

## NATO Approaches in Response to ISIL and International Terrorism

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The North Atlantic Treaty Organization (NATO) and its member states consider international terrorism to be a threat to the Alliance because of the threat international terrorism represents to their constituent populations.<sup>1</sup> International terrorism striking NATO states and their populations has been on the rise through the 1970s and 80s, from discotheque bombings in Germany,<sup>2</sup> radical political group kidnappings and assassinations in Greece,<sup>3</sup> “the troubles” in the UK and Northern Ireland,<sup>4</sup> through 9/11,<sup>5</sup> train and bus bombings in Spain<sup>6</sup> and the UK,<sup>7</sup> to more recently shooting/bombing attacks in Paris<sup>8</sup> and Brussels.<sup>9</sup> The stakes have escalated as groups like Al Qaeda, al-Qaeda affiliated franchise, and the Islamic State in Iraq and the Levant (also known as ISIL, ISIS, and Daesh) have shown tendencies toward an unwillingness to respond to traditional negotiated political solutions toward all-out war with a solely military dimension.

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1. Press Release, NATO, NATO Wales Summit Declaration Issued by the Head of State and Government Participating in the Meeting of the North Atlantic Council in Wales (Sept. 5, 2014) available at [http://www.nato.int/cps/en/natohq/official\\_texts\\_112964.htm](http://www.nato.int/cps/en/natohq/official_texts_112964.htm).

2. 1986: *Berlin Disco Bombed*, BBC HOME (Apr. 5, 2005) [http://news.bbc.co.uk/onthisday/hi/dates/stories/april/5/newsid\\_4357000/4357255.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/april/5/newsid_4357000/4357255.stm).

3. *Greek Domestic Terrorism*, National Counterterrorism Center (NCTC) Counterterrorism Guide, [https://www.nctc.gov/site/groups/greek\\_domestic.html](https://www.nctc.gov/site/groups/greek_domestic.html).

4. Joshua Hammer, *In Northern Ireland, Getting Past the Troubles*, SMITHSONIAN MAGAZINE (Mar. 2009), available at <http://www.smithsonianmag.com/people-places/in-northern-ireland-getting-past-the-troubles-52862004/?no-ist>.

5. See generally The 9/11 Commission Report, The National Commission on Terrorist Attacks Upon the United States (July 22, 2004), available at <http://govinfo.library.unt.edu/911/report/911Report.pdf>.

6. *Spain Train Bombings Fast Facts*, CNN (Mar. 4, 2016), <http://edition.cnn.com/2013/11/04/world/europe/spain-train-bombings-fast-facts>.

7. *7 July London Bombings: What Happened That Day?*, CNN (July 3, 2015), <http://www.bbc.com/news/uk-33253598>.

8. Andrew Higgins and Kimiko de Freytas-Tamura, *Paris Suspect Drafted an Elaborate Plot of Terror Across Europe*, N.Y. TIMES (Nov. 20, 2015), [http://www.nytimes.com/2015/11/20/world/europe/paris-attacks.html?\\_r=0](http://www.nytimes.com/2015/11/20/world/europe/paris-attacks.html?_r=0).

9. Griff Witte, Souad Mekhennet and Michael Birnbaum, *Islamic State Claims Responsibility for the Brussels Attacks*, WASH. POST (Mar. 22, 2016), [https://www.washingtonpost.com/world/brussels-on-high-alert-after-explosions-at-airport-and-metro-station/2016/03/22/b5e9f232-f018-11e5-a61f-e9c95c06edca\\_story.html](https://www.washingtonpost.com/world/brussels-on-high-alert-after-explosions-at-airport-and-metro-station/2016/03/22/b5e9f232-f018-11e5-a61f-e9c95c06edca_story.html).

