

**PAYING THEIR FAIR SHARE: THE RELATIONSHIP
BETWEEN FUNDING AND MUTUAL DEFENSE
OBLIGATIONS IN NATO**

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ABSTRACT

The North Atlantic Treaty Organization (NATO) has been the bedrock of western foreign policy since the beginning of the Cold War. While many Americans might not think of NATO on a regular basis, the military Alliance is an imposing force that sends a message to the enemies of the United States and its allies. At the heart of the Alliance is the central tenet that an attack on one member of the Alliance is an attack on all members of the Alliance. No member needs to fight alone if they are attacked. While there will always be some tension between allies, tension between the United States and other members of NATO has recently come to the forefront of media attention and has thus been subsequently called to the consciousness of many Americans. Many have likely heard President Trump declare that it is “not fair” that the other members of NATO are not “paying their fair share.”¹ This disparity has greatly frustrated President Trump and, in his characteristic style, he had no issues with publicly airing his grievances.² President Trump even went so far as to publicly question whether it was worth abiding by the mutual defense obligations created in the North Atlantic Treaty (Treaty).³ This begs the question: If the other countries that are a party to the Treaty did not pay their “fair share,” would the United States still be obligated to abide by the mutual defense obligations in NATO?

This is not merely a theoretical question, as President Trump reportedly secretly discussed withdrawing from NATO,⁴ though it should be noted that President Trump has publicly stated that American ties to

1. Alexander Mallin & Meridith McGraw, *Trump Blasts NATO Allies for not Paying Fair Share*, ABC NEWS (May 25, 2017), available at <https://abcnews.go.com/International/trump-blasts-nato-allies-paying-fair-share/story?id=47608155> (last visited Jan. 28, 2019); Nahal Toosi, *Trump Demands Other NATO Members Pay Their Fair Share*, POLITICO (Feb. 28, 2017), available at <https://www.politico.com/story/2017/02/donald-trump-congress-speech-nato-235543> (last visited Jan. 28, 2019).

2. See Mallin & McGraw, *supra* note 1.

3. When asked by an interviewer why American soldiers should die to defend Montenegro from attack, President Trump replied that he had asked the same question before. President Trump then described Montenegro as “aggressive,” and said that Montenegro’s aggression could start World War III. Eileen Sullivan, *Trump Questions the Core of NATO: Mutual Defense, Including Montenegro*, N.Y. TIMES (July 18, 2018), available at <https://www.nytimes.com/2018/07/18/world/europe/trump-nato-self-defense-montenegro.html> (last visited Jan. 28, 2019).

4. Julian E. Barnes & Helene Cooper, *Trump Discussed Pulling U.S. From NATO, Aides Say Amid New Concerns Over Russia*, N.Y. TIMES (Jan. 14, 2019), available at <https://www.nytimes.com/2019/01/14/us/politics/nato-president-trump.html> (last visited Jan. 28, 2019).

NATO are very strong and that they remain strong.⁵ Questions of whether President Trump was right to push NATO allies to spend more, or if it was right for President Trump to question mutual defense in NATO, or even whether the United States should withdraw from NATO are all irrelevant to the question at hand. Instead, this article will simply examine whether insufficient funding on the part of NATO allies would allow members of NATO to have an immediate right to renounce any mutual defense obligations invoked under Article 5 of the North Atlantic Treaty.

While President Trump's appeal to NATO member countries may have received considerable coverage in the news, he is not the first American president to criticize NATO members for "not paying their fair share."⁶ President George W. Bush and President Obama had both requested more NATO spending, which shows that the issue has had bipartisan concern.⁷ This also shows that President Trump is not breaking precedent or acting in a manner wholly inconsistent with past presidents.

There are two main types of funding which Alliance members are required to provide: direct and indirect. Direct funding is what would commonly be thought of as "funding." Direct funding consists of direct payments to the NATO, which are used by the Alliance to maintain its infrastructure and fund projects. This type of funding, while relevant to the discussion, is not what has been causing controversy recently. The source of recent controversy has been indirect funding. Indirect funding benefits NATO, but it is not given directly to NATO to spend as it chooses. Instead, indirect funding is money that each member country's government spends on its own national defense. While it may not be obvious at first, NATO indirect funding is important as it contributes the health of the Alliance more than the direct funding itself. As NATO is based on the idea of mutual defense, members of the Alliance must maintain their militaries to a level where they could easily be utilized to defend a member of the Alliance from an attack if such an instance were to arise. If members of the Alliance did not maintain their militaries sufficiently, NATO would provide a benefit to weak member countries only, by binding the stronger members to protect them.

5. Louis Nelson, *Trump Says U.S. Ties to NATO 'Very Strong,'* POLITICO (July 12, 2018), available at <https://www.politico.com/story/2018/07/12/trump-nato-spending-714976> (last visited Jan. 28, 2019).

6. Peter Baker, *Trump Says NATO Allies Don't Pay Their Share. Is That True?*, N.Y. TIMES (May 26, 2017), available at <https://www.nytimes.com/2017/05/26/world/europe/nato-trump-spending.html> (last visited Oct. 21, 2018).

7. *Id.*

A failure to properly meet a funding guideline under NATO does not allow other members of NATO to immediately renounce their mutual defense obligations. First, failure to provide the requested amount of direct funding to NATO for its own infrastructure does not allow this to happen under international treaty law. As direct funding is not mentioned in the North Atlantic Treaty, failure to provide it does not constitute a material breach which would justify a renunciation in the purpose of the Charter. Despite this, failure to meet the funding requirement could give a member the political will to withdraw from the treaty, which would be allowed, though it would require one year's notice. This would mean that parties to the treaty would still need to engage in any Article 5 invocations before one year passed after announcing withdrawal, and therefore, would not be immediate. In terms of the 2% funding figure, neither the 2006 implementation of the guideline or the 2014 guideline are legally binding on the members. The 2006 implementation was specifically stated to be a non-binding target, and the 2014 reaffirmation of that target was specifically chosen to place political pressure on members of NATO without applying legal pressure. Under international treaty law, members of NATO would have to be unable to uphold their own ability to defend themselves and other members before members of the Alliance would be able to immediately suspend their mutual defense obligations. Members who wished to do so would also have to take action promptly, as conduct that could be viewed as acquiescing to the situation could potentially cause them to forfeit their ability to renounce their mutual defense obligations under international treaty law. Due to the high level to constitute a material breach worthy to suspend a treaty under international law though, simply failing to meet the 2% guideline would not give a member of NATO the ability to renounce their mutual defense obligations.

