

## NOTE

### THIS AIN'T A SCENE; IT'S AN ARMS RACE: NATO AND THE USE OF NUCLEAR WEAPONS TO MAINTAIN THE COMMITMENT TO COLLECTIVE SELF DEFENSE

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#### INTRODUCTION

We have spent trillions of dollars over time on planes, missiles, ships, equipment, building up our military to provide a strong defense for Europe and Asia. The countries we are defending must pay for the cost of this defense, and if not, the U.S. must be prepared to let these countries defend themselves. We have no choice. The whole world will be safer if our allies do their part to support our common defense and security. A Trump administration will lead a free world that is properly armed and funded, and funded beautifully.<sup>1</sup>

This message delivered on the campaign trail by U.S. President Donald Trump in a foreign policy speech in April 2016 sent shockwaves across Europe.<sup>2</sup> After his election, the North Atlantic Treaty Organization (NATO)<sup>3</sup> member countries began responding to the potential decrease in U.S. influence and funding for the organization.<sup>4</sup> NATO Secretary General Jens Stoltenberg

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1. Donald J. Trump, Address Before the Center for the National Interest (Apr. 27, 2016).

2. See Peter Graff, *Trump's 'America First' Speech Alarms U.S. Allies*, REUTERS (Apr. 27, 2016), <https://www.reuters.com/article/us-usa-election-trump/trumps-america-first-speech-alarms-u-s-allies-idUSKCN0XO10R> [<https://perma.cc/XCS8-RWRL>]; Jeremy Diamond & Stephen Collinson, *Donald Trump's Foreign Policy: 'America First'*, CNN (Apr. 27, 2016), <http://www.cnn.com/2016/04/27/politics/donald-trump-foreign-policy-speech/> [<https://perma.cc/7BPQ-YYFF>].

3. Throughout this Note, the acronym "NATO" refers to the North Atlantic Treaty Organization that consists of twenty-nine member countries from North America and Europe. *Member Countries*, NATO, [http://www.nato.int/cps/en/natohq/topics\\_52044.htm](http://www.nato.int/cps/en/natohq/topics_52044.htm) (last updated June 12, 2017) [<https://perma.cc/ZHP4-DKRT>].

4. Simon Shuster, *Can NATO Survive a Donald Trump Presidency?*, TIME (Nov. 14, 2016), <http://time.com/4569578/donald-trump-nato-alliance-europe-afghanistan> [<https://perma.cc/D3X3-7YXF>].

responded with an appeal to President Trump in *The Guardian*.<sup>5</sup> “In these uncertain times we need strong American leadership, and we need Europeans to shoulder their fair share of the burden,” Stoltenberg wrote;<sup>6</sup> “[g]oing it alone is not an option.”<sup>7</sup>

Trump’s unwillingness to commit the United States to supporting NATO members could carry international consequences.<sup>8</sup> A total of twenty-nine countries across North America and Europe agreed to uphold Article 5 of the North Atlantic Treaty (NAT),<sup>9</sup> which states that all member countries will provide for the collective defense of one another.<sup>10</sup> Today, the countries most likely to invoke Article 5 protection are Estonia, Latvia, and Lithuania (the Baltic states).<sup>11</sup> These states fear a Russian invasion<sup>12</sup>—and for good reason, considering Russia’s recent aggression in Eastern Europe.<sup>13</sup>

Russia invaded Ukraine and annexed Crimea in February 2014.<sup>14</sup> In the dark of night, a significant group of uniformed and armed men surrounded the Crimean parliament, seized control, and admitted pro-Russian deputies.<sup>15</sup> These deputies appointed a new

5. Jens Stoltenberg, Opinion, *Now Is Not the Time for the US to Abandon NATO – Nor Should Its European Allies Go It Alone*, *GUARDIAN* (Nov. 12, 2016), <https://www.theguardian.com/commentisfree/2016/nov/12/us-must-not-abandon-nato-europe-go-alone-jens-stoltenberg> [<https://perma.cc/EL2R-Q6JU>].

6. *Id.*

7. *Id.*

8. See Shuster, *supra* note 4; Michael Hikari Cecire, *3 Things to Know About the Trump Administration’s Warning Shots on NATO*, *WASH. POST* (Feb. 27, 2017), [https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/27/3-things-to-know-about-the-trump-administrations-warning-shots-on-nato/?utm\\_term=.5c551b0223fc](https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/27/3-things-to-know-about-the-trump-administrations-warning-shots-on-nato/?utm_term=.5c551b0223fc) [<https://perma.cc/GT3X-CWFK>].

9. See North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243. The North Atlantic Treaty (NAT) is the founding document of NATO. *Id.* pmb1.

10. *Id.* pmb1., art. 5.

11. See Stéfanie von Hlatky, *Introduction: American Alliances and Extended Deterrence*, in *THE FUTURE OF EXTENDED DETERRENCE: THE UNITED STATES, NATO, AND BEYOND* 1, 2 (Stéfanie Von Hlatky & Andreas Wenger eds., 2015) (explaining that Estonia, Latvia, and Lithuania (the Baltic states) are at a greater risk of invoking Article 5 protections simply because they share a border with Russia).

12. See Joachim Krause, *Threat Scenarios, Risk Assessments, and the Future of Nuclear Deterrence*, in *THE FUTURE OF EXTENDED DETERRENCE: THE UNITED STATES, NATO, AND BEYOND*, *supra* note 11, at 19, 21, 30.

13. See *id.*

14. See OFFICE OF THE PROSECUTOR OF THE INT’L CRIMINAL COURT, *REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2016*, 34–35 (Nov. 14, 2016), [https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE\\_ENG.pdf](https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf) [<https://perma.cc/4YH6-S2JH>].

15. See *id.*; See Paul Roderick Gregory, Opinion, *International Criminal Court: Russia’s Invasion of Ukraine Is a ‘Crime,’ Not a Civil War*, *FORBES* (Nov. 20, 2016), <https://www.forbes.com/sites/paulroderickgregory/2016/11/20/international-criminal-court-russias-invasion-of-ukraine-is-a-crime-not-a-civil-war/#36bfaad07ddb> [<https://perma.cc/5V9P-CPNX>].

prime minister, rallied for a referendum, and declared Crimea to no longer be a part of Ukraine but to be part of the Russian Federation.<sup>16</sup> The International Criminal Court (ICC) issued preliminary findings in November 2016.<sup>17</sup> The ICC found that Russia was illegally occupying Crimea and that its involvement there resulted in an international armed conflict.<sup>18</sup>

Ukraine's democratically elected government dealt with extreme antigovernment protests and mass violence in the spring of 2014,<sup>19</sup> and Russia sent troops to fight on behalf of the antigovernment party.<sup>20</sup> These Russian forces intimidated pro-government supporters by warning them not to challenge one of the world's leading nuclear powers.<sup>21</sup> The ICC found that available information regarding the conflict in Ukraine—the conflict Russia tried to portray as a “civil war” in the international community—actually supported the existence of an international armed conflict between Russia and Ukraine.<sup>22</sup> The ICC required further assessment regarding the involvement of Russian authorities in the conflict to determine if Russian support sufficiently controlled the armed antigovernment groups.<sup>23</sup> Currently, the Russian-involved “civil war” in Ukraine continues to threaten the safety and sovereignty of Ukrainians.<sup>24</sup> If the democratically elected government in Ukraine falls to Russia, it might not be long before Russia sets its sights on the Baltic states.<sup>25</sup>

16. See OFFICE OF THE PROSECUTOR, *supra* note 14, at 35.

17. See *id.*

18. See *id.* at 35–36.

19. See *id.* at 36.

20. See Paul Roderick Gregory, Opinion, *International Criminal Court: Russia's Invasion of Ukraine Is a 'Crime,' Not a Civil War*, FORBES (Nov. 20, 2016), <https://www.forbes.com/sites/paulroderickgregory/2016/11/20/international-criminal-court-russias-invasion-of-ukraine-is-a-crime-not-a-civil-war/#36bfaad07ddb> [<https://perma.cc/4PMA-NPH6>].

