

ARTICLE

The Mutual Assistance Clauses of the North Atlantic and EU Treaties:
The Challenge of Hybrid Threats

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Abstract

Mutual assistance clauses serve a dual purpose. They commit their signatories to stand up to a common threat and are thereby meant to deter potential aggressors. Their dual purpose places them at the crossroads between war and peace and the intersection between law and strategy. The rise of hybrid threats, however, has led many to question whether the mutual assistance guarantees found in the North Atlantic and EU Treaties remain suited for our present security environment. Adversaries employ tactics that increasingly seem to blur the dividing line between war and peace. The hybridization of warfare thus poses a risk that adversaries may circumvent classic security guarantees. The purpose of the present Article is to compare the mutual assistance clauses of the North Atlantic and EU Treaties to determine their scope of application, clarify the nature and extent of the obligations they impose on the contracting parties, and assess their vulnerability to hybrid threats. The analysis confirms that the provisions in question are at risk of subversion, but that the impact of this threat is more limited than is often assumed. Nevertheless, this Article argues that there is no room for complacency. NATO, the EU, and their member states should take steps to strengthen legal interoperability in order to increase the legal resilience of their collective security arrangements against the challenges posed by hybrid threats.

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I. Introduction

The return of a more confrontational strategic environment in Europe has sparked renewed interest in the mutual assistance clauses of the North Atlantic and the EU Treaties.¹ Recent events have prompted commentators to question whether Article 5 of the North Atlantic Treaty (NAT) remains an effective safeguard against contemporary security challenges.² Many are concerned that Article 5 is too blunt an instrument in an era of hybrid threats. Potential adversaries increasingly combine conventional capabilities with more elusive methods of exercising their influence, ranging from disinformation campaigns and election meddling to cyber attacks and the deployment of “little green men.”³ Faced with such tactics, William Hague, the former British Secretary of State, has argued that NATO needs a new concept of “attack” and “defense,” as well as a new treaty article to “make clear that the use of a hybrid and undeclared attack would trigger a collective response from the Alliance.”⁴ In parallel to these developments, the Transatlantic relationship has entered a period of turbulence, raising doubts about the Trump Administration’s enthusiasm to uphold the collective self-defense commitment under Article 5.⁵ This in turn has revived support in some capitals for deepening the process of European security and defense integration.⁶

Against this background, the purpose of this Article is to assess whether the mutual assistance guarantees embodied in Article 5 NAT, Article 42(7) of the Treaty on European Union (TEU), and Article 222 of the Treaty on the Functioning of the European Union (TFEU) remain fit for purpose in the light of hybrid threats.

¹ North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 244 [hereinafter NAT]; Consolidated Version of the Treaty on European Union, May 9, 2008, 2008 O.J. (C 115) 13 [hereinafter TEU]; Consolidated Version of the Treaty on the Functioning of the European Union, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

² See, e.g., James Goldgeier, *NATO’s Charter: Adaptable but Limited*, in CHARTER OF THE NORTH ATLANTIC TREATY ORGANIZATION: TOGETHER WITH SCHOLARLY COMMENTARIES AND ESSENTIAL HISTORICAL DOCUMENTS 288, 299 (Ian Shapiro & Adam Tooze eds., 2018).

³ On the notion of hybrid warfare and hybrid threats, see generally HYBRID WARFARE: FIGHTING COMPLEX OPPONENTS FROM THE ANCIENT WORLD TO THE PRESENT (Williamson Murray & Peter R. Mansoor eds., 2012); NATO’S RESPONSE TO HYBRID THREATS (Guillaume Lasconjarias & Jeffrey A. Larsen eds., 2015); COUNTERING HYBRID THREATS: LESSONS LEARNED FROM UKRAINE (Niculae Iancu et. al eds., 2016); OFER FRIDMAN, RUSSIAN “HYBRID WARFARE”: RESURGENCE AND POLITICIZATION (2018).

⁴ William Hague, *NATO must confront Putin’s stealth attacks with a new doctrine of war of its own*, THE TELEGRAPH (Mar. 19, 2018); see also Khatuna Burkadze, *A Shift in NATO’s Article 5 in the Cyber Era*, 42 FLETCHER F. WORLD AFF. 215, 226 (2018); Dave Weinstein, *Snowden and U.S. Cyber Power*, GEO. J. INT’L AFF. 4, 10 (2014).

⁵ Scott R. Anderson, *Saving NATO*, LAWFARE (July 15, 2018), <https://www.lawfareblog.com/saving-nato> [https://perma.cc/UD58-495U].

⁶ Heiko Maas, Minister of Foreign Affairs, Germany, Speech: Courage to Stand Up for Europe – #EuropeUnited (June 13, 2018), <https://www.auswaertiges-amt.de/en/newsroom/news/maas-europeunited/2106528> [https://perma.cc/DP9J-A3MU]; Emmanuel Macron, *Dear Europe, Brexit is a lesson for all of us: it’s time for renewal*, GUARDIAN (Mar. 4, 2019), <https://www.theguardian.com/commentisfree/2019/mar/04/europe-brexit-uk> [https://perma.cc/APG5-FE3B]; see also Simon Duke, *The Enigmatic Role of Defence in the EU: From EDC to EDU?*, 23 EUR. FOREIGN AFF. REV. 63, 69–74 (2018).

Such an analysis is timely for several reasons. NATO and the EU are rules-based organizations.⁷ The mutual assistance clauses set out in their founding instruments form a key part of the normative framework that conditions their response to current security challenges. It is not uncommon, however, for commentators to question the scope of the obligations imposed by these clauses and to cast doubt on their binding effect.⁸ This Article sets out to clarify the extent of these commitments and their legal nature. Since approximately two-thirds of the membership of NATO and the EU overlaps,⁹ the Article adopts a comparative approach to assess how far the three provisions may complement one another. In doing so, it also investigates their limitations. States employ law and legal arguments as an instrument to pursue their strategic interests.¹⁰ It should be expected that future adversaries will attempt to exploit any deficiencies in the Transatlantic and European security guarantees as part of a hybrid approach to warfighting.¹¹ The Article therefore seeks to determine to what extent the three mutual assistance clauses are vulnerable to subversive tactics.

The NAT is a comparatively short agreement—a “simple document” as U.S. President Harry Truman put it—consisting of a preamble and fourteen articles.¹² Among these, Article 5 NAT is widely seen as the cornerstone of the Treaty and of the Alliance itself.¹³ By contrast, Article 42(7) TEU and Article 222 TFEU form part of a more elaborate legal and policy framework that has evolved gradually over a number of decades.¹⁴ For our purposes, these three provisions are best compared along two axes: the circumstances which engage the duty of mutual assistance and the scope of the obligations they impose on the contracting parties. Accordingly, this Article proceeds in three steps.

Section II reviews the conditions that trigger the application of the Transatlantic and European mutual assistance clauses. It shows that Article 5 NAT and Article 42(7) TEU are engaged in the same, or virtually identical,

⁷ NAT, *supra* note 1, preamble (“[The Parties] are determined to safeguard the freedom, common heritage and civilisation of their peoples, founded on the principles of democracy, individual liberty and the rule of law.”); TEU, *supra* note 1, art. 2 (“The Union is founded on the values of respect for . . . the rule of law . . .”).

⁸ See, e.g., Michael J. Glennon, *United States Mutual Security Treaties: The Commitment Myth*, 24 COLUM. J. TRANSNAT’L L. 509, 544–52 (1986); Zbigniew Brzezinski, *An Agenda for NATO: Toward a Global Security*, 88 FOREIGN AFF. 2, 15 (2009).

⁹ Twenty-two nations are members of both organizations.

¹⁰ For recent work on this subject, see Ian Hurd, HOW TO DO THINGS WITH INTERNATIONAL LAW (2017); Monica Hakimi, *The Work of International Law*, 58 HARV. INT’L. L. J. 1 (2017).

¹¹ Aurel Sari, *Hybrid Warfare, Law and the Fulda Gap*, in COMPLEX BATTLESPACES: THE LAW OF ARMED CONFLICT AND THE DYNAMICS OF MODERN WARFARE 161 (Christopher M. Ford & Winston S. Williams eds., 2019).

¹² ADDRESS OF THE PRESIDENT OF THE UNITED STATES, 20 U.S. DEP’T OF STATE, PUB. NO. 511, 481 (1949).

¹³ Press Release, NATO, Declaration on Alliance Security Issued by the Heads of State and Government Participating in the Meeting of the North Atlantic Council in Strasbourg/Kehl (Apr. 4, 2009); see also SHERROD LEWIS BUMGARDNER ET AL., NATO LEGAL DESK BOOK 72 (2010).

¹⁴ See PANOS KOUTRAKOS, THE EU COMMON SECURITY AND DEFENCE POLICY 5–21 (2013); MARTIN TRYBUS, EUROPEAN UNION LAW AND DEFENCE INTEGRATION (2005).

circumstances of an armed attack or an act of armed aggression. These two provisions therefore mostly overlap in their scope of application. This opens up the possibility that they could serve as a fallback option to each other. By contrast, Article 222 TFEU may apply in a broader range of circumstances, but it is subject to a gravity threshold which reduces its utility. Section III compares the mutual commitments undertaken by the contracting parties. It demonstrates that they entail legal obligations and not merely political pledges, as is often assumed. All three provisions require the contracting parties to consider providing both military and non-military forms of assistance to each other. However, the analysis reveals that the parties remain free to choose the most appropriate means of assistance. Section IV places these findings within the current security context. It confirms that the Transatlantic and European mutual assistance guarantees are in fact vulnerable to the strategies of subversion and erosion associated with hybrid threats, but suggests that the impact of this vulnerability is misunderstood and overrated. Calls to revise Article 5 and Article 42(7) fail to appreciate that this step would not resolve the legal and policy challenges associated with their implementation. This Article therefore argues that increasing legal interoperability among NATO and EU nations on the basis of the existing legal frameworks offers the best prospect for countering the challenges presented by hybrid threats.

II. Casus Foederis

Mutual assistance clauses serve two core functions. They express in formal terms a commitment by their signatories to assist each other in the face of common danger. They also send a message to any would-be aggressor that certain hostile actions will be met with a unified response. They are, in other words, a promise and a warning. Their aim is to compel action by their signatories and to deter aggressive behavior by third parties.¹⁵

These twin functions give rise to competing considerations that pull mutual assistance clauses in opposite directions. The circumstances that trigger their application must be defined in a way that leaves the signatories in no doubt as to when their duty of mutual help has been engaged. Clarity is also needed to accomplish the deterrent effect. Aggressors must be told in unmistakable terms what action will not be tolerated.¹⁶ These considerations call for precision, detail, and completeness. Yet too much of these qualities may be counterproductive. Red lines, if not enforced, may undermine the credibility of an alliance. Drawing clear lines also signals to an adversary what action it is likely to get away with unopposed. In fact, they may induce an aggressor to engage in hostile activities below the threshold that would trigger a united reaction by the allies. The contracting parties therefore may well desire to retain a degree of ambiguity and

¹⁵ *Cf.* Minutes of the Twelfth Meeting of the Washington Exploratory Talks on Security (Feb. 8, 1949), in 4 FOREIGN RELATIONS OF THE UNITED STATES 1949, WESTERN EUROPE, 73, 81 (1974) [hereinafter FRUS VOL. IV] (“The Pact should serve both as a deterrent against aggression and as a means of bringing about collective action to restore order should an attack occur.”).

¹⁶ THOMAS C. SCHELLING, *ARMS AND INFLUENCE* 35–36 (2008).

terminological laxness.¹⁷ This could also provide them with room to adopt a more flexible response to acts of aggression.¹⁸ It may even encourage adversaries to exercise greater caution for fear of provoking a robust allied reaction.¹⁹ In defining the conditions that trigger the applicability of mutual assistance guarantees, states are thus caught in a dilemma between the competing needs for maximum clarity and strategic ambivalence.

The purpose of the present section is to assess how these competing considerations have shaped the content of Article 5 NAT, Article 42(7) TEU, and Article 222 TFEU by reviewing and comparing the circumstances that trigger their application.

A. Article 5 NAT

Pursuant to Article 5 NAT, the contracting parties have agreed that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and 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 UN Charter, will assist the party or parties so attacked.²⁰ The duty of mutual assistance is thus engaged if an armed attack occurs against one or more of the parties within the geographical boundaries set by Article 5 NAT.²¹

The term “armed attack” derives from Article 51 of the UN Charter. This is confirmed by the express reference made to that provision in Article 5 NAT and by the latter’s drafting history.²² In fact, the principal reason why the right of self-defense was incorporated into the UN Charter in the first place was to acknowledge that mutual assistance arrangements concluded on a regional basis, such as the Act

¹⁷ See MINISTRY OF DEFENCE, *DETERRENCE: THE DEFENCE CONTRIBUTION*, 2019, JDN 1/19, 45–46 (UK) (explaining the different forms of ambiguity and its benefits for deterrence).

¹⁸ *Id.* at 45 (suggesting that leaving doubt about the exact threshold at which an adversary’s actions will trigger a response “allows the political leadership room to manoeuvre and allows for measured assessments of the impact of the adversary’s action without committing to retaliation.”).

¹⁹ *Id.* at 46 (“If an adversary is clear what actions they can and cannot take, there is always the prospect of them circumventing a line or simply creating a large quantity of smaller actions, none of which might breach a clear red line.”).

²⁰ The first paragraph of NAT, *supra* note 1, art. 5 reads: “The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.”

²¹ NAT, *supra* note 1, art. 6 further defines what is meant by an armed attack against one or more of the parties “in Europe or North America” within the meaning of NAT art. 5.

²² Minutes of the Eighteenth Meeting of the Washington Exploratory Talks on Security (Mar. 15, 1949), in 3 FOREIGN RELATIONS OF THE UNITED STATES 1948, WESTERN EUROPE, 213, 221 (1974) [hereinafter FRUS VOL. III]; see also *The Vandenberg Resolution and the North Atlantic Treaty: Hearing on Executive L Before the Comm. on Foreign Relations*, 81st Cong. 129, 155 (1949) [hereinafter Hearing on Executive L] (Informal Session, The North Atlantic Treaty) (“We have taken the words ‘armed attack’ from the United Nations Charter.”).

of Chapultepec of 1945,²³ were compatible with the collective security machinery of the UN.²⁴ Article 5 NAT thus merely gives effect to the inherent right of collective self-defense recognized by Article 51 of the Charter and, contrary to what the Soviet Union claimed at the time,²⁵ does not contradict the principles and aims of the UN.²⁶ Indeed, the NAT is at pains to underline its compatibility with the UN system.²⁷ Article 7 NAT explicitly declares that nothing in the agreement affects the rights and obligations of the contracting parties under the Charter.²⁸

The subordinate position of the NAT may suggest that the concept of “armed attack” has no autonomous meaning under Article 5 NAT, but carries the same connotations as in Article 51 of the UN Charter. It is certainly true that Article 5 cannot authorize the use of force in self-defense in a broader set of circumstances than those envisaged in the Charter. Yet nothing in either agreement precludes the contracting parties of the NAT from adopting a more restrictive definition of armed attack for the purposes of Article 5. This is not, however, the approach they have taken in practice.

When the NAT was signed in April 1949, little authoritative guidance on the concept of an armed attack existed. Government representatives and commentators were at something of a loss about the exact meaning of the phrase, including its relationship with the notion of “aggression.”²⁹ Ultimately, a broad

²³ DECLARATION ON RECIPROCAL ASSISTANCE AND AMERICAN SOLIDARITY BY THE GOVERNMENTS REPRESENTED AT THE INTER-AMERICAN CONFERENCE ON WAR AND PEACE, 12 U.S. DEP’T OF STATE, PUB. NO. 297, 339 (1945) (Act of Chapultepec).

²⁴ See *Summary Report of the Fourth Meeting of Committee III/4, Doc. 576, III/4/9*, in 12 DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION, 679, 680–82 (1945); see also Minutes of the Thirty-Fifth Meeting of the United States Delegation (May 10, 1945), in 1 FOREIGN RELATIONS OF THE UNITED STATES, DIPLOMATIC PAPERS 1945, GENERAL: THE UNITED NATIONS, 657, 659 (1967) [hereinafter FRUS VOL. I]; STANMIR A. ALEXANDROV, SELF-DEFENCE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 81–92 (1996); Josef L. Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 AM. J. INT’L L. 872 (1947).

²⁵ See Memorandum of the Government of the USSR Concerning the North Atlantic Treaty, in FRUS VOL. IV, *supra* note 15, at 261; see also Hans Kelsen, *The North Atlantic Defense Treaty and the Charter of the United Nations*, 19 NORDISK TIDSSKRIFT FOR INT’L RET. 41, 41–48 (1949); Hans Kelsen, *Is the North Atlantic Treaty in Conformity with the Charter of the United Nations*, 19 U. KAN. CITY L. REV. 1 (1950). *But see* Clyde Eagleton, *The North Atlantic Defense Pact*, 3 COLUM. J. INT’L AFF. 21, 26–28 (1949).

²⁶ Cf. Lawrence S. Kaplan, *Collective Security and the Case of NATO* 95, 97, in THE ORIGINS OF NATO (Joseph Smith ed., 1990) (arguing that a cursory reading of the NAT “could leave the impression that the pact was an ancillary instrument of the Charter.”).

²⁷ Compatibility with the “purposes, principles, and provisions of the Charter” was one of the conditions for U.S. participation in the NAT stipulated in the Vandenberg Resolution. S. Res. 239, 80th Cong., 94 CONG. REC. 7791 (1948).

²⁸ This echoes U.N. Charter art. 103, which provides: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

²⁹ Minutes of the Eighteenth Meeting of the Washington Exploratory Talks on Security (Mar. 15, 1949), in FRUS VOL. III, *supra* note 22, at 213, 221–22. For academic commentary, see, for example, Grayson Kirk, *The Atlantic Pact and International Security*, 3 INT’L ORG. 239, 247–48

definition prevailed. Dean Acheson, the U.S. Secretary of State at the time, thought that an armed attack extended not only to the use of force by one state to overpower another, but also to the combination of external force with internal revolution.³⁰ Most importantly, the negotiating parties of the NAT decided not to adopt among the “agreed interpretations” of the NAT (a set of informal agreements on the meaning of certain phrases used in the draft)³¹ an understanding that an armed attack for the purposes of Article 5 means “one of sufficient gravity to constitute an attack by one State upon another.”³² Even though the NAT was first and foremost intended to deal with an “all-out attack” by the Soviet Union,³³ the parties thus left open the possibility that even a lesser incident could qualify as an armed attack under Article 5,³⁴ if they so determined.³⁵

The intervening years have clarified some aspects of the definition of an armed attack.³⁶ In line with the judgment of the International Court of Justice in the *Nicaragua* case, today an armed attack is understood to refer to a use of force that reaches a certain level of gravity due to its scale and effect.³⁷ Where exactly this threshold lies is the subject of continuing debate, but it is generally seen to be met when the use of force involves the loss of life or the physical destruction of objects.³⁸ Notwithstanding the decision not to adopt a gravity threshold among the

(1949); A. L. Goodhart, *The North Atlantic Treaty of 1949*, 79 RECUEIL DES COURS 183, 223 (1951); Kunz, *supra* note 24, at 877–78; Emory Clark Smith, *Legal Aspects of the North Atlantic Treaty*, 20 GEO. WASH. L. REV. 497, 510 (1952).

³⁰ *Hearing on Executive L*, *supra* note 22, at 155 (Informal Session, The North Atlantic Treaty); *see also id.* at 372 (Senate Report No. 8 on Executive L).

³¹ Minutes of the Eighteenth Meeting of the Washington Exploratory Talks on Security, *supra* note 29, at 213, 222–23.

³² Sir O. Franks (Washington) to Mr. Bevin (Mar. 11, 1949), in *THE BRUSSELS AND NORTH ATLANTIC TREATIES, 1947–1949*, 428 (Tony Insall & Patrick Salmon eds., 2015) [hereinafter Insall & Salmon]. Contrary to this message, no agreement on a definition of armed attack could be reached and the idea to include one among the agreed interpretations was dropped. *See* Ambassador in United States to Secretary of State for External Affairs (Mar. 29, 1949), in *15 DOCUMENTS ON CANADIAN EXTERNAL RELATIONS 603–04* (Hector Mackenzie ed., 1995) [hereinafter DCER VOL. XV]. For the final text of the agreed interpretations, *see id.* at 604–05; Minutes of the Eighteenth Meeting of the Washington Exploratory Talks on Security, *supra* note 29, at 213, 222–23; *see also* ESCOTT REID, *TIME OF FEAR AND HOPE: THE MAKING OF THE NORTH ATLANTIC TREATY 1947–1949*, at 261 (1977).

³³ Ambassador in United States to Secretary of State for External Affairs (Feb. 25, 1949), in *DCER VOL. XV*, *supra* note 32, at 546, 548.

³⁴ *See also* *THE ATLANTIC COMMUNITY AND THE UNITED NATIONS BY AMBASSADOR PHILIP C. JESSUP*, 20 U.S. DEP’T OF STATE, PUB. NO. 3464, 486–87 (1949); *cf.* Kunz, *supra* note 24, at 878 (arguing that the notion of “armed attack” covers any illegal attack, including small border incidents).

³⁵ *Hearing on Executive L*, *supra* note 22, at 85, 110 (The North Atlantic Treaty, Executive Session); *see also* *REPORT OF THE SECRETARY OF STATE TO THE PRESIDENT ON THE NORTH ATLANTIC TREATY*, 20 U.S. DEP’T OF STATE, PUB. NO. 512, 532, 534–35 (1949).

³⁶ For a comprehensive discussion, *see generally* TOM RUYTS, ‘ARMED ATTACK’ AND ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE (2010).

