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NATO AT 75: COLLECTIVE DEFENSE PAST, PRESENT, AND FUTURE

This panel was convened at 10:30 a.m. on Thursday, April 4, 2024 by its moderator, John Swords, who introduced the speakers: Michael Schmitt, John Swords, Harold Hongju Koh, and Oona Hathaway.

Introductory Remarks by John Swords

Good morning, everyone. My name is John Swords. I am the legal adviser at the North Atlantic Treaty Organization (NATO) headquarters. It is a great honor to be with you here in Washington seventy-five years to the day after the North Atlantic treaty was signed here in Washington in 1949. When those twelve original allies committed to collective defense, to treat an attack on one as an attack on all, they were motivated by a desire to defend democracies against Soviet aggression in Europe and beyond. And in that sense, unfortunately, the alliance has come full circle today. Russia's brutal war of aggression against Ukraine has once again shattered peace in Europe and once again threatens the values of democracy, freedom, and the rule of law that are enshrined in the North Atlantic Treaty. But once again, nations have rallied around NATO in response, including new allies Finland and Sweden, who are now signatories to the treaty.

But it is the alliance's commitment to the rule of law that we are here to focus on today, to take stock of some of the contributions to international law that have been made by NATO and NATO allies in the last seventy-five years. To see how NATO has been shaped by and has helped shape some of those international law developments. And to do this, I am delighted to welcome the esteemed panel of experts you have before you—Harold Hongju Koh, Sterling Professor of International Law at Yale and former Legal Adviser at the U.S. State Department and before that Assistant Secretary for Democracy, Human Rights, and Labor; my far left, Michael Schmitt, distinguished scholar and professor at both the U.S. Military Academy and the U.S. Naval War College, professor of public international law at Reading University, and general editor of the *Tallinn Manual*; and Oona Hathaway, professor of international law, also at Yale Law School and other Yale faculties, co-author of the excellent book *The Internationalists*. Like Mike, she is a member of the Advisory Committee on International Law at the State Department, and before that, Oona served as a special counsel to the general counsel at the Department of Defense.

Let us dive straight in. We only have fifty-five minutes to cover some seventy-five years of history. Hopefully we will make a bit of time for questions and answers. Let us start by going back seventy-five years to the founding of NATO and explore the relationship between NATO and the UN Charter. Oona, could you perhaps explain how the geopolitical situation then and the workings of the Security Council added impetus for the creation of NATO?

Remarks by Oona Hathaway

Cast your mind back to exactly seventy-five years ago. At that moment, the United Nations had been recently founded, and the Security Council had begun meeting. But from the very start, the Soviet ambassador to the United Nations cast a large number of vetoes, which made it difficult for

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the Security Council to achieve the purpose the Charter had set for it, which was to secure international peace and security.

There were several events happening in the world at the same time: There was a Soviet- sponsored coup in Czechoslovakia in February 1948 and the rise of Communist Party in Italy in the 1948 general election. Critically, beginning in mid-1948, there was the blockade of West Berlin, which was then under U.S., British, and French control but surrounded by Soviet-controlled Germany. The blockade led to a massive airlift to supply the city to prevent starvation of the population without an outright confrontation between the allied forces and those of the Soviet Union. All of this made it strikingly clear that the Soviets were prepared to use force to extend their influence.

In May 1948, Republican Senator Arthur Vandenberg proposed a resolution that called for the president to seek a security treaty with Western Europe that would support the United Nations Charter but not be subject to the constraints of the Security Council. His goal—and the goal of what would become the NATO Treaty—was to create a defensive institution that would not rely on action through the Security Council and that would not include the Soviet Union and therefore would not allow the Soviet Union to exercise veto power over actions to defend its members.