21. See Fran Blandy, *Putin Mulls Putting Nuclear Forces 'On Alert' Over Crimea*, BUS. INSIDER (Mar. 15, 2015), <http://www.businessinsider.com/afp-putin-mulled-putting-nuclear-forces-on-alert-over-crimea-2015-3#ixzz3kDDleZIC> [<https://perma.cc/5B9X-6Z32>].

22. See OFFICE OF THE PROSECUTOR, *supra* note 14, at 35.

23. See *id.* at 38.

24. See Shaun Walker, *Violence Flares in War-Wearry Ukraine as US Dithers and Russia Pounces*, GUARDIAN (Feb. 14, 2017), <https://www.theguardian.com/world/2017/feb/14/avdiivka-frontline-ukraine-war-russia-backed-separatists> [<https://perma.cc/FH39-KDPQ>]; Jennifer Rankin, *EU Ministers Press Russia Over Fighting in Ukraine*, GUARDIAN (Feb. 3, 2017), <https://www.theguardian.com/world/2017/feb/03/france-raises-concerns-with-russia-over-fighting-in-ukraine> [<https://perma.cc/XN85-4AF7>].

25. *Deterrence and Defense*, NATO, [https://www.nato.int/cps/en/natohq/topics\\_133127.htm](https://www.nato.int/cps/en/natohq/topics_133127.htm) (last visited Jan. 4, 2018) (explaining, “[T]he Alliance is faced with a security environment that is more diverse, complex, fast moving and demanding than at any time since its inception. It faces challenges and threats that originate from the east and from the south; from state and non-state actors; from military forces and from terrorist, cyber and

NATO and its members must prepare for the possibility of political challenges involving Russian aggression along the borders of the Baltic states.<sup>26</sup> Currently, NATO's military capabilities lack the most basic means required to deter and to respond to the threat of a Russian nuclear strike along the border of the Baltic states.<sup>27</sup> In conventional military terms, Russia maintains superiority over smaller, neighboring countries, including the Baltic states.<sup>28</sup> The most effective way for NATO to deter Russia as a potential nuclear adversary is to adopt a strong nuclear posture.<sup>29</sup>

This Note argues that NATO should honor its commitment to provide for the collective defense of its members by amending Article 5 of the NAT to include the sharing of nuclear weapons among member countries for the purpose of self-defense.<sup>30</sup> This action can be lawfully accomplished because it is within the legal rights of the organization to provide protection for members.<sup>31</sup> This proposal may initially appear to exacerbate the danger of the current global nuclear environment,<sup>32</sup> but in fact, it would decrease the likelihood of a global nuclear war.<sup>33</sup> This proposal would also provide greater assurance of collective defense for the Baltic states (as guaranteed by Article 5).<sup>34</sup> For these reasons, this proposal merits serious consideration.

Part I lays the foundation for this proposal. The first Section provides a comprehensive synopsis of NATO, including an expla-

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hybrid attacks. Russia has become more assertive with the illegal annexation of Crimea and destabilisation of eastern Ukraine, as well as its military build-up close to NATO's borders.") [<https://perma.cc/YXK6-XLXM>]; see also Andreas Wenger, *Conclusion: Reconciling Alliance Cohesion with Policy Coherence*, in *THE FUTURE OF EXTENDED DETERRENCE: THE UNITED STATES, NATO, AND BEYOND*, *supra* note 11, at 199, 221.

26. See Andreas Wenger, *Conclusion: Reconciling Alliance Cohesion with Policy Coherence*, in *THE FUTURE OF EXTENDED DETERRENCE: THE UNITED STATES, NATO, AND BEYOND*, *supra* note 11, at 217–18.

27. See MATTHEW KROENIG, ATLANTIC COUNCIL, *THE RENEWED RUSSIAN NUCLEAR THREAT AND NATO NUCLEAR DETERRENCE POSTURE 1* (2016).

28. See *id.* at 2.

29. See *id.* at 5.

30. See *infra* Part II.

31. See *infra* Sections II.B.2–3.

32. See Ben Farmer, *Russian Tensions Could Escalate into All-Out War, Says NATO General*, TELEGRAPH (Feb. 20, 2015), <http://www.telegraph.co.uk/news/uknews/defence/11425393/Russian-tensions-could-escalate-into-all-out-war-says-Gen-Adrian-Bradshaw.html> [<https://perma.cc/PU9V-MUYF>].

33. See Philip M. Breedlove, *NATO's Next Act: How to Handle Russia and Other Threats*, FOREIGN AFF., July–Aug. 2016, at 96, 104, <https://www.foreignaffairs.com/articles/europe/2016-06-13/natos-next-act> [<https://perma.cc/3FHW-E8DP>].

34. See *infra* Sections IA.2–3.

nation and analysis of Article 5.<sup>35</sup> The second Section provides background on the use and deployment of nuclear weapons within the international community, including the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and an Advisory Opinion of the International Court of Justice (ICJ).<sup>36</sup> The third Section addresses Russia and the evolving security landscape in Europe and analyzes recent Russian aggression and NATO responses.<sup>37</sup> Part II proposes amending Article 5 to address NATO's problem regarding border-related Russian aggression. The first Section sets out and analyzes the proposed amendment language.<sup>38</sup> The second Section demonstrates the merit of the incorporation of the proposed language,<sup>39</sup> and the third Section addresses counterarguments.<sup>40</sup>

## I. BACKGROUND

NATO should amend Article 5 to allow member countries to share nuclear weapons for the purpose of self-defense because it is a lawful exercise of the organization's power which also serves as a nuclear deterrent to aggressive neighboring countries. This Part begins by presenting background information on NATO and its nuclear posture. Next, it discusses the use of nuclear weapons as a means of deterrence in the context of the international legal community. Finally, it examines the current security landscape between Russia and NATO members as it pertains to nuclear self-defense.

### A. *NATO Provides a Unique Transatlantic Defense and Security Link Between Europe and North America*

This Section examines NATO from four different perspectives: first, NATO in general; second, the collective self-defense article; third, NATO's legal authority and power to provide collective self-defense within the scope of international law; and fourth, NATO's position on nuclear weapons as methods of deterrence.

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35. See *infra* Sections I.A.1–4.

36. The Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and an Advisory Opinion of the International Court of Justice (ICJ) will be discussed. See background *infra* Section I.B.1–2.

37. See *infra* Sections I.C.1–2.

38. See *infra* Section II.A.

39. See *infra* Section II.B.

40. See *infra* Section II.C.

## 1. NATO's Fundamental Purpose Is to Protect the Independence and Security of Its Members

The NAT was signed on April 4, 1949 for the purposes of military cooperation and collective defense among several Western European democracies and the United States following World War II.<sup>41</sup> The original twelve NATO members included the nations of Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, the United Kingdom, and the United States.<sup>42</sup> These countries agreed to collectively defend one another against the military threat posed by the Soviet Union and also agreed to provide for the defense of one another in case a member nation should come under attack.<sup>43</sup> Today, NATO consists of twenty-nine member countries who continue to provide collective defense for all participating members.<sup>44</sup>

The notion of collective defense is based on the concept of collective security.<sup>45</sup> Collective security entails the creation of a single, multi-nation force that is designed to protect the general interests shared by a group of states.<sup>46</sup> NATO's incorporation of collective defense in Article 5 is derived from the right of individual and collective self-defense guaranteed by Article 51 of the U.N. Charter.<sup>47</sup> Article 5 provides language that incorporates both the concepts of collective defense and collective self-defense.<sup>48</sup>

## 2. Article 5 Establishes NATO's Military Capacity to Provide for the Collective Defense

The most well-known part of the NAT is Article 5, which defines the parameters of collective defense guaranteed to all members as follows:

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree that, if such an

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41. See North Atlantic Treaty, *supra* note 9, pmbl.