While certain member states see terrorism as a hybrid problem inviting military, law enforcement, diplomatic, economic and political solutions, other member states, particularly in Europe, deemphasize the military component of counterterrorism.<sup>10</sup> As a consensus-based organization, NATO therefore has adopted a counterterrorism stance that uses military capabilities indirectly against terrorism, even as it seeks new and inventive ways to apply military capabilities to address this seemingly intractable and persistent problem.<sup>11</sup>

If NATO were to organize a military response to a terrorist event, it could act only under Article 51 of the U.N. Charter (collective self-defense), or under Chapter VII, when authorized by the Security Council.<sup>12</sup> Media commentators often “invoke Article 5” of the North Atlantic Treaty as legal authority to act under international law, a common misunderstanding of the meaning and utility of this provision.<sup>13</sup> The North Atlantic Treaty alone confers no authority under international law to undertake an armed attack or use of force against a state or international non-state actor. The Treaty does not even define NATO as a “regional agency” under Chapter VIII of the UN Charter. Rather, NATO, per the terms of the North Atlantic Treaty, is merely a mutual defense pact, such that where Article 51 of the UN Charter authorizes the use of force in self-defense, it authorizes it for all NATO member states by virtue of the state’s multilateral commitment to NATO.<sup>14</sup> Regional organizations include OAS, ECOWAS, AU, ASEAN, Arab League, etc. – but not NATO, for this purpose.

## **I. NATO Responses to Mass Maritime Migration**

One recent, ongoing NATO “activity” touching on the issue of the mobility of potential terrorist actors through Europe’s borders is the NATO response to the mass migration from North Africa and the Levant, through southeastern Europe, into the heart of the continent.<sup>15</sup> In response, NATO authorized the deployment of Standing NATO Maritime Group 2 assets to provide assistance to the refugee/migrant crisis in eastern Mediterranean.<sup>16</sup>

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10. Patryk Pawlak, *Understanding Hybrid Threats*, EUROPEAN PARLIAMENTARY RESEARCH SERVICE BLOG (June 24, 2015), <https://eprthinktank.eu/2015/06/24/understanding-hybrid-threats>.

11. *Countering Terrorism*, NATO (Dec. 3, 2015), [http://www.nato.int/cps/en/natohq/topics\\_77646.htm](http://www.nato.int/cps/en/natohq/topics_77646.htm).

12. See U.N. Charter ch. VII.

13. Ilya Somin, *Using Article 5 of the North Atlantic Treaty to Legalize the War Against ISIS [Updated with Response to Julian Ku]*, WASH. POST (Nov. 15, 2015), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/11/15/using-article-5-of-the-nato-treaty-to-legalize-the-war-against-isis/?utm\\_term=.8ae260471732](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/11/15/using-article-5-of-the-nato-treaty-to-legalize-the-war-against-isis/?utm_term=.8ae260471732).

14. See U.N. Charter art 51, para. 1.

15. *NATO’s Maritime Activities*, NATO (July 12, 2016), [http://www.nato.int/cps/en/natohq/to pics\\_70759.htm](http://www.nato.int/cps/en/natohq/to pics_70759.htm).

16. Yuri M. Zhukov, *NATO’s Mediterranean Mission: What the Alliance is Doing in the Aegean Sea*, FOREIGN AFFAIRS (Feb. 21, 2016), <https://www.foreignaffairs.com/articles/europe/2016-02-21/natos-mediterranean-mission>.

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This current expanded “activity” includes interdicting people-smuggling of migrants at sea and returning them to Turkey for repatriation by national coast guards, with NATO *support* only – that is, there is no authorized, direct interdiction by NATO forces *unless* a mariner is in distress.<sup>17</sup> On February 10-11, 2016, at a regularly scheduled NATO Defense Ministers’ meeting, the Secretary General stressed that this activity<sup>18</sup> is “not about stopping or pushing back refugee boats,” but about contributing “critical information and surveillance to help counter human trafficking and criminal networks.”<sup>19</sup> As part of the agreement, NATO will cooperate closely with national coastguards and the European Union to stop human trafficking, provide situational awareness of migrants taking to the seas on their own, and working to screen potential terrorists out of migrant populations allowed to enter Europe’s borders.<sup>20</sup>