Far from creating an end run around the Charter, the treaty was meant to reinforce and support it. The treaty expressly reaffirmed a commitment to the UN Charter and created a set of institutions and structures that would allow the defense of Western Europe, consistent with the Charter. You can see that right in the text of the NATO treaty. The preamble begins, "The Parties to this Treaty reaffirm their faith in the purposes and principles of the Charter of the United Nations and their desire to live in peace with all peoples and all governments."[1] Article I continues on to reaffirm that commitment: "The Parties undertake, as set forth in the Charter of the United Nations, to settle any international dispute in which they may be involved by peaceful means in such a manner that international peace and security and justice are not endangered, and to refrain in their international relations from the threat or use of force *in any manner inconsistent with the purposes of the United Nations*."[2]

Hence, the Treaty was designed to reaffirm and reinforce a commitment to the Charter and give rise to an institution that could defend the nations of Europe against possible aggression. It did so in the face of deep concern about the growing willingness of the Soviet Union to use both overt and covert force to disrupt elections and electoral democracies.

In answer to your question as to whether the aim of the NATO treaty was to set up an institution outside of the Security Council: Yes, it was motivated by the failure of the Security Council to achieve its intended goals, but it was not about creating an institution that would be in competition with the UN. Instead the treaty aimed to create an institution that would be supportive of the central goals and aims of the United Nations.

John Swords

Oona, thank you very much. Yes, you certainly get a sense of the North Atlantic Treaty being complementary to the charter, as you say, looking at the drafting itself, but also looking at the various NATO operations that have been undertaken on the basis of a UN Security Council resolution. Thank you very much for that. Let us stay with the Cold War period. Mike, you were in the U.S. Air Force. NATO's a defensive alliance. It is also a nuclear alliance. Could you say how central nuclear weapons have been to the Allies' thinking about effective self-defense and perhaps speculating

[1] North Atlantic Treaty, pmbl., Apr. 4, 1949, 63 Stat. 2241, 34 UNTS 243.

[2] *Id.* (emphasis added).

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about how influential that might have been with considerations more broadly about the legality of nuclear weapons?

Remarks by Michael Schmitt

The question of the effectiveness of nuclear weapons as a deterrent during the Cold War is complex, as proving deterrence is inherently difficult. To assess NATO's deterrent effect during that period, we must distinguish between conventional and nuclear capabilities.

Regarding conventional capabilities, NATO was not a strong deterrent, for it was generally considered outmatched by the Soviet Union and its Warsaw Pact partners, especially given the difficulty of securing reinforcements from the United States. Deterrence is a product of capability and the extent to which the enemy believes you will use that capability. As to the latter, there was certainty of use because the enemy would get a vote by attacking through the Fulda Gap, down from the Caucuses, and elsewhere. NATO would be forced to fight. The issue was capability, and that is where nuclear weapons came in.

NATO's nuclear capability was immense. I served during the Cold War as a U.S. Air Force conventional/nuclear targeting officer with a dual-capable wing, and later as a legal advisor to a similar unit and a Ground Launched Cruise Missile (GLCM) wing. The reality was that we had an enormous number of nuclear weapons in Europe, so many that we had to work hard to find potential targets; many of those identified, such as railheads and individual airfields, might seem more appropriate for conventional attack under normal circumstances. And it was not just us.

Other Allies were part of NATO planning for the use of the nuclear weapons that the United States maintained and safeguarded in Europe. In the event of an attack against NATO, Allied forces were trained and capable of executing nuclear strikes.

The shift from a policy of "massive retaliation" to flexible response" also played a crucial role in compensating for NATO's conventional weakness. It meant we could fight along a continuum. For instance, during exercises, we simulated Warsaw Pact forces crossing into NATO territory, but our conventional assets could not halt their advances. This would lead to NATO's use of limited nuclear options (LNOs) against the enemy's fielded forces. These, too, would fail to stop them. The exercises usually culminated in what we called the "elephant walk," in which we would "launch the fleet" with our dual-capable aircraft armed with mock nuclear weapons.

NATO-dedicated tactical missile and maritime units did the same, thereby demonstrating our readiness to escalate to full nuclear war if necessary. In addition to these highly visible exercises, regular NATO and U.S. "operational readiness inspections" were conducted to test and assess our nuclear readiness.