³⁷ *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, ¶ 195 (June 27) [hereinafter *Nicaragua*].

³⁸ *See, e.g.*, TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS Rule 71, 341 (Michael N. Schmitt ed., 2d ed. 2017).

agreed interpretations of Article 5 NAT, such a threshold does apply as a matter of customary international law and Article 51 of the UN Charter. As a result of more recent state practice, it is now also widely, though not universally,³⁹ accepted that an armed attack may emanate from a non-state actor and give rise to the right to use force in self-defense even where the latter does not act under the control of a state.⁴⁰ State practice under the NAT has made a significant contribution to this development.⁴¹ Throughout the seven decades of its existence, Article 5 has only been invoked once, in response to the terrorist attacks perpetrated against the United States on September 11, 2001.⁴² By determining that the attack on September 11 was covered by Article 5, the Allies recognized that the right of self-defense can be triggered by an armed attack launched by a non-state actor.⁴³ They also confirmed that any armed attack must have a transnational character, meaning that it cannot arise wholly within one nation.⁴⁴

Whether or not an armed attack has occurred is a question of fact and law. Article 5 does not specify how this question should be answered. The negotiating history, however, makes abundantly clear that determining the existence of an armed attack is the sole prerogative of each individual signatory.⁴⁵ This principle was emphasized from the very outset of the talks,⁴⁶ affirmed by all representatives

³⁹ See, e.g., Olivier Corten & François Dubuisson, *Operation Liberté Immuable: Une Extension Abusive du Concept de Légitime Défense*, 106 REVUE GENERALE DE DROIT INT'L PUB. 51 (2002).

⁴⁰ Kimberley Trapp, *Can Non-State Actors Mount an Armed Attack?*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 679 (Marc Weller ed., 2015).

⁴¹ Carsten Stahn, *International Law at Crossroads? The Impact of September 11*, 62 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 183, 189 (2002).

⁴² Statement by the North Atlantic Council (Sept. 12, 2001), <https://www.nato.int/docu/pr/2001/p01-124e.htm> [<https://perma.cc/XL8V-22LK>]; confirmed by NATO Secretary General, Lord Robertson, Statement (Oct. 2, 2001), [<https://www.nato.int/docu/speech/2001/s011002a.htm>] [<https://perma.cc/J6SQ-YWXB>].

⁴³ For critical reactions, see, e.g., Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L. 993, 995–98 (2001); Broderick C. Grady, *Article of the North Atlantic Treaty: Past, Present, and Uncertain Future*, 31 GA. J. INT'L. & COMP. L. 167, 184–93 (2002); Eric P.J. Myjer & Nigel D. White, *The Twin Towers Attack: An Unlimited Right to Self-Defence*, 7(1) J. CONFLICT & SEC. L. 5, 7–8 (2002). *But see Hearing on Executive L, supra* note 22, at 372 (Senate Report No. 8 on Executive L) (noting that “article 5 would come into operation only when a nation had committed an international crime by launching an armed attack against a party to the treaty”) (emphasis added).

⁴⁴ Statement by the North Atlantic Council, *supra* note 42 (“The Council agreed that if it is determined that this attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the Washington Treaty.”).

⁴⁵ This is widely recognized in the literature. See, e.g., HANFORD L. HOSKINS, THE ATLANTIC PACT 32 (1949); Georg Schwarzenberger, *The North Atlantic Pact*, 2 WESTERN POL. Q. 309, 312 (1949); BVerfG [Federal Constitutional Court] Dec. 18, 1984, 68 ATOMWAFFENSTATIONIERUNG [BVERFGE] 1 ¶ 159 (Ger.) [hereinafter Atomwaffenstationierung].

⁴⁶ See, e.g., Minutes of the Fourth Meeting of the United States-United Kingdom-Canada Security Conversations (Mar. 29, 1948), in FRUS VOL. III, *supra* note 22, at 69; Minute from Mr. Bevin to Mr. Attlee (Apr. 6, 1948), in Insall & Salmon, *supra* note 32, at 147; Minutes of the Fifth Meeting of the Washington Exploratory Talks on Security (July 9, 1948), in FRUS VOL. III, *supra* note 22, at 169, 176–77.

in the Washington Paper that served as the basis for the drafting process,⁴⁷ and repeatedly recalled throughout the negotiations.⁴⁸ Accordingly, a situation may arise where different Allies arrive at opposite conclusions about the existence of an armed attack.⁴⁹ One group may consider that an attack has occurred, triggering their responsibilities under Article 5, while another group may reject that view. Policy considerations obviously militate in favor of developing a common position, as happened in response to the September 11 attacks.⁵⁰ The text of the NAT lends some support to this policy imperative. Although the assistance to be provided under Article 5 may be carried out individually or in concert with other parties, the obligation to assist applies to the parties collectively, in accordance with the principle that an attack against one is an attack against all. Article 5 therefore does not seem to envisage a situation where one group of nations adopts whatever measures of assistance it considers necessary, including the use of armed force, whereas the rest of the Alliance remains idle or even opposes such action. The fact that the parties resolved to “unite their efforts for collective defence” implies a desire for a united reaction.⁵¹ This suggests that the North Atlantic Council, NATO’s highest decision-making organ,⁵² ought to consider the situation so as to develop a consensus position.⁵³ Nevertheless, in the absence of a consensus, nothing in the language of the NAT precludes a party from determining that it has suffered an armed attack and from requesting the assistance of the other parties, nor one or more Allies from providing such assistance on a bilateral or multilateral basis.⁵⁴

⁴⁷ Memorandum by the Participants in the Washington Security Talks, July 6 to September 9, Submitted to Their Respective Governments for Study and Comment (Sept. 9, 1948), in FRUS VOL. III, *supra* note 22, at 237, 245.

⁴⁸ See, e.g., Memorandum from Secretary of State for External Affairs to Prime Minister (Jan. 4, 1949), in DCER VOL. XV, *supra* note 32, at 478, 479–80; *Hearing on Executive L*, *supra* note 22, at 88 (The North Atlantic Treaty, Executive Session) (“It has been made clear to [the negotiating parties] that each party must have to determine for itself the question of fact as to whether or not there had been an armed attack.”).

⁴⁹ See Stephen Hill, *The Role of NATO’s Legal Adviser*, in THE ROLE OF LEGAL ADVISERS IN INTERNATIONAL LAW 213, 227–28 (Andraž Zidar & Jean-Pierre Gauci eds., 2016).

⁵⁰ Edgar Buckley, *Invoking Article 5*, NATO REV. (Summer 2016), https://www.nato.int/DOCU/review/2006/Invokation-Article-5/Invoking_Article_5/EN/index.htm [<https://perma.cc/NH24-XWF4>].

⁵¹ NAT, *supra* note 1, preamble; see also THE NORTH ATLANTIC PACT: COLLECTIVE DEFENSE AND THE PRESERVATION OF PEACE, SECURITY, AND FREEDOM IN THE NORTH ATLANTIC COMMUNITY, 20 U.S. DEP’T OF STATE PUB. NO. 3462, 342–43 (1949) (referring to the “clear intention of the Parties to the Pact to take united action”).

⁵² NAT, *supra* note 1, art. 9.

⁵³ NAT, *supra* note 1, preamble. *Hearing on Executive L*, *supra* note 22, at 372 (Senate Report No. 8 on Executive L).

⁵⁴ See *Hearing on Executive L*, *supra* note 22, at 372 (Senate Report No. 8 on Executive L) (suggesting that if it was not clear whether an armed attack had occurred, “there would presumably be consultation but each party would have the responsibility of determining for itself the answer to this question of fact.”); see also *infra* note 268 and the accompanying text; cf. REPORT OF THE SECRETARY OF STATE TO THE PRESIDENT ON THE NORTH ATLANTIC TREATY, *supra* note 35, at 534 (suggesting that in clear cases “action would not necessarily depend on consultation”). But see ALEXANDER ORAKHELASHVILI, COLLECTIVE SECURITY 284 (2011) (suggesting that “under Article

B. Article 42(7) TEU

In 1992, the member states of the European Economic Community signed the Treaty on European Union at Maastricht.⁵⁵ One of the TEU's objectives was to strengthen cooperation in security matters by launching a Common Foreign and Security Policy.⁵⁶ The new policy included plans for the progressive development of a "common defence policy," which was understood might over time lead to a "common defence."⁵⁷ In line with these commitments, the member states of the EU took a series of steps over the next decade to deepen their cooperation in the field of security and defense.⁵⁸ The adoption of the Treaty of Lisbon in 2007 marked a new stage in this process.⁵⁹ The Lisbon Treaty upgraded the existing provisions on defense cooperation and introduced, for the first time, a mutual defense commitment among the member states of the EU. Article 42(7) TEU provides that if a member state is the victim of armed aggression on its territory, the other member states shall have an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the UN Charter.⁶⁰ The duty of mutual aid and assistance is thus triggered if a member state becomes the victim of "armed aggression" on its territory.

The TEU does not define "armed aggression." While the term "aggression" appears in several places in the UN Charter,⁶¹ its relationship to the notion of "armed attack" is not settled.⁶² A few points are nevertheless beyond doubt. An act of aggression within the meaning of the Charter entails the unlawful use of armed

5 decision making is premised on a consensus within the North Atlantic Council").

⁵⁵ Treaty on European Union preamble, Feb. 7 1992, 1992 O.J. (C 191) 1 [hereinafter Maastricht TEU].

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ The Lisbon Treaty was designed to revise the founding treaties of the EU after the more ambitious plans for reform set out in the draft Treaty Establishing a Constitution for Europe were rejected by European voters. The Lisbon Treaty amended the TEU and renamed the Treaty establishing the European Community into the Treaty on the Functioning of the European Union. *See* JEAN-CLAUDE PIRIS, *THE LISBON TREATY: A LEGAL AND POLITICAL ANALYSIS* 275 (2010).

⁶⁰ TEU, *supra* note 1, art. 42(7) reads as follows: "If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States.

Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation."

⁶¹ U.N. Charter arts 1(1), 39 and 53(1).

⁶² INTERNATIONAL LAW ASSOCIATION, SYDNEY CONFERENCE (2018), *USE OF FORCE* 26 (2018); *see* Dino Kritsiotis, *Topographies of Force*, in *INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES* 29, 45–63 (Michael Schmitt & Jelena Pejic eds., 2007); Jan Klabbers, *Intervention, Armed Intervention, Armed Attack, Threat to Peace, Act of Aggression, and Threat or Use of Force: What's the Difference?*, in *THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW* 489 (Marc Weller ed., 2015).

force.⁶³ The fact that Article 42(7) TEU refers to *armed* aggression, rather than to an act of aggression pure and simple, confirms that it uses the word in this sense. While every act of armed aggression therefore entails the use of force, not every such act necessarily rises to the level of an armed attack that triggers the application of the right of self-defense under Article 51 of the Charter.⁶⁴ However, as the International Court of Justice has confirmed,⁶⁵ certain acts of aggression may cross that threshold and entitle the victim to use force in self-defense.

Against this background, two alternative readings of Article 42(7) TEU are possible. A wide interpretation recognizes that the concept of aggression is broader in scope than the notion of armed attack.⁶⁶ That was the position taken by the majority of the delegations drafting the NAT.⁶⁷ On this view, the duty of mutual aid and assistance could be engaged even where an EU member state is the victim of an unlawful use of force that does not reach the gravity threshold of an armed attack.⁶⁸ The fact that Article 42(7) requires any aid and assistance to be rendered in accordance with Article 51 of the UN Charter does not preclude this interpretation. Clearly, if an act of aggression falls below the level of an armed attack, the other member states may not assist the victim by using armed force in the exercise of the right of self-defense.⁶⁹ Rather, in such cases they would have to provide other forms of aid and assistance to the victim that are permissible under the UN Charter, in line with their commitment to use “all means” within their power.

By contrast, a narrow interpretation equates “armed aggression” with

⁶³ General Assembly Resolution 3314 (XXIX), art. 1, Definition of Aggression, (Dec. 14, 1974) [hereinafter Definition of Aggression]; Rome Statute of the International Criminal Court art. 8(2), July 17, 1998, 2187 U.N.T.S. 90. *But see* Julius Stone, *Hopes and Loopholes in the 1974 Definition of Aggression* 71 AM. J. INT’L L. 224, 230–31 (1977) (suggesting that the disagreement as to whether extreme economic coercion could constitute aggression remains unresolved).

⁶⁴ The non-consensual presence of foreign armed forces, for example, which Article 3(e) of the Definition of Aggression lists among the acts that qualify as an act of aggression, does not necessarily cross the gravity threshold of an armed attack. *Id.* art. 3(e); *cf.* TALLINN MANUAL 2.0, *supra* note 38, at 265 (noting that the majority of experts did not consider the mere presence of foreign military aircraft without the consent of the territorial state to constitute an armed attack). *But see* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 202 (5th ed. 2011).

⁶⁵ Nicaragua, *supra* note 37, ¶ 195.

⁶⁶ MARTIN REICHARD, THE EU-NATO RELATIONSHIP: A LEGAL AND POLITICAL PERSPECTIVE 209 (2006).

⁶⁷ Minutes of the Eighteenth Meeting of the Washington Exploratory Talks on Security, *supra* note 29, at 213, 221–22.

⁶⁸ *Cf.* Mattias G. Fischer & Daniel Thym, *Article 42 [CSDP: Goals and Objectives; Mutual Defence]*, in THE TREATY ON EUROPEAN UNION (TEU), A COMMENTARY 1201, 1224–25 (Hermann-Josef Blanke & Stelio Mangiameli eds., 2013) [hereinafter TEU, A COMMENTARY] (arguing that, while an analysis of the English language version suggests “that the EU Treaty’s reference to armed aggression instead of armed attack deliberately lowers the threshold for mutual assistance,” an analysis of the French language version and consideration of the explicit reference to Article 51 “supports an interpretation of Art. 42.7 EU in line with international law”).

⁶⁹ In other words, Article 51 of the Charter is only engaged if the member states were to use force. *See* Laurie O’Connor, *Legality of the Use of Force in Syria against Islamic State and the Khorasan Group*, 3 J. USE OF FORCE & INT’L L. 70, 91 (2016).

“armed attack.” The duty of mutual aid and assistance would thus be triggered only if a member state becomes the victim of an armed attack on its territory within the meaning of Article 51 of the UN Charter.⁷⁰ This approach is supported by the fact that the phrase “armed aggression” echoes the French language version of Article 51, which employs the words “agression armée” in place of “armed attack.” This reading is further supported by the drafting history of Article 42(7) TEU. The predecessor of Article 42(7) first appeared in the Treaty Establishing a Constitution for Europe adopted by the European Convention in 2003.⁷¹ In preparing this clause, the drafters’ express intention was to replicate the mutual assistance obligations laid down in the Brussels Treaty for Economic, Social and Cultural Collaboration and Collective Self-Defence of 1948,⁷² as modified in 1954.⁷³ Whereas the English language version of Article 5 of the Modified Brussels Treaty refers to “armed attack,” the French version uses the phrase “agression armée.” The first draft of what later became Article 42(7) was prepared in French and thus employed the words “agression armée.” The English version of this draft thus seems to be the product of a literal translation of the French text rather than a deliberate attempt to depart from the authentic English wording of the Modified Brussels Treaty.

Nevertheless, the published preparatory works do not allow firm conclusions to be drawn about the intent of the negotiating states.⁷⁴ The phrase “armed aggression” was retained in all subsequent drafts of what is now Article 42(7) TEU. However, at one point, it was proposed that the same phrase used in a companion clause dealing with the implementation of the duty of mutual assistance should be replaced with the words “armed attack.”⁷⁵ Eventually, this second clause

⁷⁰ Cf. Teija Tiilikainen, *The Mutual Assistance Obligation in the European Union’s Treaty of Lisbon*, Publications of the Ministry for Foreign Affairs of Finland, 15 (2008) (noting that the interpretative practices governing UN Charter art. 51 play a key role in the interpretation of TEU art. 42(7) and limit the activities that may be carried out within the framework of the latter provision).

⁷¹ On the negotiating history, see REICHARD, *supra* note 66, at 191–208; Jolyon Howorth, *The European Draft Constitutional Treaty and the Future of the European Defence Initiative: A Question of Flexibility*, 9 EUR. FOREIGN AFF. REV. 483, 492–95 (2004).

⁷² Treaty for Economic, Social and Cultural Collaboration and Collective Self-Defence, Mar. 17, 1948, 19 U.N.T.S. 51 [hereinafter Brussels Treaty]; see *Final Report of Working Group VIII – Defence*, EUR. CONV. 461/02, 21 (Dec. 16, 2002); see also Contribution by Mr. Dominique de Villepin and Mr. Joschka Fischer, members of the Convention, presenting joint Franco-German proposals for the European Convention in the field of European security and defence policy, EUR. CONV. 422/02, 2–4 (Nov. 22, 2002).

⁷³ Protocol Modifying and Completing the Brussels Treaty, Oct. 23, 1954, 211 U.N.T.S. 342 [hereinafter Paris Protocol]. The Paris Protocol revised the original Brussels Treaty to pave the way for the accession of the Federal Republic of Germany and Italy, two former enemy nations, to the Treaty. As a result, Article IV of the original Brussels Treaty, which set out its collective assistance clause, was renumbered to become Article V of the Modified Brussels Treaty. Otherwise the text of the clause remained unchanged.

⁷⁴ As opposed to the intentions of the original drafters of the Constitutional Treaty.

⁷⁵ IGC 2003 – *Editorial and Legal Comments on the Draft Treaty establishing a Constitution for Europe*, CIG 4/1/03 REV 1, 376, art. III-214 (Oct. 6, 2003); *Draft Treaty establishing a Constitution for Europe*, CIG 50/03, 184, art. III-214 (Nov. 25, 2003).

became superfluous and was deleted.⁷⁶ This episode demonstrates that the negotiating parties were aware of the discrepancy between the English version of their draft on the one hand and the original language of Article 5 of the Modified Brussels Treaty and Article 51 of the UN Charter on the other. However, no steps were taken to eliminate this inconsistency. Although this does not prove conclusively that the member states intended to enter into broader commitments than those laid down in Article 5 of the Modified Brussels Treaty, this possibility cannot be discounted completely.⁷⁷ Accordingly, both the wide and narrow interpretation of Article 42(7) are tenable.

Article 42(7) TEU does not determine who is entitled to decide whether a member state has become the victim of armed aggression on its territory. Nor does the negotiating history provide any clues. However, it is useful to recall in this context the position under the Brussels Treaty. At least some states have taken the view that it was for each contracting party to determine whether an armed attack triggering its obligation to provide aid and assistance under the Brussels Treaty has occurred, even if this unilateral right was not stated in express terms.⁷⁸ The rationale for this view was outlined by Sir Eric Beckett, Legal Adviser to the UK Foreign Office at the time. It is the usual position under treaties of alliance, wrote Sir Eric Beckett, that each party remains the judge of whether its duty of mutual assistance has been engaged, unless the treaty provides otherwise.⁷⁹ Regardless of whether auto-interpretation really is an inherent feature of treaties of alliance or not,⁸⁰ it is worth recalling that Article 42(7) is not subject to the jurisdiction of the Court of Justice of the European Union or any other compulsory interpretative process under the TEU.⁸¹ Its interpretation therefore falls to each individual member state. Should the member states arrive at different positions, this would engage their duty to consult one another within the European Council and the Council of the European Union “in order to determine a common approach.”⁸² However, this obligation of consensus-building does not alter the fact that it is for each member state to determine the existence of armed aggression. Even on the assumption that the European Council and the Council of the European Union are empowered to adopt

⁷⁶ IGC 2003 – Defence, CIG 57/1/03 REV 1, 4 (Dec. 5, 2003).

⁷⁷ Cf. Niklas I. M. Nováky, *The Invocation of the European Union’s Mutual Assistance Clause: A Call for Enforced Solidarity*, 22 EUR. FOREIGN AFF. REV. 357, 370 (2017) (suggesting that at least some EU member states adhere to a broader interpretation of TEU art. 42(2)).

⁷⁸ Minute from Mr. Bevin to Mr. Attlee (Apr. 6, 1948), in Insall & Salmon, *supra* note 32, at 147; Letter from Sir O. Franks (Washington) to Mr. Bevin (Feb. 17, 1949), in Insall & Salmon, *supra* note 32, at 385, 387.

⁷⁹ SIR W. ERIC BECKETT, *THE NORTH ATLANTIC TREATY, THE BRUSSELS TREATY AND THE CHARTER OF THE UNITED NATIONS* 28 (1950).

⁸⁰ Cf. Secretary of State for External Affairs to Ambassador in United States (Mar. 4, 1949), in DCER VOL. XV, *supra* note 32, at 564 (noting the concerns of the Legal Advisor of the Canadian Department of External Affairs that leaving it up to each signatory to take such action “as it deems necessary” under NAT art. 5 “does a good deal more than make explicit what had been implicit” in the agreement).

⁸¹ TEU, *supra* note 1, art. 24(1).

⁸² *Id.* art. 32.

formal decisions with regard to Article 42(7) at all, which is questionable,⁸³ any decisions having military or defense implications are to be taken unanimously.⁸⁴ This preserves each member state's final say on whether or not an act of armed aggression has taken place.

C. Article 222 TFEU

In addition to the classic collective defense guarantee set out in Article 42(7) TEU, the Treaty of Lisbon also introduced a more wide-ranging solidarity clause. Article 222 TFEU requires the Union and the member states to "act jointly in a spirit of solidarity if a member state is the object of a terrorist attack or the victim of a natural or man-made disaster."⁸⁵ In addition to the duty to act jointly, Article 222 also imposes individual obligations on the EU and on the member states to respond to such attacks or disasters.