NATO’s focus is on deterring people-smugglers through intelligence and surveillance, sharing information with Greek and Turkish coast guards, and EU border control agency.<sup>21</sup> The Greeks and Turks have agreed to wary cooperation, as each traditional rival concurred not to operate in the other’s territorial waters.<sup>22</sup> Political reaction to NATO’s response has been varied, with the UNHCR Europe Bureau concerned that a military response may “undermine the institution of asylum for people in need of international protection.”<sup>23</sup> Another concern posited by humanitarian groups is the prospect of NATO ships in the Aegean may *encourage* people to take to the Aegean Sea for passage, if they see NATO as a guarantor against the

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17. *Id.*

18. NATO sometimes weathers criticism about its decision cycles and timeliness of action. See Uwe Benecke, *Reconsidering NATO’s Decision Making Process*, US ARMY WAR COLLEGE STRATEGY RESEARCH PROJECT (Mar. 30, 2007), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA467165>. But consider on February 8, German Chancellor Merkel and Turkish PM Davutoglu announced they would seek NATO’s help with migration crisis calling on alliance to monitor the flow of smuggler ships destined for Europe. By February 10-11, the Defense Ministers had convened to discuss this topic and, acting as the North Atlantic Council, authorize action, among others, and by February 11, the Supreme Allied Commander Europe (SACEUR) had ordered three ships from SNMG-2 to begin patrols in Aegean Sea. Work is ongoing to refine rules of engagement, caveats, and procedures and obligations (national) for rescue at sea, differentiating between economic migrants and political refugees.

19. *Statement by the NATO Secretary General on NATO Support to Assist with the Refugee and Migrant Crisis*, NATO (Feb. 25, 2016), available at [http://www.nato.int/cps/en/natohq/opinions\\_128372.htm](http://www.nato.int/cps/en/natohq/opinions_128372.htm).

20. John Vandiver, *British Warships Joining NATO Mission to Combat Human Trafficking in Aegean*, STARS AND STRIPES (Mar. 7, 2016), <http://www.stripes.com/news/british-warships-joining-nato-mission-to-combat-human-trafficking-in-aegean-1.397996>.

21. Michael S. Schmidt and Sewell Chan, *NATO Will Send Ships to Aegean Sea to Deter Human Trafficking*, N.Y. TIMES (Feb. 11, 2016), <http://www.nytimes.com/2016/02/12/world/europe/nato-aegean-migrant-crisis.html>.

22. Robin Emmott, *NATO Overcomes Greek-Turkish Tensions to Agree Aegean Mission*, REUTERS (Feb. 25, 2016) <http://www.reuters.com/article/europe-migrants-nato-idUSL8N1640TR>.

23. *The Syrian Refugee Crisis and the Need for U.S. Leadership, Executive Summary*, HUMAN RIGHTS FIRST (Feb. 2016), <http://www.humanrightsfirst.org/sites/default/files/HRF-Syrian-Ref-Crisis-ExSum.pdf>.

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dangerous journey, feeding hopes of safe passage.<sup>24</sup> Finally, some of the opposition has occurred from within the alliance itself: Military Committee Chairman, Czech General Petr Pavel, observed “If we are to pick the more significant of the two threats (refugees and Russia) then a government with an exceptional military arsenal, including nuclear weapons, which unabashedly violates international agreements, undoubtedly takes the top position.”<sup>25</sup> Even so, NATO’s measured response to the migrant crisis is ongoing.

It is important to note NATO has not been engaged in stopping or turning away migrant boats. Rather, NATO’s role has been to monitor and report maritime flows of migrants from Turkey to Greece, collecting and sharing intelligence on smuggling networks with national law enforcement and coast guards.<sup>26</sup> NATO ships encountering boats in distress defer to Turkish or Greek coast guards to handle any rescue, intervening only as the last resort when necessary, as the duty to rescue by warships arguably is required by international maritime law.<sup>27</sup>