This display of nuclear capability and readiness served as a credible deterrent. While it is impossible to definitively determine whether the Soviet Union and other Warsaw Pact states would have attacked in the absence of a nuclear deterrent, the perceived risk, should they cross the armed attack threshold that triggers the right to collective self-defense under international law, was undoubtedly convincing, particularly considering factors like secure second-strike capability and the shift from counter-value to counter-force targeting. Moreover, their own limitations became glaringly apparent once the Cold War ended and may also have played a significant role in the absence of an attack.

This nuclear deterrence policy remains integral to NATO's strategy today, as affirmed in the 2022 Strategic Concept. As long as nuclear weapons exist, NATO will maintain its status as a nuclear alliance.

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JOHN SWORDS

Let us move the timeline on. Harold, following the end of the Cold War, the focus was no longer on Russia. NATO started to get involved in other sorts of operations, so-called out-of-area operations. Could you speak to how some of those NATO operations reflected or may even have contributed to changing understandings of international law?

REMARKS BY HAROLD HONGJU KOH

Let me describe the moment in NATO history that I first witnessed twenty-five years ago. What is helpful is to look back and understand exactly what era we were living through in the historical evolution of NATO over seventy-five years. We should understand the politics, the policy, the law, and the personalities that drove that evolution.

NATO's last seventy-five years essentially break into three eras. Phase One was the Cold War, the four decades from 1949 to the fall of the Berlin Wall. This was a period of nuclear obsession, as Mike Schmitt has just described. An era of "ashes-adoption-architecture," inasmuch as legal developments in this period built on the ashes of World War II, leading to the adoption of the North Atlantic Treaty, and the creation of a new legal architecture across the post-war landscape—the Genocide Convention, the Geneva Conventions, the United Nations Charter system, Bretton Woods, and Nuremberg.

Phase Two ran from 1989, the fall of the Berlin Wall and the collapse of the Soviet Union, to December 31, 1999. I became Assistant Secretary of Human Rights in 1998, during the time of Kosovo, the bromance between "Boris and Bill" (Yeltsin and Clinton), Madeleine Albright and the first enlargement of NATO to the Czech Republic and Poland, then the immediate post-Dayton period, where experienced Russia hands like Strobe Talbott and Steve Sestanovich were running U.S. policy toward the "Newly Independent States." This second NATO phase was a moment of extraordinary optimism: an exciting window of cooperation, democratization, and marketization. There seemed to be no limit to how far NATO could extend. People were talking euphorically about "NATO from V to V," stretching from Vancouver to Vladivostok.

During this second phase, the main legal innovation was *adaptation* of NATO's rules to new and emerging situations. Kosovo was a policy success but, to me, a legal failure, because nineteen NATO nations bombed for seventy-nine days and all apparently thought it was lawful to do so; but they could never agree upon and announce a common legal rationale for their joint humanitarian intervention. That failed lawmaking moment has led to failure ever since to articulate when collective humanitarian intervention might be lawful, from Rwanda to Libya to Syria. But at the tail end of this period, 2001, came a more successful legal adaptation: the collective agreement that Article V of the NATO Treaty should apply to non-state actors, a legal adaptation that allowed NATO to be hugely effective in the battle against Al Qaeda and its spinoffs.

Why did Phase Two end on December 31, 1999? Because on that day, Boris Yeltsin quit and Vladimir Putin became president of Russia. This is where personalities come in. We cannot tell NATO's story without telling the story of Vladimir Putin. It would be like Hamlet without the Prince. There is something rotten in the state of NATO, and it is Vladimir Putin, who has now been president longer than anybody in Russia since Stalin. Putin grew up watching NATO develop, threatening what he believed was the imperial prerogative of his country, which in his eyes, by winning World War II, deserved to control Central and Eastern Europe forever. Instead, Putin realized that at its fiftieth anniversary, NATO was expanding eastward, and what other observers might have thought of as routine enlargement, he saw as an existential threat to Russia's future.