42. *Member Countries*, *supra* note 3.

43. See *A Short History of NATO*, NATO, [https://www.nato.int/cps/en/natohq/declassified\\_139339.htm?selectedLocale=en](https://www.nato.int/cps/en/natohq/declassified_139339.htm?selectedLocale=en) (last visited Jan. 4, 2018) [<https://perma.cc/73KB-JBDV>].

44. See *Member Countries*, *supra* note 3.

45. See Hans Kelsen, *Collective Security and Collective Self-Defense Under the Charter of the United Nations*, 42 AM. J. INT'L L. 783, 784 (1948).

46. See *id.* at 784.

47. See IVO H. DAALDER, BROOKINGS INST., *NATO, THE UN, AND THE USE OF FORCE* (1999), <https://www.brookings.edu/research/nato-the-un-and-the-use-of-force/> [<https://perma.cc/SD7G-5RDN>].

48. See *id.*

armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area. 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>49</sup>

Article 5 illustrates the intent and purpose of the NAT by outlining the rights and duties of member countries that participate in providing for the collective defense.<sup>50</sup> NATO members are not required by the Treaty or international law to respond to an armed attack on a fellow NATO member.<sup>51</sup> Yet, the successful implementation of collective security requires a willingness among all members to contribute to the provision defense because collective defense cannot exist without the collective effort of members to provide assistance.<sup>52</sup> To encourage each member to meet its obligation consistently to provide defense, each NATO member is

49. North Atlantic Treaty, *supra* note 9, art. 5.

50. See DAALDER, *supra* note 47.

51. See North Atlantic Treaty, *supra* note 9, art. 5 (explaining, “[T]he 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.*”); see also *Collective Defence—Article 5*, NATO, [https://www.nato.int/cps/en/natohq/topics\\_110496.htm#](https://www.nato.int/cps/en/natohq/topics_110496.htm#) (last visited Jan. 4, 2018) (explaining, “This assistance is taken forward in concert with other Allies. It is not necessarily military and depends on the material resources of each country. It is therefore left to the judgment of each individual member country to determine how it will contribute. Each country will consult with the other members, bearing in mind that the ultimate aim is to ‘to restore and maintain the security of the North Atlantic area.’ At the drafting of Article 5 in the late 1940s, there was consensus on the principle of mutual assistance, but fundamental disagreement on the modalities of implementing this commitment. The European participants wanted to ensure that the United States would automatically come to their assistance should one of the signatories come under attack; the United States did not want to make such a pledge and obtained that this be reflected in the wording of Article 5.”) [<https://perma.cc/52W6-Y7G8>].

52. In practice, the overall success of a system of collective security necessitates a minimum amount of “required” contribution from members and a limited amount of variation in member’s “self (determined) help.” Kelsen, *supra* note 45, at 784 (“In the case of collective security, states not directly violated in their rights are *obliged* to assist the violated state; whereas in the state of self-help under general international law, they are only *allowed* to do so.”).

autonomous in determining the amount of resources contributed to the collective defense of a victim country.<sup>53</sup> Article 9 of the NAT establishes the North Atlantic Council for the specific purpose of considering and recommending measures for the implementation of Article 5.<sup>54</sup> Nonetheless, the legal enforcement of the NAT falls under the purview of the U.N. Charter.<sup>55</sup>

### 3. The U.N. Charter Governs All Actions Taken by NATO

Article 7 of the NAT affirms the specific obligations of U.N. member countries under the U.N. Charter and acknowledges that the U.N. Security Council maintains primary responsibility for “the maintenance of international peace and security.”<sup>56</sup> The U.N. Charter also recognizes that regional arrangements or agencies, such as NATO,<sup>57</sup> may maintain peace and security within their region, provided that they do so in a manner “consistent with the

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53. See North Atlantic Treaty, *supra* note 9, art. 5; see also *Collective Defence—Article 5*, NATO, [https://www.nato.int/cps/en/natohq/topics\\_110496.htm#](https://www.nato.int/cps/en/natohq/topics_110496.htm#) (last visited Jan. 4, 2018) (“At the drafting of Article 5 in the late 1940s, there was consensus on the principle of mutual assistance, but fundamental disagreement on the modalities of implementing this commitment. The European participants wanted to ensure that the United States would automatically come to their assistance should one of the signatories come under attack; the United States did not want to make such a pledge and obtained that this be reflected in the wording of Article 5.”) [<https://perma.cc/M39X-TX5H>].

54. See *id.* art. 9. (“The Parties hereby establish a Council, on which each of them shall be represented, to consider matters concerning the implementation of this Treaty. The Council shall be so organised as to be able to meet promptly at any time. The Council shall set up such subsidiary bodies as may be necessary; *in particular* it shall establish immediately a defence committee which *shall recommend measures for the implementation of Articles 3 and 5.*”).

55. North Atlantic Treaty, *supra* note 9, art. 1 (“The Parties undertake, *as set forth in the Charter of the United Nations*, to settle any international dispute in which they may be involved by peaceful means in such a manner that international peace and security and justice are not endangered, and *to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations.*”); see U.N. Charter art. 1 (“The Purposes of the United Nations are: 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.”).

56. North Atlantic Treaty, *supra* note 9, art. 7; see also U.N. Charter art. 54 (“The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.”).

57. U.N. Charter Article 52, paragraph 1 provides as follows:

Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.



[p]urposes and [p]rinciples of the United Nations.”<sup>58</sup> The primary purpose of both the U.N. and NATO is to maintain international peace and security.<sup>59</sup> One of the fundamental standards of the Charter is its prohibition of members from engaging in the interstate use or threat of force.<sup>60</sup> There are two instances when the use or threat of force is acceptable under the Charter<sup>61</sup>: (1) in self-defense against an armed attack<sup>62</sup> and (2) when the use of force is authorized by the Security Council.<sup>63</sup>

Consistent with the principles of customary international law,<sup>64</sup> NATO members are of the majority opinion that any sanctions or military operations should be executed only if first approved by the U.N. Security Council.<sup>65</sup> The U.N. Security Council is a decision-making body comprised of a total of fifteen members, each of whom hold one vote.<sup>66</sup> There are ten non-permanent members who are elected for two-year terms by the General Assembly.<sup>67</sup>

58. *Id.*

59. U.N. Charter pmbll., art. 1; North Atlantic Treaty, *supra* note 9, pmbll., art. 1; *see* BARRY E. CARTER & ALLEN S. WEINER, *INTERNATIONAL LAW* 944–48 (6th ed. 2011).

60. *See* U.N. Charter art. 2, ¶ 4 (prohibiting “the threat or use of force against the territorial integrity or political independence of any state”).

61. *See id.*

62. U.N. Charter Article 51 provides as follows:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense 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.

63. U.N. Charter Article 39 provides as follows: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”

64. Customary international law is defined as a law “which is created and sustained by the constant and uniform practice of States . . . in circumstances which give rise to a legitimate expectation of similar conduct in the future.” *COMM. ON FORMATION OF CUSTOMARY (GEN.) INT’L LAW, INT’L LAW ASS’N, STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW* 8 (2000).