I. WHAT IS NATO?

NATO was originally conceived by Western countries as a counterbalance to potential communist expansion.⁸ NATO was created on April 4th, 1949 with the signing of the North Atlantic Treaty in Washington D.C.⁹ Initially comprised of twelve member countries,¹⁰ NATO

8. *NATO*, HIST. (Aug. 21, 2018), available at <https://www.history.com/topics/cold-war/formation-of-nato-and-warsaw-pact> (last visited Oct. 26, 2018).

9. *What is NATO?*, NATO, available at <https://www.nato.int/nato-welcome/index.html> (last visited Oct. 26, 2018).

10. The twelve countries that were the original members of NATO at the time of its founding are: Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, Netherlands, Norway, Portugal, the United Kingdom, and the United States of America. *Id.*

currently has twenty-nine member countries.¹¹ NATO states the goals of the Alliance in the North Atlantic Treaty. The preamble of the charter establishes a commitment to pre-existing obligations of each of the individual members of the Alliance by stating, “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.”¹² This sentence served to allay the fears of potential Alliance members or other interested parties that NATO could potentially usurp the United Nations or become an imperialist organization. The next sentence of the North Atlantic Treaty preamble was then meant to paint the Alliance as a force for good by stating, “[t]hey are determined to safeguard the freedom, common heritage and civilization of their peoples, founded on the principles of democracy, individual liberty and the rule of law.”¹³ The drafters of the North Atlantic Treaty then decided to reiterate the geographic area on which the treaty was most focused by stating, “They seek to promote stability and well-being in the North Atlantic area.”¹⁴ The preamble then stated the primary purpose of the Alliance by providing the phrase, “[t]hey are resolved to unite their efforts for collective defense and for the preservation of peace and security.”¹⁵

To shed light on the historical period in which the formation of NATO took place, World War II had just concluded, and the Soviet Union had shown signs that they did not intend to evacuate formerly Nazi held territory that they had conquered during the war. In June 1948, the year before NATO was formed, the Soviets attempted to force Western nations outside of the Allied-controlled parts of Berlin by closing all of the transportation routes into the city from Allied-controlled Western Germany.¹⁶ The Western governments brought in humanitarian supplies by air to Berlin until the Soviets, then led by Joseph Stalin, abandoned the plan and reopened the transportation routes in what would

11. The current countries that are members of NATO are: Albania, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Luxembourg, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Turkey, the United Kingdom, and the United States of America. *Id.*

12. North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243 [hereinafter Treaty].

13. *Id.*

14. *Id.*

15. *Id.*

16. *Berlin Airlift*, HIST. (Sept. 12, 2018), available at <https://www.history.com/topics/cold-war/berlin-airlift> (last visited Oct. 26, 2018).

become to be known as the Berlin Airlift.¹⁷ It is also strongly believed that this event led to the creation of NATO as a military Alliance to combat Soviet attempts to spread communism around the globe.¹⁸

The principle of mutual defense is at the heart of the NATO Alliance.¹⁹ Mutual defense is meant to guarantee that if one member of the organization is attacked, the other members of that organization will react to protect the member that was attacked. This principle provides safety as well as a deterrent for potential aggressors, as a war against one country could potentially mean a war against all countries that are a party to the Alliance. The principle of mutual defense was set forth in Article 5 of the North Atlantic Treaty.²⁰ Article 5 of the North Atlantic Treaty starts by stating, "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 that the other NATO countries shall act together for collective defense.²¹ The charter justifies the mutual defense in Article 5 by invoking the "right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations."²² Article 51 of the United Nations Charter allows a member of the United Nations the right to exercise individual or collective self-defense until the United Nations Security Council takes steps to re-establish international peace and security.²³ These same references to the United Nations Security Council are in the North Atlantic Treaty,²⁴ which demonstrated that NATO does not intend to challenge the supremacy or authority of the United Nations' charter, or the Security Council.²⁵

Throughout the history of NATO, the invocation of Article 5 for collective defense has been quite rare. This is surprising considering

17. *Id.*

18. *Id.*

19. *Collective Defence - Article 5*, NATO (June 12, 2018), available at https://www.nato.int/cps/en/natohq/topics_110496.htm (last visited Oct. 26, 2018).

20. Treaty, *supra* note 12.

21. *Id.*

22. *Id.*

23. U.N. Charter art. 51.

24. *What is NATO?*, *supra* note 4.

25. It should be noted that NATO is not underrepresented in the Security Council. The United Nations Security Council has fifteen members, with ten of the members serving a term in a term in temporary position before switching with another member country. There are five permanent members that never rotate, and they hold a large amount of power on the Security Council. Among these powers is a veto to any Security Council resolutions. Three of the five permanent Security Council members are NATO members, those being the United Kingdom, France, and the United States. *Id.*

that NATO describes the mutual defense as “at the very heart of NATO’s founding treaty” and saying that it “remains a unique and enduring principle that binds its members together.”²⁶ Despite all of the military conflicts that NATO members have been involved in over the year, such as the Wars in Vietnam and Korea, Article 5 has only been invoked a single time in the history of NATO.²⁷ Article 5 was invoked for the first time by the United States in response to the terrorist attacks on September 11, 2001.²⁸ The likely reason that Article 5 has only been invoked once is because Article 5 is grounded in self-defense, while many actions by NATO members are pre-emptive or humanitarian. These are cases when Article 5 could not necessarily be invoked since no NATO member would have actually been attacked in those scenarios.

Though the United States was indisputably attacked, the fact that the attackers were part of a terrorist organization, and not a traditional state actor, makes the invocation of Article 5 a little more curious. To begin with, terrorism was not new to NATO, as the Alliance’s 1999 Strategic Concept identified terrorism as a threat to the security of NATO.²⁹ On September 12, 2001, the allies made the decision to invoke Article 5, and the NATO Secretary General informed the UN Secretary-General of the Alliance’s decision.³⁰ The North Atlantic Council, NATO’s principal decision-making body, decided that the September 11th attacks were an attack from abroad that was directed at the United States, which meant that it was covered under Article 5 and NATO commenced its first anti-terror operations to defend the United States.³¹

II. FAILURE TO MEET NATO DIRECT FUNDING GOALS DOES NOT PROVIDE A RIGHT TO IMMEDIATELY RENOUNCE NATO MUTUAL DEFENSE OBLIGATIONS. IT IS NOT MENTIONED IN THE NORTH ATLANTIC TREATY, AND THEREFORE DOES NOT CONSTITUTE MATERIAL BREACH UNDER INTERNATIONAL TREATY LAW.