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NATO's out-of-theater operations, which John has just mentioned, was just another form of NATO enlargement. There were two forms of NATO enlargement—enlargement by membership and enlargement by geography and nature of operations. By the time we get to the post-2001 era and onto the present, NATO has grown to cover a billion people, thirty-two countries—North America, Iceland, Greenland, the UK, Europe, the Baltics, Finland, and Sweden, all bound by the collective security obligation of Article V. And Putin feels like he is surrounded.

Here is the irony: NATO has never been stronger, but it has also never been more at the cusp of its own destruction. NATO's victories sowed the seeds for its own challenge because all of this enlargement triggered Putin's "counter-enlargement" instincts. What did Putin do?

First, he decided to follow the strategy of Yeltsin toward adventurism, which had started in Chechnya, continued with Moldova, Transnistria, Abkhazia, South Ossetia, and now Crimea, the Donbas, and Ukraine.

Second, the Putin era marked the end of nuclear cooperation and the collapse of arms control—the end of the Anti-Ballistic Missile (ABM) Treaty, the Intermediate-Range Nuclear Forces (INF) Treaty, and the Conventional Forces in Europe (CFE) Treaty.

Third, to justify his adventurism, Putin fostered the false link to terrorism—when Putin first met Clinton, and I remember this happening, he said, "Osama bin Laden is in Chechnya. So we should fight together against Chechen terrorists." That is exactly what he just said about the people who just blew up the Moscow opera house: that the terrorists are in Ukraine, which justifies Putin's continuing invasion. Remember that Trump and Putin are actually quite alike in certain respects. They do not have many moves, but they play them over and over again, aggressively and unilaterally.

Fourth, this third period saw the return of the Russian veto, which resumed with a vengeance after Libya in 2011. Witness particularly multiple vetoes that blocked action to prevent meaningful UN intervention in Syria. The return of Russia's veto made cooperation through the UN far less possible and therefore made cooperation within NATO absolutely crucial.

A fifth and final feature of this third era: continuing NATO enlargement—NATO grows from twelve countries to thirty-two, so that it is right on Russia's borders. NATO's pivotal moment came in February 1990 when, in an early phase of the negotiations over Germany's unification, then-Secretary of State James Baker asked Mikhail Gorbachev whether Moscow would accept a unified Germany if NATO would not move NATO "one inch" to the East. The idea that NATO would commit not to engage in further eastward expansion was, however, quickly abandoned in the further negotiation process, and no such commitment found its way into the 2+4 Treaty. In the end, Gorbachev fell, the Soviet Union collapsed, so now there was nothing not potentially subject to NATO's enlarged scope. For Putin, this has been unbelievably threatening, which is why he treats the joint NATO response in Ukraine as aggression by the West because of the aggregation of NATO military infrastructure on his border. We have an unusual situation, whereby Joe Biden has committed that Russia will not touch one inch of Estonian (i.e., NATO) soil for 1.3 million people, while for 33 million people in Ukraine who have been invaded in a brutal Russian campaign of aggression and atrocity, we have to stay on this side of the rules of neutrality, and on this side of the rules of intelligence gathering and sharing. Still, although Ukraine is not a NATO member, it is hard to imagine what more NATO could have given by way of aid over the last couple of years.

For Putin, legal imitation is the sweetest form of payback. Putin watches what NATO does, and when it pushes the legal bounds, he does us one better. When the United States holds prisoners on Guantánamo, Putin holds Navalny in the Arctic Circle. When NATO treats Kosovo as a breakaway republic, Putin says the same about Crimea, the Donbas, Transnistria, and Abkhazia. When NATO ranges out of theater to do counterterrorism operations, he invokes it as a reason why he can do the same thing fighting "terrorists" in Ukraine.

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For each of NATO's moves, Putin has parallel counter-move. When we do elections, he subverts them with cyber. When we cite the UN Charter, he says we must respect his veto. When we do AI, he does counter-AI. When we do a forever war, he says forever war works for me. And what the most important thing for all of us to remember at the American Society of International Law is that *Putin is an international lawyer.* His degree at Saint Petersburg University was on the most-favored-nation treaty principle in international law before he joined the KGB, which is why he is so clever at taking unnuanced international law arguments made by NATO countries and then flipping and abusing them for his own self-interested ends.