65. Krause, *supra* note 12, at 24.

66. *See* U.N. Charter arts. 23, 27; Amendments to Articles 23, 27 and 61 of the Charter of the United Nations, Dec. 17, 1963, 557 U.N.T.S. 143 (expanding the size of the Security Council from eleven members to fifteen). The United Nations maintains the authority to adjudicate issues of international peace and security. The U.N. Security Council is a subgroup with the authority to determine if and when military intervention is appropriate and/or necessary. *See* U.N. Charter arts. 24, 42; *INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT VII* (2001) [hereinafter *THE RESPONSIBILITY TO PROTECT*].

67. U.N. Charter art. 23; Amendments to Articles 23, 27 and 61 of the Charter of the United Nations, *supra* note 66 (expanding the size of the Security Council from eleven

There are also five permanent members who, because of their position on the U.N. Security Council, have the right to veto any possible action regarding the use or threat of force clause in the Charter.<sup>68</sup> The five nations that have the ability to prevent the approval of any proposed action by the Security Council include China, France, Russia, the United Kingdom, and the United States.<sup>69</sup>

Russia would likely veto any motion from NATO members seeking Security Council approval of nuclear sharing for collective defense of the Baltics.<sup>70</sup> This is likely because Russia is expected to veto any measure alleging the existence of a threat, breach of the peace, or act of aggression toward the Baltic states by Russia.<sup>71</sup> For example, Russia has asserted that any Western intervention in Syria would constitute a violation of the general international law principle of non-intervention,<sup>72</sup> yet it legitimized its own interventions in Crimea as complying with the established norms of international law.<sup>73</sup> One effective legal avenue for NATO members to pursue in this situation is to classify the sharing of nuclear weapons as an integral component of providing collective defense to members, such as the Baltic states, for the explicit purpose of self-defense.<sup>74</sup>

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members to fifteen by increasing the amount of non-permanent members from six to ten); see Stephen Lendman, *Understanding the U.N. Security Council Veto Power: America Threatens Russia*, GLOBAL RES. (Sept. 24, 2015), <https://www.globalresearch.ca/understanding-the-un-security-council-veto-power/5477846> [<https://perma.cc/735B-FF2N>].

68. See U.N. Charter art. 27; Amendments to Articles 23, 27 and 61 of the Charter of the United Nations, *supra* note 66. This is also called the hidden veto because it allows permanent members to threaten to use their veto power in closed-door sessions. Céline Nahory, *The Hidden Veto*, GLOBAL POL'Y F. (May 2004), <https://www.globalpolicy.org/component/content/article/185/42656.html> [<https://perma.cc/9GWJ-86XK>]. This veto power directly impacts what issues the Security Council will formally consider. *Id.*

69. Following their victory in World War II, these countries were selected as permanent members with the ability to contribute independent leadership perspectives to Security Council decisions. *The UN Security Council*, COUNCIL ON FOREIGN REL., <http://www.cfr.org/international-organizations-and-alliances/un-security-council/p31649> (last updated Sept. 7, 2017) [<https://perma.cc/KV9L-MWWF>].

70. See THE RESPONSIBILITY TO PROTECT, *supra* note 66, at 51, ¶ 6.20; Krause, *supra* note 12, at 30–32.

71. See Krause, *supra* note 12, at 30–31 (explaining that Russia considers its actions concerning the Baltic states to be defensive in nature, and thus not a threat).

72. See Alexei Anishchuk, *Russia Warns Against Military Intervention in Syria*, REUTERS (Aug. 26, 2013), <http://www.reuters.com/article/us-syria-crisis-lavrov-intervention-idUSBRE97P0G220130826> [<https://perma.cc/ZB24-AQDH>].

73. See Ashley Deeks, *Here's What International Law Says About Russia's Intervention in Ukraine*, NEW REPUBLIC (Mar. 2, 2014), <https://newrepublic.com/article/116819/international-law-russias-ukraine-intervention> [<https://perma.cc/FSA3-K8DK>].

74. See DAALDER, *supra* note 47.

#### 4. NATO Committed to Remain a Nuclear Alliance for As Long As Nuclear Weapons Exist

NATO's nuclear policy is one of deterrence.<sup>75</sup> A policy of deterrence is defined as one party using threats of force to dissuade another party from behaving in a manner that might incite violence or aggression.<sup>76</sup> NATO's nuclear deterrence policy is derived from both the 2010 Strategic Concept<sup>77</sup> and the 2012 Deterrence and Defence Posture Review.<sup>78</sup> All NATO members, with the exception of France, are also members of the Nuclear Planning Group (NPG), a group comprised of top government officials from NATO member countries that meet to discuss and consult on issues related to NATO's nuclear deterrence policies.<sup>79</sup>

The current legal arrangement regarding the use of nuclear weapons for NATO countries was established at NATO's first summit meeting in 1957.<sup>80</sup> To deter Soviet military aggression and to help assure the protection by means of collective defense,<sup>81</sup> the United States proposed the creation of sharing arrangements that would distribute the risk and responsibility of possessing nuclear weapons among NATO members.<sup>82</sup> NATO's nuclear sharing program consists of "arrangements under which non-nuclear members participate in nuclear planning and possess specially configured aircraft capable of delivering nuclear weapons [which] contribute

75. Press Release, NATO, Deterrence and Defence Posture Review (May 20, 2012), Press Release (2012) 063, [http://www.nato.int/cps/en/natohq/official\\_texts\\_87597.htm](http://www.nato.int/cps/en/natohq/official_texts_87597.htm) [<https://perma.cc/7A62-8PHT>].

76. See ALEXANDER L. GEORGE, *FORCEFUL PERSUASION: COERCIVE DIPLOMACY AS AN ALTERNATIVE TO WAR* 3–14 (1991) ("It is not enough that the policymaker feel confident that he has conveyed a threat of punishment for noncompliance . . . . Rather, it is the *target's* estimate of the credibility and potency of the threat that is critical. . . . [M]any of the critical variables are psychological ones having to do with the perceptions and judgment of the target. The possibility of misperceptions and miscalculations by the opponent is ever present and can determine the outcome.").

77. *Active Engagement, Modern Defence: Strategic Concept for the Defence and Security of the Members of the North Atlantic Treaty Organization*, NATO, ¶ 17 (Nov. 19–20, 2010), [https://www.nato.int/cps/ua/natohq/official\\_texts\\_68580.htm](https://www.nato.int/cps/ua/natohq/official_texts_68580.htm) [<https://perma.cc/VB9K-E8VD>].

78. See Deterrence and Defence Posture Review, *supra* note 75.

79. See *Nuclear Planning Group (NPG)*, NATO, [http://www.nato.int/cps/en/natohq/topics\\_50069.htm](http://www.nato.int/cps/en/natohq/topics_50069.htm) (last updated Apr. 7, 2016) [<https://perma.cc/8CZB-7XYT>].

80. See *Final Communiqué*, NATO, <http://www.nato.int/docu/comm/49-95/c571219a.htm> (last updated Oct. 23, 2000) [<https://perma.cc/T8V4-UJ84>].

81. *Collective Defence - Article 5*, NATO, [http://www.nato.int/cps/en/natohq/topics\\_110496.htm](http://www.nato.int/cps/en/natohq/topics_110496.htm) (last updated Mar. 22, 2017) [<https://perma.cc/5H72-3AMG>].

