

Some Thoughts on the NATO Position in Relation to the Iraqi Crisis

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Abstract

NATO is a collective self-defence regional organization that was established at the time of the Cold War, and the end of East–West confrontation gave rise to the debate about its future role. In the 1999 Washington summit a new strategic concept was promulgated, according to which NATO was to act as a collective security organization as well. The community of interest previously represented by the Eastern bloc has not been unequivocally replaced by a new one. Hence there is room for national interest to play greater role in the decision-making by the alliance. This decision-making is based on consensus, which is incompatible with assertions of strictly national policy. The institutional crisis within NATO in early 2003 was largely due to the transfer to within NATO of the disagreement among its member states in the UN Security Council over dealing with Iraq's alleged weapons of mass destruction. The crisis was ultimately resolved, but it exposed the serious limitations of the NATO decision-making process. While claims about the likelihood of NATO's survival seem premature, the recent institutional crisis may be a legitimate ground for considering institutional reform.

Key words

collective security; consensus; Iraq; NATO; self-defence

I. INTRODUCTION

The North Atlantic Treaty Organisation (NATO) was established on the basis of the North Atlantic Treaty, its constituent instrument, signed in Washington, DC on 4 April 1949.¹ It came into being during the Soviet blockade of Berlin, and basically constitutes a military alliance of the traditional kind premised on the right of collective self-defence. At the time of its creation, NATO possessed only the very rudimentary features of an international organization, Article 9 of the Washington treaty providing only for a Council and 'such subsidiary bodies as may be necessary'.² In fact, the institutional framework of the alliance appears to have been conceived as nothing more than traditional inter-state co-operation, rather than the creation of an 'autonomous' organization acting in its own capacity.³ However, substantial constitutional changes have taken place both soon after the establishment of the

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1. 34 UNTS 243.

2. P. Sands and P. Klein (eds.), *Bowett's Law of International Institutions* (2001), at 193.

3. Final Communiqué, North Atlantic Council, Washington, 17 Sept. 1949, <http://www.nato.int/docu>.

alliance and in 1951–2.⁴ Furthermore, since the ending of the Cold War NATO has embarked upon a practice of establishing structures of co-operation between its members and third states, such as the Euro-Atlantic Partnership Council in 1997.⁵ The decision-making process in the Council and its subsidiary committees is by way of consensus, so that no decision can be taken if there is dissent by any of the member states.

The institutional crisis within NATO in February 2003 constituted a side effect of the Iraq crisis. It raised doubts as to the credibility of the organization regarding honouring its commitments to member states and even prompted comments as to the viability of NATO as an international institution. It has certainly exposed certain limitations of the decision-making process of the alliance and offers an opportunity of assessing NATO's role in the post-Cold War environment.

The Iraq crisis of November 2002–March 2003 developed as a result of the question of Iraq's compliance with UN Security Council Resolution 687 (1991).⁶ Iraq was under the obligation to submit to a regime of international inspection, whose function was to discover and destroy long-range conventional weapons and weapons of mass destruction possessed by Iraq. For 12 years Iraq's co-operation was not always forthcoming and it would put difficulties in the way of the United Nations Special Commission (UNSCOM) inspectors. After the US–UK air strike against it in 1998, Iraq ceased co-operation with the UN inspectors. In November 2002, as a result of US and UK allegations that Iraq had resumed a programme of rearming with weapons of mass destruction during the period 1998–2002 and that the Iraqi regime had established links with terrorist organizations, the Security Council adopted Resolution 1441 (2002) demanding that Iraq accept the resumption of weapons inspections.⁷ The United States and the United Kingdom had threatened the use of force; Resolution 1441 threatened serious consequences for Iraq if its terms were not complied with, but it did not authorize the use of force. Inspections resumed promptly and it