My point is that we should think of NATO's seventy-five-year history as a story about challenge and response. Phase Three, the age in which we now live, spans Putin's Twenty-First Century, where the greatest challenges will be *authoritarianism*, *artificial intelligence*, *and advancement* of NATO from an organization dedicated to common defense into an organization dedicated to joint security. When NATO uses drones, Putin will twist and use those drone rules, all of which means—and this is my bottom line here—that if NATO is going to come up with new rules for Artificial Intelligence, NATO's rules need to be very clear. They have to be written down. These rules have to set clear limitations, so that they do not get flipped and abused by Putin for his next round of adventurism.

This is NATO's third era in which we now live. If the legal challenges in Phase One were rising from the ashes of war to adoption of the Charter and to build a legal architecture, and Phase Two was about adaptation of existing rules to address NATO enlargement, NATO's third phase will focus on artificial intelligence, anti-authoritarianism, and advancement of the organization to broader goals. After the brief detente of the late 1990s, this third phase may not be a Cold War, but today certainly looks like a "Killing Frost." And if we allow ourselves to get distracted from NATO's challenges by Israel/Hamas and China/Taiwan, decades of forward NATO progress could quickly get unwound.

John Swords

Thanks, Harold. You touched there on issues related to the *jus ad bellum*—humanitarian intervention and self-defense in relation to non-state actors. Perhaps I can bring you in again, Mike, moving from the *jus ad bellum* to the *jus in bello*. Have you seen any examples from NATO operations that have been influential on developing understandings of international humanitarian law, for example?

Michael Schmitt

NATO operations have repeatedly served as a crucible for refining the interpretation and application of international humanitarian law (IHL). The Alliance's diverse membership, encompassing states with varying legal obligations and interpretations, often necessitates finding common ground in complex operational environments. This is particularly the case with respect to the application of Additional Protocol I to the Geneva Conventions, to which, most importantly, the United States and Türkiye are not parties. Although fascinating academically, such differences actually must be resolved or accommodated in the battlespace.

One notable example is the debate surrounding the targeting of "war-sustaining" objects. In 2008, NATO ministers authorized International Security Assistance Forces (ISAF) forces in Afghanistan to target facilities supporting the insurgency. However, disagreements arose regarding the legality of targeting Afghan drug facilities under this mandate. General Craddock, then the Supreme Allied Commander Europe (SACEUR), interpreted it to include targeting them, for drug production generated funds that, in a variety of ways, eventually ended up in the hands of

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the Taliban. However, his decision faced pushback on legal and operational grounds from the German Commander of Allied Joint Force Command Brunssum and the U.S. Commander in Afghanistan, General McKiernan. This internal NATO conflict influenced future operations, such as attack on ISIS oil assets, by necessitating a clear nexus between targets and military operations.

Another significant example followed the release of the International Committee for the Red Cross's (ICRC) 2009 *Interpretive Guidance on the Notion of Direct Participation in Hostilities*. The *Guidance*'s restrictive approach, such as excluding individuals making improvised explosive devices (IEDs) from being treated as directly participating, applying the "continuous combat function" criterion, and the "revolving door" effect, faced considerable pushback from NATO operators due to their impracticality in real-world scenarios. This experience highlighted NATO's role as a test bed for legal concepts, where practical challenges inform the interpretation and application of IHL.

Additionally, NATO operations have moderated some uniquely American views on IHL. For instance, the U.S. perspective on perfidy, environmental considerations, and entities containing dangerous forces differ from those of most NATO allies. In coalition exercises and operations, these American views often recede to accommodate the broader consensus within NATO, thereby ensuring cohesive and legally sound operations. NATO has moderated the American views in a way that operationally means they do not make much of a difference anymore.