The adoption of this clause was motivated by a widespread feeling among members of the Convention on the Future of Europe, the body tasked with drafting a new constitutional treaty for the EU between 2001 and 2003, that the security environment in Europe had changed considerably.⁸⁶ While the threat of territorial invasion had subsided, the risk posed by terrorism, weapons of mass destruction, and asymmetric forms of warfare had increased, as demonstrated by the September 11 attacks.⁸⁷ These developments seemed to underline the need for more flexible

⁸³ Pursuant to TEU Article 25(b) the European Council and the Council may adopt formal decisions to provide for operational action or a common position *by the Union*. However, mutual assistance under TEU Article 42(7) does not involve action by the Union, *see infra* Section 0, but is at best an example of systematic cooperation *between the member states* within the meaning of TEU Article 25(c).

⁸⁴ TEU, *supra* note 1, art. 31(4).

⁸⁵ The first two paragraphs of TFEU, *supra* note 1, art. 222 read as follows:

1. The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to:

(a) prevent the terrorist threat in the territory of the Member States; protect democratic institutions and the civilian population from any terrorist attack; assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack;

(b) assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster.

2. Should a Member State be the object of a terrorist attack or the victim of a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities. To that end, the Member States shall coordinate between themselves in the Council.

⁸⁶ The Convention was tasked with preparing a draft Treaty establishing a Constitution for Europe designed to replace the existing founding treaties of the EU. Following further refinement, the Constitutional Treaty was formally adopted by the member states on October 29, 2004. As part of their domestic ratification processes, France and the Netherlands held national referenda on the Treaty, ending in its rejection by French and Dutch voters. In response, the member states adopted the less ambitious Treaty of Lisbon on December 13, 2007. On the origins of the Lisbon Treaty, *see* PIRIS, *supra* note 59.

⁸⁷ *Summary of the meeting held on 29 Oct. 2002*, EUR. CONV. 399/02 (Oct. 29, 2002); *see also* Introductory Note by the Secretariat on the scope of ESDP, EUR. CONV. WORKING GROUP VIII,

and adaptable capabilities, in particular the need to use civil, police, and military resources in an integrated manner. The solidarity clause was meant to respond to this new reality by directing the Union and its member states to mobilize all instruments at their disposal. In doing so, the clause was intended to take advantage of the full spectrum of the EU's comprehensive capabilities and thereby clearly distinguish it from a classic military alliance such as NATO.⁸⁸

As originally proposed, the solidarity clause applied only to terrorist attacks emanating from non-state actors.⁸⁹ During the drafting process, members of the European Convention argued that the clause should also extend to cover threats and dangers posed by disasters of a natural or human origin.⁹⁰ These suggestions were incorporated into the draft Constitutional Treaty and retained by the member states in the Treaty of Lisbon.⁹¹ Accordingly, under Article 222 TFEU, the Union and the member states' shared and individual solidarity obligations are triggered if a member state becomes the object of a "terrorist attack" or the victim of a "natural or man-made disaster."

The publicly available records do not reveal whether the meanings of a "terrorist attack" and a "natural or man-made disaster" were discussed at all during the drafting process. However, the Council of the European Union subsequently has defined these terms in Decision 2014/415/EU,⁹² which makes arrangements for the implementation of the Union's own obligations under Article 222 TFEU. Although the Decision is not concerned with the obligations of the member states,⁹³ there is no reason why its definitions should not be followed in the interpretation of the duties borne by the member states, too.

Decision 2014/415/EU defines a "disaster" to mean "any situation which has or may have a severe impact on people, the environment or property, including cultural heritage."⁹⁴ This is a broad and flexible definition, but the requirement that the impact must be "severe" echoes the views expressed by national delegations that the solidarity clause should be reserved for "specific exceptional and emergency circumstances."⁹⁵ This gravity threshold is also reflected in the procedure governing the invocation of the clause. Decision 2014/415/EU provides that a member state must first exploit the possibilities offered by existing means

Working Doc. 10 (Oct. 25, 2002).

⁸⁸ *Final Report of Working Group VIII – Defence*, *supra* note 72.

⁸⁹ *Draft Articles on External Action in the Constitutional Treaty*, EUR. CONV. 685/03 (Apr. 23, 2003).

⁹⁰ *Summary Sheet of Proposals for Amendments Concerning External Action, Including Defence Policy*, EUR. CONV. 707/03 (May 9, 2003); *Summary Report of the Plenary Session*, EUR. CONV. 748/03 (May 27, 2003); *Reactions to the Draft Articles of the Revised Text of Part One*, EUR. CONV. 779/03 (June 4, 2003).

⁹¹ *Revised Text of Part One*, EUR. CONV. 797/03 (June 10, 2003).

⁹² Council Decision 2014/415/EU of 24 June 2014 on the Arrangements for the Implementation by the Union of the Solidarity Clause, ¶ 4, 2014 O.J. (L 192) 53.

⁹³ *Id.* preamble ¶ 1.

⁹⁴ *Id.* art. 3(a).

⁹⁵ Outcome of Proceedings of CATS on 6 and 7 October 2011, ¶ 3, 15498/11 (Nov. 3, 2011).

and tools at national and Union level, before coming to the conclusion that the crisis clearly overwhelms the response capabilities available to it.⁹⁶ Accordingly, the disaster must be of such severity as to plainly overwhelm the capabilities that would otherwise be available to the affected country.

Council Decision 2014/415/EU defines a “terrorist attack” to mean a terrorist offense as defined in Council Framework Decision 2002/475/JHA,⁹⁷ now replaced by Directive 2017/541 on combating terrorism.⁹⁸ The latter sets out a detailed list of terrorist offenses. Collectively, it defines them as intentional acts which, given their nature or context, may seriously damage a country or an international organization, if committed with a specific terrorist aim, namely to seriously intimidate a population, to unduly compel a government or an international organization to perform or abstain from performing any act, or to seriously destabilize or destroy the fundamental political, constitutional, economic, or social structures of a country or an international organization.⁹⁹ The list of specific terrorist offenses is extensive and includes acts such as attacks upon a person’s life which may cause death, causing extensive destruction of public facilities or private property likely to endanger human life or result in major economic loss, and the release of dangerous substances, or causing fires, floods, or explosions, the effect of which is to endanger human life.¹⁰⁰

D. Comparison

Analysis reveals a substantial overlap in the circumstances that trigger the application of the Transatlantic and European mutual assistance clauses, as depicted in *Figure 1*. As discussed earlier, Article 42(7) TEU is open to a narrow and a wider interpretation.¹⁰¹ The narrow reading equates “armed aggression” with “armed attack.” On this interpretation, the duty of mutual aid and assistance under Article 42(7) is triggered in exactly the same circumstances as under Article 5 NAT: both require that a party should fall victim to an armed attack. The material scope of the two provisions therefore is identical and coincides with the conditions that give rise to the right of individual and collective self-defense under Article 51 of the UN Charter. Less grave uses of force and other incidents that do not reach the threshold of an armed attack fall outside their scope. The wider reading of Article 42(7) construes the notion of “armed aggression” to cover acts of armed force that do not constitute armed attacks. On this interpretation, the member states of the EU are bound to assist each other even in circumstances where Article 5 is not applicable. However, the size of any potential gap between Article 5 and Article 42(7) should not be overestimated. Although the International Court of Justice has

⁹⁶ Council Decision 2014/415/EU, *supra* note 92, art. 4.

⁹⁷ *Id.* art. 3(b).

⁹⁸ Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA, 2017 O.J. (L 88) 6.

⁹⁹ *Id.* art. 3.

¹⁰⁰ *Id.* art. 3(1).

¹⁰¹ *See supra* Section 0.

stopped short of equating armed aggression with armed attack, its jurisprudence seems to imply that there is not much of a gap at all.¹⁰² Moreover, at least some of the acts that may fall within this gap, for instance a maritime blockade,¹⁰³ are either of limited relevance in practice or unlikely to take place in the territory of a member state, as required by Article 42(7). Consequently, Article 5 and Article 42(7) are engaged in identical, or near identical, circumstances.

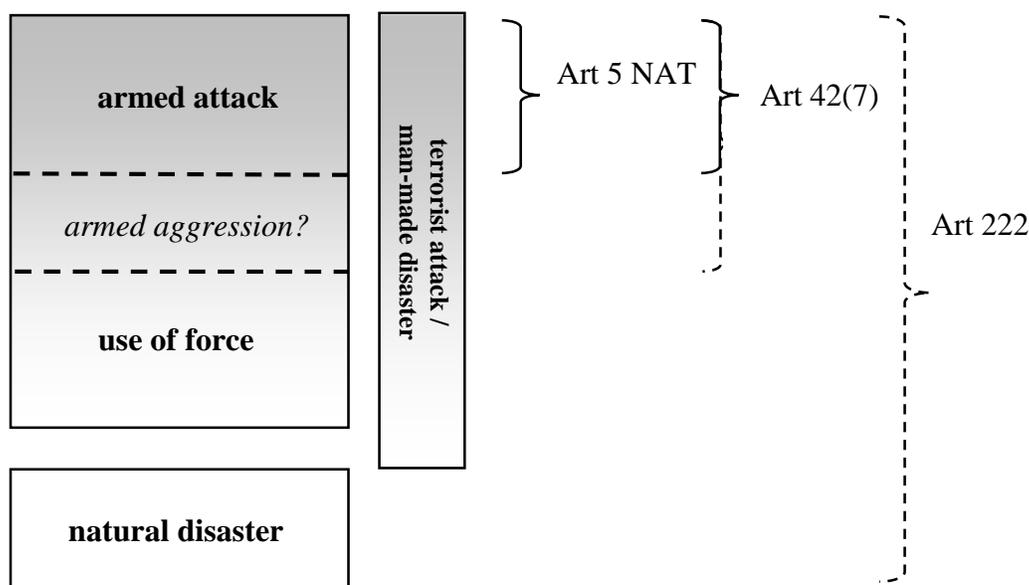


Figure 1

In at least one respect, the scope of application of Article 222 TFEU is broader than that of either Article 5 NAT or Article 42(7) TEU.¹⁰⁴ This is so because Article 222 extends to situations that entail no or only relatively low levels of deliberate violence. These include natural disasters as well as certain terrorist offenses, such as kidnapping or hostage-taking.¹⁰⁵ It should be noted that not only the commission of terrorist offenses, but also the threat of committing such offenses qualifies as a terrorist attack within the meaning of Article 222.¹⁰⁶ Similarly, the definition of a disaster under Decision 2014/415/EU includes situations which may have a severe impact. Consequently, Article 222 applies to acts and events which

¹⁰² Cf. *Nicaragua*, *supra* note 37, ¶ 257 (assessing the question of “aggression in the form of armed subversion” from the perspective of the right of individual and collective self-defense); *see, e.g.*, Definition of Aggression, *supra* note 63, art. 3(f) (classifying the “action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State” as an act of aggression). However, it is difficult to qualify such action as an armed attack in its own right or indeed as an act of *armed* aggression.

¹⁰³ Definition of Aggression, *supra* note 63, art. 3(c).

¹⁰⁴ Luigi Lonardo, *Integration in European Defence: Some Legal Considerations*, 2 EUR. PAPERS 887, 895 (2017).

¹⁰⁵ Directive (EU) 2017/541, *supra* note 98, art. 3(1)(c).

¹⁰⁶ *Id.* art. 3(1)(j).

do not involve the use of force at all or which remain below the level of an armed attack or armed aggression. Nevertheless, it is clear that at least some terrorist offenses could qualify as armed attacks. These include lethal attacks and the extensive destruction of property,¹⁰⁷ provided that in each case the requisite scale and intensity is met. The terrorist attack that took place in Paris on November 13, 2015, which left 130 people dead and more than 400 injured, offers an example.¹⁰⁸ Accordingly, Article 222 extends to situations that could trigger the applicability of Article 5 and Article 42(7) as well as to situations that do not.

However, in other respects the scope of Article 222 TFEU is narrower than that of Article 5 NAT and Article 42(7) TEU. The solidarity clause is engaged only in the case of a *terrorist* attack or a natural or man-made *disaster*. While a large-scale invasion launched by a third state against a NATO or EU nation would undoubtedly bring Article 5 and Article 42(7) into play, it would not constitute a *terrorist* attack within the meaning of Article 222. Could such an attack nonetheless qualify as a man-made *disaster*? As we saw, the definition of a “disaster” adopted in Decision 2014/415/EU covers “any situation” that may have a severe impact on people, the environment or property, including cultural heritage. A disaster is therefore defined by its impact or effect. In principle, there is no reason why a conventional or unconventional armed attack could not qualify as a disaster for the purposes of Article 222, provided that its impact is sufficiently severe to clearly overwhelm the response capability of the country affected. This gravity threshold means that not every situation that triggers the applicability of Article 5 and Article 42(7) will automatically engage Article 222 too. In fact, the threshold is likely to serve as a powerful disincentive for invoking Article 222. Except in the gravest of situations, few governments are likely to admit that an adversary has overcome their country’s defensive capabilities, especially if that adversary is a non-state actor.¹⁰⁹

The geographical scope of application of the three clauses also differs. As long as it falls within the geographical boundaries defined by Article 6 NAT, the duty of mutual assistance under Article 5 NAT may be triggered by an attack on a party’s armed forces located outside their national territory, for instance by an attack on naval assets on the high seas or on military units stationed in the territory

¹⁰⁷ *Id.* arts. 3(1)(a) and (d).

¹⁰⁸ U.N. SCOR, 70th Sess. 7565th mtg. at 2, U.N. Doc S/PV.7565 (Nov. 20, 2015). *But see* O’Connor, *supra* note 69, at 80.

¹⁰⁹ *Cf.* Stan Anton & Cristina Bogzeanu, *A Comparative Analysis of Mutual Defence and Collective Defence Clauses*, 57 STRATEGIC IMPACT 7, 12 (2015) (suggesting that by opting for TEU art. 42(7) rather than TFEU art. 222 in its response to the Paris attack of Nov. 13, 2015, the French Government signaled that the attack did not overwhelm its capacity to respond); Nováky, *supra* note 77, at 367 (“[I]nvolving the solidarity clause would have sent a message to the French public that France could no longer handle its internal security.”). *But see* Peter Hilpold, *Article 222*, *forthcoming in* THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION (TFEU), A COMMENTARY § 6 (Hermann-Josef Blanke & Stelio Mangiameli eds.) (on file with the author) [hereinafter TFEU, A COMMENTARY] (suggesting that the practical relevance of TFEU art. 222 ranks far above that of TEU art. 42(7)).

of another party.¹¹⁰ By contrast, the duty of mutual assistance under Article 42(7) TEU applies only when an EU member state falls victim to an act of armed aggression on its own territory, but not when the aggression is directed against national assets located outside its borders. The same limitation also applies to the Union's duties under Article 222(1) TFEU.¹¹¹ However, Decision 2014/415/EU takes an expansive approach and defines a member state's territory for these purposes to include not only its land area, internal waters, territorial sea, and airspace, but also infrastructure, such as off-shore oil and gas installations, located in its territorial sea, exclusive economic zone, or continental shelf.¹¹² No territorial limitation applies to Article 222(2) TFEU, meaning that an EU member state may request assistance from the other member states on a bilateral level even where it has become the object of a terrorist attack or the victim of a natural or man-made disaster outside its own national territory.¹¹³ It is difficult to envisage a strictly extra-territorial attack or disaster overwhelming a country's ability to respond, however.

Since Article 5 NAT and Article 42(7) TEU overlap in their material scope of application, a party that has suffered an armed attack on its territory and is a member of both NATO and the EU may seek assistance under either provision—or under both at the same time. Such a party may also fall back on Article 5 if the assistance received under Article 42(7) is insufficient and *vice versa*.¹¹⁴ In addition, EU member states also benefit from the arrangements laid down in Article 222 TFEU. The added value of Article 222 lies in the fact that it extends to terrorist attacks and man-made disasters below the level of an armed attack. Accordingly, in situations where the other parties are reluctant to accept that a terrorist attack or man-made disaster qualifies as an armed attack under Article 5 or as an act of armed aggression under Article 42(7), the affected member state may request assistance under Article 222(2), provided that the gravity threshold is met. By contrast, in circumstances where all three provisions are applicable, it is unlikely that an EU member state would derive any benefit from invoking Article 222 in preference over Article 5 or Article 42(7). In fact, doing so would entail a very public admission that its responsive capabilities have been overwhelmed. It would also entail the judicial oversight by the Court of Justice of the European Union, which has jurisdiction over Article 222, but not over Article 42(7).¹¹⁵

¹¹⁰ NAT, *supra* note 1, art. 6(2).

¹¹¹ This is somewhat ironic, given that Article 222 is to be found among the provisions TFEU dealing with external relations.

¹¹² Council Decision 2014/415/EU, *supra* note 92, art. 2.

¹¹³ *Contra* Marie Fuchs-Drapier, *The European Union's Solidarity Clause in the Event of a Terrorist Attack: Towards Solidarity or Maintaining Sovereignty?*, 19 J. CONTINGENCIES & CRISIS MGMT. 184, 186 (2011); *see also* Peter Hilpold, *Filing a Buzzword with Life: The Implementation of the Solidarity Clause in Article 222 TFEU*, 42.3 LEGAL ISSUES OF ECON. INTEGRATION 209, 219–20 (2015).

¹¹⁴ *Cf.* EU's Mutual Defence and Solidarity Clauses: Political and Operational Dimensions, EUR. PARL. DOC. T7-0456 (2012) (pointing to the utility of TEU art. 42 in "situations where no agreement on collective action has been reached within NATO").

¹¹⁵ TEU, *supra* note 1, art. 24(1).

III. The Scope of the Commitments

Once the duty of mutual assistance is triggered, attention turns to the legal and practical consequences. Competing considerations pull mutual assistance clauses in different directions in this context, too. Their signatories will typically seek utmost clarity about the nature and scope of the commitments they have undertaken.¹¹⁶ The terms of the bargain must be plain. The parties will want to know what is expected of them and, perhaps even more importantly, what they may expect from their allies. However, drawing up a detailed catalogue of their mutual commitments may be neither practicable nor desirable.¹¹⁷ Doing so could constrain a nation's policy and military options for dealing with a future crisis. Spelling out the obligations in detail may also fuel opposition among segments of domestic opinion against entering into binding guarantees in the first place, a lesson brought home during the drafting of Article 5 NAT. For both political and strategic reasons, it may be prudent therefore to specify neither the exact obligations entailed by the duty of mutual assistance nor its exact limits, but instead set out only the nature and overall outlines of the commitment undertaken by the parties.

Building on the preceding analysis, the purpose of this section is to assess and compare the scope of the substantive obligations imposed by Article 5 NAT, Article 42(7) TEU, and Article 222 TFEU and to clarify their binding nature.

A. Article 5 NAT

If an armed attack within the meaning of Article 5 NAT against one or more Allied nations occurs, each other party is bound to “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.”¹¹⁸ To fully appreciate all the nuances of this text, it is necessary to review its drafting history.

The negotiating parties drew on two pre-existing texts in drafting Article 5 NAT.¹¹⁹ The U.S. representatives felt that the proposed agreement should adhere as closely as possible to Article 3 of the Inter-American Treaty of Reciprocal Assistance of 1947,¹²⁰ known as the Rio Pact. This declares that an armed attack against an American state shall be considered as an attack against all the American states and commits each of the parties to “assist in meeting the attack” in the exercise of the inherent right of self-defense recognized by Article 51 of the

¹¹⁶ Memorandum by the Participants in the Washington Security Talks, *supra* note 47, at 242.

¹¹⁷ Minutes of Meeting of the Working Group (Dec. 16, 1948), in 14 DOCUMENTS ON CANADIAN EXTERNAL RELATIONS 724–25 (Hector Mackenzie ed., 1948) [hereinafter DCER VOL. XIV].

¹¹⁸ NAT, *supra* note 1, art. 5.

¹¹⁹ Memorandum by the Participants in the Washington Security Talks, *supra* note 47, at 247; *see also* Memorandum by Chargé d’Affaires, Embassy in United States (Aug. 26, 1948), in DCER VOL. XIV *supra* note 117, at 548. For a detailed account of the negotiations, see NICHOLAS HENDERSON, THE BIRTH OF NATO (1982); LAWRENCE S. KAPLAN, NATO 1948: THE BIRTH OF THE TRANSATLANTIC ALLIANCE (2007).

¹²⁰ Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, 62 Stat. 1681, 21 U.N.T.S. 77.

Charter. By contrast, the European and Canadian representatives favored the stronger terms of Article 4 of the original Brussels Treaty of 1948,¹²¹ which states that in case any of the contracting parties should be the object of an armed attack in Europe, the other parties will, in accordance with Article 51 of the Charter, afford the victim “all the military and other aid and assistance in their power.”¹²² As the U.S. negotiators emphasized repeatedly, they could not agree to an automatic commitment to provide all military and other aid to the victim of an armed attack along the lines stipulated by the Brussels Treaty, since under the U.S. Constitution, congressional action is required prior to entering into a state of war.¹²³ The other representatives thus came to accept that the terms of the Brussels Treaty were “a little too stringent to find general acceptance.”¹²⁴

By the end of 1948, a draft clause emerged that was modeled largely on the Rio Pact, but which also borrowed some of the language of the Brussels Treaty. It set out the principle that an attack against one party was to be considered an attack against them all and declared that in such an event, each party was to “assist the party or parties so attacked by taking forthwith such military or other action, individually and in concert with the other parties, as may be necessary to restore and assure the security of the North Atlantic area.”¹²⁵ However, this wording proved unacceptable to leading members of the Committee on Foreign Relations of the U.S. Senate. Despite reassurances from the Secretary of State, they feared that the draft implied an automatic commitment to go to war and therefore suggested removing the words “forthwith,” “military,” and “as may be necessary.”¹²⁶ These proposals caused considerable alarm among the Europeans and Canadians, who were concerned that the already modest language of the draft was being watered down and its deterrent effect eroded.¹²⁷ Their concerns only grew when further objections were raised in an unscheduled Senate debate.¹²⁸ Efforts to accommodate

¹²¹ Commentary on the Washington Paper of September 9, 1948 (Dec. 6, 1948), in DCER VOL. XIV, *supra* note 117, at 703, 708.