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4. Agreement on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff, Ottawa, 20 Sept. 1951, <http://www.nato.int/docu/basicxtxt>. The Agreement provides that NATO shall possess 'juridical personality', *ibid.*, Art. IV. This provision provides for legal personality in domestic law by stating that NATO 'shall have the capacity to conclude contracts, to acquire and dispose of movable and immovable property and to institute legal proceedings'. There is no express reference to personality under international law. This, however, may be deduced by implication on the basis of the ICJ reasoning in the *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, [1949] ICJ Rep. 174, at 178–9. However, Art. II of the Ottawa Agreement expressly excludes military headquarters (and, arguably, military operations executed under their command) from its object and purpose. Moreover, the North Atlantic Council, as the principal organ of NATO, does not seem to possess authority analogous to that of the UN Security Council to invest, by authorizing it, a military operation which is planned and carried out as joint enterprise with the legal mantle of collective security action. The Agreement also provides that the organization and its staff shall enjoy privileges and immunities: Arts. IV–XI, XVII–XXIII, and Agreement on the Status of Missions and Representatives of Third States to the North Atlantic Treaty Organisation, Brussels, 5 Oct. 2000. Moreover, at the ninth session of the North Atlantic Council in Lisbon, on 25 Feb. 1952, the office of Secretary-General of NATO was created and the rotating presidency of the Council by member states abolished. Final Communiqué of the Ninth Session of the North Atlantic Council ('The Lisbon Decisions' on the Reorganization of the Alliance and the Appointment of a Secretary-General), Lisbon, 25 Feb. 1952, <http://www.nato.int/docu/basicxtxt>.
 5. Sands and Klein, *supra* note 2, at 195. Also, Founding Act on Mutual Relations, Co-operation and Security between NATO and the Russian Federation, Paris, 27 May 1997, <http://www.nato.int/docu/basicxtxt>.
 6. UN Doc. S/RES/687 (1991).
 7. UN Doc. S/RES/1441 (2002).

was reported that Iraq was generally co-operative and that there were no findings that suggested that Iraq possessed weapons of mass destruction. The United States and the United Kingdom persisted in their stance, and the US Secretary of State presented evidence to the Security Council that in his government's view substantiated the allegations.⁸ Moreover, the United States and the United Kingdom pressed for the adoption of a further Security Council resolution authorizing the use of force against Iraq, while at the same time maintaining that armed force would be used irrespective of a new resolution.

The evidence presented to the Security Council by the US government failed to persuade the majority of the Council of the necessity of an authorization to use force against Iraq. Three of the five permanent members (France, China, and the Russian Federation) and the majority of the non-permanent members took the view that inspections should be allowed to continue. Moreover, France and the Russian Federation expressly stated that they would cast a negative vote on a draft resolution authorizing the use of force against Iraq, if it were placed before the Council at that point.⁹ The rift among the Western permanent members of the Council spilled over to the European Union and NATO. The EU became divided on the issue of the use of force against Iraq and was unable to agree a common position on that country. The division within NATO was prompted by a US proposal in January 2003 that the alliance take steps in order to assist the defence of Turkey by dispatching Patriot ground-to-air anti-aircraft missiles, early warning surveillance aircraft (AWACS) and chemical/bacteriological warfare early-warning systems. The US proposal met opposition from France, Germany, and Belgium. As a result there was no consensus in the North Atlantic Council and NATO could not act.

On 10 February 2003, Turkey formally made a request for consultations under Article 4 of the NATO treaty concerning the dispatch of defensive assistance. Under this provision member states are obliged to consult together 'whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened'. Therefore, if a NATO member considers that it is likely to be the victim of an imminent armed attack, it may express its fears publicly and activate the consultation process with regard to the measures to be taken by the alliance to boost its defensive capacity. Again France, Germany, and Belgium disagreed and no consensus was achieved.¹⁰ Article 5 of the North Atlantic Treaty provides that an armed attack against one or more of the member states in Europe or North America shall constitute an attack against all, giving them the right of individual and collective self-defence, as recognized in Article 51 of the UN Charter.

NATO was never activated as a defensive alliance during the Cold War, but rather aimed to operate as a deterrent to the rival Warsaw Pact. In the post-Cold War era it was authorized by the UN Security Council to use force in Bosnia, as an instrument of the United Nations in order to enforce sanctions under Chapter VII.¹¹ Moreover,

8. Statement by the US Secretary of State Mr C. Powell, 5 Feb. 2003, S/PV.4701, at 2–17.

9. *Keating's Record of World Events* 2003, 45313–14.