John Swords

Thanks very much, Mike. I think that is right. I think there is a lot of legal interoperability that also goes on, deconflicting of legal positions and such like. We have touched on influence on the Charter, the *jus ad bellum*, and the *jus in bello*. I will just very briefly add, in terms of international human rights law, in particular on the other side of the Atlantic before the European Court of Human Rights, there have been a number of landmark cases that have come out of NATO-related operations. You can think of *Banković*, a leading case on extraterritorial jurisdiction; *Behrami and Saramati*, concerning attribution and responsibility to international organizations; and more recently, the case of *Hassan*, IHRL accommodating IHL as a *lex specialis*.

Time is against us. Let us move forward once again to the present day, to the tragedy unfolding in Ukraine. Oona, I would like to ask you a bit about outcasting. Can you speak to the efforts of NATO allies, through NATO but also elsewhere, to call out Russia's violations of international law to impose costs or otherwise to hold Russia accountable?

Oona Hathaway

I want to begin by briefly reacting to what Mike said. I largely agree with him, but it is important to note that the effect of legal interoperability is not a one-way street. It is not just NATO tempering America's distinctive positions, but sometimes the influence goes the other direction. Sometimes America's distinctive positions end up shaping NATO allies' legal positions—not always for the good, in my view. The move toward more lenient targeting of war-sustaining objects, the broader understanding of what it constitutes civilians "directly participating in hostilities," the approach to assessing proportionality. Some of these legal positions have led to increasing vulnerability of civilians in areas of conflict—and that has meant more civilian casualties. This is a two-way street and it does not always lead toward more protective legal positions; indeed, the opposite can be true.

In response to your question: Yes, NATO has played an extraordinarily important role in responding to Russia's violations of international law through outcasting. Obviously, the UN has been incapable of responding through the Security Council. The General Assembly has voted many times to condemn Russia's invasion of Ukraine, but it does not have any enforcement

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capacity. That has meant that it is left to other institutions and to individual states to take up the slack and to act. NATO has been a really important player in that. NATO summits have repeatedly called out the Russian invasion of Ukraine as illegal, demanded that Russia "immediately stop this war and completely and unconditionally withdraw all of its military forces from Ukraine in line with UN General Assembly resolutions."[3] There is an EU-NATO Staff Coordination on Ukraine that supports cooperation between NATO and Ukraine in support of Ukraine's defense. NATO has also expanded through the accession of Finland and Sweden, broadening the defensive network supporting Ukraine. NATO has created broad institutional structures for responding to the threat to Ukraine.

NATO members have also played a critical role in a variety of forms of outcasting.[4] By outcasting, I mean various ways of excluding states from the benefits of global cooperation in response to their illegal actions. Outcasting has been the central form of international law enforcement in the post-war era. NATO has played a critical role in the extensive ways in which the global community has responded to Russia's illegal invasion of Ukraine. Indeed, NATO has really led the way. Most notably, there is a massive sanctions regime. It is hard to recall a system of sanctions as extensive and broad as the one that we have seen in response, first, to Russia's illegal annexation of Crimea in 2014 and, since 2022, to the full-scale invasion of Ukraine.

Russia was also expelled from the G8 after the seizure of Crimea, it was expelled from the Human Rights Council, a vote that happened through the General Assembly backed by NATO member states. Russia has also been expelled from the Council of Europe, again a move backed by NATO members.

In addition to leading the way on outcasting, NATO has also led the way in providing support to Ukraine. NATO is helping to transition Ukraine from Soviet-era military technologies to NATO-era standards and training and doctrines, helping to rebuild Ukraine's security and defense sector. Individual NATO member countries have been sending weapons, ammunition, and many types of light and heavy military equipment, which have been critical to Ukraine's capacity to defend itself. There is no doubt that Ukraine would no longer be independent today if not for that support. It simply could not stand up against the onslaught that it is facing from Russia. The NATO Ukraine Council has also provided a forum for crisis consultation in the face of the ongoing threat from Russia, bringing Ukraine and NATO members to the table to work together to deal with the crisis. Together, NATO allies account for 99 percent of all the military aid to Ukraine, so it is not just an important contributor but really it is the *central* contributor to military and other forms of assistance to Ukraine.