82. See David S. Yost, *The U.S. Debate on NATO Nuclear Deterrence*, 87 INT'L AFF. 1401, 1403–04 (2011) (explaining that the process of nuclear sharing involved "some US allies [hosting] US nuclear weapons and/or [providing] the personnel and delivery systems for them—artillery, missiles and aircraft").

to Alliance cohesion and provide reassurance to allies and partners who feel exposed to regional threats.”<sup>83</sup>

B. *The International Legal Community Allows the Use of Nuclear Weapons for Self-Defense and Deterrence*

This Section explores the use of nuclear weapons within the scope of international law as a means of deterrence for self-defense. It first examines NATO’s legal duties under the Non-Proliferation Treaty,<sup>84</sup> and then examines the decision of the ICJ regarding the legal use of nuclear weapons for self-defense under international law.<sup>85</sup>

1. The Treaty on the Non-Proliferation of Nuclear Weapons Applies to All NATO Member Countries

All NATO member countries are signatories to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) of 1970.<sup>86</sup> The NPT is an agreement originally made between five nuclear weapons states (NWS) and all other non-NWS.<sup>87</sup> Article 1 of the NPT prohibits NWS from sharing their nuclear weapons with non-NWS.<sup>88</sup> Article 2 prohibits non-NWS from receiving nuclear weapons from NWS.<sup>89</sup> Article 6 requires all parties to the treaty to “pursue negoti-

83. See U.S. DEP’T OF DEF., NUCLEAR POSTURE REVIEW REPORT 32 (2010).

84. See *infra* Section I.B.1.

85. See *infra* Section I.B.2.

86. The Treaty on the Non-Proliferation of Nuclear Weapons (NPT) applies to all NATO members. *Fact Sheet: NATO and the Non-Proliferation Treaty*, NATO (Mar. 2017), [https://www.nato.int/nato\\_static\\_fl2014/assets/pdf/pdf\\_2017\\_03/20170323\\_170323-npt-factsheet.pdf](https://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2017_03/20170323_170323-npt-factsheet.pdf) [<https://perma.cc/55DK-CTNW>]; Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

87. The NPT consists of nuclear weapons states (NWS) and non-nuclear weapons states (non-NWS). Merav Datan, *Nuclear Weapons and International Law*, 9 SCI. FOR DEMOCRATIC ACTION (Inst. for Energy and Env’tl. Research), May 2001, at 2. The Treaty requires NWS to negotiate nuclear disarmament if non-NWS agree to not acquire nuclear weapons. *Id.*

88. Article 1 of the Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 86, provides as follows:

Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices.

89. Article 2 of the Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 86, provides as follows:

Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other

ations in good faith” to eventually end the nuclear arms race and create total disarmament.<sup>90</sup> Before signing the NPT, the United States and the Soviet Union developed and shared their unilateral interpretation of Articles 1 and 2, expressing the view that provisions such as nuclear sharing among NATO members were allowed on the grounds that anything not expressly prohibited by the NPT was allowed.<sup>91</sup> NATO maintains that its nuclear sharing practice follows international law because it does not explicitly violate the NPT.<sup>92</sup> Moreover, the Obama Administration reiterated the long-standing general consensus of NATO members that the quantity of U.S. nuclear weapons in Europe would not be reduced “without negotiated Russian reciprocity.”<sup>93</sup>

## 2. An ICJ Advisory Opinion Did Not Find the Use of Nuclear Weapons for Self-Defense and Deterrence Illegal

The U.N. Charter<sup>94</sup> and the ICJ Statute<sup>95</sup> established the ICJ and designated it as the principal judicial organ of the United Nations.<sup>96</sup> The ICJ has jurisdiction to both adjudicate legal dis-

nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.

90. Article 6 of the Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 86, provides as follows:

Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.

91. WILLIAM ALBERQUE, INSTITUT FRANÇAIS DES RELATIONS INTERNATIONALES, *THE NPT AND THE ORIGINS OF NATO'S NUCLEAR SHARING ARRANGEMENTS* 5 (2017) (“[T]he historical record shows that the text of the NPT was crafted by the US and the USSR, in close cooperation, precisely so that NATO’s arrangements would be compatible with Treaty obligations—while also constraining the ability of non-nuclear states to acquire nuclear weapons.”).

92. During times of war, the United States would cede control of its nuclear weapons to the non-nuclear weapons states’ pilots for use with aircraft from non-nuclear weapon states. Otfried Nassauer, *Nuclear Sharing in NATO: Is it Legal?*, 9 *SCI. FOR DEMOCRATIC ACTION*, May 2001, at 12–13. The control of the weapon is effectively transferred to the pilot once the aircraft begins its mission, hence the aspect of sharing. *Id.*

93. There has been virtually no demonstrated interest on behalf of the Russians to cooperate with arms control polices or transparency regarding their own possession of nuclear weapons. See Yost, *supra* note 82, at 1416.

94. U.N. Charter arts. 7(1), 92–96.

95. Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933 (hereinafter: I.C.J. Statute).

96. In 1946, the ICJ replaced the Permanent Court of International Justice (PCIJ). All U.N. member states are *ipso facto* parties to the ICJ Statute. U.N. Charter Arts. 92, 93(1); *The Court*, INT’L CT. JUST., <http://www.icj-cij.org/en/court> (last visited Jan. 4, 2018) [<https://perma.cc/T7XW-GSH2>].

putes submitted by States in accordance with international law<sup>97</sup> and provide advisory opinions on any referred legal questions.<sup>98</sup> The Court is not technically legally bound by its own decisions or advisory opinions; however, the Court consistently considers both to be highly persuasive sources of judicial authority.<sup>99</sup>

On July 8, 1996, the ICJ issued an Advisory Opinion on the following question requested by the General Assembly: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?"<sup>100</sup> First, the Court considered if it had jurisdiction to issue an Advisory Opinion within the meaning of the ICJ Statute and the U.N. Charter.<sup>101</sup> The Court concluded that it had jurisdiction because it was asked by the General Assembly to "rule on the compatibility of the threat or use of nuclear weapons with the relevant principles and rules of international law."<sup>102</sup> Second, the Court considered if any customary or conventional international law specifically authorized the threat or use of nuclear weapons.<sup>103</sup> The Court concluded that "[t]here is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons."<sup>104</sup> Third, the Court consid-

97. The ICJ may only hear contentious cases if both parties are States and both States express consent to the ICJ's jurisdiction. International organizations such as NATO are excluded from being parties in contentious cases before the ICJ. To meet the requirement of consent to ICJ jurisdiction, a State must express consent to ICJ jurisdiction that exceeds simply joining the United Nations and thus becoming a party to the ICJ Statute. I.C.J. Statute Arts. 35(1), 36(1).

98. The U.N. Charter permits the General Assembly or the Security Council to request the ICJ to give an advisory opinion on any legal question. U.N. Charter art. 96.

99. Because the international legal system is scarce in judicial precedents, the judicial authority of advisory opinions in particular can legitimate certain conduct of states and organizations. Sean D. Murphy, *The International Court of Justice, in THE RULES, PRACTICE, AND JURISPRUDENCE OF INTERNATIONAL COURTS AND TRIBUNALS* 11, 18 (Chiara Giorgetti ed., 2012).

100. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226 ¶¶ 1, 21, 22 (July 8) (explaining that the use of the word "permitted" by the General Assembly was criticized as a starting point for comparing international law because it appeared to contradict the dicta described by the PCIJ in the case *S.S. Lotus (Fr. V. Turk)*, Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 35 (Sept. 7). "[S]tates are free to threaten or use nuclear weapons unless it can be shown that they are bound not to do so by reference to a prohibition in either treaty law or customary international law." The Court concluded that the legal conclusions to be drawn the use of the word "permitted" were without particular significance for the disposition of issues before the court.).

101. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. ¶ 105(2)(A).

102. Because the Court may not legislate, the fact that it provided an Advisory Opinion on the issue confirms that it recognizes that existing *corpus juris* is certainly not devoid of relevant rules on the matter. See U.N. Charter art. 96; I.C.J. Statute art. 65(1); Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. ¶¶ 18, 19.

103. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. ¶ 105(2)(A).