¹²² Memorandum by the Participants in the Washington Security Talks, *supra* note 47, at 247.

¹²³ Memorandum of the Ninth Meeting of the Working Group Participating in the Washington Exploratory Talks on Security (Aug. 9, 1948), in FRUS VOL. III, *supra* note 22, at 209, 211.

¹²⁴ Minutes of the Fifth Meeting of the Washington Exploratory Talks, *supra* note 46, at 178.

¹²⁵ Report of the International Working Group to the Ambassadors' Committee (Dec. 24, 1948), in FRUS VOL. III, *supra* note 22, at 333, 335; *see also* Sir O. Franks (Washington) to Mr. Bevin (Feb. 4, 1949), in Insall & Salmon, *supra* note 32, at 370–71.

¹²⁶ Memorandum of Conversation with Senator Tom Connally and Senator Arthur Vandenburg (Feb. 5, 1949), Acheson Papers (on file at Truman Library), https://www.trumanlibrary.org/whistlestop/study_collections/achesonmemos/index.php?documentid=65-01_25 [<https://perma.cc/K8SM-WM2S>].

¹²⁷ Minutes of the Twelfth Meeting of the Washington Exploratory Talks on Security, *supra* note 15, at 73; *see also* Mr. Bevin to Sir O. Franks (Washington) (Feb. 7, 1949), in Insall & Salmon, *supra* note 32, at 372.

¹²⁸ *See, e.g.*, The Proposed North Atlantic Security Pact, 95 CONG. REC. 1163–69 (Feb. 14, 1949); Sir O. Franks (Washington) to Mr. Bevin (Feb. 15, 1949), in Insall & Salmon, *supra* note 32, at 379–81; Mr. Bevin to Sir O. Franks (Washington) (Feb. 17, 1949), in Insall & Salmon, *supra* note 32, at 384; Secretary of State for External Affairs to Ambassador in United States (Feb. 17, 1949), in DCER VOL. XV, *supra* note 32, at 528 (“It is better to have no treaty at all than to have a treaty which is so weak and ambiguous as to be meaningless and therefore mischievous.”).

the Senators' objections led the Truman Administration to prepare four alternative drafts of the mutual assistance guarantee.¹²⁹ Following consultations,¹³⁰ one draft was laid before the Committee on Foreign Relations.¹³¹ The next day, the European and Canadian ambassadors tentatively approved the draft at an informal meeting.¹³² The final text of Article 5 NAT, which incorporated further suggestions made by the Senate Committee,¹³³ was adopted on March 15, 1949.¹³⁴

The drafting history demonstrates that the terms of Article 5 NAT were shaped by the overriding need—felt most acutely within the United States, but shared by other nations and eventually accepted by all—to avoid any language that would automatically commit the parties to use armed force in response to an armed attack.¹³⁵ Going to war remained a national decision.¹³⁶ This is reflected in the fact that unlike the initial draft of late 1948,¹³⁷ which called for such military or other action as may be necessary, the final text explicitly demands only such action as the individual contracting parties *themselves* deem necessary. This point is also reinforced by Article 11 NAT, which declares that the NAT's provisions, including Article 5, shall be carried out by the parties in accordance with their respective constitutional processes.¹³⁸ It therefore falls to each contracting party to determine how it will respond in case of an attack.

Given the feeble nature of this obligation, commentators have widely questioned the legal value of Article 5 NAT. Not only have they emphasized that the text leaves the parties with a wide margin of discretion,¹³⁹ but many have

¹²⁹ Memorandum of Conversation, by the Secretary of State (Feb. 14, 1949), in FRUS VOL. IV, *supra* note 15, at 108. For the drafts, see Memorandum by the Counsellor of the Department of State (Bohlen) to the Secretary of State and the Under Secretary of State (Webb) (Feb. 16, 1949), in FRUS VOL. IV, *supra* note 15, at 113, 115.

¹³⁰ Memorandum of Conversation, by the Secretary of State (Feb. 17, 1949), in FRUS VOL. IV, *supra* note 15, at 117.

¹³¹ *Hearings on Executive L*, *supra* note 22, at 337 (North Atlantic Security Pact); *see id.* at 105–20 (The North Atlantic Treaty, Executive Session).

¹³² Sir O. Franks (Washington) to Mr. Bevin, (Feb. 19, 1949), in Insall & Salmon, *supra* note 32, 388–89.

¹³³ *Hearings on Executive L*, *supra* note 22, at 131–43 (Informal Session, The North Atlantic Treaty).

¹³⁴ Minutes of the Eighteenth Meeting of the Washington Exploratory Talks on Security, *supra* note 29, at 222.

¹³⁵ *See, e.g.*, Memorandum of Conversation, by the Secretary of State (Mar. 14, 1949), in FRUS VOL. IV, *supra* note 15, at 203.

¹³⁶ 95 CONG REC. 8895, (1949) (Statement of Sen. Vandenberg) (“A commitment to take notice and to do something about it is automatic. A commitment to war is not”); *see also* FOREIGN OFFICE, EVENTS LEADING UP TO THE SIGNATURE OF THE NORTH ATLANTIC TREATY, WITH A COMMENTARY ON THE TEXT, 1949, Cmd. 7692, 5 (UK).

¹³⁷ Report of the International Working Group to the Ambassadors' Committee (Dec. 24, 1948), in FRUS VOL. III, *supra* note 22, at 333, 335.

¹³⁸ Any action taken by an Ally to assist another, including the commitment of armed forces, is therefore subject to its usual constitutional processes and procedures. *See* Richard H. Heindel et al., *The North Atlantic Treaty in the United States Senate*, 43 AM. J. INT'L. L. 633, 649–51 (1949).

¹³⁹ LORD HASTINGS ISMAY, NATO: THE FIRST FIVE YEARS 1949-1954 13 (1954); J. C. S., *Problèmes juridiques de l'Organisation du traité de l'Atlantique Nord*, 20 POLITIQUE ÉTRANGÈRE

suggested that Article 5 entails no legally binding guarantees at all,¹⁴⁰ and is only of political and practical significance.¹⁴¹ Amongst others, this position has been championed by John R. Bolton, the current U.S. National Security Advisor.¹⁴² From a more formal perspective, it may be questioned whether a commitment which its addressees may discharge at their complete discretion amounts to a binding legal obligation at all.¹⁴³ As Senator Claude Pepper remarked during the hearings before the Senate Committee, “[i]f you leave it to an agreement which obligates every member of it to do what he thinks he ought to do under the circumstances if anything arises, it does not seem to me it obligates anybody to do anything special.”¹⁴⁴

These points should not be pressed too far, however. It is true that the legal significance of certain elements of Article 5 is marginal. The principle that an attack against one party is an attack against all amounts to little more than a reaffirmation of the right of collective self-defense.¹⁴⁵ But this does not mean that Article 5 is devoid of legal consequences. The parties have committed themselves to taking action, individually and in concert, for the specific purpose of restoring and maintaining the security of the North Atlantic area.¹⁴⁶ The fact that each nation may determine the precise nature of that action means that there is, in the words of Michael J. Glennon, an “element of non-commitment in the commitment,”¹⁴⁷ insofar as the use of force is not automatic. But a legal commitment to act nonetheless exists.¹⁴⁸ One reason for expressing the promise of mutual assistance

689, 691 (1955); Pitman B. Potter, *The Proposed North Atlantic Pact*, 112 WORLD AFF. 5, 5–6 (1949); DINSTEIN, *supra* note 64; Orakhelashvili, *supra* note 54, at 284; *see also* Atomwaffenstationierung, *supra* note 45, ¶ 159.

¹⁴⁰ Marina Salvin, *The North Atlantic Pact*, 27 INT’L CONCILIATION 375, 413 (1949); James E. S. Fawcett, *The Legal Character of International Agreements*, 30 BRIT. Y.B. INT’L L. 381, 392 (1953); Michael A. Goldberg, *Mirage of Defense: Reexamining Article Five of the North Atlantic Treaty after the Terrorist Attacks on the United States*, 26 B.C. INT’L & COMP. L. REV. 77, 91 (2003); PETER ROWE, LEGAL ACCOUNTABILITY AND BRITAIN’S WARS 2000–2015 32 (2016).

¹⁴¹ Erik Brüel, *Die juristische Bedeutung des Atlantikpaktes*, 4 ARCHIV DES VÖLKERRECHTS 288, 297 (1954); *see also* North Atlantic Council, Rep. of the Comm. of Three on Non-Military Cooperation, C-M(56)127, ¶ 5 (Nov. 16, 1956); NATO LEGAL DESK BOOK, *supra* note 13, at 241.

¹⁴² John R. Bolton, *Is There Really Law in International Affairs?* 10 TRANSNAT’L L. & CONTEMP. PROBS. 1, 5–6 (2000).

¹⁴³ Cf. *Certain Norwegian Loans (Fr. v. Nor.)*, Separate Opinion of Judge Sir. Hersch Lauterpacht, 1957 I.C.J. 9, ¶¶ 48–51 (July 6) (arguing that an undertaking in which the party concerned reserves for itself the right to determine the existence and extent of any obligations it has assumed is not a legal commitment at all).

¹⁴⁴ *Hearings on Executive L*, *supra* note 22, at 107 (The North Atlantic Treaty, Executive Session).

¹⁴⁵ *See* Mr. Bevin to Sir O. Franks (Washington) (Feb. 17, 1949), *in* Insall & Salmon, *supra* note 32, at 384–5 (“This sentence does not bind the United States to any action, but it has great psychological value for the European countries...”). *But see* D.W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 216–18 (1958). *See also infra* note 268 and the accompanying text.

¹⁴⁶ *See* Statement of Sen. Vandenberg, *supra* note 136; *see also* Sylvain Fournier & Sherrod Lewis Bumgardner, *Article 5 of the North Atlantic Treaty: The Cornerstone of the Alliance*, 34 NATO LEGAL GAZETTE 17, 26 (2014).

¹⁴⁷ MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 214 (1990).

¹⁴⁸ Louis B. Sohn, *Development of International Law*, 35 A.B.B. J. 426, 426–30 (1949); *cf.* Hersch Lauterpacht, *Report on the Law of Treaties*, [1953] 2 Y.B. INT’L L. COMM’N 90, 97–98 U.N. Doc.

in the form of an international agreement was precisely to formalize the “natural defense relationship” between the negotiating parties in binding terms,¹⁴⁹ thereby endowing it with an “assurance of permanence” should the political situation change.¹⁵⁰

Nor should the discretionary element in Article 5 NAT be overrated.¹⁵¹ The assistance provided must be reasonable as measured against the express purpose of Article 5 and the overall strategic situation.¹⁵² A party that contemplates taking action that by its very nature and scope is inadequate for restoring and maintaining the security of the North Atlantic area would be in breach of Article 5 just as much as a state which refused to take any action at all.¹⁵³ In this respect, we should remember that the parties are bound to perform their obligations under Article 5 in good faith.¹⁵⁴ U.S. Secretary of State Dean Acheson thus underlined that each nation is committed to do what in its “honest judgment” is necessary to restore and maintain the security of the North Atlantic area, taking into account the gravity of the armed attack and the action believed to be necessary to achieve this end.¹⁵⁵ Sir Eric Beckett likewise thought that Article 5 required each party to reach its decision “justly and fairly” in the light of the facts and the obligation to give assistance.¹⁵⁶ It also merits noting that a reservation to the ratification of the NAT proposed in the U.S. Senate, which would have made the obligation to use force dependent on Congressional authorization and declared that the NAT did not oblige or commit Congress to authorize the employment of military force, was defeated by an 87–8 vote.¹⁵⁷ This supports the conclusion that at least in certain circumstances, to be determined on a case-by-cases basis by each signatory, Article 5 does require the employment of military force.

Accordingly, Article 5 NAT imposes an obligation on the parties to adopt

A/CN.4/63 (“The fact that the interested State is the sole judge of the existence of the obligation is, while otherwise of considerable importance, irrelevant for the determination of the legal character of the instrument.”).

¹⁴⁹ Memorandum by the Director of the Policy Planning Staff (Nov. 24, 1948), in FRUS VOL. III, *supra* note 22, 283–84.

¹⁵⁰ Minute from Mr. Bevin to Mr. Attlee, (Apr. 6, 1948), in Insall & Salmon, *supra* note 32, at 146; *see also* REID, *supra* note 32, at 99–112.

¹⁵¹ *See* Secretary of State for External Affairs to Ambassador in United States (Mar. 4, 1949), in DCER VOL. XV, *supra* note 32, at 564.

¹⁵² *See* Buckley, *supra* note 50. This point is often overlooked. *See, e.g.,* Salvin, *supra* note 140, at 413–14 (suggesting that even the appeasement of an aggressor would be compatible with the wording of NAT art. 5 “if that seemed more convenient and less costly”); Jerome B. Elkind, *Normative Surrender*, 9 MICH. Y.B. INT’L LEGAL STUD. 263, 280–81 (1988).

¹⁵³ *See* REICHARD, *supra* note 66, at 184.

¹⁵⁴ Vienna Convention on the Law of Treaties art. 27, May, 23 1969, 1155 U.N.T.S. 332 [hereinafter VCLT].

¹⁵⁵ Dean Acheson, *The Meaning of the North Atlantic Pact*, 20 U.S. DEPT. OF STATE BULLETIN 384, 387 (1949); *see also* THE NORTH ATLANTIC PACT, *supra* note 51, at 343; Max Hagemann, *Der Atlantikpakt und die Satzung der Vereinten Nationen*, 2 ARCHIV DES VÖLKERRECHTS 385, 387–89 (1950).

¹⁵⁶ BECKETT, *supra* note 79, at 29.

¹⁵⁷ 95 CONG REC. 8741, 9806 (1949) (statement of Sen. Watkins). For the vote, *see id.* at 9916.

whatever measures, including the use of military force, are necessary, in the judgment of each nation, to restore and maintain the security of the North Atlantic area. Although in the final analysis the authority to make that judgment lies with each individual government,¹⁵⁸ the parties are bound to base their decisions on the facts, in particular on the gravity of the situation and the measures required to achieve the object of Article 5,¹⁵⁹ and to provide assistance “on a scale equal to the threat.”¹⁶⁰

In discharging these obligations, the parties must take into account any relevant prior decisions and commitments they have entered into, such as those expressed in summit communiqués and declarations of the North Atlantic Council.¹⁶¹ Since the North Atlantic Council proceeds by unanimity, its decisions may, in principle, constitute international agreements in simplified form that are legally binding on the member states.¹⁶² To determine whether or not this is the case, regard must be had to the terms of each relevant decision and the circumstances of its adoption to establish whether they reveal an intent to enter into binding commitments.¹⁶³ Typically, this is not the case: NATO strategic concepts, summit communiqués, and declarations tend not to employ language that is indicative of an intent to create legal obligations.¹⁶⁴ However, this does not mean that such instruments lack legal effects. On the contrary. As the German Federal Constitutional Court has recognized with reference to NATO’s Strategic Concept of 1999,¹⁶⁵ decisions of the North Atlantic Council may constitute subsequent agreements or practice between the parties regarding the interpretation of the NAT or the application of its provisions, within the meaning of Article 31 of the Vienna

¹⁵⁸ Letter from Sir O. Franks (Washington) to Mr. Bevin (Feb. 17, 1949), in Insall & Salmon, *supra* note 32, at 387.

¹⁵⁹ The legal advice offered by Baldwin De Vidts, then NATO Legal Advisor, to the North Atlantic Council in the immediate aftermath of the September 11 attacks points in a similar direction. See Buckley, *supra* note 50.

¹⁶⁰ Memorandum for Secretary of State for External Affairs (Mar. 10, 1949), in DCER, VOL. XV, *supra* note 32, at 571–72.

¹⁶¹ They should be seen as part of a process of adaptation that aligns the interpretation of Article 5 with its changing strategic environment. See generally KENNETH T. KLIMA, INTERPRETATIONS OF ARTICLE 5 OF THE NORTH ATLANTIC TREATY, 1949-2002 (2002).

¹⁶² *Draft Articles on the Law of Treaties with commentaries*, [1966] 2 Y.B. INT’L L. COMM’N. 188–89, U.N. Doc. A/CN.4/SER.A/1966/Add.1; Jean d’Aspremont, *Formalism versus Flexibility in the Law of Treaties*, in RESEARCH HANDBOOK ON THE LAW OF TREATIES 257, 265–66 (2014); see also Fuad S. Hamzeh, *Agreements in Simplified Form - Modern Perspective*, 43 BRIT. Y.B. OF INT’L L. 179 (1968).

¹⁶³ *Aegean Sea Continental Shelf (Greece v. Turk.)*, Judgment, 1978 I.C.J. Rep. 3 ¶¶ 94–107 (Dec. 19); *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.)*, Judgment, 1994 I.C.J. Rep. 112, ¶¶ 21–27 (Feb. 15).

¹⁶⁴ See Tarcisco Gazzini, *NATO’s Rules in the Collective Security System*, 8 J. CONFLICT & SEC. L. 231, 243–45 (2003); REICHARD, *supra* note 66, at 103–104; cf. BVerfG [Federal Constitutional Court] July 12, 1994, 90, OUT-OF-AREA-EINSÄTZE [BVerfGE] 286, ¶ 292 (Ger.) [hereinafter Out-of-area-Einsätze] (holding that NATO’s strategic concept of 1991 did not amount to an implicit amendment of the NAT); BVerfG [Federal Constitutional Court] Nov. 22, 2001, 104 NATO-KONZEPT [BVerfGE] 151, ¶ 132 (Ger.) [hereinafter NATO-Konzept] (holding that NATO’s strategic concept of 1999 does not constitute an international agreement).

¹⁶⁵ *Id.* ¶ 148.

Convention on the Law of Treaties.¹⁶⁶ Although not formally binding, such decisions have to be taken into account in the good faith interpretation and application of the NAT. For example, in the Wales Summit Communiqué of 2014, the heads of state and government agreed that cyber attacks may fall within the scope of Article 5.¹⁶⁷ A nation that subsequently questioned this common understanding, for instance by refusing to treat a cyber attack as capable of engaging its Article 5 commitments, would “justly be considered as violating its faith.”¹⁶⁸

B. Article 42(7) TEU

Before assessing the terms of Article 42(7) TEU, it is necessary to address a preliminary matter. At first sight, the existence of a collective self-defense commitment within the framework of the TEU is difficult to reconcile with the limits of the EU’s competences in the field of defense. Whilst the Union’s responsibilities include the progressive framing of a “common defence policy,”¹⁶⁹ they still do not extend to a “common defence.”¹⁷⁰ The fact that Article 42(7) imposes an obligation on the member states to aid and assist each other in the event of armed aggression even though a common defense falls outside the EU’s competences thus seems like a contradiction. How can the TEU provide for what appears to be a mutual defense guarantee, but at the same time deny the Union’s authority in this field?

This apparent inconsistency has led some experts to query the legal character and content of Article 42(7) TEU. Jean-Claude Piris, for example, has suggested that Article 42(7) is of “the utmost symbolic and political importance,” but does not actually amount to a mutual defense clause.¹⁷¹ Similarly, Panos Koutrakos has argued that it must be for each member state to decide how to assist a victim of armed aggression, given that the EU is not a military alliance and Article 42(7) has not transformed it into one.¹⁷² In his view, any comparison between Article 42(7) on the one hand and Article 5 NAT and Article 5 of the Modified Brussels Treaty on the other hand are misplaced.¹⁷³

This line of reasoning is not compelling. The TEU entrusts the EU institutions with the task of supporting the member states in organizing their territorial defense, for instance in the areas of defense capabilities development,

¹⁶⁶ VCLT, *supra* note 154, art. 31.

¹⁶⁷ Press Release, NATO, Wales Summit Declaration: Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Wales, ¶¶ 72–73 (Sept. 5, 2014).

¹⁶⁸ *The Schooner Exchange v. McFaddon*, 11 US 116, 137 (1812).

¹⁶⁹ TEU, *supra* note 1, art. 24(1).

¹⁷⁰ *Id.* art. 42(2).

¹⁷¹ PIRIS, *supra* note 59, at 275.

¹⁷² Panos Koutrakos, *The Role of Law in Common Security and Defence Policy: Functions, Limitations and Perception*, in *EUROPEAN FOREIGN POLICY: LEGAL AND POLITICAL PERSPECTIVES*, 235, 237–39 (Panos Koutrakos ed., 2011).

¹⁷³ *Id.*; see also PANOS KOUTRAKOS, *THE EU COMMON SECURITY AND DEFENCE POLICY* 69 (2013).

research, acquisition, and armaments.¹⁷⁴ In discharging this responsibility, the Union must respect the “essential State functions” of its member states, including their core function of safeguarding their own territorial integrity.¹⁷⁵ Accordingly, what distinguishes a common defense policy from a common defense is not the respective subject matter of these two sets of activities, given that both deal with territorial defense, but the nature of the Union’s involvement in these matters.¹⁷⁶ While the member states have conferred certain limited powers on the EU to support their national defense efforts, they have not transferred upon it any authority regarding the exercise of the inherent right of individual and collective self-defense.¹⁷⁷

Seen from this perspective, there is no contradiction between the lack of Union competence over common defense and the existence of a mutual defense clause under the TEU, as long as the latter operates on a purely intergovernmental basis. In fact, it is clear from its terms that the member states are the sole bearers of any rights and obligations under Article 42(7) TEU. No decision-making role is foreseen for the institutions,¹⁷⁸ which merely serve as a venue for consultations among the member states.¹⁷⁹ Practice confirms the strictly bilateral character of Article 42(7). When France invoked the clause in the aftermath of the Paris attacks of November 13, 2015, the High Representative of the Union for Foreign Affairs and Security Policy carefully emphasized the bilateral nature of both the French request for help and the assistance provided in response.¹⁸⁰ She also underlined that no formal decision by the Council was required to implement Article 42(7).¹⁸¹ Accordingly, the scope of the duties imposed by Article 42(7) must be assessed on their own terms, rather than on the basis of some *a priori* conceptions about the non-military nature of the EU.

