Future

At heart, Article 5 of the North Atlantic Treaty was designed to serve as a deterrent to any large-scale Soviet invasion of Western Europe. Arguably, given the breakup of the former Soviet Union, and the emergence of the United States as the world's lone superpower, Article 5 and NATO have successfully served the purpose for which they were created. Over 50 years after the drafting of the Washington Treaty, however, a new threat has emerged—the threat of terrorist attack. Although Article 5 has now been invoked in response to terrorist attack, the problems created by this invocation are many. Instead of using the powers in Article 5 directly to create a coordinated NATO response to the terrorist attacks, the United States and Great Britain have conducted a military campaign in Afghanistan largely without direct NATO assistance, and certainly without direct NATO control. The invocation of Article 5 in this case, therefore, has given an international and 'official' feeling to an essentially unilateral American-British military action. This process has revealed a deep flaw in the function of Article 5; namely, that the Article can be invoked in such a way that it places little or no added scrutiny or responsibility on a NATO member state acting in self-defense under Article 51 of the UN Charter. Indeed, the invocation seems to have been nothing more than an attempt to add an extra measure of legality or legitimacy to self-defense action under UN Article 51.

The problems associated with the invocation of Article 5 following the September 11 attacks suggest that a better solution to the terrorist problem must exist. Given the various solutions offered by the OAS and by NATO itself, perhaps even those who invoked Article 5 in the wake of September

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155 See Convention on Terrorist Bombings, supra note 111, arts. 6-7 (a signatory state of the Convention would have the right to prosecute a suspected terrorist under its domestic laws; therefore, if the United States discovered that a suspected terrorist bomber was a national of, or living in, another signatory's territory, it would inform the state of its suspicions. The other signatory state would then investigate; if sufficient evidence is found, it must pursue the matter, but it has the basic right to prosecute the suspect under its own criminal laws and refuse extradition of the suspect to the U.S.).

156 See U.N. CHARTER, art. 51.

157 See supra note 122 and accompanying text.

158 See Robert Hall & Carl Fox, Rethinking Security, NATO Review (web edition), Vol. 49,
11 realize that the powers given under the Article are ill-suited to military campaigns against terrorist organizations. Certainly the NATO Member States, like many other countries throughout the world, must face the reality of the terrorist threat and meet this threat in the most effective manner. Given the design and purpose of Article 5, as well as its effects, or lack thereof, following September 11, NATO should realize that Article 5 is simply not an effective tool for countering terrorism. Invocation of Article 5 should therefore be reserved for use in response to a large-scale military attack on NATO.

Certainly, the breakup of the former Soviet Union suggests that Western Europe may not face any credible large-scale military threat, which brings into focus the question of whether Article 5 has outlived its usefulness. Even if this is the case, it does not suggest that Article 5 should now be used in a manner inconsistent with its purpose and language. Leaving Article 5 intact does not harm the effectiveness of the Treaty or of the Organization. In fact, Article 5 could be looked upon as an "article of last resort," available in the unlikely event of large-scale attack, but unused and largely forgotten when the only significant threats are from terrorist groups. With any luck, NATO would never have to invoke Article 5 again.

No. 4, pgs. 9-11, available at http://www.nato.int/docu/review/2001/0104-02.htm (Winter 2001) (calling for more centralized intelligence structures, such as an EU Intelligence Agency).