104. *Id.*

ered if any customary or conventional international law comprehensively and universally prohibited the threat or use of nuclear weapons.<sup>105</sup> The Court concluded that “[t]here is in neither customary nor conventional international law any comprehensive and universal prohibition the threat or use of nuclear weapons as such.”<sup>106</sup> Without customary nor conventional law available to consider, the Court finally concluded that the most directly relevant applicable law governing the question was “that related to the use of force enshrined in the U.N. Charter and the law applicable in armed conflict which regulates the conduct of hostilities, together with any specific treaties on nuclear weapons that the Court might determine to be relevant.”<sup>107</sup>

The Court, therefore, considered the question in the context of the law of the U.N. Charter and the law applicable in armed conflict. The Court considered the lawfulness of a threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the U.N. Charter and that fails to meet the requirements in Article 51.<sup>108</sup> The Court concluded that a threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, and that fails to meet the requirements of Article 51 is unlawful *except* in the following three circumstances: (1) in collective or individual self-defense,<sup>109</sup> (2) if an armed attack occurs,<sup>110</sup> and (3) only when the U.N. Security Council has not taken adequate measures to remedy the situation.<sup>111</sup> The Court also concluded that a threat or use of nuclear weapons “should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons.”<sup>112</sup> However, given the international law

105. *Id.* ¶ 105(2)(B).

106. *Id.*

107. *Id.* ¶¶ 23, 34.

108. *Id.* ¶¶ 38–40, 105(2)(C).

109. *Id.* ¶¶ 38–40.

110. The U.N. Charter neither expressly prohibits nor permits the use of any specific weapon, including nuclear weapons. *See id.* An imminent armed attack will satisfy the requirement of an armed attack. *See* MARY ELLEN O’CONNELL, *THE POWER AND PURPOSE OF INTERNATIONAL LAW: INSIGHTS FROM THE THEORY AND PRACTICE OF ENFORCEMENT* 172–81 (2008).

111. *See* Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. ¶ 44. U.N. member countries who fear an armed attack should appeal to the Security Council as a remedy for perceived danger. *See* O’CONNELL, *supra* note 110, at 178–79.

112. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. ¶¶ 41–42, 105(2)(D) (“The proportionality principle may thus not in itself exclude the use of nuclear

available for consideration, the Court could not, and thus did not, definitively conclude whether or not “the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake.”<sup>113</sup> The Court also implied that the obligation for good faith negotiations under the NPT might remedy the lack of clarity surrounding the law regarding the exception of self-defense,<sup>114</sup> but the Court did not explicitly extend this obligation to apply in an extreme circumstance of self-defense.<sup>115</sup>

### C. *Recent Russian Actions Are Changing the Security Landscape for NATO Member Countries*

#### 1. Supreme Allied Commander for Europe Says NATO Is Not Prepared to Respond to Russian Aggression

Philip M. Breedlove was the Commander of U.S. European Command and NATO’s Supreme Allied Commander for Europe from 2013 to 2016.<sup>116</sup> Reflecting on his tenure, he argued the current threat of Russian aggression is of an extent and complexity rivaled only by the end of World War II.<sup>117</sup> He noted that the seizure of Crimea is just one example of Russia’s disregard for established norms of international behavior to advance its geopolitical goals.<sup>118</sup> Neither the United States military nor its NATO allies are adequately prepared for a rapid response to the overt military aggression and hybrid warfare displayed by Russia in Eastern Ukraine.<sup>119</sup> Breedlove suggests that the key to protecting the interests of NATO member countries depends upon the maintenance of U.S. nuclear forces combined with the NATO allies demonstrating that their forces in Europe constitute a credible deterrent.<sup>120</sup>

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weapons in self-defence in all circumstances. But at the same time, a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law.”).

113. *Id.* ¶¶ 41–42, 105(2)(E).

114. *See* Datan, *supra* note 87, at 4.

115. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. ¶ 97.

116. *See* Breedlove, *supra* note 33, at 96.

117. *Id.*

118. *Id.* at 98.

119. *Id.*

120. *See id.* at 104.



## 2. NATO's Very High Readiness Joint Task Force Is Not Enough to Defend the Baltic States

The RAND Corporation conducted a war-games study between summer 2014 and spring 2015 to assess potential outcomes of a near-term Russian invasion of Baltic NATO members.<sup>121</sup> With a multitude of expert participants playing each side, NATO could not successfully defend the territory of its Baltic members, even with the Very High Readiness Joint Task Force.<sup>122</sup> The simulations determined that it would take nearly ten days for the quickest responding NATO heavy armor force, likely a U.S. combined arms battalion, to even reach the battle area in the Baltic states.<sup>123</sup>

NATO considers the events in Ukraine and the increasingly aggressive posture of Russia to “challenge the very foundations of European security.”<sup>124</sup> Despite this characterization, NATO says that it has no intention of altering the nuclear posture of the organization or engaging in a nuclear arms race.<sup>125</sup> Instead, NATO intends to foster readiness by focusing on the military and political credibility of the Alliance, particularly on the Very High Readiness Joint Task Force.<sup>126</sup>

## II. ANALYSIS

This Part proposes to amend Article 5 to allow member countries to share nuclear weapons for the purpose of self-defense in accordance with the U.N. Charter and the NPT because it would deescalate aggression between neighboring countries and is a lawful exercise of the NATO's power. It begins by articulating the exact language of the proposed amendment. It continues by explaining why this particular amendment language would be the

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121. DAVID A. SHLAPAK & MICHAEL W. JOHNSON, RAND CORP., *REINFORCING DETERRENCE ON NATO'S EASTERN FLANK: WARGAMING THE DEFENSE OF THE BALTICS I* (2016).

122. *See id.* (“[T]he longest [amount of time] it [took] Russian forces to reach the outskirts of the Estonian and/or Latvian capitals of Tallinn and Riga, respectively is 60 hours.”); *NATO Response Force / Very High Readiness Joint Task Force*, NATO, <https://shape.nato.int/nato-response-force—very-high-readiness-joint-task-force> (last visited Jan. 4, 2018) [<https://perma.cc/7KL8-F5TN>].

123. SHLAPAK & JOHNSON, *supra* note 121, at 8. Other European NATO members do not even possess the minimal combat-ready heavy forces that would be required to prevent a rapid Russian invasion of Estonia and Latvia.

124. Camille Grand, *Nuclear Deterrence and the Alliance in the 21st Century*, NATO REV. MAG., <https://www.nato.int/docu/review/2016/Also-in-2016/nuclear-deterrence-alliance-21st-century-nato/EN/index.htm> (last visited Jan. 4, 2018) [<https://perma.cc/PVP7-CPPZ>].

125. *Id.*

126. *See id.*; *NATO Response Force / Very High Readiness Joint Task Force*, *supra* note 122.

best way for NATO to provide for the collective defense of its members. It concludes by analyzing and responding to arguments against this proposal.

A. *The NAT Should Adopt This Proposal to Amend Article 5*

This Note proposes to amend<sup>127</sup> Article 5 of the NAT to allow member countries to share nuclear weapons for the purpose of self-defense because it is a lawful method of providing for collective defense within the legal boundaries of both the U.N. Charter and the NPT.<sup>128</sup> The specific language of the proposed amendment is presented first, then the reasoning behind the language is explained.<sup>129</sup>

This Note proposes adding additional language to the existing NAT. Specifically, Article 5 should be amended to include the following italicized language:

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including *but not limited to* the use of armed forces *and/or sharing of nuclear weapons in accordance with the U.N. Charter and the Treaty on the Non-Proliferation of Nuclear Weapons*, to restore and maintain the security of the North Atlantic Area.