Although Article 42(7) TEU was meant to restate the commitments contained in Article 5 of the Modified Brussels Treaty,¹⁸² the text of the two provisions is not identical. Whereas Article 5 of the Modified Brussels Treaty directed its contracting parties to afford “all the military and other aid and assistance in their power” to any other party that has fallen victim to an armed attack, Article

¹⁷⁴ TEU, *supra* note 1, art. 42(3).

¹⁷⁵ *Id.* art. 4(2).

¹⁷⁶ Matthias G. Fischer & Daniel Thym, *Article 42, in TEU, A COMMENTARY*, *supra* note 68, at 1212–14.

¹⁷⁷ See generally Sebastian Graf von Kielmansegg, *The European Union’s Competence in Defence Policy – Scope and Limits*, 32 EUR. L.REV. 213 (2007).

¹⁷⁸ This has not escaped criticism. See Sven Biscop, *The European Union and Mutual Assistance: More than Defence*, 51 INT’L SPECTATOR 119, 121 (2016).

¹⁷⁹ TEU, *supra* note 1, arts. 25(c) and 32.

¹⁸⁰ Outcome of the Council Meeting: 2426th Council meeting—Foreign Affairs, 6, 14120/15 (Nov. 17, 2015). Commentators suggest that France chose to invoke TEU Article 42(7), rather than TFEU Article 222, precisely to avoid the involvement of the EU’s institutions. See CHRISTOPHE HILLION & STEVEN BLOCKMANS, EUROPE’S SELF-DEFENCE: TOUS POUR UN ET UN POUR TOUS? 2 (2015); see also Tiilikainen, *supra* note 70, at 14–15.

¹⁸¹ Outcome of the Council Meeting, *supra* note 180, at 6.

¹⁸² See Brussels Treaty, *supra* note 72.

42(7) omits the words “military and other” from this formula. The TEU thus no longer specifies in express terms what form the aid and assistance should take. Yet the revised wording does not alter the spectrum of support to be provided, since the member states are still bound to use “all the means” in their power. This plainly includes military as well as non-military measures.¹⁸³ The change of wording is therefore cosmetic and does not alter the scope of the commitment.

What remains unclear, however, is the length to which the member states must go in providing aid and assistance. Does the obligation to commit all the means in their power merely require them to use the *full range* of capabilities at their disposal, including military and non-military means, or does it impose a duty to use all available national resources to their *full extent*? Although both interpretations are tenable, the better view is that the duty of aid and assistance cannot be unlimited. Not only would this be unrealistic, but it would run counter to at least two implicit constraints. First, although not explicitly stated by Article 42(7) TEU, its wording and context suggest that the purpose of the duty of assistance is to support the victim state in neutralizing the act of armed aggression directed against it. The measures to be taken thus depend on the nature and gravity of the act of aggression. Second, no member state providing aid and assistance is required to jeopardize its own territorial defense. In extreme circumstances, each state is entitled to prioritize its own survival.¹⁸⁴ In this context, it is worth recalling Sir Eric Beckett’s view that each signatory remained free to determine the type of assistance to be provided under the original Brussels Treaty.¹⁸⁵

The member states’ duty to provide aid and assistance is also circumscribed by the two safeguard clauses found in the second and third sentence of Article 42(7) TEU. The first of these provides that the duty of mutual aid and assistance does not prejudice the specific character of the security and defense policy of certain member states. This clause was designed to allay fears that the participation of neutral member states in a collective defense guarantee would be incompatible with their non-aligned status. During the negotiation of the Lisbon Treaty, the Austrian, Irish, Finnish and Swedish Governments strongly opposed the idea of entering into a formally binding security guarantee.¹⁸⁶ The safeguard clause preserves the position of these member states by adjusting their obligations under Article 42(7) TEU. As the Protocol on the Concerns of the Irish People on the Treaty of Lisbon states:

It will be for Member States—including Ireland, acting in a spirit of solidarity and without prejudice to its traditional policy of military

¹⁸³ See Mattias G. Fischer & Daniel Thym, *Article 42*, in TEU, A COMMENTARY, *supra* note 68, at 1227; Nováky, *supra* note 77, at 359; Tiilikainen, *supra* note 70, at 17.

¹⁸⁴ Cf. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 96 (July 8) (holding that every state has a fundamental right to survival).

¹⁸⁵ BECKETT, *supra* note 79, at 28.

¹⁸⁶ Letter to the President of the Council of the European Union, IGC 2003 – European Security and Defence Policy (Dec. 5, 2003), CIG 62/03, at 2; *see also Final Report of Working Group VIII – Defence*, *supra* note 72, at 21.

neutrality—to determine the nature of aid or assistance to be provided to a Member State which is the object of a terrorist attack or the victim of armed aggression on its territory.¹⁸⁷

The Protocol confirms that *all* member states are free to determine the nature of the aid or assistance to be provided to another member state. However, only those member states which follow a traditional policy of neutrality may decline to provide military or other non-neutral assistance in cases where the gravity of the situation would otherwise call for a military response. This is so because the safeguard clause as worded in Article 42(7) is limited to “certain Member States.” Given its genesis, this group includes Austria, Ireland, Finland, and Sweden.¹⁸⁸ The other member states remain committed to employing the full range of instruments at their disposal, including armed force, as they deem necessary in the light of the circumstances of each particular case.

The second safeguard clause addresses the relationship between Article 42(7) TEU and the NAT.¹⁸⁹ It provides that “[c]ommitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation.”¹⁹⁰ In short, the clause accords primacy to commitments undertaken within NATO over commitments and cooperation arising under the common defense policy of the EU.¹⁹¹ This reflects the obligation that the member states of NATO have assumed in Article 8 NAT, which bars them from entering into international agreements in conflict with the NAT. The second safeguard clause incorporates this principle into the TEU and thus cements the primacy of NATO.

Whilst the basic principle is clear enough, its application in practice is a different matter. The fact that NATO commitments enjoy priority does not preclude the parallel implementation of commitments and cooperation under the TEU, as long as the latter are consistent with the former. The member states of the EU owe the duty of consistency towards each other, not towards NATO. Whether or not

¹⁸⁷ Protocol on the concerns of the Irish people on the Treaty of Lisbon, art. 3, June 12, 2012, 2013 O.J. (L 60) 131.

¹⁸⁸ See FREDERIK NAERT, INTERNATIONAL LAW ASPECTS OF THE EU’S SECURITY AND DEFENCE POLICY, WITH A PARTICULAR FOCUS ON THE LAW OF ARMED CONFLICT AND HUMAN RIGHTS 213–23 (2010); Mattias G. Fischer & Daniel Thym, *Article 42*, in TEU, A COMMENTARY, *supra* note 68, at 1216. Although other EU member states that are not members of NATO are sometimes said to benefit from this clause too, among these, only Malta pursues a formally declared policy of neutrality. See CONSTITUTION OF MALTA Sept. 21, 1964, art. 1(3).

¹⁸⁹ See TEU, *supra* note 1, art. 42(2), the second part of which provides as follows:

The policy of the Union in accordance with this Section shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States, which see their common defence realised in the North Atlantic Treaty Organisation (NATO), under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework.

¹⁹⁰ TEU, *supra* note 1, art. 42(7).

¹⁹¹ Mattias G. Fischer & Daniel Thym, *Article 42*, in TEU, A COMMENTARY, *supra* note 68, at 1217.

their mutual cooperation within the framework of Article 42(7) TEU is compatible with commitments under NATO is therefore a matter to be determined by them. Accordingly, an EU member state's decision to invoke Article 42(7) is not dependent on the prior approval of NATO.¹⁹² However, it is not clear whether such a decision must be preceded by consultations within the EU.¹⁹³ It would certainly be prudent for the member states to consult each other before invoking and implementing Article 42(7).¹⁹⁴ Support for the idea that they are under a legal duty to do so may be derived from Article 32 TEU, which requires the member states to show mutual solidarity and to consult one another "on any matter of foreign and security policy of general interest in order to determine a common approach." Ensuring that the implementation of Article 42(7) is compatible with the commitments that certain EU member states have undertaken within NATO should be seen as a matter of general interest requiring consultation.

C. Article 222 TFEU

In contrast to the strictly bilateral character of Article 42(7) TEU, the solidarity clause set out in Article 222 TFEU operates on two distinct levels.¹⁹⁵ First, Article 222(1) imposes an obligation on the Union and the member states to "act jointly in a spirit of solidarity." The brunt of this obligation is borne by the EU itself, since Article 222(1) specifically stipulates that the "Union shall mobilize all the instruments at its disposal, including the military resources made available by the Member States." However, since the Union does not enjoy exclusive competence in all policy areas where action may be appropriate,¹⁹⁶ additional steps by the member states may be required, in particular in the field of the Common Security and Defence Policy.¹⁹⁷ This explains why responsibility for the implementation of Article 222(1) is shared between the Union and the member states. In addition, Article 222(2) imposes a separate obligation on the member states to assist another member state, at the request of its political authorities, that is the object of a terrorist attack or the victim of a natural or man-made disaster. This obligation operates on a bilateral level, just like Article 42(7) TEU.

Turning to the scope of these two sets of obligations, Article 222(1)(a) TFEU requires the Union to mobilize "all the instruments at its disposal" to pursue three objectives: prevent the terrorist threat in the territory of the member states; protect democratic institutions and the civilian population from any terrorist attack; and assist a member state in its territory, at the request of its political authorities, in

¹⁹² *Id.*

¹⁹³ Whilst the basic principle is clear enough, its application in practice is a different matter. See Frederik Naert, *European Security and Defence in the EU Constitutional Treaty*, 10 J. CONFLICT & SECURITY L. 187, 194–196 (2005).

¹⁹⁴ In particular, it would make sense for EU member states that are not parties to the NAT to consult with those that are, so as to clarify what commitments under NATO may be engaged.

¹⁹⁵ SARA MYRDAL & MARK RHINARD, *THE EUROPEAN UNION'S SOLIDARITY CLAUSE: EMPTY LETTER OR EFFECTIVE TOOL?* 6–7 (2010).

¹⁹⁶ TFEU, *supra* note 1, arts. 2–6.

¹⁹⁷ Council Decision 2014/415/EU, *supra* note 92, art. 5(4).

the event of a terrorist attack. Although not expressly stated, only those instruments capable of making an effective contribution towards realizing one or more of these objectives need to be mobilized.¹⁹⁸ In this respect, the EU institutions should take into account the nature of the crisis, the needs of the affected member state(s), and the suitability of the instruments available to the Union. In addition to taking action in response to terrorist attacks, Article 222(1)(b) directs the Union to assist a member state in its territory, at the request of its political authorities, in the event of a natural or man-made disaster. Depending on the nature of the crisis, Article 222(1)(a) and (b) may demand the use of a wide range of instruments,¹⁹⁹ including both immediate and long-term measures. They may include civil protection and other emergency responses,²⁰⁰ instruments strengthening the protection of critical infrastructures in energy and transport,²⁰¹ and cooperation in law enforcement.²⁰² Since coordinating these tools is key to an effective response, Decision 2014/415/EU entrusts the Council with the political and strategic direction of the Union's activities.²⁰³

Compared to the Union's responsibilities, the obligations imposed on the member states are less extensive and less detailed.²⁰⁴ Article 222(2) TFEU merely stipulates that the member states shall assist the victim state and shall coordinate between themselves in the Council to this end. Although Article 222(2) does not specify in express terms what aims and objectives this assistance should pursue, the goal surely is to support the affected member state in mitigating the effects of an attack or disaster. As far as the scope of this duty is concerned, Declaration 37 annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon declares that nothing in Article 222 is intended to affect the right of one member state "to choose the most appropriate means to comply with its own solidarity obligation" towards another member state.²⁰⁵ The same point also emerges from the Protocol on the Concerns of the Irish People on the Treaty of Lisbon, at least in so far as terrorist attacks are concerned.²⁰⁶ Unlike the Union, the member states therefore enjoy a broad margin of discretion in selecting the instruments through which they may discharge their own solidarity obligation.²⁰⁷

¹⁹⁸ Cf. *id.*, art. 5(2).

¹⁹⁹ See Steven Blockmans, *L'Union fait la Force: Making the Most of the Solidarity Clause (Article 222 TFEU)*, in *EU MANAGEMENT OF GLOBAL EMERGENCIES* 111, 116 (Inge Govaere & Sara Poli eds., 2014).

²⁰⁰ TFEU, *supra* note 1.

²⁰¹ Council Decision 2008/114/EC of 8 December 2008 on the Identification and Designation of European Critical Infrastructures and the Assessment of the Need to Improve their Protection, 2008 O.J. (L 345) 75.

²⁰² Regulation 2016/794/EU of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, 2016 O.J. (L 135) 53.

²⁰³ Council Decision 2014/415/EU, *supra* note 92, art. 5.

²⁰⁴ Hilpold, *Filing a Buzzword with Life*, *supra* note 113, at 219.

²⁰⁵ Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, OJ [2016] C 202/337.

²⁰⁶ Protocol on the Concerns of the Irish People on the Treaty of Lisbon, *supra* note 187, art. 3.

²⁰⁷ See Hilpold, *Article 222*, in TFEU, A COMMENTARY, *supra* note 109.

The scope of this discretion is not unlimited, however. The assisting member states must choose means that are “appropriate” to discharge their obligations.²⁰⁸ At a minimum, the assistance rendered must address the demands of the situation and do so with a degree of effectiveness. This may require the use of military means.²⁰⁹ It must also be borne in mind that the member states are subject to a general duty to “work together to enhance and develop their mutual political solidarity.”²¹⁰ Since Article 222 is one of the most prominent manifestations of this general principle,²¹¹ the member states must approach their obligations in a spirit of mutual solidarity.

Finally, it should be noted that the member states’ duty to assist under Article 222(2) is not automatic, but is engaged only if the political authorities of the affected member state issue a request to this effect. By contrast, the Union’s obligation to mobilise all the instruments at its disposal under Article 222(1) is engaged automatically upon a member state becoming the object of a terrorist attack or the victim of a natural or man-made disaster.

D. Comparison

The three provisions discussed in the preceding section all impose obligations of aid and assistance, but the content and scope of these obligations varies. Article 5 NAT, Article 42(7) TEU, and Article 222 TFEU require the states concerned to consider the use of both military and non-military means of aid and assistance. At first sight, Article 42(7) appears to place greater demands on the member states of the EU in this respect compared to the obligations that Article 5 imposes on the members of NATO. Whereas Article 42(7) stipulates that EU member states must assist a victim of armed aggression “by all the means in their power,” Article 5 merely directs the parties to take whatever action they deem necessary. However, as we have seen, the Protocol on the Concerns of the Irish People recognizes that the EU member states are free to determine the nature of their aid and assistance under both Article 42(7) and Article 222. All three provisions thus defer, in the first instance, to the discretion of the assisting parties to choose the most appropriate forms of assistance. The German Federal Constitutional Court was therefore correct to hold that the obligation of assistance under Article 42(7) does not exceed the obligations pursuant to Article 5.²¹²

²⁰⁸ Declarations annexed to the Final Act of the Intergovernmental Conference, *supra* note 205.

²⁰⁹ That the member states must consider the use of both civilian and military means is further supported by the fact that the Union is required to use “all the instruments at its disposal” under TFEU Article 222(1).

²¹⁰ TEU, *supra* note 1, art. 24(3). On the evolution of the principle of mutual political solidarity, see Laura C. Ferreira-Pereira & A. J. R. Groom, ‘Mutual Solidarity’ within the EU Common Foreign and Security Policy: What is the Name of the Game?, 47 INT’L. POL. 596 (2010); see also Joris Larik, *Pars Pro Toto: The Member States’ Obligations of Sincere Cooperation, Solidarity and Unity*, in STRUCTURAL PRINCIPLES IN EU EXTERNAL REL. L. 175 (Marise Cremona ed., 2018).

²¹¹ See, e.g., Edoardo Chiti, *Enforcement of and Compliance with Structural Principles*, in STRUCTURAL PRINCIPLES IN EU EXTERNAL RELATIONS LAW 52–53 (Marise Cremona ed., 2018).

²¹² BVerfG [Federal Constitutional Court] June 30, 2009, 123 LISBON DECISION (LISSABON-URTEIL) [BVerfGE] 267, ¶ 386 (Ger.) [hereinafter Lisbon Decision].

Nevertheless, the European mutual assistance clauses are subject to additional limitations and exceptions. In the case of Article 42(7) TEU, the exercise of national discretion in the choice of the means and methods of assistance is subject to the two safeguard clauses set out in that provision. Since EU member states pursuing a traditional policy of neutrality are not bound to undertake steps that are incompatible with their neutral status, these states may decline to provide military support or to undertake other steps that would constitute non-neutral acts.²¹³ In addition, all EU member states must ensure that any assistance they provide in this context is consistent with commitments in NATO. For example, if the Transatlantic and European mutual defense clauses were to be engaged at the same time, whether in relation to the same incident or not, those EU member states that are also members of NATO would be entitled to prioritize their efforts within the framework of the Alliance.

A further limitation arises under Article 222(1) TFEU. Although Article 222(1) specifically directs the Union to mobilize the military resources made available by its member states, Decision 2014/415/EU provides that the arrangements for the implementation of this obligation are without defense implications.²¹⁴ This reflects the fact that a “common defence” does not form part of the EU’s competences at this point in time. As a consequence, the Union may employ military resources under Article 222(1) only for the purposes of civil protection and related activities inside the territory of its member states,²¹⁵ or for crisis management missions outside their national territory.²¹⁶ However, it may not mobilize military resources for the purposes of individual or collective self-defense.²¹⁷ By contrast, no such limitation applies to the member states acting pursuant to Article 222(2) TFEU: assistance provided by the member states under this provision may have defense implications. In fact, where a terrorist attack or a man-made disaster amounts to an armed attack or aggression, Article 222(2) may apply in parallel with Article 5 NAT and Article 42(7) TEU. Any military assistance provided within the framework of Article 222 is not subject to the duty to ensure its compatibility with commitments undertaken within NATO.²¹⁸

Finally, the objectives pursued by the three provisions also differ. Neither Article 42(7) TEU nor Article 222(2) TFEU identify what exact purpose the aid and assistance offered under these two provisions is meant to pursue. Perhaps this was considered too obvious a point to spell out in express terms. Evidently, the objective is to address the threat posed by the act of armed aggression, terrorist attack, or a natural or man-made disaster. If so, this means that the duty to render

²¹³ Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, U.S.T.S. 540.

²¹⁴ Council Decision 2014/415/EU, *supra* note 92, art. 2(2).

²¹⁵ *Id.*, *supra* note 92, arts. 5(2)(b) and 5(3)(b).

²¹⁶ *Id.*, *supra* note 92, preamble ¶ 11, 13 and art. 5(4).

²¹⁷ See Hilpold, *Filing a Buzzword with Life*, *supra* note 113, at 217.

²¹⁸ This is so because the safeguard clause in TEU Article 42(7) applies only to that provision, while the more general safeguard clause in TEU Article 42(2) applies only to the Common Security and Defence Policy, of which TFEU Article 222 is not a part.

assistance under Article 42(7) and Article 222(2) expires once this objective has been achieved. By contrast, Article 5 NAT requires the parties to take action in order to restore and maintain the security of the North Atlantic area. This obligation may still be engaged in situations where the parties have successfully beaten back an aggressor, but where the threat to the security of the North Atlantic area has not been fully eliminated. In such cases, Article 5 may demand continued military and non-military measures, for instance further steps designed to deter the defeated adversary.

IV. Hybrid Threats

As originally conceived, the term “hybrid warfare” was meant to express the idea that distinct modes of warfighting, acts of terrorism, and criminality are converging to produce a hybrid form of war.²¹⁹ According to proponents of the concept, state and non-state adversaries are increasingly deploying an integrated mix of conventional capabilities and irregular tactics in the same battlespace in order to achieve synergistic effects, thereby fusing the “lethality of state conflict with the fanatical and protracted fervor of irregular warfare.”²²⁰ The initial impact of these ideas was modest. They inspired further work on the implications of hybridity,²²¹ including within NATO,²²² but left only a minor impression on military doctrine.²²³

Following Russia’s annexation of Crimea and its intervention in eastern Ukraine, the concept rapidly gained wider traction. To many observers, Russia’s potent cocktail of military force, political subversion, and plausible deniability looked like a textbook example of hybrid warfare.²²⁴ NATO quickly adopted the term. In response to the events in Ukraine, its member states resolved to “ensure that NATO is able to effectively address the specific challenges posed by hybrid warfare threats, where a wide range of overt and covert military, paramilitary, and civilian measures are employed in a highly integrated design.”²²⁵ In December

²¹⁹ James N. Mattis & Frank G. Hoffman, *Future Warfare: The Rise of Hybrid Wars*, 131 U.S. NAVAL INST. PROC. 18 (2005); see also Frank G. Hoffman, *Hybrid Warfare and Challenges*, 52 JOINT FORCE Q. 34, 35 (2009).

²²⁰ FRANK G. HOFFMAN, CONFLICT IN THE 21ST CENTURY: THE RISE OF HYBRID WARFARE 28–30 (2007).