NATO is doing this because it sees Russia's illegal aggression in Ukraine as the existential threat to the global order that it really is. This is the largest land war in Europe since World War II. It is an effort at territorial aggrandizement and a clear affront to the UN Charter's prohibition on the use of force. If Russia is able to succeed, it will trigger a massive transformation, not just of Europe but of the globe and of the global legal order. NATO recognizes this existential threat to the global order for what it is. And it is responding accordingly.

Unfortunately, not all the members of NATO are fully rowing in the same direction at this moment. Our own Congress is yet to vote to provide the desperately needed aid that it has promised to Ukraine. I am hopeful that it will do so, because that aid has been critical to the ability of Ukraine to defend not just itself but the global order on which we all depend.

[3] Statement by the NATO-Ukraine Council Marking Two Years of Russia's Full-Scale Invasion of Ukraine (Feb. 24, 2024), *at* https://www.nato.int/cps/en/natohq/official_texts_223087.htm.

[4] Oona A. Hathaway & Scott J. Shapiro, *Outcasting: Enforcement of Domestic and International Law*, 121 YALE L.J. 252 (2011).

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John Swords

Thanks, Oona, and there has also been a broader legal debate about the legal basis for sanctions and others measures by Allies and others, whether they have been done under retorsion or as some kind of countermeasures—another possible example of legal development. But you also mentioned the contributions of armaments and training to Ukraine. Mike, how do you see these efforts by NATO allies to help Ukraine defend itself by providing them with armaments, but to do so in a way that enables them not to be seen as parties to the armed conflict or to violate any duties of neutrality?

Michael Schmitt

The provision of armaments and training to Ukraine by NATO allies has sparked debate regarding the law of neutrality. The traditional view, known as strict neutrality, considers such assistance a violation of neutrality and is supported by a number of very reasonable scholars and practitioners. However, the United States adheres to a different doctrine known as the qualified neutrality view, which has been prevalent since at least World War II. For its proponents, which include many NATO Allies, such assistance is not an "internationally wrongful act" on the basis of violating neutrality law.

Within the qualified neutrality framework, there are divergent opinions. Some argue that a United Nations Security Council Chapter VI resolution is a prerequisite for providing assistance. Others, myself included, contend that assistance is permissible without such a resolution, provided there is a clearly identifiable aggressor.

Determining whether a state providing aid and assistance is no longer neutral and has become a party to the conflict is a choice of law issue, involving whether IHL and other rules of armed conflict apply to the assisting state. The ICRC's work on this issue, particularly regarding aiding a state during non-international armed conflicts, offers a useful framework that can be applied to international conflicts. In my view, four critical factors must be considered: the intent of the supporting state to contribute to specific hostilities, the benefit of the support to military operations, the integration of support into the conduct of hostilities, and the immediacy of the support's impact on the battlefield. Consider the provision of intelligence. There is a substantial difference between providing actionable tactical-level intelligence that allows the supported state to identify the location of a target and strategic-level intelligence about the broad intentions of the enemy leadership.

Given the extensive military aid and assistance provided by NATO allies to Ukraine, including operationally actionable intelligence and advanced weaponry, a strong argument can be made that some of them are, in effect, parties to the conflict. For instance, intelligence provided by the United States enabled Ukraine to target and sink the Russian Black Sea Fleet's flagship, the Moskva. This raises complex legal questions regarding their obligations under IHL and potential liability for violations by Ukrainian forces, should they occur.

John Swords

Thanks, Mike. You mentioned the ICRC work. Chatham House also published a report just last month on joining existing armed conflicts that was very good and, I thought, helpful in emphasizing the need for a direct contribution to the actual conduct of hostilities and the need for coordination. Harold, I should have brought you in earlier on accountability since you have actually been representing Ukraine and many allies have supported them in litigation as well. Do you want to say anything on that or on the kind of general importance on allies speaking up in relation to violations

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of international law? And if so, is there a sense in which membership of NATO perhaps facilitates or encourages allies to have the confidence to speak out?