2. This Proposed Language Serves the Scope of the NAT and The U.N. Charter

The inclusion of this specific language serves two legal purposes. First, the language complies with the NPT because it limits the potential for sharing nuclear weapons strictly to other NATO members as agreed upon by all NPT signatories at the time of implementation.<sup>130</sup> The language adheres to the intent and purpose of the NPT because it neither condones the proliferation of nuclear

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127. This Note considers only the theoretical impact of amending the NAT. It does not discuss the practical and procedural implications of amending the NAT.

128. See U.N. Charter art. 51; North Atlantic Treaty, *supra* note 9, art. 5; Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 36.

129. See *infra* Sections II.A.1–2.

130. See ALBERQUE, *supra* note 91, at 5 (indicating that the current nuclear sharing arrangements do not violate the NPT because they were agreed upon by all signatory parties at the time of implementation).

weapons nor neglects the goal of total disarmament by restricting member countries to the single option of sharing existing nuclear weapons.<sup>131</sup> This language should therefore be adopted because it allows NATO member countries to maintain the existing sharing arrangement, which was clearly understood and consented to by all initial parties to the NPT at the time of adoption.<sup>132</sup>

Second, this language complies with the intent of the U.N. Charter because it requires NATO member countries to share nuclear weapons only for the purpose of self-defense.<sup>133</sup> The U.N. Charter exempts the illegality of the use of force when it is conducted in self-defense following an armed attack or threat of force because it values the preservation of territorial integrity and political independence of a state.<sup>134</sup> This proposed language should be adopted because it follows the intent of the U.N. Charter by allowing NATO member countries to have discretion with respect to the preservation and protection of territorial integrity from use or threat of force.<sup>135</sup>

### B. *Advocacy*

There are four primary reasons for NATO to incorporate this proposed language into Article 5. First, the existing language is ambiguous; the ability of NATO member countries to share nuclear weapons for the purpose of self-defense is not self-evident as currently written and is not understood to be included.<sup>136</sup> Second, the proposed language is consistent with the intent and purpose of the U.N. Charter, the NAT, and the NPT because it emphasizes the options to provide defense against threat or use of force in accordance with normative international law.<sup>137</sup> Third,

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131. Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 86, art. 2 (“Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.”); *see* Datan, *supra* note 87 (discussing how non-NWS are prohibited from acquiring nuclear weapons outside of the pre-existing arrangements agreed to by all parties at the time of implementation).

132. *See supra* Section I.B.1.

133. *See supra* Section I.A.1.

134. *See supra* notes 56–63 and accompanying text (discussing how the U.N. Charter allows a country to respond in self-defense to the use of force); *see also* Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. ¶ 38.

135. *See supra* notes 57–60 and accompanying text.

136. *See infra* Section II.B.1.

137. *See infra* Section II.B.2.

the proposed language is consistent with the persuasive holdings of the ICJ because it provides NATO member countries with the option to use nuclear weapons for self-defense.<sup>138</sup> Finally, the proposed language addresses the concern of the Baltic states because it defines a legal means for NATO to uphold its defense commitment in the event that foreign aggressors have nuclear capabilities.<sup>139</sup>

### 1. The Proposed Language Clarifies the Applicable Scope of Providing “Collective Defense” Under Article 5 of the NAT

The proposed language should be adopted because it improves upon the ambiguity of the existing language. As it currently exists, Article 5 does not include any reference to a NATO member’s legally protected capability to incorporate nuclear weapons as a method of collective self-defense.<sup>140</sup> The proposed language should be adopted because it clarifies the spectrum of available means for NATO member countries to provide collective security when the sovereignty of a member is violated or is in imminent danger of being violated.<sup>141</sup> Moreover, the proposed language should be adopted because it incorporates clear adherence and legal deference regarding the use of nuclear weapons for the purpose of self-defense to the U.N. Charter and the NPT.<sup>142</sup> The proposed language also refers to the U.N. Charter and NPT by incorporating the intent of both documents.<sup>143</sup>

### 2. The Proposed Language Is Consistent with the Intent of the Binding Legal Precedent

The proposed language is also consistent with the purpose of the U.N. Charter, the NAT, and the NPT.<sup>144</sup> The purpose of the United Nations is to “maintain international peace and security, and to that end: to take effective collective measures for the pre-

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138. See *infra* Section II.B.3.

139. See *infra* Section II.B.4.

140. See *supra* Section I.A.2 (explaining that collective security requires a willingness among all members to contribute to the collective defense, but that the NAT recognizes the autonomy of member states to contribute resources they deem necessary).

141. See *supra* notes 53–54 and accompanying text (explaining that the purpose of the North Atlantic Council is to serve as a decision-maker by considering and recommending measures for the implementation of Article 5).

142. See *supra* Sections I.A.3, I.B.1.

143. See *supra* Sections I.A.3, I.B.1.

144. See *supra* Sections I.A, I.B.

vention and removal of threats to the peace . . . .”<sup>145</sup> There are two ways the proposed language is consistent with the purpose of the U.N. Charter. First, the language seeks to take collective measures to prevent and remove threats to the peace of NATO members because it allows for NATO members to provide for the collective defense and remove threats to the peace with action NATO members themselves deem necessary without the potential for a veto vote by Russia at the Security Council.<sup>146</sup> Second, the language adheres to the U.N. Charter’s position regarding the right of individual countries or collective groups to provide for their own self-defense because the language does not “impair the inherent right of individual or collective self-defense.”<sup>147</sup> The language is not only consistent with the purpose of the U.N. Charter, but it is also consistent with the purpose of the NAT.<sup>148</sup>

The purpose of the NAT is to “unite [member countries’] efforts for collective defense and for the preservation of peace and security.”<sup>149</sup> Again, there are two ways the proposed language is consistent with the purpose of the NAT. First, the proposed language further unites the efforts of member countries for collective defense because it allows member countries to work together and share resources for the purpose of self-defense.<sup>150</sup> Second, the language adheres to the NAT’s purpose of preserving peace and security among its members because it allows the organization’s existing commitment of being a nuclear alliance to expand its policy of nuclear deterrence to the protection of the security interests of member countries.<sup>151</sup> The language is not only consistent with the purpose of the NAT, but it is also consistent with the purpose of the NPT.

The purpose of the NPT is to “undertake effective measures in the direction of nuclear disarmament.”<sup>152</sup> The proposed language takes effective measures to encourage nuclear disarmament because it allows NATO member countries to share existing nuclear weapons, thereby eliminating the need of member coun-

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145. U.N. Charter art. 1, ¶ 1.

146. See *supra* notes 65–73 and accompanying text (discussing the inevitability of Russia vetoing any U.N. Security Council proposal to declare the Baltic states threatened by Russia).

147. U.N. Charter art. 51.

148. See *supra* Sections I.A.1–2.

149. North Atlantic Treaty, *supra* note 9, pmb1.

150. See *supra* Sections I.A.1–3.

151. See *supra* notes 75–79 and accompanying text.

152. Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 86, pmb1.

tries to create their own.<sup>153</sup> Moreover, the existing arrangement of nuclear weapons sharing within NATO was agreed upon at the time of signing by all initial signatories.<sup>154</sup> Although the proposed language follows the intent of the binding legal precedent, it also incorporates the intent of non-binding legal precedent.