While NATO indirect funding is the more commonly discussed in the media, a discussion of NATO funding would be incomplete without

26. *Collective Defence - Article 5*, NATO (June 12, 2018), available at https://www.nato.int/cps/en/natohq/topics_110496.htm (last visited Oct. 30, 2018).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Collective Defence - Article 5*, *supra* note 26.

discussing NATO direct funding. NATO direct funding are direct contributions to NATO that are made to finance the infrastructure of NATO that are utilized by all twenty-nine members.³² The NATO direct contributions are not the responsibility of any single member, and the costs are born collectively, often by utilizing a common funding principle.³³ NATO-wide air defense, and command and control systems are examples of programs that are funded by direct contributions from NATO member countries.³⁴ When utilizing the principle of common funding, “all 29 members contribute according to an agreed cost-share formula, based on Gross National Income, which represents a small percentage of each member’s defence budget.”³⁵ The common funding arrangement is used to fund NATO’s principal budgets.³⁶ These principal budgets include: the military budget, which funds the costs of the integrated command structure; the civil budget, which funds the NATO headquarters running costs; and the NATO security investment program, which funds military capabilities.³⁷ NATO direct contributions mostly come in the forms of joint funding or common funding, but they can also come in the form of “trust funds, contributions in kind, *ad hoc* sharing arrangements and donations.”³⁸

Joint funding arrangements were described by NATO sources as “structured forms of multinational funding within the terms of an agreed NATO charter.”³⁹ When projects are funded jointly the countries participating can “identify the requirements, the priorities and the funding arrangements,” though NATO has political and financial oversight.⁴⁰ Joint funding arrangements can vary in the number of participating countries, cost-share arrangements and management structures.⁴¹ Since NATO member countries are not forced to participate and the cost and management of such programs is variable, it is unlikely that joint funding arrangements could raise serious questions about a member country’s commitments to NATO, as such programs are variable, and a

32. *Funding NATO*, NATO (June 27, 2018), available at https://www.nato.int/cps/en/natohq/topics_67655.htm (last visited Nov. 2, 2018) [hereinafter *Funding NATO*].

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Funding NATO*, *supra* note 32.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

member country that does not wish to participate would not be required to.

The amount of direct funding that each country gives to NATO is organized by the Alliance. When the need for an expenditure is identified, authorities in NATO decide if the expenditure in question will benefit all members of the Alliance.⁴² If the aforementioned authority determines that the expenditure would benefit all of the members, the principle of common funding is applied, as it is believed that all members should share in the cost of the program.⁴³ Common funding contributions by each individual member country are determined in accordance with a cost-sharing formula as determined by Gross National Income.⁴⁴ This means that each NATO member country pays in accordance with the size of their respective economies. The United States has the highest percentage of the cost, as the United States is expected to fund over 22% of all common funding arrangements.⁴⁵ France and the United Kingdom both have the next highest amount of common funding required, which is over 10% for both countries.⁴⁶ Montenegro has the lowest amount of common funding required, with less than 0.03% as based on the cost-sharing formula utilized by NATO.⁴⁷

There are international sources of law that govern treaties and whether they are binding, and under which conditions they can be withdrawn from. The Vienna Conventions on the Law of Treaties (VCLT) is one such source of international law. While the United States has signed the VCLT, the Senate has not given its advice and consent to the treaty, which means that the United States is not officially a party to the treaty.⁴⁸ Despite this, the U.S. Department of State officially recognizes that the United States considers many parts of the VCLT to be customary international law.⁴⁹ Customary international law is considered a very important primary source of international law,⁵⁰ and is therefore binding on members of NATO.

42. *Funding NATO*, *supra* note 32.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Funding NATO*, *supra* note 32.

48. *Vienna Convention on the Law of Treaties FAQs*, U.S. DEPT. OF STATE, available at <https://www.state.gov/s/l/treaty/faqs/70139.htm> (last visited Jan. 31, 2019).

49. *Id.*

50. MICHAEL BYERS, *CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW* 166 (1999).

Article 44 of the Vienna Conventions on the Law of Treaties creates law that governs the separability of treaty provisions as it relates to selective withdrawal from specific provisions.⁵¹ Article 44 provides that separability of treaty provisions cannot be accomplished if the treaty does not provide for it.⁵² Article 44 states that, "to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty."⁵³ As a result, the United States, or any other member of NATO, cannot selectively refuse to engage in Article 5 actions of collective defense under the North Atlantic Treaty without withdrawing from the entire treaty, as the North Atlantic Treaty does not provide a right to refuse participating in an invocation of Article 5.⁵⁴

VCLT Article 57 provides that a treaty which contains provisions regarding withdrawal or denunciation of the treaty can have its operation suspending in accordance with its provisions.⁵⁵ The North Atlantic Treaty is an example of a treaty with such a provision.⁵⁶ Article 13 of the North Atlantic Treaty provides that, "[a]fter the Treaty has been in force for twenty years, any Party may cease to be a Party one year after its notice of denunciation has been given to the Government of the United States of America, which will inform the Governments of the other Parties of the deposit of each notice of denunciation."⁵⁷ This provision would apply to the United States as it has been more than twenty years since the United States founded NATO. This provision does allow the United States to withdraw from NATO, though it requires a notice of one year before any party to the treaty can cease to be a party.⁵⁸ A member of NATO would likely not have notice of over one year before an attack that is eligible for the invocation of Article 5, which means that Article 13 of the North Atlantic Treaty could not be invoked to refuse mutual defense obligation unless such obligations could be predicted a year in advance. The United States, or other members of NATO, could withdraw from NATO, but such an act would require one-year notice and would eliminate all obligations on the part of NATO to the withdrawn country. This would differ from a scenario

51. Vienna Convention on the Law of Treaties art. 44, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

52. *Id.*

53. *Id.*

54. Treaty, *supra* note 12.

55. VCLT, *supra* note 51, art. 57.

56. Treaty, *supra* note 12.

57. *Id.*

58. *Id.*

where a country refused a select instance of mutual defense while still remaining a part of NATO.

Article 60 of the Vienna Conventions on the Law of Treaties could potentially allow a country to refuse mutual defense obligations under NATO.⁵⁹ Article 60 governs the termination or suspension of the operation of a treaty as a consequence of its breach.⁶⁰ According to Article 60, a material breach of a multilateral treaty entitles:

any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.⁶¹

Article 60 also gives a definition of material breach to determine if a failure on the part of other member to give the appropriate amount of funding to NATO would constitute a “material breach.”⁶² According to VCLT Article 60, a material breach is “a repudiation of the treaty not sanctioned by the present Convention; or the violation of a provision essential to the accomplishment of the object or purpose of the treaty.”⁶³ A failure to give NATO direct funding could not fall under either of these definitions of material breach under the convention.