10. I. Black, 'Veto Deepens NATO Rift over Iraq', *Guardian*, 10 Feb. 2003, <http://www.guardian.co.uk/Iraq/story>.

11. UN Doc. S/RES/770 (1992); UN Doc. S/RES/816 (1993); UN Doc. S/RES/836 (1993).

it established its first field operation, the Implementation Force (IFOR) in 1995 (replaced by the Stabilization Force (SFOR) in 1996), again under the authority of the Security Council,¹² in order to supervise the implementation of the Dayton Peace Accords ending the conflict in former Yugoslavia. Furthermore, NATO assumed command of the International Security Assistance Force (ISAF) in Afghanistan on 11 August 2003.¹³ The first occasion on which NATO resorted to force in Kosovo in 1999 was not as a defensive alliance, but rather as a collective security regional arrangement. While such a role was not expressly envisaged in the North Atlantic Treaty, it is not uncommon for a defensive organization to act in such capacity, provided it conforms to the requirement of prior Security Council authorization in accordance with Chapter VIII of the UN Charter.¹⁴ In the case of Kosovo, no such authorization was given, and the NATO action, taken in spite of Article 7 of the North Atlantic Treaty recognizing the primacy of the Security Council in the maintenance of international peace and security, was of doubtful legality.¹⁵ While NATO has not abandoned its original character as a defensive regional arrangement, it has taken substantial steps into the field of collective security, by virtue of the articulation of new strategic concepts in the declarations of Washington in 1999¹⁶ and Prague in 2002.¹⁷

Article 5 of the North Atlantic Treaty was invoked for the first time by the alliance with respect to the terrorist strike against the United States on 11 September 2001. However, action in self-defence against the Taliban regime in Afghanistan was not resorted to by NATO, but by the United States acting in concert with certain other states. It has been suggested that this has been due to US unwillingness to submit its military planning and target selection to the likely scrutiny of the rest of the NATO allies within the framework of the alliance committees.¹⁸ The invocation by Turkey of Article 4 of the North Atlantic Treaty was another 'first-time' instance, and it took place in the broader context of the recent Iraq crisis. This particular invocation became the source of sharp division within the alliance that gave rise to concerns about the very survival of NATO and raised doubts about the propriety of its existence.

12. UN Doc. S/RES/1031 (1995).

13. 'NATO Takes on Afghanistan Mission', 11 Aug. 2003, <http://www.nato.int/docu/update/2003/08-august/>.

14. Sands and Klein, *supra* note 2, at 153, 193.

15. The resort to force rested on two justifications, humanitarian intervention and the assertion of an 'automatic' authorization by the UN Security Council to use force which is implicit in previous Chapter VII resolutions. It is extremely doubtful that both the above justifications are admissible in present international law as exceptions to the rule of the prohibition of the use of force. For this author's views see C. Antonopoulos, 'The NATO Military Action against the Federal Republic of Yugoslavia (Kosovo) and the International Law on the Use of Force', (1999) 52 *Revue Hellénique de Droit International* 411. See also I. Brownlie and C. J. Apperley, 'Kosovo Crisis Inquiry: Memorandum on the International Law Aspects', in A. Boyle (ed.), *Kosovo: House of Commons Foreign Affairs Committee 4th Report, June 2000* (2000) 49 ICLQ 878; N. D. White, 'The Legality of Bombing in the Name of Humanity', (2000) 5 *Journal of Conflict and Security Law* 27.

16. The Alliance's Strategic Concept. Approved by the Heads of State and Government participating in the meeting of the North Atlantic Council in Washington, DC on 23 and 24 April 1999, <http://www.nato.int/docu/pr/1999>.

17. Prague Summit Declaration, 21 Nov. 2002, <http://www.nato.int/docu/pr/2002>.

18. I. Black, 'Iraq Exposes Divided Alliance', *Guardian*, 7 Feb. 2003, <http://www.guardian.co.uk>.

2. THE OBJECT AND PURPOSE OF NATO

NATO constitutes a collective self-defence organization by the terms of its constituent instrument. Moreover, it constitutes an exclusively collective self-defence institution, unlike other regional organizations (such as the Organization of American States – OAS), whose constitutions embody collective defence pacts but whose field of activity also extends to collective security, and to economic and social purposes.¹⁹ The establishment of a regional organization solely on the basis of the right of self-defence is a manifestation of the will to be able to resort to armed force unhampered by the prior authorization of the UN Security Council. According to the original draft of the UN Charter the Security Council would have had the monopoly of the right to resort to force. Self-defence represents a situation of extreme gravity for a state-victim of an armed attack that requires immediate action. If such action were dependent on prior Security Council permission (which might not be forthcoming due to the negative vote of a permanent member) then the state facing an armed attack would not be able to defend itself and would run the risk of being overrun. It was the concern of the American states at the San Francisco conference that their collective defence alliance would become inoperative as a result of Chapter VII of the Charter. Therefore, on their insistence, Article 51 providing for the right of self-defence was inserted in the text of the Charter.²⁰ Moreover, the advent of the Cold War, and the consequent paralysis of the Security Council through the exercise of the veto, resulted in disillusionment with respect to the effectiveness of the UN collective security system. Hence states were prompted to turn to the right of self-defence as the basis of safeguarding their security interests.