²²¹ See, e.g., TIMOTHY MCCULLOH & RICHARD JOHNSON, HYBRID WARFARE (2013).

²²² Chief of Staff of NATO, *Bi-SC Input to a New NATO Capstone Concept for the Military Contribution to Countering Hybrid Threats*, 1500/CPPCAM/FCR/10-270038 (Aug. 25, 2010) [hereinafter *Bi-SC Input*].

²²³ See DEP’T OF THE ARMY, TRADOC PAM 525-3-0: THE U.S. ARMY CAPSTONE CONCEPT 15 & 47 (2009) (noting that the US Army must be prepared to defeat “both hostile states and non-state enemies that combine a broad range of weapons capabilities and regular, irregular, and terrorist tactics”).

²²⁴ See, e.g., John R. Davis Jr., *Continued Evolution of Hybrid Threats: The Russian Hybrid Threat Construct and the Need for Innovation*, 28 THE THREE SWORDS MAG. 19 (2015); Alexander Lanoszka, *Russian Hybrid Warfare and Extended Deterrence in Eastern Europe*, 92 INT’L AFF. 175 (2016); ANDRÁS RÁCZ, RUSSIA’S HYBRID WAR IN UKRAINE: BREAKING THE ENEMY’S ABILITY TO RESIST (2015).

²²⁵ Wales Summit Declaration, *supra* note 167, ¶ 13.

2015, the North Atlantic Council adopted a Hybrid Warfare Strategy focusing on preparedness, deterrence, and defense.²²⁶ The concept also attracted the attention of the EU. In a paper prepared in May 2015, the European External Action Service recommended that the EU should develop a Union-wide strategy to counter hybrid threats that would be complementary to NATO's efforts.²²⁷ Building on this, in April 2016, the High Representative and the European Commission presented a Joint Framework on Countering Hybrid Threats containing a set of proposals for preventing, responding to, and recovering from hybrid threats.²²⁸

As it grew in popularity, the concept of hybrid warfare has taken on a broader meaning.²²⁹ Today, the term is employed mostly to refer to the synchronized use of multiple levers of power by state and non-state actors to exploit another nation's or organization's vulnerabilities across the full spectrum of its societal functions.²³⁰ By using a combination of coercive and non-coercive measures to target the political, military, economic, social, informational, and infrastructure vulnerabilities of a state or international organization, hybrid adversaries are able to avoid open military confrontation and achieve incremental strategic gains.²³¹ The notion of hybrid warfare has thus evolved from a relatively narrow idea designed to describe the changing character of warfare into a more amorphous notion about the nature and modalities of contemporary strategic competition. This development has not gone without criticism. Many commentators believe that the looser, now dominant, understanding of hybrid warfare offers few analytical insights.²³²

Against this background, the purpose of this section is to identify the legal challenges typically associated with hybrid threats, assess their implications for the Transatlantic and European mutual assistance clauses, and determine how the strategies of legal subversion and erosion that may be deployed as part of a hybrid campaign should be countered.

²²⁶ Jens Stoltenberg, NATO Secretary General, Press Conference following the meeting of the North Atlantic Council in Foreign Ministers session (Dec. 1, 2015), http://www.nato.int/cps/en/natohq/opinions_125362.htm [<https://perma.cc/SJ8V-XJV7>].

²²⁷ *Food-for-thought paper "Countering Hybrid Threats,"* ¶ 31, EEAS (2015) 731 (May 13, 2015) [hereinafter *EEAS Working Paper*].

²²⁸ *Joint Communication to the European Parliament and the Council, Joint Framework on countering hybrid threats—a European Union response*, JOIN (2016) 18 final (Apr. 6, 2016).

²²⁹ See, e.g., FRIDMAN, *supra* note 3.

²³⁰ PATRICK CULLEN & ERIK REICHBORN-KJENNERUD, MCDC COUNTERING HYBRID WARFARE PROJECT: COUNTERING HYBRID WAREFARE 8 (2019).

²³¹ THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 27–28 (2017).

²³² See, e.g., Samuel Charap, *The Ghost of Hybrid War*, 57 SURVIVAL 51, 52 (2015); Andrew Monaghan, *The 'War' in Russia's 'Hybrid Warfare'*, 45 PARAMETERS 65, 72 (2016); Bettina Renz, *Russia and 'Hybrid Warfare'*, 22 CONTEMP. POL. 283, 293–97 (2016); Robert Johnson, *Hybrid War and Its Countermeasures: A Critique of the Literature*, 29 SMALL WARS & INSURGENCIES 141, 143 (2018).

A. *The legal dimension of hybrid warfare*

Seen from a legal perspective, the concept of hybrid warfare draws attention to two sets of difficulties. The original understanding of the term shines a spotlight on the legal challenges posed by complex military operations that involve diverse lines of effort, such as warfighting, security assistance, and post-conflict reconstruction. Such military deployments are governed by multiple legal regimes and raise difficult questions about the interaction between diverse branches of the law, in particular the law of armed conflict and international human rights law.²³³ However, few of these difficulties are new. They already featured prominently during the counter-insurgency operations in Iraq and Afghanistan.²³⁴ The lesson to draw from a hybrid warfare perspective is not that these are novel developments, but that the legal difficulties surrounding counter-insurgency operations and other complex military deployments are likely to become a permanent fixture of future conflict more generally, including peer-to-peer confrontation.

By contrast, hybrid warfare understood more broadly as multimodal strategic competition brings into focus the legal thresholds that separate lawful, though unfriendly, measures of international intercourse from unlawful acts of intervention, use of force, and armed attack. Many commentators thus consider the application of the rules governing the use of force, including the exercise of the right of individual and collective self-defense, to be among the most pressing legal questions raised by hybrid threats.²³⁵ Indeed, it is these questions that have preoccupied NATO and the EU, rather than the legal challenges associated with hybrid forms of war in the narrow sense. Two overarching themes emerge from the relevant policy documents and statements adopted by the two organizations.

First, hybrid adversaries are said to deploy law and legal arguments in an effort to gain an operational or strategic advantage. They exploit the lack of legal interoperability and consensus among Western nations by capitalizing on “different interpretations and national restrictions in areas such as (but not limited to) international law and lethal engagement.”²³⁶ They circumvent legal boundaries and thresholds to avoid triggering the applicability of mutual assistance commitments:

Specifically, actors will operate below NATO’s Article 5 threshold of an attack against NATO member states. By operating below

²³³ See generally KENNETH WATKIN, *FIGHTING AT THE LEGAL BOUNDARIES: CONTROLLING THE USE OF FORCE IN CONTEMPORARY CONFLICT* (2016).

²³⁴ See generally WILLIAM BANKS, *COUNTERINSURGENCY LAW: NEW DIRECTIONS IN ASYMMETRIC WARFARE* (2013); GANESH SITARAMAN, *THE COUNTERINSURGENT’S CONSTITUTION: LAW IN THE AGE OF SMALL WARS* (2013). It has been suggested that the wars in Iraq and Afghanistan should be understood as hybrid wars. See Josef Schroefl & Stuart J. Kaufman, *Hybrid Actors, Tactical Variety: Rethinking Asymmetric and Hybrid War*, 37 *STUD. IN CONFLICT & TERRORISM* 862, 866–69 (2014).

²³⁵ See, e.g., Douglas Cantwell, *Hybrid Warfare: Aggression and Coercion in the Gray Zone*, 21 *AMER. SOC. INT’L L. INSIGHTS* (Nov. 29, 2017), <https://www.asil.org/insights/volume/21/issue/14/hybrid-warfare-aggression-and-coercion-gray-zone> [<https://perma.cc/7J3Y-GAQM>].

²³⁶ *Bi-SC Input*, *supra* note 222, at 3.

NATO's threshold of response, an adversary can potentially enable continuous, incremental progress without the risk of large setbacks due to significant military action. They can also potentially undermine the legitimacy of a NATO response.²³⁷

Hybrid adversaries also generate and exploit ambiguity:

A critically important aspect of hybrid warfare is to generate ambiguity both in the affected population under attack and in the larger international community. The aim is to mask what is actually happening on the ground in order to obscure the differentiation between war and peace. This ambiguity, the lack of full attribution, can paralyse the ability of an opponent to react effectively and mobilize defences as it becomes unclear who is behind an attack. Even more, ambiguity can divide the international community, limiting the speed and scope of a response to the aggression.²³⁸

Second, it is widely believed that the dividing line between war and peace is fading. This development is sometimes seen as a by-product of the hybridization of warfare.²³⁹ For example, Gavin Williamson, the British Secretary of Defence, has suggested that the difference between war and peace is diminishing as a result of “states adopting the tactics of terrorists and terrorists increasingly armed with sophisticated weapons.”²⁴⁰ Jens Stoltenberg, the Secretary General of NATO, has argued that with the expansion of conflict into the cyber domain and the prevalence of high-intensity non-international armed conflicts, the line between war and peace has become more blurred.²⁴¹ Occasionally, this development is perceived as a more deliberate process. In a speech delivered at the European Parliament in October 2015, General Petr Pavel, then Chairman of the NATO Military Committee, blamed Russia for clouding the distinction between the traditional concepts of war and peace.²⁴² Similarly, in their Brussels summit communiqué of July 2018, NATO leaders took note of the increasing challenges posed by states and non-state actors

²³⁷ NATO HEADQUARTERS, SUPREME ALLIED COMMANDER TRANSFORMATION, ASSESSING EMERGING SECURITY CHALLENGES IN THE GLOBALISED ENVIRONMENT: THE COUNTERING HYBRID THREATS (CHT) EXPERIMENT, FINAL EXPERIMENT REPORT (FER) 33 (2011).

²³⁸ *EEAS Working Paper*, *supra* note 227, ¶ 7.

²³⁹ See Hans-Georg Ehrhart, *Postmodern Warfare and the Blurred Boundaries between War and Peace*, 33 DEF. & SEC. ANALYSIS 263, 269–70 (2017).

²⁴⁰ Gavin Williamson, *Defence Secretary at Atlantic Council*, GOV.UK (Aug. 8, 2018), <https://www.gov.uk/government/speeches/defence-secretary-at-atlantic-council> [<https://perma.cc/24SL-LDJL>].

²⁴¹ See, e.g., Jens Stoltenberg, Sec'y Gen., NATO, *Adapting NATO in an Unpredictable World* (Dec. 19, 2017), https://www.nato.int/cps/en/natohq/opinions_150337.htm [<https://perma.cc/RF4D-MR8A>]; Panel Discussion, Jens Stoltenberg, NATO Secretary General, & Aleksandar Vucić, President of the Republic of Serbia, at the Belgrade Security Forum: Leadership for a Secure Region (Oct. 8, 2018), https://www.nato.int/cps/en/natohq/opinions_159035.htm [<https://perma.cc/6S5V-KKHB>].

²⁴² Petr Pavel, Chairman of NATO Military Committee, speech at the European Parliament: Current Security Challenges and the Role of NATO and the European Union (Oct. 20, 2015), https://www.nato.int/cps/en/natohq/opinions_124128.htm [<https://perma.cc/9NHF-EEA6>].

“who use hybrid activities that aim to create ambiguity and blur the lines between peace, crisis, and conflict.”²⁴³

Taken together, these statements reveal a deep-seated concern that future adversaries will compete below the threshold of war by employing a blend of tactics and instruments deliberately designed to avoid open armed confrontation. By operating in this manner, they may succeed in circumventing the Transatlantic and European mutual assistance clauses and achieve their strategic objectives without triggering an effective response. To determine whether these concerns are justified, we must assess to what extent the three mutual assistance clauses are vulnerable to strategies of subversion.

B. Legal vulnerabilities

Classic mutual defense arrangements are triggered when an adversary crosses a red line. In the case of Article 5 NAT and Article 42(7) TEU, the duty to provide assistance is engaged by an armed attack or an act of armed aggression. Since the threshold for an armed attack is higher than the threshold for the use of force,²⁴⁴ a hybrid adversary may exploit the gap that lies between these legal fault lines by conducting its operations at a level of intensity below that of an armed attack.²⁴⁵ This way, it may reap the benefit of using force, especially in combination with other non-forcible measures, without triggering the duty of mutual assistance under Article 5 and Article 42(7).

China’s activities in the South China Sea illustrate this tactic. In recent years, China has asserted its maritime interests by advancing a series of legal claims and taking a variety of practical measures, ranging from island-building, base-construction, and an increased naval presence, to extend its control over the South China Seas.²⁴⁶ China asserts and enforces its maritime claims by deploying a mixture of civilian fishing crafts, maritime law enforcement vessels, and warships. Frontline operations such as blockades, harassment, and monitoring are conducted mainly by civilian and coast guard vessels,²⁴⁷ while Chinese navy vessels remain

²⁴³ Brussels Summit Declaration, Issued by the Heads of State and Government Participating in the Meeting of the North Atlantic Council in Brussels, ¶¶ 11–12 (July 11, 2018), https://www.nato.int/cps/ic/natohq/official_texts_156624.htm [<https://perma.cc/V7UE-NGT4>].

²⁴⁴ Nicaragua, *supra* note 37, ¶ 191–95.

²⁴⁵ For a masterful description of this art of salami-slicing, see SCHELLING, *supra* note 16, at 66–69. For a typology of deterrence failure, see ALEXANDER L. GEORGE & RICHARD SMOKE, *DETERRENCE IN AMERICAN FOREIGN POLICY: THEORY AND PRACTICE* 547–62 (1974).

²⁴⁶ See generally RONALD O’ROURKE, CONG. RES. SERV., R42784, *CHINA’S ACTIONS IN SOUTH AND EAST CHINA SEAS: IMPLICATIONS FOR U.S. INTERESTS-BACKGROUND AND ISSUES FOR CONGRESS* (2019).

²⁴⁷ On maritime militia, see Conor M. Kennedy & Andrew S. Erickson, *China Maritime Report No. 1: China’s Third Sea Force, The People’s Armed Forces Maritime Militia: Tethered to the PLA*, U.S. NAVAL WAR C. (2017), http://www.andrewerickson.com/wp-content/uploads/2017/03/Naval-War-College_CMSI_China-Maritime-Report_No-1_People%E2%80%99s-Armed-Forces-Maritime-Militia-Tethered-to-the-PLA_Kennedy-Erickson_201703.pdf [<https://perma.cc/KX9W-JHX2>].

in the background to form a second line of capabilities.²⁴⁸ Chinese civilian, paramilitary, and military assets thus operate in an integrated and mutually reinforcing manner: frontline vessels are able to conduct aggressive operations because the presence of second-line forces discourages other nations from responding more robustly and thereby running the risk of escalation. Meanwhile, land-reclamation and base-construction activities enable China to maintain a continuous naval presence in the area and to increase its ability to project power.²⁴⁹ By deploying a mutually reinforcing blend of capabilities, China is able to exercise low-intensity coercion from a position of escalation dominance,²⁵⁰ which in turn enables it to achieve its strategic goals whilst avoiding open military confrontation.²⁵¹

However, there are limits to this tactic of operating below the threshold of open conflict. Hostile actions that do not exceed the severity of “mere frontier incidents,”²⁵² such as confrontations and other incidents at sea,²⁵³ will produce only limited effects. They may demonstrate a hybrid actor’s resolve, but they are unlikely to achieve lasting results, especially if they remain isolated acts. For example, in July 2008, four Russian military aircraft violated Georgia’s airspace.²⁵⁴ Whilst this show of strength may have succeeded in deterring the Georgian Government, at least temporarily, from asserting its control over the break-away republic of South Ossetia,²⁵⁵ Russia was unable to avoid recourse to armed force on a far greater scale during the ensuing Russo-Georgian War in order to tilt the balance decisively in favor of the Abkhaz and South Ossetian separatists.²⁵⁶ While the gravity threshold of an armed attack affords hybrid adversaries with some opportunities to utilize their armed forces and other national assets without triggering the applicability of Article 5 and Article 42(7), in particular in the preparatory phases of a larger conflict, more often than not that the military benefits

²⁴⁸ Ryan D. Martinson, *Echelon Defense: The Role of Sea Power in Chinese Maritime Dispute Strategy*, 15 U.S. NAVAL WAR C. 35–49 (2018).

²⁴⁹ O’ROURKE, *supra* note 246, at 15; BEN DOLVEN ET AL., CONG. RES. SERV., R44072, CHINESE LAND RECLAMATION IN THE SOUTH CHINA SEA: IMPLICATIONS AND POLICY OPTIONS (2015)

²⁵⁰ See FORREST E. MORGAN ET AL., RAND, PROJECT AIR FORCE, DANGEROUS THRESHOLDS: MANAGING ESCALATION IN THE 21ST CENTURY 15 (2008).

²⁵¹ OFF. OF THE SEC. OF DEF., ANNUAL REPORT TO CONGRESS: MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE’S REPUBLIC OF CHINA 2018, 16 (2018).

²⁵² Nicaragua, *supra* note 37, ¶ 195.

²⁵³ Cf. Wolff Heintschel von Heinegg, *The Difficulties of Conflict Classification at Sea: Distinguishing Incidents at Sea from Hostilities*, 98 INT’L REV. RED CROSS 449 (2017) (discussing the circumstances in which aggressive incidents at sea amount to the use of force for the purposes of triggering the applicability of the law of armed conflict).

²⁵⁴ MAX PLANCK INST. FOR COMP. PUB. L. & INT’L. L., INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON THE CONFLICT IN GEORGIA, VOL. II, 205–06 (2009) [hereinafter CONFLICT IN GEORGIA].

²⁵⁵ This was the stated objective of the Russian overflights. Press Release, Russian MFA Info. and Press Dep’t, Commentary Concerning the Situation in South Ossetia (July 10, 2008); see also Press Release, Russian MFA Info. and Press Dep’t, Commentary Concerning Possible Discussion of Situation in South Ossetia at UN Security Council (July 14, 2008).

²⁵⁶ CONFLICT IN GEORGIA, *supra* note 254, at 274.

are likely to be moderate.

Whereas the direct use of force by an adversary below the threshold of an armed attack may not achieve lasting effects, the indirect use of force may offer more lucrative rewards. The International Court of Justice has rejected the idea that the supply of weapons or logistical support to rebels qualifies as an armed attack.²⁵⁷ Taken at face value, the Court's categorical ruling implies that not even the provision of extensive and mission critical military assistance to separatists would trigger Article 5 NAT and Article 42(7) TEU, as long as the hybrid state adversary avoided exercising effective control over the groups concerned. A state may train and equip rebel forces, airlift them into battle, share critical intelligence, supply strategic weapons, and coordinate its own operations with their movements without any of these activities, either alone or in combination, surpassing the threshold of an armed attack.²⁵⁸

Supporting proxy forces and acting through intermediaries also promises other benefits to a hybrid adversary.²⁵⁹ Indirect forms of aggression hamper efforts to attribute hostile activities to a state. While it is now broadly recognized that the right of self-defense extends to armed attacks emanating from non-state actors,²⁶⁰ this point is not universally accepted. In addition, the use of force against non-state groups present in the territory of third states runs into considerable legal difficulties, above all the controversial "unable or unwilling" standard.²⁶¹ Invoking Article 5 NAT and Article 42(7) TEU against non-state actors located abroad is therefore bound to provoke legal and political objections in situations where clear and compelling evidence that they are operating under the control of another state is lacking.²⁶² Indeed, should proxy forces be located in the territory of the state targeted by a hybrid campaign without sufficient evidence linking them to a third state, Article 5 and Article 42(7) may not be available at all, due to the lack of a cross-border dimension.²⁶³ The involvement of proxy forces also presents difficulties for conflict classification,²⁶⁴ exposing the targeted state to potential

²⁵⁷ Nicaragua, *supra* note 37, ¶ 195.

²⁵⁸ In the case of DRC v. Uganda, the Court held that even if Uganda's allegations of substantial Congolese and Sudanese support for anti-Ugandan rebels, together with their direct and indirect involvement in attacks carried out by those rebels, were proven, they still were not of such a nature as to entitle Uganda to use force in self-defense. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, ¶¶ 118–147 (Dec. 19).

²⁵⁹ See Van Jackson, *Tactics of Strategic Competition: Gray Zones, Redlines, and Conflicts before War*, 70 NAVAL WAR C. REV. 39, 48–50 (2017).

²⁶⁰ See *supra* Section 0.

²⁶¹ Monica Hakimi, *Defensive Force against Non-State Actors: The State of Play*, 91 INT'L L. STUD. 1, 12–14 (2015).

²⁶² The point is illustrated by the controversy surrounding the exercise of the right of self-defense in response to the September 11 attacks. See generally Corten & Dubuisson, *supra* note 39; Myjer & White, *supra* note 43; MYRA WILLIAMSON, *TERRORISM, WAR AND INTERNATIONAL LAW: THE LEGALITY OF THE USE OF FORCE AGAINST AFGHANISTAN IN 2001* (2009).

²⁶³ See *supra* Section 0.

²⁶⁴ See, e.g., Françoise Hampson, *Afghanistan 2001–2010*, in *INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS* 242, 252–58 (Elizabeth Wilmshurst ed., 2012).

challenges over the extent and nature of its legal authority to conduct offensive operations under the law of non-international armed conflict.²⁶⁵ Overall, using indirect force below the threshold of an armed attack presents hybrid adversaries with ample opportunities to exploit legal thresholds, gaps, and gray areas and may even produce more valuable strategic effects than using force directly.