A failure to provide direct funding to NATO for the organization to fund its infrastructure can neither be a repudiation of the treaty, nor can it be a violation of a provision essential to the treaty. The reason behind this is simple: NATO direct funding is not established in NATO’s founding charter.⁶⁴ The closest that the charter gets to mentioning NATO direct funding is in Article 3, which states: “In order to more effectively achieve the objectives of this Treaty, the Parties, separately and jointly, by means of continuous and effective self-help and mutual aid, will maintain and develop their individual and collective capacity to resist armed attack.”⁶⁵ The term “mutual aid” could be interpreted as applying to funding for NATO infrastructure, though in the context of that clause, mutual aid refers to members of NATO aiding each other to ensure that their militaries are ready to mobilize, as opposed to funding

59. VCLT, *supra* note 51, art. 60.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. Treaty, *supra* note 12.

65. *Id.*

for NATO infrastructure. Funding for NATO infrastructure is not mutual aid, it is instead the creation of ancillary organizations to manage NATO. Since NATO direct funding is not mentioned in the North Atlantic Treaty, it cannot constitute a material breach of the treaty and therefore would not justify a renunciation of the mutual defense obligations in the North Atlantic Treaty.

III. NATO INDIRECT FUNDING: THE ARTICLE 5 MUTUAL DEFENSE OBLIGATIONS IN THE NORTH ATLANTIC TREATY ARE NOT DISMISSED SIMPLY BECAUSE ALLIANCE MEMBERS FAIL TO SPEND 2% OF THEIR GDP ON NATIONAL DEFENSE ANNUALLY

NATO members' failure to spend 2% of their GDP on their national defense does not create an immediately exercisable option to renounce mutual defense obligations in NATO. Indirect funding is the type of NATO funding that has received more controversy recently. Indirect funding is not funding that goes directly to NATO for NATO itself to fund its operational infrastructure.⁶⁶ Instead, indirect funding to NATO actually refers to the amount of funding that NATO member countries spend on their own defense by investing money in their own military and domestic defense infrastructure.⁶⁷ At first it may not seem to matter how much NATO member countries spend on their defense, as domestic spending does not affect the funds that NATO is receiving as an organization to cover the organization's operating costs.⁶⁸ The reason for this is actually based on the mutual defense principle that is present in the founding charter of NATO.⁶⁹ Since an attack on one NATO country is meant to be considered an attack on all of NATO, NATO members countries are supposed to rush to the defense of the country that was attacked, and the indirect funding goals are meant to ensure that the NATO member countries have a military that would be properly fit to fight a defensive war.⁷⁰ While funding may not always directly correlate to military prowess, military funding is easy to measure with

66. Millie Dent, *NATO: Everything You Need to Know About the Alliance Donald Trump Says Is 'Obsolete'*, YAHOO! FIN. (Apr. 24, 2016), available at <https://finance.yahoo.com/news/nato-everything-know-Alliance-donald-213500967.html> (last visited Oct. 31, 2018).

67. *Id.*

68. Ivana Kottasová, *How NATO is Funded and Who Pays What*, CNN (May 25, 2017), available at <https://money.cnn.com/2017/05/25/news/nato-funding-explained-trump/index.html> (last visited Oct. 31, 2018).

69. *Id.*

70. *Id.*

objective tests, and it is most probable that a properly funded military will have a better ability to defend any members of the Alliance.⁷¹

IV. ESTABLISHMENT OF THE 2006 INDIRECT FUNDING GUIDELINE DID NOT CREATE A BINDING COMMITMENT, THEREFORE FAILURE TO MEET THE GUIDELINE DOES NOT ALTER MEMBERS' COMMITMENT TO MUTUAL DEFENSE

After understanding what indirect funding of NATO is, we must examine the origins of the funding guideline to further understand the nature of the indirect funding guideline and how it may affect the NATO of mutual defense. Currently, NATO member countries are required to spend 2% of their gross domestic product (GDP)⁷² on defense spending.⁷³ Currently, the majority of NATO members do not meet this requirement.⁷⁴ Only five of the Alliance's members currently meet the 2% guideline for defense spending in 2017.⁷⁵ Even though some NATO member countries meet the funding guidelines, NATO funding is still widely disproportionate when one compares American defense spending to the defense spending of other allies.⁷⁶ American defense spending is actually twice the amount that all other twenty-eight NATO member countries are spending on their defense combined.⁷⁷ This figure actually became more disproportionate after the September 11th attacks, at which point the United States further increased its defense spending.⁷⁸ Those countries reaching the 2% figure were: The United States, The United Kingdom, Poland, Greece, and Estonia.⁷⁹ The 2%

71. *See id.*

72. Gross domestic product is the measure of the monetary value of all goods and services that are produced within a country's borders during a specific period of time. *Gross Domestic Product – GDP*, INVESTOPEDIA, available at <https://www.investopedia.com/terms/g/gdp.asp> (last visited Nov. 2, 2018). GDP is usually calculated annually, though it can be calculated in different time increments, such as quarterly. *Id.* To summarize it generally, GDP is a measure of the total economic output of a country. *Id.*

73. *Funding NATO*, *supra* note 32.

74. Ian Bremmer, *The Only 5 Countries That Meet NATO's Defense Spending Requirements*, TIME (Feb. 24, 2017), available at <http://time.com/4680885/nato-defense-spending-budget-trump/> (last visited Nov. 2, 2018).

75. These countries are the United States, the United Kingdom, Poland, Greece, and Estonia. Niall McCarthy, *Defense Expenditures of NATO Members Visualized [Infographic]*, FORBES (July 10, 2018), available at <https://www.forbes.com/sites/niallmccarthy/2018/07/10/defense-expenditure-of-nato-members-visualized-infographic/#1760f72a14cf> (last visited Nov. 2, 2018).

76. *Funding NATO*, *supra* note 32.

77. *Id.*

78. *Id.*

79. *Id.*

figure can best be described as an “arbitrary figure,” but a figure that did have “symbolic value” nonetheless.⁸⁰ According to NATO itself, “[t]his guideline principally serves as an indicator of a country’s political will to contribute to the Alliance’s common defence efforts.”⁸¹

The 2% guideline was originally created in 2006.⁸² The number was established at a meeting of NATO defense ministers at NATO headquarters in Brussels, and the number was unveiled to the press on June 8 of that year.⁸³ The introduction of the 2% figure is rather complex, and it was rolled out in a more indirect manner.