### 3. The Proposed Language Is Consistent with Non-Binding Legal Precedent

The proposed language should be adopted because it incorporates the legally persuasive holdings of both the ICJ and the PCIJ.<sup>155</sup> The holdings clarify that NATO member countries are not excluded from adopting nuclear weapons as a means of collective self-defense.<sup>156</sup> This is consistent with international law, which historically supports the proposition that whatever is not specifically prohibited is permitted.<sup>157</sup> Therefore, NATO countries are free to use nuclear weapons as a method of self-defense because there is no customary or conventional international law that restricts this method of collective security.<sup>158</sup> In the absence of specific and direct language prohibiting the sharing of nuclear weapons by a legally binding agreement, the proposed language should be adopted because it informs both at-risk NATO members and their potential adversaries that NATO's collective security measures can include access to nuclear defense capabilities.<sup>159</sup>

### 4. The Proposed Language Creates a Legal Solution for the Concern of the Baltic NATO Members Regarding Russian Aggression

The proposed language should also be adopted because it provides a legal way for NATO to fulfill its commitment to provide collective defense for all of its members.<sup>160</sup> The proposal provides reassurance to Baltic NATO members of its commitment to protect

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153. *See supra* note 92 and accompanying text.

154. *See supra* note 91 and accompanying text (discussing the historical context of the creation of the NPT and the recent context of Russian disinterest in adhering to the legally binding agreement).

155. *See supra* Section I.B.2.

156. *See supra* notes 105–106 and accompanying text (explaining the Advisory Opinion conclusions of the ICJ).

157. *See id.*

158. *See supra* note 112.

159. *See supra* notes 110–112 and accompanying text (discussing the circumstances and limitations of NATO members to include access to nuclear defense capabilities as a means of self-defense).

160. *See supra* Section I.A.2.

against various global political threats, including threats of nuclear aggression.<sup>161</sup> The current military capabilities of NATO forces are unlikely to fully protect the Baltic states.<sup>162</sup> The proposed language would provide assurance that NATO's commitment to collective defense is not limited by conventional military operations.<sup>163</sup> The incorporation of the proposed language will provide NATO member countries with not only options for the implementation of self-defense strategies but also confidence that their involvement in the NAT is meaningful under international law.<sup>164</sup>

### C. *Counterarguments*

Two primary counterarguments to the adoption of the proposed language emerge, and this Section addresses each respectively. First, this Section addresses the issue of how the proposed language would impact NATO compliance with the NPT.<sup>165</sup> Second, this Section balances the risks and benefits of nuclear weapons for collective self-defense for NATO member countries.<sup>166</sup>

#### 1. Sharing Nuclear Weapons Is Not Equal to the Proliferation of Nuclear Weapons

It is true that the proposed language appears at first glance to infringe upon the requirements of the NPT because it would allow non-NWS to have access to nuclear weapons.<sup>167</sup> Nevertheless, the proposed language does not impact existing NATO member country compliance with the NPT because it neither intends to nor allows NATO member countries to expand proliferation in their individual capacity.<sup>168</sup> Instead, the language simply codifies the current nuclear-sharing arrangement for NATO member countries agreed upon by the United States and Russia over sixty years ago.<sup>169</sup> The current nuclear-sharing arrangement is based upon an important legal distinction between sharing access to existing

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161. See Deterrence and Defence Posture Review, *supra* note 75.

162. *Supra* Section I.C.

163. See *supra* Sections I.C.1–2.

164. See George, *supra* note 76, at 13–14 (discussing the importance of upholding policy compliance regarding punishments and threats of punishment).

165. See analysis *infra* Section II.C.1.

166. See analysis *infra* Section II.C.2.

167. See Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 86, arts. 1, 2, 6.

168. See *supra* note 92 and accompanying text.

169. See *supra* note 91.

nuclear weapons and increasing the number of nuclear weapons.<sup>170</sup> When the NPT was drafted, both the United States and Russia required individual assurances from the other before signing away their future development of nuclear weapons.<sup>171</sup> Specifically, the United States required that NATO would have access to existing U.S. nuclear weapons for the purpose of providing collective security in the form of a nuclear deterrent.<sup>172</sup> Although this provision was not objectively in Russia's best interest, the countries negotiated a deal.<sup>173</sup> Russia agreed to sign the NPT without incorporating language regarding the ability of the United States to provide nuclear weapons to NATO member countries, allowing the United States to enforce the international legal standard: "what is not specifically prohibited is allowed."<sup>174</sup> The proposed language continues to recognize the illegality of proliferation, that is the illegality of creating new nuclear weapons today, for all NWS NATO member countries.<sup>175</sup>

## 2. NATO's Commitments Are First and Foremost to the Collective Defense of Member Countries

Nuclear weapons are undoubtedly more dangerous than conventional military weapons.<sup>176</sup> In this particular instance, however, NATO is faced with a difficult problem because member countries are objectively underprepared to provide conventional military force for Baltic members.<sup>177</sup> The problem is exacerbated because, as amended, Article 5 does not require a member state to contribute anything more than it deems necessary to provide for the collective defense.<sup>178</sup>

The immediate danger that Russia presents to the territorial integrity of Baltic NATO members is evidenced by the recent Russian invasions of the border countries Crimea and Ukraine<sup>179</sup>; yet, many NATO member countries have yet to, and show no signs of beginning to, contribute anything to NATO to provide a conventional military force that is prepared to meet the demands of pro-

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170. See ALBERQUE, *supra* note 91.

171. See *id.* at 37–41.

172. See *id.* at 39–40.

173. See *id.* at 5.

174. See *supra* notes 105–106 and accompanying text.

175. See *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. ¶ 97.

176. See Nassauer, *supra* note 92.

177. See *supra* notes 121–123 and accompanying text.

178. See *North Atlantic Treaty*, *supra* note 9, art. 5.

179. See *supra* Introduction.



viding collective security for the Baltic states.<sup>180</sup> This proposal provides an alternative for NATO member countries to meet their obligation to provide for the collective defense of all members with a relatively low burden of cost in individually determined resources for implementation.<sup>181</sup> NATO members should adopt this proposed language not only to reaffirm the organization's commitment to providing collective defense but also to demonstrate each member's commitment to enforcing internationally recognized treaty agreements.<sup>182</sup> Without a clear devotion from all member countries to the guarantee of upholding the sole obligation of NATO, the NAT is meaningless.<sup>183</sup>

### CONCLUSION

In summary, by amending Article 5 of the NAT to include the sharing of nuclear weapons among member countries for the purpose of self-defense, NATO can honor its commitment to provide for the collective defense of its members.<sup>184</sup> The proposed language should be adopted because the language clarifies the scope of providing collective defense under Article 5, is consistent with the intent of both binding and non-binding legal precedent, and creates a legal solution for the problem of Russian aggression to Baltic NATO members.<sup>185</sup> Even though the language appears on its face to infringe upon the NPT, the proposed language only codifies the existing nuclear-sharing arrangement for NATO member countries.<sup>186</sup> Moreover, nobody denies that nuclear weapons are more dangerous than conventional military weapons; however, the difficult reality is that NATO member countries are unprepared and unwilling to increase the preparedness of conventional military forces to meet the collective defense needs of the Baltic NATO

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180. See *supra* notes 121–123 and accompanying text.

181. See *supra* Part II.

182. See *supra* Section II.B.

183. In practice, the overall success of a system of collective security necessitates a minimum amount of “required” contribution from members and a limited amount of variation in member’s “self (determined) help.” Kelsen, *supra* note 45, at 784 (“In the case of collective security, states not directly violated in their rights are *obliged* to assist the violated state; whereas in the state of self-help under general international law, they are only *allowed* to do so.”).

184. See *supra* Part II.

185. See *supra* Sections II.A–B.

186. See *supra* Section II.C.

members.<sup>187</sup> Allowing NATO member countries to share nuclear weapons is one solution to this problem.<sup>188</sup>

Prior to his election in 2016, U.S. President Donald Trump clearly articulated his disinterest in the continued commitment of the United States to provide collective defense for NATO members.<sup>189</sup> In the current disruptive and erratic global political climate, the tradition of respect for and adherence to international commitments must stand firm.

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187. *See supra* Section II.C.

188. *See supra* Part II.

189. *See* Trump, *supra* note 1.