The application of Article 5 NAT and Article 42(7) TEU is subject not only to a legal threshold, but also a political one.²⁶⁶ In principle, the two clauses are engaged automatically once an armed attack or an act of armed aggression takes place. In practice, however, their application depends on a positive assessment by the parties that such an attack or act has in fact occurred.²⁶⁷ In addition, the use of force in the exercise of the right of collective self-defense is not lawful unless the state that regards itself the victim of an armed attack has issued a request for assistance.²⁶⁸ Practice over the last seventy years demonstrates that Article 5 will not be invoked lightly. Activating the mutual defense commitment has escalatory potential, particularly in response to threats posed by peer competitors.²⁶⁹ As a command paper presented by the British Government to Parliament put it, “[i]n order to obtain the assistance of the other parties, the party attacked must be able to convince them that the attack is of such a nature that its independence and integrity are threatened.”²⁷⁰ The same point also applies to Article 42(7). If circumstances permit, it is therefore likely that a hybrid adversary will attempt to employ force at a level or in a manner that does not unambiguously amount to an armed attack, so as to deter the targeted state from invoking Article 5 or Article 42(7), to prevent a consensus from forming within NATO and the EU as to whether the threshold of an armed attack has been crossed, and to minimize the level of aid and assistance offered by other nations should Article 5 or Article 42(7) be invoked after all.

Although perhaps not entirely immune to such manipulation, Article 222 TFEU is less exposed to tactics of subversion than either Article 5 NAT or Article 42(7) TEU. This is so because the conditions that trigger its applicability—the

²⁶⁵ YORAM DINSTEIN, *NON-INTERNATIONAL ARMED CONFLICTS IN INTERNATIONAL LAW* 58–63 (2014); SANDESH SIVAKUMARAN, *THE LAW OF NON-INTERNATIONAL ARMED CONFLICT* 359–62 (2012).

²⁶⁶ *Cf.* GEORGE & SMOKE, *supra* note 245, at 553–56 (suggesting that a nation’s legal commitments alone “are no sure guide to its actions should deterrence be challenged”).

²⁶⁷ *See* Buckley, *supra* note 50.

²⁶⁸ Nicaragua, *supra* note 37, ¶ 199. However, as far as NAT Article 5 is concerned, it would not be unreasonable to argue that by agreeing that an armed attack against one party shall be considered an armed attack against all, the parties have issued such a request in advance. Yet driven to its logical conclusion, this would imply that one party is entitled to render assistance to any other party it believes to have suffered an armed attack even against the wishes of the alleged victim. This is not only difficult to reconcile with the ‘collective’ character of collective self-defense, but also with NAT Article 11. *See* KNUT IPSEN, *RECHTSGRUNDLAGEN UND INSTITUTIONALISIERUNG DER ATLANTISCH-WESTEUPÄISCHEN VERTEIDIGUNG* 54–60 (1967).

²⁶⁹ *Cf.* F.E. MORGAN ET. AL., *RAND, DANGEROUS THRESHOLDS: MANAGING ESCALATION IN THE 21ST CENTURY* 19–28 (2008) (discussing examples of deliberate, inadvertent, and accidental escalation during the Cold War).

²⁷⁰ FOREIGN OFFICE, *EVENTS LEADING UP TO THE SIGNATURE OF THE NORTH ATLANTIC TREATY*, 1949, Cmd. 7692, at 5 (1949) (UK).

existence or threat of terrorist attack or natural or man-made disaster—are less demanding, leaving EU member states with greater discretion and hybrid adversaries with fewer gaps to exploit. As we saw earlier, Council Decision 2014/415/EU defines “terrorist attacks” for the purposes of Article 222 to mean “terrorist offenses” as defined in Directive 2017/541 on combating terrorism. The list of terrorist offenses set out in Directive 2017/541 is comprehensive, covering both the actual commission of a wide range of acts and the threat to commit them.²⁷¹ To qualify as terrorist offenses, and thus as terrorist attacks for the purposes of Article 222, these acts must be committed intentionally and in pursuit of one of the terrorist aims identified in Directive 2017/541.²⁷² These two requirements do not, however, provide hybrid adversaries with much room to exploit. While the terrorist intent and aim must be established with reference to objective criteria,²⁷³ Directive 2017/541 does not demand that they be imputed to a state. Moreover, while the effects pursued by two of the terrorist aims must be “serious,”²⁷⁴ the Directive nowhere defines what level of severity is required. This leaves the member states free to make that judgment on a case-by-case basis. As far as man-made disasters are concerned, we saw that this term covers “any situation which has or may have a severe impact on people, the environment or property, including cultural heritage.”²⁷⁵ Save for the requirement of severity, it is difficult to envisage a more elastic trigger for the application of Article 222.

Accordingly, the language of Article 222 TFEU leaves the member states of the EU with considerable latitude to invoke the duty of mutual aid and assistance.

²⁷¹ Under Article 3(1) of Directive (EU) 2017/541, *supra* note 98, terrorist offenses are defined as:

- (a) attacks upon a person’s life which may cause death;
- (b) attacks upon the physical integrity of a person;
- (c) kidnapping or hostage-taking;
- (d) causing extensive destruction to a government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;
- (e) seizure of aircraft, ships or other means of public or goods transport;
- (f) manufacture, possession, acquisition, transport, supply or use of explosives or weapons, including chemical, biological, radiological or nuclear weapons, as well as research into, and development of, chemical, biological, radiological or nuclear weapons;
- (g) release of dangerous substances, or causing fires, floods or explosions, the effect of which is to endanger human life;
- (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life;
- (i) illegal system interference, as referred to in Article 4 of Directive 2013/40/EU of the European Parliament and of the Council (19) in cases where Article 9(3) or point (b) or (c) of Article 9(4) of that Directive applies, and illegal data interference, as referred to in Article 5 of that Directive in cases where point (c) of Article 9(4) of that Directive applies;
- (j) threatening to commit any of the acts listed in points (a) to (i).

²⁷² *Id.*, *supra* note 98, art. 3(2).

²⁷³ *Id.*, *supra* note 98, preamble ¶ 8.

²⁷⁴ “Seriously intimidating a population” and “seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.” *Id.*, *supra* note 98, arts. 3(2)(a) and 3(2)(c).

²⁷⁵ Council Decision 2014/415/EU, *supra* note 92, art. 3(a).

Since the concepts of “terrorist attack” and “man-made disaster” are not borrowed from general international law, unlike the term “armed attack” and “armed aggression” found in Article 5 NAT and Article 42(7) TEU, the member states enjoy greater freedom to interpret them as they see fit. This significantly reduces the likelihood that a hybrid adversary may be able to deliberately circumvent the trigger mechanisms of Article 222. The European Parliament too has expressed itself in favor of a flexible approach in defining the type of attacks and disasters covered by this clause, so as to ensure “that no significant threats, such as attacks in cyberspace, pandemics, or energy shortages, are overlooked.”²⁷⁶ The European Parliament has also taken the view that whilst Article 222 should be reserved for situations that overwhelm the response capacities of the affected member state or require a multisector response, “once a Member State has decided to invoke the clause, it should not be a matter for debate for the others to offer assistance.”²⁷⁷ On this view, it is for the affected member state to decide whether or not the severity threshold is met.

Strategic Implications

The vulnerability of Article 5 NAT and Article 42(7) TEU to subversive tactics has two consequences. First, should a hybrid adversary succeed in exploiting their shortcomings, the utility of these two provisions as a framework for mounting an effective military response to counter hybrid threats could be severely compromised, either because a hybrid adversary might render them formally unavailable by operating below their threshold of applicability or because it might foil the emergence of a political consensus in favor of invoking them where they are in fact applicable as a matter of law. Second, the very prospect of successfully circumventing Article 5 and Article 42(7) reduces their deterrent effect.

It is important to appreciate that the bar for success in circumventing Article 5 NAT and Article 42(7) TEU is not necessarily high. The primary goal of a hybrid adversary is not to convince an expert audience that its activities do not amount to an armed attack or an act of armed aggression. Rather, its goal is to prevent the targeted state and its allies from making a compelling case that invoking Article 5 or Article 42(7) would be a lawful, legitimate, and prudent response to the threats they are facing. A plausible narrative that casts doubt on these points among domestic and international audiences might suffice to achieve that objective.²⁷⁸ States craft legal storylines to support their national security objectives on a regular basis.²⁷⁹ Although the idea that such verbal strategies are as important as military

²⁷⁶ EUR. PARL. DOC. T7-0456 (2012), *supra* note 114, ¶ 20.

²⁷⁷ *Id.*, *supra* note 114, ¶ 22.

²⁷⁸ Cf. Rick Fawn & Robert Nalbandov, *The Difficulties of Knowing the Start of War in the Information Age: Russia, Georgia and the War over South Ossetia, August 2008*, 21 EUR. SEC. 57 (2012) (explaining how adversaries deploy competing narratives not to establish objective truth, but to justify their actions).

²⁷⁹ Compare Sergey Lavrov, Foreign Minister of Russia, Remarks at the 73rd Session of the UN General Assembly, New York, September 28, 2018 (Sept. 28, 2018), http://www.mid.ru/en/press_service/minister_speeches/

strategies may push the point too far,²⁸⁰ the significance of legal narratives and counter-narratives for opening up certain courses of action and for foreclosing others must not be underestimated. If anything, the progressive legalization of the conduct of foreign affairs and the vastly increased public interest in the legality of military action,²⁸¹ amplified by social media,²⁸² has boosted the impact of legal justifications. Assessing the potential vulnerabilities of the Transatlantic and European collective security arrangements from a narrow black letter perspective therefore risks misjudging their susceptibility to hostile strategic communication.

Nevertheless, the threat of subversion should not be overrated, either. In particular, the widespread unease over the blurring of the line between war and peace must be put into perspective. Hybrid warfare in its original, narrow sense describes a style of operational art: the integrated use of conventional and unconventional methods of warfighting in the same battlespace. Armed conflict, whether actual or impending, is integral to the concept. By contrast, hybrid warfare in its broader sense describes the use of the full range of instruments by hostile actors in pursuit of their strategic goals. Here, hybrid warfare no longer refers to a method of waging war, but to the combination of diverse levers of influence for the purposes of geopolitical competition. Hard power and the threat of military confrontation remain essential components of the concept, but actual or imminent hostilities do not. Describing non-forcible measures carried out by hostile powers as hybrid *warfare* may be justified in circumstances where these activities constitute shaping operations in anticipation of armed conflict or where they form part of ongoing hostilities.²⁸³ However, in the absence of any realistic connection with actual or impending war, labeling such measures as acts of *warfare*, whether hybrid or not, is a misnomer.²⁸⁴ It may convey the hostile nature of geopolitical confrontation,²⁸⁵ but it is still hyperbole. The dividing line between war and peace may look blurred when it is viewed from the perspective of a wide understanding of hybrid warfare, but this is so largely because the very use of the concept in such a loose manner creates a link between non-forcible acts falling below the threshold of war and the mere prospect of war.²⁸⁶ Russian theorists of contemporary conflict

/asset_publisher/7OvQR5KJWVmR/content/id/3359296 [https://perma.cc/8ZEF-2A8A]; *with Reckless Campaign of Cyber Attacks by Russian Military Intelligence Service Exposed*, NAT'L. CYBER SEC. CTR. (Oct. 3, 2018), <https://www.ncsc.gov.uk/news/reckless-campaign-cyber-attacks-russian-military-intelligence-service-exposed> [https://perma.cc/SD67-7XE9] (attributing cyber attacks around the world to Russia's military intelligence service, the GRU).

²⁸⁰ THOMAS M. FRANCK & EDWARD WEISBAND, *WORD POLITICS: VERBAL STRATEGY AMONG THE SUPERPOWERS* 119 (1971).

²⁸¹ PETER ROWE, *LEGAL ACCOUNTABILITY AND BRITAIN'S WARS 2000–2015* 238–59 (2016).

²⁸² *See generally* DAVID PATRIKARAKOS, *WAR IN 140 CHARACTERS: HOW SOCIAL MEDIA IS RESHAPING CONFLICT IN THE TWENTY-FIRST CENTURY* (2017).

²⁸³ *Cf.* NATO STANDARDIZATION OFF. ALLIED JOINT DOCTRINE, AJP-01, ED. 1 VERSION 1 § 4.17 (2017) (defining “shaping” as “manipulating the operating environment to the Alliance’s advantage and the disadvantage of the adversary”).

²⁸⁴ Charap, *supra* note 232; Élie Tenenbaum, *Hybrid Warfare in the Strategic Spectrum: An Historical Assessment*, in Lasconjarias & Larsen, *supra* note 3, at 95, 111–12.

²⁸⁵ *See, e.g.*, CULLEN & REICHBORN-KJENNERUD, *supra* note 230, at 17.

²⁸⁶ Recognizing this, many commentators prefer to talk about hybrid *threats* rather than hybrid

have avoided such conceptual freefall by insisting that violence is an integral element of warfare.²⁸⁷

Since hybrid warfare in a broad sense does not necessarily involve armed violence, the question arises whether mutual defense clauses should be considered as implicated in such circumstances at all. There are compelling reasons to answer in the negative. On their own, acts of hostile interference not entailing the use of force are unlikely to subvert Article 5 NAT or Article 42(7) TEU. As Russia's interventions in Georgia and Ukraine demonstrate, there is little evidence that non-military instruments have rendered the use of armed force redundant. Tweets do not seize ground—infantry battalions do. Since states are not capable of achieving traditional military objectives, such as seizing and holding ground, without employing armed force, they are not able to circumvent mutual defense guarantees by limiting themselves solely to non-forcible measures. At the same time, the fact that specific incidents are not caught by Article 5 or Article 42(7) does not necessarily point to a flaw in their design. Take, for example, the attempted murder of Sergei Skripal with a chemical nerve agent in Salisbury on March 4, 2018, an act which the British Government declared to be an unlawful use of force.²⁸⁸ While commentators are divided as to whether the incident did in fact amount to the use of force,²⁸⁹ they concur that it certainly did not reach the level of an armed attack.²⁹⁰ Indeed, the UK and its allies studiously refrained from describing it as an *armed* attack.²⁹¹ The Salisbury incident thus escaped the reach of Article 5. Yet this is not the result of some drafting deficiency, but reflects the fact that not every security challenge gives rise to the right of self-defense under international law.²⁹² Similarly,

warfare. See, e.g., GREGORY TREVERTON ET. AL., SWEDISH DEF. UNIV., ADDRESSING HYBRID THREATS 10 (2018); Joint Communication to the European Parliament, the European Council, and the Council: Increasing Resilience and Bolstering Capabilities to Address Hybrid Threats, 1–2, JOIN (2018) 16 final (June 13, 2018).

²⁸⁷ See, e.g., Sergei G. Chekinov & Sergei A. Bogdanov, *The Nature and Content of a New-Generation War*, 22 MIL. THOUGHT 12, 12–13 (2013).

²⁸⁸ Prime Minister Theresa May, *PM Commons Statement on Salisbury incident response: 14 March 2018*, GOV.UK (Mar. 14, 2018), <https://www.gov.uk/government/speeches/pm-commons-statement-on-salisbury-incident-response-14-march-2018> [<https://perma.cc/3ALF-WR35>].

²⁸⁹ See, e.g., Marc Weller, *An International Use of Force in Salisbury?*, BLOG OF EUR. J. INT'L L. (Mar. 14, 2018), <https://www.ejiltalk.org/an-international-use-of-force-in-salisbury/> [<https://perma.cc/W5SL-WSGJ>]; Tom Ruys, “License to Kill” in Salisbury: State-Sponsored Assassinations and the Jus Ad Bellum, JUST SEC. (Mar. 15, 2018), <https://www.justsecurity.org/53924/license-kill-salisbury-state-sponsored-assassinations-jus-ad-bellum/> [<https://perma.cc/5GDG-67XF>]; Stephen Lewis, *Salisbury, Novichok and International Law on the Use of Force*, 163 RUSI J. 10, 13–15 (2018).

²⁹⁰ See, e.g., Weller, *supra* note 289; Ruys, *supra* note 289; Lewis, *supra* note 289, at 15–7.

²⁹¹ U.N. Security Council, Letter dated 13 March 2018 from the Chargé d'affaires of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2018/218 (Mar. 13, 2018); Press Release, NATO, Statement by the North Atlantic Council on the Use of a Nerve Agent in Salisbury (Mar. 14, 2018), https://www.nato.int/cps/en/natohq/news_152787.htm [<https://perma.cc/YW4N-RFZB>].

²⁹² Cf. Thomas M. Franck, *Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809, 813–14 (1970) (arguing that not every form of intervention can give rise to the right of self-defense).

the fact that Chinese warships support the frontline operations of Chinese civilian and coast guard vessels in the South China Seas by providing a deterrent effect does not mean that their mere presence constitutes an armed attack. Nor should we assume that military force is an appropriate and effective response to every type of threat.²⁹³ There are plenty of hostile actions in response to which it would be unreasonable to use force—either because doing so would be disproportionate to the threat, and thus morally and politically unpalatable, or because it would carry a real risk of escalation with limited prospects of compelling the adversary to submit to our will, or both.

Accordingly, the danger that hybrid threats may bypass Article 5 NAT and Article 42(7) TEU does not lie at the two extremes: the possibility that non-forcible instruments may render the use of armed force redundant at one end or that individual low-intensity incidents may fail to trigger the right to use force in self-defense at the other. Rather, the danger lies in the indirect use of force and in its combination with non-military levers of influence in a way that avoids Article 5 and Article 42(7) being triggered in precisely those situations where a forcible response would be politically warranted, legally admissible, and militarily effective.

Countering the challenges

The legal challenges that hybrid threats present for collective security guarantees have been recognized at the highest political level. At their Warsaw summit held in July 2016, NATO's member states confirmed their readiness to assist each other at any stage of a hybrid campaign and to counter hybrid warfare as part of collective defense.²⁹⁴ They also underscored that the North Atlantic Council "could decide to invoke Article 5 of the Washington Treaty."²⁹⁵ They repeated these points at their Brussels summit in July 2018.²⁹⁶ By drawing an express link between hybrid warfare and collective defense, NATO leaders signaled their resolve not to allow Article 5 to be hollowed out.²⁹⁷ Still, their declarations of intent strike a rather conservative note. Whilst they accept that NATO may assist an Ally at any stage of a "hybrid campaign," it is only in cases of "hybrid warfare" that they foresee a potential role for Article 5. This is not an unreasonable position to take. As we saw earlier, recourse to the use of force to

²⁹³ See, e.g., Freddy Gray, *No, Britain shouldn't invoke Article 5 of the NATO Treaty*, SPECTATOR, (Mar. 13, 2018), <https://blogs.spectator.co.uk/2018/03/no-britain-shouldnt-invoke-article-5-of-the-nato-treaty/> [<https://perma.cc/9BPY-URUR>] ("No sane person can think that to call up NATO's collective military might is a sensible response to a murky crime in Salisbury.").

²⁹⁴ Press Release, NATO, Warsaw Summit Communiqué issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Warsaw 8–9 July 2016, ¶ 72. (July 9, 2016).

²⁹⁵ *Id.*

²⁹⁶ Brussels Summit Declaration, *supra* note 243, ¶ 21; see also Mariusz Fryc, *From Wales to Warsaw and Beyond: NATO's Strategic Adaptation to the Russian Resurgence on Europe's Eastern Flank*, 15 CONNECTIONS Q. J. 45, 46 (2016).

²⁹⁷ See MICHAEL J. MAZARR ET AL., RAND, WHAT DETERS AND WHY: EXPLORING REQUIREMENTS FOR EFFECTIVE DETERRENCE OF INTERSTATE AGGRESSION 65 (2018).

counter hybrid threats falling below the threshold of an armed attack is neither permissible nor necessarily appropriate. A pledge to invoke the mutual defense commitment in response to every type of hybrid threat would be a promise to use the proverbial sledgehammer to crack a nut. It would be unrealistic and therefore lack credibility in the eyes of hybrid adversaries.²⁹⁸ By accepting that the role of Article 5 is confined to situations of hybrid *warfare*, the Warsaw and Brussels Summit Declarations avoid such empty gestures. However, in the same breath they also concede that the application of Article 5 is contingent on the legal threshold between warfare and peace, and thus vulnerable to subversion along the lines discussed in the preceding sections.

It may be tempting to deal with the problem of legal thresholds by attempting to escape them altogether, but this is not a feasible strategy. Even if the contracting parties were to revise Article 5 NAT and Article 42(7) TEU to avoid references to “armed attack” and “armed aggression,”²⁹⁹ they would remain bound by the rules governing the use of force under the UN Charter and customary international law. Although the member states of NATO and the EU make up an influential part of the international community, it is not within their ability to adjust these general rules of international law unilaterally. In any event, lowering the threshold for the use of force in order to facilitate the application of Article 5 and Article 42(7) would come with significant costs, since it would loosen the legal restrictions for all states, including hostile powers. The applicable thresholds therefore cannot be unilaterally modified at will and without the risk of unraveling key elements of the international legal order as it currently stands.

A more promising approach is to strengthen legal interoperability among NATO and EU nations. One line of effort is to reduce legal gray zones,³⁰⁰ for example by narrowing disagreements over the gap that lies between the definition of force and armed attack. This could prepare the ground for developing a shared understanding of what kind of hybrid threats may trigger the applicability of Article 5 NAT and Article 42(7) TEU. Given that the assessment of any security threat depends heavily on its context, it may prove somewhat sterile to build such a consensus in the abstract. Drawing on war-gaming and exercises may offer a more fruitful way forward. Bearing in mind how attractive the use of proxies is to a hybrid state adversary,³⁰¹ developing a common approach to attribute their activities to the

²⁹⁸ WILLIAM W. KAUFMANN, *THE REQUIREMENTS OF DETERRENCE* 6–12 (1954); ROBERT E. OSGOOD, *LIMITED WAR: THE CHALLENGE TO AMERICAN STRATEGY* 242 (1957); BERNARD BRODIE, *STRATEGY IN THE MISSILE AGE* 239 (1959).