First, to understand the origin of the 2% figure, we have to first understand the origin and purpose of the NATO Comprehensive Political Guidance.⁸⁴ The NATO Comprehensive Political Guidance was a document that set out the “framework and priorities for all Alliance capability issues, planning disciplines, and intelligence” for the succeeding ten to fifteen years.⁸⁵ The Comprehensive Political Guidance “set out the kinds of operations the Alliance had to be able to perform in light of the Alliance’s 1999 Strategic Concept and the kinds of capabilities the Alliance would need.”⁸⁶ This document does address the issue of sufficient funding in NATO, though it does not provide specific numbers to analyze the funding.⁸⁷

The comprehensive Political Guidance starts off with a statement describing the necessity of sufficient funding by stating that, “[t]he development of capabilities will not be possible without the commitment of sufficient resources.”⁸⁸ The Comprehensive Political Guidance then reiterates the need to effectively spend the funds dedicated to defense, by stating that, “it will remain critically important that resources that Al-

80. *NATO 2% Defence Spending Target Should Be Met, MPs Say*, BBC NEWS (Mar. 12, 2015), available at <https://www.bbc.com/news/uk-politics-31857044> (last visited Nov. 2, 2018).

81. *Funding NATO*, *supra* note 32.

82. *Funding NATO*, *supra* note 32.

83. James Appathurai, *Press Briefing*, NATO (June 8, 2006), available at <https://www.nato.int/docu/speech/2006/s060608m.htm> (last visited Nov. 3, 2018).

84. See Paul Saveroux, *The Comprehensive Political Guidance: A primer*, NATO (Jan. 1, 2007), available at https://www.nato.int/docu/review//2007/Reviewing_Riga/Comprehensive_political_guidance/EN/index.htm (last visited Dec. 29, 2018).

85. *Comprehensive Political Guidance (Archived)*, NATO (June 1, 2015), available at https://www.nato.int/cps/en/natolive/topics_49176.htm (last visited Dec. 29, 2018).

86. *Id.*

87. See *id.*

88. *Comprehensive Political Guidance (Full Text)*, NATO (July 13, 2009), available at https://www.nato.int/cps/en/natohq/official_texts_56425.htm (last visited Dec. 30, 2018) [hereinafter *Political Guidance*].

lies make available for defence, whether nationally, through multinational projects, or through NATO mechanisms, are used as effectively as possible and are focused on priority areas for investment.”⁸⁹ The Comprehensive Political Guidance then provides guidelines on how to determine if national defense funds are being spent properly, without providing specific guidance on how they should be spent by stating that, “[i]ncreased investment in key capabilities will require nations to consider reprioritisation, and the more effective use of resources, including through pooling and other forms of bilateral or multilateral cooperation.”⁹⁰ The Comprehensive guideline then commands NATO member countries to follow the previous guidelines by declaring that, “NATO’s defence planning should support these activities.”⁹¹

The Comprehensive Political Guidance then describes readiness standards that NATO member countries should aspire to abide by, though those guidelines are qualitative and do not provide specific numeric targets for NATO member countries.⁹² The 2% figure is not specifically established in the Comprehensive Political Guidance.⁹³ Despite this, the adoption of the Comprehensive Political Guidance was necessary for the genesis of the 2% figure, even if it did not directly create it.

The Comprehensive Political Guidance was fully adopted by NATO. According to NATO, the Comprehensive Political Guidance was agreed to by NATO defense ministers at their June 2006 meeting at the NATO headquarters in Brussels.⁹⁴ At the highest political level, the NATO heads of state and government agreed to the Comprehensive Political Guidance in November 2006 at the Riga Summit.⁹⁵ Agreement to the terms of the Comprehensive Political Guidance was also agreement to supplementary documents that would provide additional terms that NATO member countries should abide by. While this may seem strange at first, the purpose of this becomes clearer as one comes to understand the purpose of the Comprehensive Political Guidance itself.

NATO itself describes the Comprehensive Political Guidance as a “high-level guidance document which provides a framework and politi-

89. *Id.*

90. *Id.*

91. *Id.*

92. *Political Guidance, supra* note 88.

93. *See id.*

94. *Political Guidance, supra* note 88.

95. *Id.*

cal direction” for NATO’s future.⁹⁶ Ultimately, the Comprehensive Political Guidance “provides the agreed vision and priorities for NATO’s ongoing transformation.”⁹⁷ The Comprehensive Political Guidance attempted to predict the future strategic landscape for NATO, though it also simultaneously acknowledges the possibility that this strategic vision could change.⁹⁸ Due in part to this, the NATO Comprehensive Political Guidance expressed the kind of strategic capabilities that NATO would have to be able to perform, the specific manner in which these capabilities would have to be fulfilled was intentionally left open.⁹⁹ These specifics were meant to be determined both individually by nations and collectively by NATO.¹⁰⁰ The Comprehensive Political Guidance “does not delve into sufficient detail to give exhaustive guidance for each specific planning discipline and other capability-related bodies;” therefore, a requirement for “lower level guidance still remains.”¹⁰¹ The Comprehensive Political Guidance did not contain quantitative information on what allies expected NATO to be able to do.¹⁰²

It appears that the 2% of GDP towards defense spending figure was first unveiled in a document that would be considered lower-level guidance. NATO sources explicitly stated this: “For force planning, this is done in a subordinate, classified document (Ministerial Guidance 2006), which is based on the CPG and was agreed by the nations concerned in June 2006.”¹⁰³ This appears to be the document in which the 2% figure was initially introduced to NATO member countries. We have some clues that suggest that this is the case. When NATO spokesman James Appathurai first unveiled the 2% figure to the media, the press briefing took place on June 8, 2006,¹⁰⁴ which is the same time period within which the primer stated that the Ministerial Guidance was created.¹⁰⁵ The press briefing was also described as taking place after “the meeting of the North Atlantic Council at the level of Defence Ministers.”¹⁰⁶

96. Savereux, *supra* note 84.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. Savereux, *supra* note 84.

102. *Id.*

103. *Id.*

104. Appathurai, *supra* note 83.

105. Savereux, *supra* note 84.

106. Appathurai, *supra* note 83.

Why is it important to establish that the 2% figure was first unveiled in the NATO Ministerial Guidance? The Ministerial Guidance is classified.¹⁰⁷ Due to this, it is not possible to review the document in which the 2% figure was originally introduced.¹⁰⁸ Instead, the most direct source we have is the contemporary press briefing by NATO Spokesman James Appathurai, in which he educates members of the media on the 2% and describes the expectations surrounding it.¹⁰⁹