Although Article 5 of the North Atlantic Treaty in principle entitles member states to resort to force against an aggressor, its wording is broad, allowing each member state to take ‘such action as it deems necessary’.²¹ Also, collective self-defence appears to afford an entitlement to use force only against third-state aggressors, namely non-members of NATO. Indeed, it would hardly conform to the concept of an alliance if Article 5 could be invoked against another member state. Article 5 is premised upon Article 51 of the UN Charter. It requires an armed attack as the *casus foederis* for resort to force, and imposes a duty to report measures of self-defence to the Security Council; it also acknowledges the temporary character of action in self-defence should the Security Council adopt measures under Chapter VII for the restoration or maintenance of international peace and security. At the same time it is inevitably subject to controversy over the scope of self-defence under the UN Charter. Thus the issue of anticipatory self-defence in case of an imminent armed attack may arise under the NATO treaty.

The proponents of the doctrine of anticipatory self-defence rely on the diplomatic correspondence between the US and the UK governments following the *Caroline*

19. N.D. White, *The Law of International Organisations* (1996), 205.

20. *Ibid.*

21. Sands and Klein, *supra* note 2, at 193.

incident of 1837.²² They argue that it represents the concept of self-defence in customary law, which was preserved under the UN Charter as a result of the phrase ‘inherent right’ in Article 51. It is submitted, however, that anticipatory self-defence is a concept of dubious legality.²³ First, its legal basis rests on a statement made at a time when the use of force was not prohibited in international law. Therefore claims of self-defence at that time had only moral or political value and hardly constituted an exception to a prohibitive rule. Second, the support for anticipatory self-defence appears to rest on *ex post facto* experience rather than on consistent and unopposed state practice. Events such as the Japanese attack on Pearl Harbor in 1941 are given overwhelming significance as blueprints for legitimate future military action based entirely on the predicament of the victim state (the United States). The argument seems to be that anticipatory action is legitimate because no state must find itself in the position of the United States in 1941. But there is no word of what the United States actually did in 1941. Third, experience may constitute a cogent basis for generating state practice in favour of the admissibility of anticipatory self-defence, provided that the ‘imminence’ of an attack is proved. However, this has not been the case in state practice. The anticipatory use of force by Israel in June 1967 and by the United States against Libya in 1986 do not seem to have persuaded the international community with respect to the ‘imminence’ of the attacks they purported to counter. Fourth, anticipatory self-defence has appeared very attractive in offering to states feeling threatened in an insecure regional political and military setting a justification for resorting to force. The aim is to prevent another state or states from becoming potentially powerful militarily or simply to assert themselves before a politically hostile state or states. As a result, anticipatory self-defence has gone beyond what was envisaged by eminent authorities on the basis of the Second World War experience and it seems to have degenerated into manipulating self-defence to serve as an instrument of national policy under a doctrine of ‘pre-emptive strike’.²⁴ Fifth, in the absence of any positive action by the putative aggressor, anticipatory self-defence renders unimportant the requirement of proportionality of action.²⁵

The events of 11 September 2001 have caused calls to be renewed for the admissibility of not just anticipatory action against an imminent armed attack, but of pre-emptive strikes against states that harbour terrorists or are building an arsenal of weapons of mass destruction.²⁶ The fight against terrorism, hitherto pursued primarily through the exercise of criminal jurisdiction and judicial assistance, seems to expand into the field of the *jus ad bellum* by invoking the right of self-defence as a justification of pre-emptive action. The basic characteristic of the law of the use of force is that it is state-centred. Therefore, any forcible action by armed individuals, such as terrorist groups, must be reduced to some form of another state’s involvement

22. H. Waldock, ‘The Regulation of the Use of Force by Individual States in International Law’, (1952 II) 81 RCADI 455, at 497–8; D. W. Bowett, *Self-Defence in International Law* (1958), 188–9, 191, 192.

23. I. Brownlie, *International Law and the Use of Force by States* (1963), 272 *et seq.*

24. Note, for instance, the universal condemnation of the destruction of the Iraqi nuclear reactor OSIRAK by the Israeli air force in June 1981.