Human rights law, of course, looms large over the issue of handling migrants. The European Court of Human Rights (ECtHR) case of *Hirsi Jamaa v. Italy* is one monumental case that causes concern to the allies, and, by extension, to the Alliance. In *Jamaa*, three vessels with twenty-four Somali and Eritrean nationals bound for Italy from Libya were intercepted by Italian Guardia di Finanza (law enforcement) and Coast Guard within thirty-five nautical miles of Agrigento, in Sicily, May 2009.<sup>28</sup> They were returned to Tripoli under the provisions of an Italian/Libyan bilateral agreement, with no attempt to identify their nationality.<sup>29</sup> Italy’s stated “Push Back Policy” is designed to reduce “clandestine immigration” and criminal people smuggling.<sup>30</sup> Fourteen of the applicants were granted refugee status by UNHCR in 2009.<sup>31</sup>

After exhausting their appeals under Italian law, the ECtHR accepted the case and found the court had territorial jurisdiction based on Italian law noting ships are Italian sovereign territory, therefore, the European Convention on Human Rights, and the court’s jurisdiction, applied.<sup>32</sup> The court found that Italy violated Article 3 of the European Convention on Human Rights by exposing refugees to risk of inhuman and degrading treatment in Libya, or by potential return to country of origin – an arbitrary

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24. Zhukov, *supra* note 16.

25. Zhukov, *supra* note 16.

26. *Id.*

27. *Id.*

28. *Hirsi Jamaa and Others v. Italy*, App. No. 27765/09, Eur. Ct. H.R., 3 (2012).

29. *Id.*

30. *Id.* at 4

31. *Id.*

32. *Id.* at 16.

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*refoulement*, an elementary principle of refugee law in which states are not allowed to return refugees to locations where abuse is likely.<sup>33</sup>

The 1951 Geneva Convention on Refugees defines a refugee as the following:

a person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country. . .or is unable or, owing to such fear, is unwilling to return to it.<sup>34</sup>

Article 33 notes “no Contracting State shall expel or return (‘refouler’) a refugee in any manner to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”<sup>35</sup> The court found there was a real risk to the migrants they would be abused in Libya, with no real protections for refugees in that state as the situation there deteriorated.<sup>36</sup>

The court also found, on the issue of mere potential repatriation to Eritrea and Somalia, there was real danger of violence and torture with repatriation to either country, so the court looked at whether Libya could offer guarantees against arbitrary repatriation.<sup>37</sup> The court noted that collective expulsion’s lack of legal basis constitutes a violation of Article 4 to Protocol 4 to the European Convention on Human Rights and ruled against Italy on that point, as well.<sup>38</sup> The court found that Italy’s failure to permit the petitioners to seek a national remedy within the national system of Italy per Article 13 of the Convention, constituted a denial to the petitioners any Italian forum before expelling them.<sup>39</sup>

Finally, under Articles 46 and 41 of the Convention, the court bound Italy to abide by the final judgment, requiring the Italian government to seek assurances from Libya regarding the treatment of the petitioners, no further forced repatriation to Eritrea and Somalia, and a money judgment of 15,000 Euro and costs and interest for each petitioner.<sup>40</sup> The case constituted a complete victory for the petitioners over the Italian government, a fact widely noticed in the NATO capitals and which has guided national policy on handling and interacting with refugees since the *Jamaa* judgment.

Examining the applicability of *Jamaa* to the current situation in Eastern Mediterranean, it stands to reason if Turkey intercepts migrants originating

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33. *Id.* at 38.

34. Convention Relating to the Status of Refugees art. 1, July 28, 1951, 189 U.N.T.S. 150.

35. *Id.* at art. 33.

36. Hirsi *Jamaa*, App. No. 27765/09, at 38.

37. *Id.*

38. *Id.* at 48.

39. *Id.* at 54.

40. *Id.* at 56.

in Turkey in Turkish territorial waters and takes them back to Turkey, there is no violation, as this is an internal law enforcement issue. Similarly, if Turkey intercepts migrants originating in Turkey on the high seas and returns them to Turkey, presumably there is no problem for the same reason. Even if they are refugees, there is no *refoulement* by definition because the migrants originated in Turkey. However, there is an open question as to whether other participating NATO nations have a *potential Jamma* type issue if they intercept migrants (potential refugees) on the high seas and return them to Turkey, depending on what eventually happens to the migrants once they return to Turkey<sup>41</sup> For example, what if the Syrian war eventually subsides, Turkey repatriates the migrants to Syria, the violence in Syria intensifies again, and the migrants are harmed or killed? Does *Jamma* establish precedent for human rights liability in such a case for a state party to the European Human Rights Convention? Is the situation different if the migrants set sail from Syria, or Lebanon?