In the meeting, Appathurai told the press that NATO member countries, “through the comprehensive political guidance have committed to endeavour, to meet the 2% target of GDP devoted to defence spending.”¹¹⁰ He also stated, “[l]et me be clear, this is not a hard commitment that they will do it. But it is a commitment to work towards it.”¹¹¹ The NATO spokesman also stated that the 2% was the first attempt by NATO to put forward a specific commitment for NATO member countries to work towards.¹¹² Furthermore, as Appathurai answered a question, he referred to the 2% figure as a “target”, not a requirement or other similar language, and stated that he believes that seven NATO member countries were meeting the deadline at that time, without speaking of any way that the remaining non-compliant members may be forced to reach the 2% mark, and he also fails to give any type of deadline.¹¹³ In 2005, the last year of information that the NATO spokesman would have had available to him, supports this claim.¹¹⁴ The countries that met the 2% mark were: Bulgaria, France, Greece, Romania, Turkey, the United Kingdom, and the United States.¹¹⁵ As a reference for compliance in other years, NATO data shows that six Alliance members made the 2% target in 2006.¹¹⁶ All of the same member

107. Savereux, *supra* note 84.

108. As I was unable to find the NATO Ministerial Guidance, it appears that the document is still classified. This is likely so that NATO’s true capabilities will be hidden, which would prevent enemies of NATO from properly preparing for and anticipating a conflict from NATO, thus preserving the element of surprise for NATO member countries in the event of an armed conflict.

109. Appathurai, *supra* note 83.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. Press Release, NATO, *NATO-Russia Compendium of Financial and Economic Data Relating to Defence* (Dec. 20, 2007), available at https://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2007_12/20090327_p07-141.pdf (last visited Nov. 8, 2018) [hereinafter *Compendium*].

115. *Id.*

116. *Id.*

countries made the target, except for Romania, which was not in compliance.¹¹⁷ Based on Appathurai's words, when the 2% guideline was originally created, it was not intended to be a binding commitment with specific consequences for failing to meet the deadline. Appathurai referred to the 2% figure as a "target" and he explicitly said that it was not a hard commitment.¹¹⁸ Additionally, the lack of specific consequences that were not set up by NATO defense ministers at the time of the drafting of this specific guideline further supports this point.

When looking at the circumstances surrounding the introduction of the 2% figure in 2006, we can come to no other conclusion except that the guideline was not intended to be legally binding at the time. Official NATO sources even described the figure "as not a hard commitment," and that the figure was instead a "target."¹¹⁹ There were also no specific consequences set for NATO member countries who failed to meet the funding goals, which would likely have been created if the target was meant to affect the status of NATO member countries. While the guideline was first unveiled in 2006, the analysis cannot stop as the guideline continue has received further attention, including in 2014 when the guideline was recommitted to by NATO member countries.

V. THOUGH POLITICALLY PERSUASIVE, MEMBERS' 2014 RECOMMITMENT TO 2% GDP DEFENSE SPENDING IS NOT LEGALLY BINDING

While it appears that the 2% guideline was not originally intended to be legally binding on the members of the Alliance, the analysis cannot stop there and rest on that conclusion. The 2006 meeting at the NATO headquarters was not the only time that the guideline was specifically laid out, nor was it the only time that members of the Alliance agreed to try to reach it. NATO countries actually agreed to commit themselves to make the 2% guideline in the year 2014.¹²⁰ This recommitment to the target was likely caused by the perceived need on the part of NATO officials to try to gain compliance on the part of Alliance members. Military spending at that time had actually decreased, and more countries had fallen out of compliance with the 2% guideline since

117. *Id.*

118. Appathurai, *supra* note 83.

119. *Id.*

120. Jan Techau, *The Politics of 2 Percent: NATO and the Security Vacuum in Europe*, CARNEGIE EUR. (Sept. 2, 2015), available at <http://carnegieeurope.eu/2015/09/02/politics-of-2-percent-nato-and-security-vacuum-in-europe-pub-61139> (last visited Nov. 9, 2018).

the original target was created in 2006, despite what an observer would assume.¹²¹ In 2013 – the last year that NATO officials would have had data for, as 2014 was not yet complete – there were only three members of the Alliance that actually reached the 2% threshold.¹²² The only three Alliance members that actually complied with the 2% figure were Greece, the United Kingdom, and the United States.¹²³ For NATO officials, this was likely an alarming sign, as three countries complying is less than half of the seven countries complying in 2005 before the 2% target was even introduced.¹²⁴

In 2014, the eyes of the world were on Newport in the United Kingdom, where all twenty-eight NATO member countries¹²⁵ were represented, and many world leaders were converging to discuss the business and future of NATO moving forward.¹²⁶ At the Wales Summit, national leaders of the NATO member countries agreed to commit themselves to spending goals.¹²⁷ The text of the Wales Summit Declaration (Declaration) is expansive and covers many issues discussed and decided on at the Summit.¹²⁸ There was clear intent on the part of the drafters of the Wales Summit Declaration to show that assent to the declaration was given by officials at the top level of the respective governments of each country, as opposed to the many ministerial, or bureaucratic-type decisions that are made in NATO.¹²⁹ The opening sentence of the Declaration states, “We, the Heads of State and Government of the member countries of the North Atlantic Alliance, have gathered in Wales at a pivotal moment in Euro-Atlantic security.”¹³⁰

121. Press Release, NATO, *Defence Expenditures of NATO Countries (2008-2015)* (Jan. 28, 2016), available at https://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2016_01/20160129_160128-pr-2016-11-eng.pdf (last visited Nov. 9, 2018).

122. *Id.*

123. *Id.*

124. *Compendium, supra* note 114.

125. At the time of the Wales Summit in 2014, there were only twenty-eight countries that comprised NATO, as Montenegro only joined the Alliance in 2017. See *Montenegro Ratifies NATO Membership in Historic Shift to Western Alliance*, THE GUARDIAN (Apr. 28, 2017), available at <https://www.theguardian.com/world/2017/apr/28/montenegro-ratifies-nato-membership-in-historic-shift-to-western-alliance> (last visited Nov. 9, 2018).

126. See *World Comes to Wales for 2014 NATO Summit in Newport*, BBC NEWS (Sept. 4, 2014), available at <https://www.bbc.com/news/uk-wales-29053052> (last visited Nov. 9, 2018).