25. Brownlie, *supra* note 23, at 259, 261–2.

26. ‘US Adoption of New Doctrine on Use of Force’, *Contemporary Practice of the United States Relating to International Law*, (2003) 97 AJIL 203–5.

in it. The International Court of Justice (ICJ) in the *Nicaragua* case has ruled that the provision by a state of arms, training, and logistical support to armed bands using force against another state constitutes a violation of Article 2(4) of the UN Charter. Moreover, the sending by a state and its substantial involvement in the activities of armed bands may constitute a use of force that amounts to an 'armed attack', provided that the requirement of 'scale and effects' is met: in other words, provided there is a use of force of such intensity as to pose a real threat to the existence of the victim state as a territorial, political, military, or economic entity.²⁷ In the former situation, the victim state has the right to resort to proportionate counter-measures analogous to self-defence, whose nature the Court has not specified, nor whether they could be resorted to only on the victim state's territory or beyond its borders. However, the Court was clear that it was only in the case of armed attack that the right of collective self-defence could be invoked.²⁸ The implication of the Court's judgement seems to be that force in self-defence against another state, though lawful, may constitute a serious breach of international peace that should not be allowed to degenerate into its total collapse. Action in collective self-defence involves the use of force by the victim state's allies, and this entails the likelihood of such an eventuality. A further implication of the Court's judgement is that, if an armed group constitutes both the source and the author of the use of force (such as a national liberation movement), the assistance they receive from another state may sustain or prolong their armed struggle. But it is inconsequential with respect to its existence. Therefore, it is only when another state is the real author of the use of force, namely, when the armed group is sent or is reduced to its agents, that the right of collective self-defence may be invoked.

The US action in Afghanistan took place after the strikes on New York and Washington, DC on 11 September 2001. However, in justifying its action as self-defence the US government asserted this right against future attacks by al-Qaeda.²⁹ The issue, nevertheless, was the precise link between the terrorist group and the Taliban authority in Afghanistan. It is undisputed that the Taliban offered sanctuary to al-Qaeda. In fact, this provided the basis for the imposition of economic sanctions by the Security Council against the Taliban regime in relation to the bombings of the US embassies in Kenya and Tanzania.³⁰ But the United States has offered no evidence establishing that al-Qaeda members had been sent by the Taliban or that they had been reduced to their agents when they carried out the attacks in the United States.³¹ Be that as it may, the US action commanded the support of third states, while NATO was persuaded by the evidence disclosed to it in confidence by the United States to invoke Article 5 of the North Atlantic Treaty.

27. C. Antonopoulos, *The Unilateral Use of Force by States in International Law* (1997), 240–6.

28. *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, Judgement of 27 June 1986, [1986] ICJ Rep. 14, at 103–4, 127.

29. Letter dated 7 Oct. 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/2001/946.

30. UN Doc. S/RES/1214 (1998), UN Doc. S/RES/1267 (1999).

31. J. I. Charney, 'The Use of Force against Terrorism and International Law', (2001) 95 AJIL 835, at 836; cf. T. M. Franck, 'Terrorism and the Right of Self-Defense', (2001) 95 AJIL 839.

It is submitted that the general proposition of the admissibility of pre-emptive action, especially as an exercise of the right of collective self-defence, will result in the expansion of self-defence as a ground of resort to unilateral force to such an extent as to render hortatory the prohibition of Article 2(4). It amounts in effect to a reintroduction of unilateralism in *jus ad bellum* as the rule, rather as the exception introduced by the UN Charter and elaborated by the ICJ in *Nicaragua*. Moreover, the invocation of a right of pre-emptive strike by a NATO member under Article 5 may result in a major eruption of force endangering international peace as a whole. In this respect decision-making by consensus in conjunction with Article 4 of the North Atlantic Treaty may function as safety valve against the assertion of pre-emptive action made by individual NATO members.