## II. Maritime Counterterrorism Operations in Mediterranean

Since 9/11, NATO has undertaken maritime patrols of the Mediterranean to “deter, defend, disrupt and protect against terrorist activity.”<sup>42</sup> Operation Active Endeavor is NATO’s only current Article 5 operation focused on counterterrorism.<sup>43</sup> The operation focuses on tracking “suspect vessels,” building a common operating picture of Mediterranean maritime activity, and conducting regular queries of maritime vessels at sea.<sup>44</sup> “As of March 2015 NATO had hailed over 122,000 merchant vessels and boarded about 166 suspect ships” (master consent or flag state consent) to inspect documentation, manifests, and cargo.<sup>45</sup>

Sixty-five percent of the oil and natural gas consumed in Western Europe and a huge, unknown portion of energy resources headed to North America pass through the Mediterranean.<sup>46</sup> The Operation Active Endeavor mission is counterterrorism-oriented, focusing on counter-proliferation and preventing attacks on commercial ships at sea, but ships and helicopters have also rescued several hundred civilians on stricken oil rigs and sinking ships.<sup>47</sup> The operation has also contributed to the “Mediterranean Dialogue” security cooperation, which is a NATO partnership program.<sup>48</sup> As a result of

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41. See *EU: Don't Send Syrians Back to Turkey*, HUMAN RIGHTS WATCH (June 20, 2016), <https://www.hrw.org/news/2016/06/20/eu-dont-send-syrians-back-turkey>.

42. *Operation Active Endeavour*, NATO (July 12, 2016), [http://www.nato.int/cps/en/natolive/topic\\_pics\\_7932.htm](http://www.nato.int/cps/en/natolive/topic_pics_7932.htm).

43. *Id.*

44. *Id.*

45. NATO Shipping Centre (March 2015), <http://www.shipping.nato.int/operations/AE/Pages/Results.aspx>.

46. *Operation Active Endeavour*, *supra* note 42.

47. *Id.*

48. *Id.*

this security cooperation program, Mediterranean Dialogue countries routinely share “intelligence about suspicious shipping.”<sup>49</sup>

Task Force Endeavour operates in the Mediterranean, but NATO command and control (OPCON, or operational control) resides with the NATO Maritime Command (MARCOM) in the UK.<sup>50</sup> A rotating array of surface units, submarines, and maritime patrol aircrafts constitute the task force.<sup>51</sup> For a while, the task force provided escorts through the Straits of Gibraltar to ships requesting to prevent an MV Limburg (suicide boat ramming an oil tanker near Yemen) type incident.<sup>52</sup> The escort operation was later suspended, but could be revived quickly as threat assessments indicate their necessity.<sup>53</sup> The operation’s principal contributors are Germany, Greece, Italy, Spain and Turkey, but occasionally the U.S., Denmark and Norway participate.<sup>54</sup> Some non-NATO states have participated in varying degrees, including Israel, Morocco, Russia, Georgia and Ukraine, and even New Zealand.<sup>55</sup>

### **III. NATO Member State Obligations Under Convention on Genocide**

The US has described ISIL activities against certain minority groups (Yazidis, Christians and Shia Muslims) as genocide,<sup>56</sup> but the UN has not done so in any formal or official way. For example, neither the UN General Assembly nor the UN Security Council has used the term “genocide” in any resolution, even though the Office of the UN High Commissioner for Human Rights has obliquely characterized ISIL’s activities vis-à-vis the Yazidis with the word “genocide,” specifically that ISIL’s actions “possibly constitute genocide” and “may constitute genocide.”<sup>57</sup>

If the Security Council made such a determination, it could authorize action against ISIL on this basis. Yet even without a Security Council resolution definitively establishing the existence of genocide, the Genocide Convention places affirmative obligations on signatory states to undertake the prevention of genocide – but it does not tell them how or under what circumstances. From the UN report:

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49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Operation Active Endeavour*, *supra* note 42.