127. *2014 NATO Summit in Wales*, RT (Sept. 4, 2014), available at <https://www.rt.com/uk/184944-nato-summit-live-updates/> (last visited Nov. 9, 2018).

128. Press Release, NATO, *Wales Summit Declaration* (Sept. 5, 2014) [hereinafter *Wales Summit Declaration*].

129. *Id.*

130. *Id.*

This signals that consent for the policies and positions within the declaration have received approval at the highest levels of government.

The Declaration then reiterates NATO's fundamental principles and goals, and gets into the discussion of funding. The discussion of funding in paragraph fourteen by stating, "We agree to reverse the trend of declining defence budgets, to make the most effective use of our funds and to further a more balanced sharing of costs and responsibilities."¹³¹ The Declaration also states that any countries that were currently meeting the 2% minimum for defense spending would continue to do so.¹³² The Declaration also has a stipulation that any countries that were currently spending twenty percent of their defense budget on major equipment, which included research and development, would continue to do so as well.¹³³ This stipulation is used as a way to guarantee that the 2% of GDP being used on defense spending is not being wasted on other types of funding that may not be as effective in creating a readily mobile and deployable national defense force.

To address the situation where certain NATO member countries were not meeting their domestic defense spending goals for NATO, the Declaration then goes on to lay out three different directives for countries that were currently failing to meet the 2% of GDP funding for defense spending target.¹³⁴ First, they are to "halt any decline in defence expenditure" as a starting point.¹³⁵ Second, those countries out of compliance are to "aim to increase defence expenditure in real terms as GDP grows," which means that countries should continue to increase their defense spending as their GDP increases.¹³⁶ The third goal sets a deadline for the defense spending to comply with the "aim to move towards the 2% guideline within a decade with a view to meeting their NATO Capability Targets and filling NATO's capability shortfalls."¹³⁷ The Declaration also specifies that any countries that "spend less than 20% of their annual defence spending on major new equipment, including related Research & Development, will aim, within a decade, to increase their annual investments to 20% or more of total defence expenditures."¹³⁸ In an attempt to reiterate the general purpose of the funding,

131. *Id.*

132. *Id.*

133. Wales Summit Declaration, *supra* note 128.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. Wales Summit Declaration, *supra* note 128.

so as not to make the discussion solely about the amount of funding, the Declaration required all allies to “ensure that their land, air and maritime forces meet NATO agreed guidelines for deployability and sustainability and other agreed output metrics,” and it also requires them to “ensure that their armed forces can operate together effectively, including through the implementation of agreed NATO standards and doctrines.”¹³⁹ The discussion of the funding is finished with a reminder that the progress would be reviewed annually.¹⁴⁰

The nature of the Wales Summit Declaration, and even the document’s name itself, can help us answer whether or not this commitment was meant to be binding. While it is certainly persuasive to members of the Alliance, the Declaration does not appear to be politically binding. According to United Nations sources, a declaration is not binding by its nature.¹⁴¹ According to the United Nations Educational, Scientific, and Cultural Organization, a “Declaration and a Recommendation is generally a document of intent, and, in most cases, does not create a legally binding obligation on the countries which have signed it.”¹⁴² As a result, a declaration is a document that cannot be ratified.¹⁴³ The term “declaration” is “often deliberately chosen to indicate that the parties do not intend to create binding obligations but merely want to declare certain aspirations.”¹⁴⁴ Accordingly, it would appear that the creators of the Wales Summit Declaration intentionally chose to make it a declaration, as opposed to some other title for the document which would suggest that it was meant to be binding, such as a treaty.

While the name of the Wales Summit Declaration is suggestive that the document was meant to be non-binding, it is not a strict rule that all declarations are not binding on signatories. Though declarations are often not binding, it is possible that they could “be treaties in the generic sense intended to be binding at international law.”¹⁴⁵ This determination, though, has to be done by looking at the original intent of the people who drafted the Declaration.¹⁴⁶ In this case, it appears unlikely that

139. *Id.*

140. *Id.*

141. *Declaration*, UNESCO, available at <https://wayback.archive-it.org/10611/20171126022619/http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/declaration/> (last visited Nov. 11, 2018) [hereinafter *Declaration (definition)*].

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Declaration (definition)*, *supra* note 141.

this was the intent. Originally, when the guideline was first drafted, the guideline was explicitly intended to be non-binding on the members of the Alliance.¹⁴⁷ Since the 2% figure was originally intended to be non-binding, it stands to reason that there would have to be a clear intention on the part of the drafters of the Wales Summit Declaration that the recommitment to the figure was meant to be binding, as it would be changing the nature of the 2% target. Throughout the Wales Summit Declaration, there does not appear to be any indication of intent on the part of the drafters of the declaration to turn the 2% target into a legally-binding target.¹⁴⁸ The Declaration does not explicitly state that the 2% figure was to become binding.¹⁴⁹ Similarly, it did not establish any type of consequences for countries that failed to meet the 2% target.¹⁵⁰ Since it is “therefore necessary to establish in each individual case whether the parties intended to create binding obligation,”¹⁵¹ it must be concluded that the Wales Summit Declaration did not bind the members of NATO to the 2% target for defense spending, as there was no language in the Wales Summit Declaration to suggest that it would.¹⁵²

After examining the history of the figure, it does not appear that any NATO member countries can renounce NATO mutual defense obligations simply because other members of the Alliance do not apply 2% of their GDP on their domestic defense budget. Instead, the figure is merely suggestive and a failure to meet the figure is not meant to have real consequences on the Alliance.

VI. INTERNATIONAL TREATY LAW LETS NATO MEMBERS
RENOUNCE MUTUAL DEFENSE OBLIGATIONS IF ANOTHER
NATO MEMBER CANNOT UPHOLD ITS OWN. FAILURE TO
MEET THE 2% GUIDELINE ALONE IS INSUFFICIENT TO
SUSPEND SUCH OBLIGATIONS

It appears that members of NATO are not legally bound to the 2% figure for defense spending. Since the target is persuasive and not legally binding, failing to meet that guideline would not cause the mutual defense described in Article 5 of the North Atlantic Treaty to be affected.¹⁵³ The 2% target for NATO funding is simply just that: a target. It

147. Appathurai, *supra* note 83.

148. See Wales Summit Declaration, *supra* note 128.

149. See *id.*

150. See *id.*

151. Declaration (definition), *supra* note 141.

152. Wales Summit Declaration, *supra* note 128.

153. See Treaty, *supra* note 12.

is an aspiration and a goal for NATO member countries to try to achieve, it is not a necessary part of remaining a member of NATO. It is not a prerequisite which allows the other members of the Alliance to ignore the mutual defense principle of NATO if they fail to make the target of 2% of their GDP dedicated to defense spending. There were not treaties that enforced the 2% target, and it was both implicitly and explicitly stated that the target was not meant to be binding.