The possibility of a member state of NATO invoking anticipatory self-defence appears quite diminished as a result of Article 4 of the North Atlantic Treaty. This provision introduces the obligation of member states to consult together 'whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened'. Therefore, if a NATO member considers that it is the likely victim of an imminent armed attack it may express its fears publicly and activate the consultation process with regard to the measures taken by the alliance in order to boost its defensive capacity. The obligation to consult is thus almost certain to deter any putative aggressor and render resort to anticipatory action unnecessary. Moreover, the consultation process may be significant in relation to the invocation of Article 5 by a member state. In this respect, consultation may be a procedure additional to the individual assessment as to whether a member state has really been the victim of an armed attack. Therefore the invocation of Article 5 in the case of a frontier incident could be avoided, and as a result the alliance would avoid being drawn into an armed conflict of unpredictable consequences and would not be used by a single member as a means of settling its bilateral differences with another state. Membership of a military alliance may well offer an otherwise weak power the opportunity to resolve past or present grievances with a neighbouring state against which it would not act if it stood alone. The recent expansion of NATO membership to the east may theoretically give rise to such a possibility in view of historical grievances with respect to boundaries and minority issues. The Baltic republics or Poland, for instance, may consider that as NATO members their security is less threatened by the powerful Russian Federation, so that they might feel less constrained in acting assertively towards it.

3. NATO AND THE IRAQ CRISIS

The US proposal to assist Turkey seems to have been perceived as an attempt to use NATO as a means of legitimizing the unilateral use of force against Iraq in view of the failure to persuade the UN to undertake the task.³² In other words, assisting in the defence of Turkey was put forward not to counter an existing threat, let alone an

32. I. Black, 'NATO Crisis Over Veto on Plans to Defend Turkey', *Guardian*, 11 Feb. 2003, <http://www.guardian.co.uk/international/story>.

imminent attack, by Iraq, but to counter the likelihood of Iraq using force in the event of an attack on it (Iraq) by the United States. And this is plausible, because the United States planned to use the territory of Turkey as a launching ground for its use of force against Iraq. Moreover, the intention was not just to use Turkish airfields to launch air strikes, but also to introduce large numbers of ground forces to Turkey which would cross into northern Iraq, where they would establish a northern front for operations against the Iraqi army. Furthermore, at the time the United States made its proposal, Turkey appeared not to consider itself in need of defensive assistance. The Turkish Prime Minister stated that the armed forces of Turkey were capable on their own of withstanding an attack against the country.³³

The persistent opposition to Turkey's request for consultations under Article 4 gave rise to an intense crisis within NATO. According to the majority of member states and the Secretary-General the issue was the organization's credibility in honouring a treaty obligation in the event of a formal request by a NATO member under Article 4.³⁴ It is submitted that the honouring of a request under Article 4 necessarily means the honouring of its object. And this is a matter of substance. In February 2003, the UN Security Council was debating the inspection process; it was the forum in which the question of Iraq had been considered ever since 1990. Under Article 7 of the North Atlantic Treaty the primacy of the Security Council in the maintenance of international peace and security is recognized. While actions in self-defence or simply the preparations for self-defence are outside the Council's authorization (and primacy), there still had to be proof of a renewed act of Iraqi aggression. Otherwise, the inspection process constituted a 'measure' taken by the Security Council under Chapter VII of the Charter, which by virtue of Article 51 precludes action in self-defence. The assertion that any request under Article 4 of the NATO treaty should be honoured, irrespective of the specific nature of its object and the circumstances of a particular situation, would enable the use of this provision in order to advance a host of objectives under the guise of defensive preparation. Be that as it may, NATO overcame the impasse because, on the one hand, Germany and Belgium abandoned their opposition with respect to providing assistance to Turkey under Article 4 of the NATO Treaty and, on the other, the decision to accede to the request of Turkey was adopted at the Defence Planning Committee, where France is not represented.³⁵

The change in Turkey's position may be explained by its intense bilateral negotiations with the United States with respect to the introduction of US ground forces on Turkish territory. The moderate Islamic government of Turkey was faced with a public opinion totally opposed to armed action against Iraq, and it was also concerned about the political situation in northern Iraq on the overthrow of the government of the Iraqi leader Saddam Hussein. Since 1991 Kurdish-populated northern Iraq has been effectively outside the authority of the central Iraqi government as a result of the establishment of the 'safe haven' and the 'no-fly zone'. During the ensuing

33. S. Tisdall, 'Defending the Indefensible', *Guardian*, 14 Feb. 2003, <http://www.guardian.co.uk/nato/story>.

34. *Ibid.*

35. I. Black, 'France Snubbed as NATO Strikes Turkish Deal', *Guardian*, 17 Feb. 2003, <http://www.guardian.co.uk/international/story>.