54. *Id.*

55. *Id.*

56. Amanda Holpuch, Harriet Sherwood, and Own Bowcott, *John Kerry: ISIS is Committing Genocide in Syria and Iraq*, THE GUARDIAN (Mar. 17, 2016), <https://www.theguardian.com/world/2016/mar/17/john-kerry-isis-genocide-syria-iraq>.

57. *ISIL May have Committed War Crimes, Crimes Against Humanity and Genocide: UN Report*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE COMMISSIONER (Mar. 19, 2015), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15720>.

All States are required to determine how to implement their obligations to ensure respect for international humanitarian law, especially in the framework of their obligation to investigate and prosecute allegations of war crimes and genocide. The Government of Iraq has a duty to investigate all allegations, which concern ISIL, ISF and affiliated armed groups, as well as other armed militias and to prosecute perpetrators, including responsible commanders and other superiors.<sup>58</sup>

Article I of the Genocide Convention defines genocide as a crime under international law which the Contracting Parties “undertake to prevent and to punish.”<sup>59</sup> Article V places an obligation on states to enact domestic legislation giving domestic effect to the Convention,<sup>60</sup> and Article VIII empowers any contracting party to call upon the Security Council to take action “appropriate for the prevention and suppression of acts of genocide,” with no geographical restrictions in the treaty.<sup>61</sup> No state has done so.

These are national obligations flowing from the treaty, and NATO is not a party to the Convention — yet all twenty-eight member states are parties to the agreement and are bound by it as a function of international law.<sup>62</sup> Is there an optional (political) role for NATO to organize the response in fulfillment of national obligations? What would trigger NATO’s role? Perhaps only a UNSC resolution inviting NATO to act, or an invitation by a nation-state for NATO intervention, could cause NATO to act within the “spirit” of the convention to prevent genocide.

#### **IV. Other Aspects of NATO Cooperation Against Terrorism**

It is clear NATO either is a military alliance with a political component — or, after the Cold War, it has evolved into a political alliance with a military component.<sup>63</sup> But terrorism and counterterrorism are not exclusively, or perhaps not even primarily, military problems. As we can see, coalition uses of force, such as aviation delivered fires and SOF raids, have affected ISIL but have not stopped them from attacks in France, Belgium and Turkey. What can NATO do to affect ISIL?

First things first: Article 5 of the North Atlantic Treaty is the *raison d’être* for NATO in this context:

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58. Rep. of the Office of the U.N. High Comm’r for Human Rights on the Human Rights Situation in Iraq in the Light of Abuses Committed by the So-Called Islamic State in Iraq and the Levant and Associated Groups, 28th Sess., ¶73, U.N. Doc. A/HRC/28/18 (Mar. 27, 2015).

59. Convention on the Prevention and Punishment of the Crime of Genocide art 1., Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Convention on Genocide].

60. *Id.* at 281.

61. *Id.* at 282.

62. *Status of Treaties, Convention on the Prevention and Punishment of the Crime of Genocide*, UNITED NATIONS TREATY COLLECTION (Aug. 27, 2016), [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-1&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&clang=_en).

63. See *NATO’s Purpose After the Cold War*, BROOKINGS.EDU (Mar. 19, 2001), <https://www.brookings.edu/wp-content/uploads/2016/06/reportch1.pdf>.



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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.<sup>64</sup>

There are a few important points to consider regarding this language. First, inconsistent with imprecise media reporting, this is NOT *necessarily* a mutual defense obligation. Rather, it is an obligation to take “such action as it deems necessary, including the use of armed force”<sup>65</sup> leaving up to the nations to decide individually what they can afford politically, militarily and maybe financially to use to assist.