Harold Hongju Koh

Simply put, NATO is the "law-abiding nations" club. We can only maintain our moral high ground over the Russians if the allies enforce these international law rules on one another.

But the NATO allies also benefit from legal comparison with one another, to build on the point just made about interoperability. We have with us Canadian Supreme Court Justice Rosalie Abella, who has been a leader among global Supreme Court justices in urging different countries to borrow from each other's constitutional traditions. But if national courts can borrow legal lessons from each other, so too can executive branch lawyers. When the Obama administration finally eliminated its "Don't Ask, Don't Tell" policy toward LGBTQ+ individuals in the U.S. military, it was partly the result of a meeting that I attended with my friend, the long-time Canadian Legal Adviser Alan Kessel, who is also here today. After U.S. Defense Department officials agonized about how "unit cohesion" would be maintained if gay soldiers took showers with other American troops, the German Legal Adviser politely pointed out that gay German soldiers had been serving alongside Americans in NATO units since 1969, and that those interoperable units had actually proven to be pretty coherent.

As I mentioned earlier, in NATO's third phase, the three challenges are artificial intelligence, anti-authoritarianism, and advancement of the organization to new goals. NATO's future is artificial intelligence. Significantly, Putin said "whoever controls AI controls the world." Putin does not say something like that unless he himself intends to control the future of AI, which means that the NATO allies, now thirty-two countries, have to agree on their own rules about artificial intelligence that can constrain both their own behavior and Putin's. And the United States and its like-minded allies got a useful start on this with its February 16, 2024 political declaration regarding Responsible Military Use of Artificial Intelligence. That declaration specifies that human beings must be in the loop when engaged in lethal targeting, and senior officials must play an essential role with regard to the development, deployment, use, and legal review of AI targeting.

But the second big threat to NATO is authoritarianism. Right now, the biggest threats to NATO are Ukraine, artificial intelligence, and Donald Trump and other authoritarians: Viktor Orbán is inside NATO; Erdoğan is inside NATO. We have a lot of current and potential authoritarian leaders who do not understand NATO's history, do not understand what the critical global role of NATO is, who will not fund NATO, who will not fund Ukraine, and who see the value of persisting in a world of perpetual war, rather than in a world with broader advancement of NATO as an international institution.

Which brings me back to the NATO Treaty, whose seventy-fifth birthday we celebrate today. Everybody talks about Article V, but read the preamble and four articles that come before it. The preamble basically says we want to live in peace. We do not want to have perpetual war. We want to safeguard freedom in the common heritage, which includes the environment, "founded on the principles of democracy, individual liberty, and the rule of law." In other words, NATO is and will be a coalition of democracies who stand against authoritarianism.

Article I of the NATO Treaty encourages the peaceful settlement of international disputes. We have never had a time where there are more cases in international dispute settlement procedures strengthening free international institutions. Article II calls for building collaboration, cooperation, and the joint rule of law. Article III promotes capacity building to resist armed attack. And then, Article IV, consultation when there are common threats to territorial integrity, political

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independence, or security. NATO does nothing these days if not consult. The degree of consultation in Brussels, Washington, and online is beyond anything anybody ever imagined.

This creates a real possibility now that in the twenty-first century, NATO will come to see its role not just as a collective defense, but as promoting a system of *collective security* for NATO and its members, as well as adjacent countries like Ukraine. And that role inevitably involves democratic nations working together to protect democratic institutions, the rule of law, and human rights. This broader mission—democracies protecting democracies—suddenly makes NATO one of the most important international organizations that we have going forward, and also, among other things, human rights as well as a security organization.

John Swords

Fascinating. We have done it. We have galloped through seventy-five years of history, and you have actually already stolen the march by talking about the future. I would just like to say a huge thank you to the American Society of International Law for allowing us to have this panel session and an even bigger thank you to our panel.

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