²⁹⁹ Lord Jopling, *Countering Russia's Hybrid Threats: An Update*, NATO Parliamentary Assembly Committee on the Civil Dimension of Security, ¶ 77 (Oct. 1, 2018); Maria Mälksoo, *Countering Hybrid Warfare as Ontological Security Management: The Emerging Practices of the EU and NATO*, 27 *EUR. SEC.* 374, 386 (2018).

³⁰⁰ Cf. Steven Hill, *Current International Law Challenges Facing NATO*, NATO LEGAL GAZETTE, Issue 39, 5, at 9 (2019) (“NATO could be a natural venue for discussions about how international norms apply in the cyber area, not just in the military domain of operations but regarding broader issues relating to cyber defence”).

³⁰¹ See *supra* Section IV.B.

sponsoring state also merits attention. Although many aspects of the rules governing the attribution of wrongful acts are settled, certain questions could benefit from a joint posture.³⁰² NATO and EU nations should also strengthen their collective mechanisms for unmasking attempts at plausible deniability in order to deny its use as a hybrid instrument,³⁰³ as illustrated by their united response to the Skripal incident and to Russian cyber operations.³⁰⁴

Rather than seek to harmonize divergent national positions, another option for increasing legal interoperability is to embrace and draw strength from their diversity. As is well known, the United States denies that a gap exists between the use of force and armed attack.³⁰⁵ On the U.S. view, any use of force against a state, regardless of its gravity, gives rise to the right to use necessary and proportionate force in self-defense. Stationing even small numbers of U.S. forces in the territory of the most vulnerable allied nations thus increases the chances that the United States could invoke its right of individual self-defense in circumstances where neither the host nation nor other Allies might be prepared to invoke Article 5.³⁰⁶ Similarly, the greater the number of nations that expose their forces to the risk of direct attack by an adversary, the more likely it is that they will muster the political will to invoke Article 5 should they suffer an attack.³⁰⁷ This calls for highly multinationalized force structures. It should be emphasized that the function of national assets in these circumstances is not operational, but legal. Their primary role is not to defeat or deter an aggressor through military strength, but to serve as legal tripwires that threaten to increase the costs of aggression.³⁰⁸

³⁰² These include the question of complicity for internationally wrongful acts and the attribution of the acts of non-State actors. On the former, see generally HELMUT PHILLIP AUST, *COMPLICITY AND THE LAW OF STATE RESPONSIBILITY* (2011); MILES JACKSON, *COMPLICITY IN INTERNATIONAL LAW* (2015). On the latter, see Kubo Mačák, *Decoding Article 8 of the International Law Commission's Articles on State Responsibility: Attribution of Cyber Operations by Non-State Actors*, 21 J. OF CONFLICT & SEC. L. 405 (2016).

³⁰³ See Rory Cormac & Richard J. Aldrich, *Grey is the New Black: Covert Action and Implausible Deniability*, 94 INT'L AFF. 477 (2018).

³⁰⁴ European Council Meeting (22 March 2018) – Conclusions, ¶ 9, EUCO 1/18 (Mar. 22, 2018); Press Release, Joint statement from Prime Minister May and Prime Minister Rutte (Oct. 4, 2018), <https://www.gov.uk/government/news/joint-statement-from-prime-minister-may-and-prime-minister-rutte> [<https://perma.cc/V2RX-7PRZ>].

³⁰⁵ UNITED STATES DEPARTMENT OF DEFENSE, *LAW OF WAR MANUAL* § 1.11.5.2, (2016); see also William H. Taft IV, *Self-Defense and the Oil Platforms Decision*, 29 YALE J. INT'L L. 295, 299–302 (2004); Abraham D. Sofaer, *Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 93–96 (1989).

³⁰⁶ There may be a hint at this strategy in the Brussels Summit Declaration, *supra* note 243, which provides in paragraph 21 that Article 5 may be invoked “as in the case of armed attack” (emphasis added). The word “as” seems to suggest that Article 5 may be relevant in cases other than armed attack. Although too much should not be read into a single word taken on its own, the passage does illustrate that calculated uncertainty may increase the risk of escalation and thus affect the calculations of hybrid adversaries.

³⁰⁷ Put differently, this would close the gap between “extended” and “central” deterrence. See LAWRENCE FREEDMAN, *DETERRENCE* 34–36 (2004).

³⁰⁸ See Wojciech Lorenz, *The Evolution of Deterrence: From Cold War to Hybrid War*, 26 POLISH Q. INT'L AFF. 22, 35 (2017).

The same tactic is available only to a more limited extent under Article 42(7) TEU. Whereas any member state of NATO may invoke Article 5 NAT if its armed forces present in the territory of another NATO nation are subject to an armed attack,³⁰⁹ the geographical scope of application of Article 42(7) is limited to acts of armed aggression carried out against EU member states on their own territory. Consequently, where the forces of one EU member state suffer an attack in the territory of another member state, the former may invoke the right of individual self-defense, but not the mutual assistance commitment under Article 42(7). There is room, however, for Article 42(7) to complement Article 5. Since the two provisions may apply at the same time,³¹⁰ Article 42(7) could serve as a fallback solution for EU member states where there is no political appetite to rely on Article 5. Precisely because the EU is not a fully-fledged military alliance, invoking Article 42(7) instead of Article 5 may be seen as a less momentous decision, which could be more palatable in situations that are not of the utmost gravity.³¹¹ Seen in this light, Article 42(7) may be more readily available in response to more limited acts of aggression, such as temporary violations of national airspace or territory. However, even though Article 42(7) can no longer be dismissed as having no practical relevance following the Paris attack,³¹² its bilateral character is also its greatest weakness. At present, there are no standing arrangements in place to give teeth to the European mutual assistance commitment.

Regardless of how successful NATO and the EU are in safeguarding Article 5 NAT and Article 42(7) TEU from subversion, there is no escaping the fact that collective self-defense is not a suitable response to all hybrid threats. The drafters of the NAT were very much aware of this limitation. The Canadian Government, for example, held the firm view that the proposed treaty would not be effective if it did not offer guarantees against political and economic subversion, in addition to defending against armed attacks.³¹³ George Kennan, then Director of the Policy Planning Staff at the U.S. State Department, cautioned against overestimating the significance of the NAT for similar reasons.³¹⁴ For Kennan, the conclusion of a mutual defense pact would serve to deter overt Soviet aggression and also contribute to a general sense of security among the contracting parties, but it would not offer an answer to political warfare, which he considered to be the decisive and

³⁰⁹ NAT, *supra* note 1, art. 6.

³¹⁰ Steven Hill & David Lemétayer, *NATO–EU Relations: An International Law Perspective*, 11–12 IRISH Y.B. OF INT’L L. 97, 101 (2016–2017).

³¹¹ See Nanette Neuwahl, *Cooperation under Article 42(7) of the Treaty on European Union in Reaction to the Paris Attacks*, 21 EUR. FOREIGN AFF. REV. 5, 6 (2016).

³¹² See, e.g., Sascha Dietrich, *Die rechtlichen Grundlagen der Verteidigungspolitik der Europäischen Union*, 66 HEIDELBERG J. OF INT’L L. 663, 694 (2006).

³¹³ Memorandum by Assistant Under-Secretary of State for External Affairs (June 26, 1948), in DCER VOL. XIV, *supra* note 117, at 354, ¶ 12–14. In line with this position, Canada pushed strongly for establishing closer economic, political and cultural ties between the contracting parties. See JOHN C. MILLOY, *THE NORTH ATLANTIC TREATY ORGANIZATION, 1948–1957: COMMUNITY OR ALLIANCE?* 9–34 (2006).

³¹⁴ Memorandum by the Director of the Policy Planning Staff (Kennan) (Nov. 24, 1948), in FRUS VOL. III, *supra* note 22, at 283–84.

more severe threat facing the West.³¹⁵ Although subversion was thus recognized as a critical security challenge,³¹⁶ attempts to address it in express terms ran into political objections and disagreements over how to define indirect aggression.³¹⁷ These attempts were therefore abandoned in favor of providing for a duty to enter into consultations in the event that any contracting party considered itself menaced by indirect aggression.³¹⁸ Article 4 NAT thus stipulates that the parties “will consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened.”

Taken together, Article 4 and 5 NAT cover the full spectrum of security challenges facing NATO nations. The scope of Article 4 is deliberately broad. It extends to any situation or event deemed to threaten the security of a contracting party,³¹⁹ including subversive interference,³²⁰ in any part of the world.³²¹ Article 4 thus affords the Allies with an explicit treaty basis to consult each other in practically all circumstances where Article 5 has not been invoked or is not applicable.³²² However, Article 4 entails no commitment to take any action beyond the duty to enter into consultations.³²³ Moreover, it envisages consultations in response to specific emergency situations and other matters of immediate importance.³²⁴ Like Article 5, it is a crisis response mechanism, rather than a framework for coordinating national policies on a continuing basis.³²⁵ Despite these

³¹⁵ *Id.*, at 284–85.

³¹⁶ Report Prepared by the Policy Planning Staff Concerning Western Union and Related Problems (Mar. 23, 1948, in FRUS VOL. III, *supra* note 22, at 61, 63–64.

³¹⁷ REID, *supra* note 32, at 157–59.

³¹⁸ Minutes of the Fifth Meeting of the United States–United Kingdom–Canada Security Conversations (Mar. 31, 1948), in FRUS VOL. III, *supra* note 22, at 70–71.

³¹⁹ REPORT OF THE SECRETARY OF STATE, *supra* note 35, at 348; *see also* Minutes of the Twelfth Meeting of the Washington Exploratory Talks on Security, in FRUS VOL. IV, *supra* note 15, at 73, 86.

³²⁰ *Hearings on Executive L*, *supra* note 22, at 155 (Informal Session, The North Atlantic Treaty); *id.*, at 371 (Senate Report No. 8 on Executive L).

³²¹ Minutes of the Eighteenth Meeting of the Washington Exploratory Talks on Security, *supra* note 29, at 213, 223.

³²² *Cf.* Press Release, NATO, The Alliance’s Strategic Concept Approved by the Heads of State and Government participating in the meeting of the North Atlantic Council in Washington D.C., ¶¶ 10, 24 (Apr. 24, 1999) (noting that one of NATO’s core functions is to serve, as provided for in NAT art. 4, as a forum for Allied consultations on any issues that affect their vital interests, including acts of terrorism, sabotage and organized crime); Press Release, NATO, Strategic Concept for the Defence and Security of the Members of the North Atlantic Treaty Organisation adopted by Heads of State and Government in Lisbon, ¶ 5 (Nov. 19, 2010) (noting that any security issue of interest to any Ally can be brought before NATO under NAT art. 4 “to share information, exchange views and, where appropriate, forge common approaches”).

³²³ NATO-Konzept, *supra* note 164, ¶ 145 (noting no obligation to take collective action).

³²⁴ North Atlantic Council: Interim Report by the Committee on the North Atlantic Community, ¶ 7, C8-D/6 (Nov. 26, 1951).

³²⁵ One of NATO’s functions is to serve as a forum for ongoing political consultation, but it acquired this role as a result of organizational innovations, rather than through NAT Article 4. *See* North Atlantic Council, Reorganization of the North Atlantic Treaty Organization, C9-D/4 (Mar. 17, 1952); Assistant Secretary General for Political Affairs, The Evolution of NATO Political Consultation, 1949–1962, NHO/63/1 (May 2, 1963).

limitations, the importance of Article 4 lies in the fact that it provides NATO nations with a basis for countering hybrid threats falling below the threshold of an armed attack. Although so far formal reliance on Article 4 has been rare,³²⁶ making more frequent use of this procedure would offer two benefits.³²⁷ First, it would lessen the relevance of legal thresholds. If an adversary must expect a robust reaction in response to undertaking subversive acts below the level of an armed attack, then hybrid tactics designed to circumvent Article 5 become less effective and costlier to the aggressor. Second, an effective system of countermeasures under Article 4 would create a continuum between defensive action not involving the use of force at one end and collective self-defense under Article 5 at the other.³²⁸ This linkage would carry escalatory potential, which, in turn, would encourage adversaries to exercise restraint. Both of these factors would reinforce the deterrent effect of Article 5.³²⁹

Compared to NATO, the EU has access to a far broader set of instruments for countering hybrid threats that fall below the threshold of an armed attack.³³⁰ The security capabilities of the two organizations are thus complementary.³³¹ As a result, Article 222 TFEU may complement Article 5 NAT and Article 42(7) TEU in two important respects. First, the breadth of the definition of terrorist attacks and man-made disasters renders Article 222 applicable in a wide range of circumstances. One of the recurring concerns voiced by security experts in this area is that hybrid adversaries may “weaponize” non-military means and domains, for example communication systems, energy supplies, or democratic political processes, to achieve warlike effects and outcomes.³³² Such hostile activities may range from information operations to the disruption of critical infrastructure. At the lower end, most of these activities do not involve acts of violence or other direct physical effects. Accordingly, neither of the three mutual assistance clauses would be engaged.³³³ However, at the higher end, hostile acts may entail varying levels of

³²⁶ See, e.g., North Atlantic Council, NATO Planning for Berlin Emergency: Instructions to NATO Military Authorities, 3, C-M(61)104 (Nov. 9, 1961); Press Release, NATO, Statement by the North Atlantic Council following Meeting under Article 4 of the Washington Treaty (Mar. 4, 2014).

³²⁷ Suggestions to this effect have been made before. See, e.g., GROUP OF EXPERTS ON A NEW STRATEGIC CONCEPT FOR NATO, NATO 2020: ASSURED SECURITY; DYNAMIC ENGAGEMENT 9, 45–46 (2010); NATO Parliamentary Assembly Defence and Security Committee: Hybrid Warfare: NATO’s New Strategic Challenge? ¶¶ 18–21, 166 DSC 15 E bis (Oct. 10, 2015).

³²⁸ See Frank G. Hoffman, *Examining Complex Forms of Conflict: Gray Zone and Hybrid Challenges*, 7 PRISM 30, 41 (2018).

³²⁹ James J. Wirtz, *Life in the “Gray Zone”: Observations for Contemporary Strategists*, 33 DEF. & SEC. ANALYSIS 106, 112–13 (2017); see also Jahara W. Matisek, *Shades of Gray Deterrence: Issues of Fighting in the Gray Zone*, 10 J. STRATEGIC SEC. 1, 13–18 (2017); Sugio Takahashi, *Development of Gray-zone Deterrence: Concept Building and Lessons from Japan’s Experience*, 31 PAC. REV. 787, 800 (2019).

³³⁰ See Oleksandr Moskalenko & Volodymyr Streltsov, *Shaping a “Hybrid” CFSP to Face “Hybrid” Security Challenges*, 22 EUR. FOREIGN AFF. REV. 513, 516–19 (2017).

³³¹ Rafał Wiśniewski, *EU-NATO Cooperation in Countering Hybrid Threats: Comparing Capabilities and Defining Roles*, in SECURITY BEYOND THE STATE 93, 110 (Claudia Morsut & Daniela Irrera eds., 2018).

³³² See, e.g., CULLEN & REICHBORN-KJENNERUD, *supra* note 230, at 17.

³³³ However, the possibility that TFEU Article 222 could apply cannot be discounted, since the

physical destruction and damage. For example, hybrid adversaries may attempt to disrupt critical transport facilities through acts of sabotage, thereby seeking to cause economic harm, disrupt supply chains, degrade military mobility, and tie up scarce resources. Unless such acts amount to an armed attack, Article 5 and Article 42(7) would not be engaged. However, acts of sabotage may qualify as terrorist attacks within the meaning of Article 222, for instance if they were to cause extensive destruction to a transport system, an infrastructure facility, or a public place or private property likely to endanger human life or result in major economic loss.³³⁴ Article 222(2) thus provides the EU member states with a legal basis for assisting each other in response to acts of violence that do not cross the threshold of armed attack and for that reason do not trigger Article 5 and Article 42(7).

Second, once engaged, Article 222 TFEU serves as a framework for mobilizing all the instruments at the Union's disposal. Compared to Article 4 NAT, which merely provides for an *ad hoc* consultation process, the distinct advantage of Article 222 is that unlocks access to a wide variety of resources, instruments, and capabilities. These include, for example, the Union Civil Protection Mechanism designed to coordinate the EU's response to disasters in Europe and further afield.³³⁵ The Mechanism consists of a pool of civil protection assets made available by the member states on a voluntary basis and an Emergency Response Coordination Centre, which serves as an operational hub for coordinating the EU's disaster response. In 2018, the Mechanism mobilized more than 360 fire-fighting personnel, several aircraft and dozens of vehicles to assist the Swedish authorities in combating large-scale forest fires in their country.³³⁶ In 2016, the EU has complemented these arrangements by creating a legal framework for the provision of emergency support in response to exceptional disasters occurring inside the EU.³³⁷ The decision to activate this support is taken by the Council and may consist of humanitarian aid and other emergency measures, such as food assistance, emergency healthcare, shelter, water, sanitation and hygiene, protection, and education. Overall, the mobilization of capabilities under Article 222 can go some way towards countering the effects of hostile acts falling below the level of an armed attack. Building on recent efforts to deepen cooperation between NATO and the EU in the field of security,³³⁸ serious thought should be given to how actions under Article 4 and Article 222 could complement one another and thus reinforce

concept of terrorist attacks extends to the threat of terrorist offenses.

³³⁴ Directive (EU) 2017/541, *supra* note 98, art. 3(1)(d).

³³⁵ Decision No 1313/2013/EU, of the European Parliament and of the Council of 17 December 2013 on a Union Civil Protection Mechanism, 2013 O.J. (L 347) 924.

³³⁶ European Commission, Record EU Civil Protection operation helps Sweden fight forest fires, EUR. MONITOR (Aug. 6, 2018), <https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vkqog3uak8vp?ctx=vigmc5msq4oc> [<https://perma.cc/8G5M-HFGD>].

³³⁷ Council Regulation (EU) 2016/369, of 15 March 2016 on the Provision of Emergency Support within the Union, 2016 O.J. (L 70) 1.

³³⁸ Press release, NATO, Joint Declaration by the President of the European Council, the President of the European Commission, and the Secretary General of the North Atlantic Treaty Organization, (July 8, 2016); NATO Parliamentary Assembly Defence and Security Committee, *NATO-EU Cooperation after Warsaw*, 163 DSCTC 17 E rev.1 Fin (Oct. 7, 2017).

the deterrent effect of both Article 5 and Article 42(7).

V. Conclusion

This study has shown that the mutual assistance clauses of the North Atlantic and EU Treaties involve not just political commitments, as is often assumed, but distinct legal obligations. Their legally binding nature is precisely why they have endured over time—in the case of the NAT, for over seventy years—against a backdrop of far-reaching changes in the international environment. The scope of the obligations they impose varies, however. Article 5 NAT and Article 42(7) TEU are engaged in the same, or near identical, circumstances of an armed attack or an act of armed aggression. By contrast, the solidarity clause in Article 222 TFEU is triggered by a terrorist attack or a natural or man-made disaster. Although this means that Article 222 may apply in a broader set of circumstances than Article 5 and Article 42(7), the fact that it is subject to a gravity threshold somewhat diminishes its utility. All three provisions envisage the use of both military and non-military forms of assistance. However, all three preserve, to varying degrees, the discretion of the assisting parties to choose the most appropriate means with which to discharge their duty of mutual assistance.³³⁹

The Article has also shown that the hybridization of warfare poses substantial challenges to Article 5 NAT and Article 42(7) TEU. Both provisions are vulnerable to subversion as part of a hybrid way of strategic competition. By exploiting the legal thresholds and gray zones between war and peace, hybrid adversaries may conduct their operations in a manner that deliberately circumvents Article 5 and Article 42(7) or undermines the political will of their signatories to activate them. If successful, such tactics could preclude the two clauses from serving as a framework for countering aggression and thereby erode their deterrent effect. Against this background, it has become commonplace to lament the vulnerability of Article 5 and Article 42(7) to hybrid threats and to deplore the blurring of the dividing line between war and peace. This Article has demonstrated that these claims are inflated. They overlook the fact that the use of force in self-defense is not a permissible or suitable response to all security challenges, whether hybrid or not. Nor does anything suggest that the pursuit of traditional military objectives no longer requires the use of armed force. Accordingly, the real risk to Article 5 and Article 42(7) arises from indirect forms of aggression and the combined use of armed force with non-military levers of influence in a way that circumvents the right of self-defense in situations where its exercise would be politically warranted, legally admissible, and militarily effective.

The principal conclusion that flows from this analysis is that neither NATO nor the EU can afford to be complacent about the legal dimension of collective security. States use law and legal arguments as an instrument to pursue their strategic interests. NATO and the EU must therefore prepare for the prospect that adversaries actively seek to exploit legal gray areas and the legal vulnerabilities of

³³⁹ It is this discretion which is often, but wrongly, identified with an absence of legal obligations.

their funding instruments. However, contrary to what has been suggested by some commentators, it is not necessary to amend the NAT and EU Treaties to safeguard against this risk. Revising the treaties would not comprehensively resolve the challenges associated with the legal and political thresholds governing the applicability of Article 5 NAT, Article 42(7) TEU, and Article 222 TFEU. Instead, this Article has argued in favor of increasing legal interoperability among allied nations by relying on the existing legal frameworks. There are several strands to this task. They include narrowing legal gray zones, for example by reducing disagreements among the member states over the definition of armed attack, by collaborating to counteract attempts at plausible deniability, and by reinforcing legal tripwires, for instance in the form of highly multinationalized force structures. NATO nations should also consider making better use of Article 4 NAT, potentially linking it with Article 222 TFEU, in order to establish a continuum between measures not involving the use of armed force at one end and the exercise of the right of self-defense on the other. These measures would go some way towards rendering the mutual defense guarantees more resilient against subversion and thus would reinforce their deterrent effect in an age of hybrid warfare and multimodal geopolitical competition.