decade an effectively autonomous Kurdish authority came into being in that area. Also, since 1997 considerable numbers of Turkish troops have been stationed in part of northern Iraq in order to prevent its use for armed actions against Turkey by the now inoperative Kurdistan Workers' Party (PKK). Turkey had remained confident that as long as Saddam Hussein ruled Iraq no change in the territorial status of Iraq would occur. However, the likelihood, and finally the fact, of the Ba'ath regime's overthrow raised fears of real Kurdish autonomy, even secession, in northern Iraq. This situation may eventually lead to a resurgence of demands by Turkey's own Kurdish minority for autonomy or even unification with a Kurdish entity emerging in northern Iraq, not long after the subduing of the Kurdish PKK armed struggle in 1999. Turkish-US negotiations thus became protracted, but in the end the Turkish parliament refused to countenance the US request for troop deployment in southern Turkey,³⁶ and shortly afterwards Turkish troops were deployed in northern Iraq.³⁷ This fell well short of the original wish that Turkey would have a substantial role in northern Iraq after the conclusion of hostilities. Such an eventuality might, in the US view, undermine the anti-Saddam coalition in Iraq of which the Iraqi Kurds were an essential component.³⁸ It also raised fears of a secret Turkish agenda of change of frontiers in the region. While Turkey had disputed the territorial arrangement of the Treaty of Lausanne of 1923, when the oil-rich provinces of Kirkuk and Mosul were awarded to the then mandated territory of Mesopotamia, it has firmly denied any such intentions during the recent crisis.³⁹ It has asserted a right of substantial presence in northern Iraq on the basis of the prevention of, first, a large flow of refugees inside its territory and, second, terrorist attacks against its territory. Turkish fears still do not seem to have been allayed, however, and its relations with the United States came under strain recently, when on 4 July 2003 a group of ten Turkish military was detected outside the Turkish sector in the vicinity of Kirkuk and was arrested by US forces.⁴⁰ The reasons for the Turkish presence in the particular area have been a matter of speculation, but the whole incident reveals uneasiness on the part of Turkey at its failure to have a recognized substantial role in northern Iraq.

The invocation of the consultations provision of the NATO treaty gives rise to doubt as to its purpose. On the evidence, no Iraqi attack on Turkey was imminent. Nor could one be, for the Kurdish 'safe haven' and its concomitant no-fly zone effectively precluded any Iraqi military presence along the common border with Turkey. Furthermore, the concerns of Turkey about a possible terrorist attack against it seem to be in anticipation of the post-Saddam era. In other words, a likely autonomous Kurdish region in northern Iraq might be used as a launching ground for attacks against it. But the fact that in post-Saddam Iraq the Kurds are partners in the reconstruction of the country with the blessing of the United States points to the conclusion that the United States viewed Article 4 as a device for extracting implicit

36. *Keesing's Record of World Events 2003*, 45299.

37. *Ibid.*, at 45300.

38. *Ibid.*

39. 'Statement by the Permanent Representative of Turkey to the Security Council at the Open Meeting of the Security Council on Iraq', 26 March 2003, <http://www.mfa.gov.tr>.

40. 'Turkish Fury at US Iraq Arrests', 5 July 2003, http://www.news.bbc.co.uk/1/hi/world/middle_east.

NATO approval of its unilateral action against Iraq. On the other hand, Turkey treated it as part of its bilateral negotiation with the United States. It appears that neither believed there to be a credible threat to the security of Turkey from Ba'athist Iraq. On the contrary, Turkey seems to consider the situation in post-Saddam Iraq more prejudicial to its security. Therefore, the ostensible invocation of Article 4 on the basis of strict national interest may give rise to concern, especially in view of the expansion of NATO membership to the east. As already mentioned, the existence of territorial and minority grievances between some of the new members and the Russian Federation may quite plausibly raise a bilateral issue to the level of a security threat involving the whole of NATO. The solution to such a disingenuous invocation of Article 4 seems to lie, first, with the availability of evidence concerning the situation on the ground, and, second, with adherence to the rules of international law concerning the use of force. In this way should any other member of the alliance feel that an invocation of the consultation procedure is made purely out of another's national self-interest, it may withhold its consent and preclude the achievement of consensus. In this sense, the interests of the alliance appear to be better served, for decision-making by consensus may constitute a barrier against drawing the alliance into a crisis without justification on the basis of evidence.