Second, in order for Article 5 to be triggered, the NAC has to meet and unanimously agree. This happened only once following 9/11, and it was actually announced by Lord Robertson on 12 September 2001<sup>66</sup> and no NATO nation “broke silence” in the NAC on the issue.<sup>67</sup>

Third, Article 5 probably is not going to be triggered by low-yield one-off attacks like Charlie Hebdo or Brussels, as horrible as they may have been and will continue to be. It will likely take a strategic attack, such as a massive yield attack on a sensitive political target, like a national legislature, or an attack with casualties in the thousands to trigger Article 5, or perhaps an asymmetric event like a CBRN attack, or a strike on a nuclear power plant.

The 2010 Strategic Concept (Lisbon) and the 2014 Wales Declaration concluded “[t]errorism poses a direct threat to the security of the citizens of NATO countries, and” committed Allies to enhance capacity to detect and defend against international terrorism, including enhanced threat analysis, more consultations with NATO partners (not Alliance members) and “the development of appropriate military capabilities.”<sup>68</sup> For example, NATO

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

65. *Id.*

66. Press Release, NATO, NATO Treaty Commitments in Dealing with Terrorist Attacks Against the U.S. (Sept. 12, 2001), *available at* <http://www.nato.int/docu/update/2001/0910/e0912a.htm>.

67. Eric R. Terzuolo, *Regional Alliance, Global Threat: NATO and Weapons of Mass Destruction, 1994-2004*, NATO (June 29, 2004), <http://www.nato.int/acad/fellow/03-04/terzuolo.pdf>.

68. Gabor Iklody, *The New Strategic Concept and the Fight Against Terrorism: Challenges & Opportunities*, Centre of Excellence Defence Against Terrorism, 3 DEF. AGAINST TERRORISM REV. 3 (2010), *available at* [http://www.coedat.nato.int/publication/datr/volume6/01-The\\_New\\_Strategic\\_Concept\\_and\\_the\\_Fight\\_Against\\_Terrorism\\_Challenges&Opportunities.pdf](http://www.coedat.nato.int/publication/datr/volume6/01-The_New_Strategic_Concept_and_the_Fight_Against_Terrorism_Challenges&Opportunities.pdf).

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encourages sharing of information – military and even national (strategic) intelligence – though, EU privacy laws and European political and social preferences may loom large over this issue. At the February 2016 Defense Ministers’ meeting, NATO member states also “agreed to step up NATO support for the international coalition to counter ISIL.”<sup>69</sup> “*We agreed in principle to use NATO AWACS surveillance planes to backfill national AWACS capabilities,*” said SECGEN Stoltenberg.<sup>70</sup> “He noted that this decision will increase the coalition’s ability to *‘degrade and destroy the terrorist group ISIL, which is our common enemy.’*”<sup>71</sup> NATO also works in close coordination with EU, OSCE, and the Global Counterterrorism Force, and develops capabilities within NATO including reach back support by the JCBRN COE to operational forces and the Very High Readiness Joint Task Force (VJTF), which focused on “three capability umbrellas to defeat asymmetric threats, incident management, force protection . . . , and network engagement.”<sup>72</sup>

In conclusion, NATO has maintained an active stance in counterterrorism policy and operations, applying military capabilities where warranted to assist national authorities in dealing with migrant populations among whom terrorists attempt to blend for safe passage. NATO’s ongoing counterterrorism mission, Operation Active Endeavour, complements other areas of NATO cooperation in counterterrorism within the limits imposed by international and national law. For NATO to take a more active role – to engage in decisive military action against transnational terrorist groups such as ISIL – would require authority under international law, either in the form of a Security Council resolution or an invocation of Article 51 collective self-defense. Either act is a precondition to the NAC invoking the Article 5 mutual obligations to assist in national and collective defense against large-scale terrorist attacks.

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69. *NATO Defence Ministers Agree on NATO Support to Assist with the Refugee and Migrant Crisis*, NATO (Feb. 11, 2016), [http://www.nato.int/cps/en/natohq/news\\_127981.htm](http://www.nato.int/cps/en/natohq/news_127981.htm).

70. *Id.*

71. *Id.*

72. *Countering Terrorism*, *supra* note 11.