Though the 2% figure does not specifically bind NATO members, that does not mean that members of the Alliance are not legally bound to have a military that can readily be used for conflict. While spending is not totally determinative of the health of a military, it certainly can affect it. The North Atlantic Treaty, which created NATO and therefore binds NATO and controls its conduct, creates an obligation for members of the Alliance to maintain a competent military.¹⁵⁴

There are sources of international law that regulate treaties between countries in the international system. A prominent source of such laws is the Vienna Convention on the Law of Treaties. It should be noted that the United States is not officially a party to the Vienna Convention on the Law of Treaties, though the United States signed the Vienna Convention on the Law of Treaties.¹⁵⁵ Despite the United States not being a party to the convention, the State Department has stated that it is the position of the United States that many parts of the Vienna Conventions on the Law of Treaties are considered customary international law.¹⁵⁶ Customary international law is considered a very important primary source of international law,¹⁵⁷ and it is therefore binding on members of NATO.

Article 60 of the Vienna Convention of the Law of Treaties states that “[a] material breach of a multilateral treaty” by one of the parties entitles

any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.¹⁵⁸

154. *Id.*

155. *Vienna Convention on the Law of Treaties FAQs*, *supra* note 48.

156. *Id.*

157. Byers, *supra* note 50.

158. VCLT, *supra* note 51, art. 60.

Article 60 defines a material breach as “(a) a repudiation of the treaty not sanctioned by the present Convention; or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.”¹⁵⁹ If members of NATO do not sufficiently fund their military forces, it could potentially be considered a material breach under Article 60 which could allow a member of NATO to suspend their involvement in the treaty.

Article 3 of the North Atlantic Treaty states, “In order more effectively to achieve the objectives of this Treaty, the Parties, separately and jointly, by means of continuous and effective self-help and mutual aid, will maintain and develop their individual and collective capacity to resist armed attack.”¹⁶⁰ Article 3 of the North Atlantic Treaty requires that members of NATO maintain their armed forces to a degree where they can resist armed attack. This is a necessary for the mutual defense requirements in NATO to be effective, as members of the Alliance would need to the ability to assist militarily if mutual defense was to be effective. If members of NATO could not resist armed attack, this would violate a provision essential to the purpose of NATO, which was a mutual defense organization.

Though Article 60 of the Vienna Convention on the Law of Treaties could allow members of NATO to withdraw from the treaty if members of NATO did not have the capacity to resist armed attack, countries not meeting the 2% of funding figure would not immediately be such a material breach. Garrett Martin and Balazs Martonffy both believe that the 2% figure is flawed and should be abandoned in favor of a better way to measure NATO spending.¹⁶¹ The authors state that the 2% figure was originally chosen because staff at the NATO headquarters in Brussel determined that the median defense spending of NATO member countries from 1991-2003 was approximately at 2%, so that figure was adopted.¹⁶² They also believe that the figure provides issue as each country can decide what they consider defense spending with a different criteria from each other.¹⁶³ The authors also believe that the figure focuses too much on inputs and no the outputs, meaning that even though Greece met the guideline, it still had trouble projecting

159. *Id.*

160. Treaty, *supra* note 12.

161. Garrett Martin & Balazs Martonffy, *Abandon the 2 Percent Obsession: A New Rating for Pulling Your Weight in NATO*, WAR ON THE ROCKS (May 19, 2017), available at <https://warontherocks.com/2017/05/abandon-the-2-percent-obsession-a-new-rating-for-pulling-your-weight-in-nato/> (last visited Nov. 2, 2018).

162. *Id.*

163. *Id.*

its power abroad, though Denmark failed to meet the guideline and boasts a military that can be easily deployed abroad at any time.¹⁶⁴ Discussion of the military readiness is outside of the scope of this article, and would be more in the realm of military experts. Without evaluating the military preparedness of every member of NATO though, it is still safe to conclude that countries failing to meet the 2% of GDP for defense spending guideline would not constitute a material breach that would allow members of NATO to immediately renounce mutual defense obligations under NATO.

Additionally, Article 45 of the Vienna Convention on the Law of Treaty states that a party may no longer invoke a ground for suspending a treaty under Article 60, after becoming aware of the facts, "it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be."¹⁶⁵ This could mean that a member could lose its ability to withdraw from NATO, if knowing that another member of NATO did not have the ability to resist armed attack, that member of NATO continued to support abide by its mutual defense obligations.

International treaty law provides the possibility that a member of NATO could suspend its mutual defense obligations if other members of NATO did not have the ability to resist armed attack, though it does not allow members of NATO to do that simply because other members of NATO failed to spend 2% of their GDP on defense spending. While it is possible, it is still unlikely to occur. A material breach in Article 60 is a rather high standard in terms of NATO. It would not allow the mutual defense obligations to be renounced simply because a military was not as powerful as it should be. Instead, a country would need to provide no assistance whatsoever militarily to constitute a material breach. Additionally, if a country was aware of the breach, if it did not act timely enough, other members of NATO could be considered to have acquiesced to that conduct, and suspension would not be allowed at that point.

VII. CONCLUSION

A failure on the part of a NATO member country to spend 2% of its GDP on national defense spending would not allow another member of NATO to suspend its mutual defense obligations to NATO immediately. Under international treaty law, a member of NATO may be able to suspend its mutual defense obligations to NATO when other mem-

164. *Id.*

165. VCLT, *supra* note 51, art. 45.

bers are unable to assist in the repelling of an armed attack. This is somewhat unlikely to happen, however, as such an inability to uphold its own defense obligations under the North Atlantic Treaty is unlikely to occur. The standard for that would be quite high, and relative weakness of a military would not constitute a material breach. Additionally, members of NATO could be perceived as acquiescing to such arrangement, which would also remove their ability to suspend their mutual defense obligations. A failure to give the requisite amount of direct funding to NATO would also not allow for a country to suspend its mutual defense obligations under international treaty law.

While a failure on the part of some countries to meet the 2% funding guideline may be frustrating to the members of NATO that meet it, it does not trigger an immediate right to renounce mutual defense obligations under the treaty. Instead, if members of NATO wish to be released from their mutual defense obligations, they need to withdraw from NATO by giving one-year notice. Without taking such action, it appears likely that the central focus of NATO will continue to bind its members as the Alliance moves forward into the future.