4. CONCLUDING REMARKS

The institutional crisis in NATO has demonstrated the limitations of decision-making by consensus. This process presupposes a high degree of community of interest, which existed during the Cold War and formed the basis of the commitment to collective self-defence in the face of a rival political and military bloc. Whereas consensus may serve as a barrier against committing the alliance to responsibilities unwarranted by existing facts, it equally may be used as an excuse to avoid fulfilling the obligations under the NATO treaty. In other words, in a post-Cold War political environment where national interest plays an ever-increasing role, institutional mechanisms such as those of NATO which are based on community of interest are likely to become deadlocked. Both Article 4 and Article 5 are premised on community of interest. Regrettably, their invocation, in 2003 and 2001 respectively, failed to make it materialize.

The stance of France, Germany, and Belgium may be explained in terms either of commercial interests in post-sanctions Iraq or of a growing scepticism towards the conduct of the United States as the sole remaining superpower. Indeed, the United States attempted to draw the entire United Nations into military action against Iraq on the basis of unpersuasive evidence and the declaration of a commitment to resorting to force unilaterally. This could be perceived as an assertion of a position of unilateralism contrary to the multilateralism in the field of collective security, and seems to be reinforced by the ultimate unilateral resort to force against Iraq and the general US distrust of institutions that it cannot fully control (such as the ICJ and the International Criminal Court).

At the same time, the United States appears to have realized that NATO may no longer constitute an institution under its undisputed influence. It has contributed to this itself to a considerable extent, by effectively declining a collective defensive

response against the Taliban under the NATO framework. The Washington declaration of 1999 and the Prague declaration of 2002 appear to introduce for NATO the role of a powerful military organization that would be instrumental in the maintenance of international peace and security. In the aftermath of the Kosovo operation, however, NATO was used only for logistical support purposes and never as the principal vehicle either for collective self-defence or collective security. This is largely due to the unwillingness of the United States to conduct military operations in a partnership subject to institutional control (as in Kosovo in 1999) and to the division of opinion among members concerning the managing of the Iraq crisis.

The function of NATO as a regional collective security arrangement remains subject to the Security Council primacy according to Article 7 of the North Atlantic Treaty and Chapter VIII of the UN Charter. Therefore, it is in the field of collective self-defence that NATO preserves autonomy of action unhampered by prior Security Council authorization. The end of the Cold War has removed the basic ingredient of the NATO membership's community of interest in acting in collective self-defence. Terrorism may constitute a new such ingredient, although a strike as tremendous as that against the United States on 11 September 2001 was not deemed by the victim state to be sufficient to implement the commitment of Article 5 of the NATO treaty. Moreover, for a terrorist attack to constitute an 'armed attack' presupposes the proof of a link between the terrorist group and a state or a de facto authority exercising effective control over part of a state's territory. It is implicit in the *Nicaragua* judgement that such a link must amount either to the sending of this group to the victim state or to the substantial involvement of the assisting state in the activities of the group.⁴¹ These are contingencies that must be supported by undisputed evidence, hence any NATO member invoking Article 5 bears a heavy burden of proof. This was unlikely to arise during the Cold War, in view of the fact that 'armed attack' in this setting constituted the classical inter-state use of force.

Moreover, action by NATO as a collective security organization, Security Council authorization aside, is largely dependent on the national interests of member states. As NATO membership has expanded twice during the past five years it is expected that national interest will play an ever increasing role, and consensus may be harder to achieve. The continuing function of NATO in the field of collective security, beyond the role of a merely logistical support institution, may require substantial institutional reform, especially with respect to decision-making. It also appears to require a continuing commitment to the organization by the United States. For it is mainly due to the advanced military infrastructure of this state that NATO may be able to act effectively. This also presupposes that the United States abandons its view that NATO should be by definition under its influence and becomes more willing to act in partnership and meaningful co-operation with other member states.

The recent Iraq crisis has exposed NATO's limitations in decision-making as the basis for action, but it is far from signalling its demise. The wish of many states of central and eastern Europe to become members is proof of its continuing and credible

41. N. D. White, 'The Legality of Intervention Following the Nicaragua Case', (1989) *International Relations* 535.

relevance as a deterrent to aggression against its membership. Moreover, there is neither the political will nor the infrastructure among European organizations to replace it. The attempt to revive the Western European Union was faced with practical difficulties of command and logistical infrastructure that made dependence on NATO inevitable. Also, the common defence policy of the EU does not seem to command the unwavering support of all its member states with respect to its implementation. There is also the problem of overlapping membership of most European states in NATO and other European institutions. So far, no European country has taken the step of withdrawing from NATO in favour of a purely European defence and security organization. Any initiative in this direction, such as the recent one by France, Germany, and Belgium, presupposes a sophisticated and advanced military infrastructure that does not seem to be in place.