

BOFAXE

Testing NATO's Resolve (Part 1)

Russia's Drone Incursion into Poland

— In the early morning hours of 10 September, Russia launched at least 19 Shahed-like Gerlan drones as well as smaller Gerbera decoy drones from both its own territory and Belarus directly toward Polish sovereign airspace. Up to four drones, each about 4.5 meters long, posing “a direct threat” were shot down by expensive fight jets. In one attempt to shoot down the Russian drone, a missile struck a civilian building in the Lublin area near the Ukrainian border. Contrary to Russian propaganda, these were not false-flag operations or Ukrainian provocations. Said incursion – whether intentionally or unintentionally – was a clear violation of Polish sovereignty and the prohibition on the use of force as well as a deliberate provocation to test NATO's resolve.

This blog post argues that sound countermeasures grounded in international law are urgently needed to defend the international law-based order—or what remains of it. Without such measures, Russian “grey zone” operations, designed to push the boundaries of what is legally and legitimately permissible in the use of force, are likely to succeed over time. An early illustration of this dynamic occurred on 19 September, when three Russian MiG-31 fighter jets violated Estonian airspace for approximately 12 minutes. Despite limited responses to the Russian drone incursion into Poland, such as Operation Eastern Sentry, no significant countermeasures were taken, effectively incentivizing Russia to continue its breaches of international law.

NATO's First Time Ever Engagement in Allied Airspace

As a consequence of the Russian attacks, Poland's operational command announced alert level and requested support from NATO's Allied Air Command (AIRCOM) as well as the Dutch F-35 air force. In addition, German Patriots air defence systems were placed on alert, while Italian airborne early warning aircrafts (AWACS) and an aerial refueler from NATO's Multinational Multi-Role Tanker Transport (MRTT) aircraft fled were deployed on that morning. Although Poland had faced several smaller drone incidents before, this was the first time ever, NATO aircrafts engaged in potential threats in Allied airspace.

Henceforth, Poland requested a UN Security Council emergency session that took place on 12 September. In its letter, Poland calls the Russian provocation an “attack” with “no doubt that this was not accidental”. Polish Foreign Minister Sikorski intended to “draw the world's attention to this unprecedented Russian drone attack on a member of the UN, EU and Nato”. Although 40 countries (with mostly EU and NATO countries) signed a statement rejecting Russia's violation of the UN Charter, no immediate sanctions followed.

The provocation took place only two days before the military exercise “Zapad 2025” in Belarus, which literally means “West” and was aimed at training Russian and Belarussian military movements in that direction. In fact, Belarussian territory and the Russian exclave Kaliningrad are only separated by less than 100km, the so-called Suwałki gap that crosses Polish and Lithuanian territory. Hence, Russia appears to be testing NATO's responses through “grey zone techniques”. Instead of an overt military build-up at the Polish border, a plausible aim could be the division of the West to slowly expand its power and territory not only over Ukraine but potentially also over Poland and the Baltic states. Military experts such as Prof. Carlo Masala have outlined this as a plausible scenario, though it has not (yet) fully materialized.

Countering the “grey zone narrative”

“Grey zone techniques” are also part of of Chinese warfare in the Indo-Pacific around Taiwan.

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The term suggests legal ambiguity, indicating that actions are not quite legal, nor quite *illegal*. Thereby, revisionist powers like China and Russia are attempting to push the boundaries towards what appears to be legal and legitimate. According to the Lotus-principle, "whatever is not explicitly prohibited is permitted". Yet international law is clear in that regard: Article 2(4) UN-Charter does prohibit the threat as well as the use of force and protects sovereign borders. Military drones can be seen as military aircraft of a special type, according to Article 3 of the Chicago Convention on International Civil Aviation. The drones deployed on 10 September were Russian Gerlan models (similar to the Iranian Shahed) as well as smaller Gerbera decoy drones occasionally used as "flying bombs" equipped with small warheads. Therefore, one must distinguish between reconnaissance and military drones. The incursion of non-military equipped drones without warheads constitutes only a violation of sovereignty according to Article 2(1) UN-Charter. However, the mere presence of military drones on foreign territory constitutes at least a threat of military force and is therefore a violation of Article 2(4) UN-Charter. Not every violation of the use of force constitutes an "armed attack" that allows for self-defence measures to take place. However, also less grave forms can be countered according to Articles 31–39 and 49–54 ASR.

Article 4 NATO Treaty Countermeasures

In this sense, later that morning the North Atlantic Council convened to discuss the ongoing situation after Poland's request for consultations under Article 4 NATO Treaty: "The Parties will consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened."

Unlike Article 5 NATO treaty, Article 4 does not presuppose an armed attack and is therefore the first and foremost step to discuss coordinated legal counter measures against the use of force violation.

NATO Secretary General Rutte stated that the violation of Polish airspace was "not an isolated incident". Concrete countermeasures were not announced by NATO. Later that day, Poland established a no-fly zone close to its border with Ukraine and Germany announced to extend its Air Policing activities to Polish air space. Two days later, France, Germany and Denmark announced that they will contribute fighter jets and other military assets, resulting in Operation Eastern Sentry. However, none of these measures has had a significant impact on Russia and is arguably ineffective in preventing future provocations, as demonstrated just ten days later when Russia again violated NATO airspace, this time in Estonia, triggering again NATO's Article 4. Since Russia's ongoing war of aggression already triggers not only Ukraine's right to self-defence under Article 51 of the UN Charter but also the collective right to self-defence, its violation of the prohibition on the use of force against Poland (and Estonia) does not alter the already existing legal opportunities for EU and NATO members to act collectively since 2022. What the events of 10 September and following do, however, is raise the political urgency to react collectively now. Here are a couple of legal countermeasures that could be taken to support Ukraine's collective right to self-defence and react to the use of force violation against Poland as well as Estonia:

- Expanding European Sky Shield over western Ukraine
- Integrating Ukrainian air defenses into NATO systems

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- Providing Ukraine with long-range precision weapons against military targets in Russia
- Releasing frozen Russian assets to Ukraine
- Cancelling Schengen visas for Russian diplomatic passport holders
- Halting payments to Russia and imports of oil, gas, and LNG
- Clearly announce new NATO policy to shoot down military aircraft in response to clear-cut airspace violations

The Urgency to Act

Poland already invoked Article 4 consultations in 2014, when Russia's initial use of force violation started in Crimea and Poland felt threatened. In fact, the Russian incursion took place only by "little green men" attributable to the Russian state (Article 8 Articles on State Responsibility). NATO's limited response at that time – due to a fear of escalation with Russian armed forces – arguably emboldened Russia, culminating in the full-scale invasion of Ukraine on 24 February 2022 that is still ongoing and is now spreading its wings.

According to military estimations, Russia could be able to launch an attack on NATO in 2029. Although the events of 10 September do not constitute an armed attack that would trigger NATO countermeasures according to Article 5, Russia's hybrid warfare activities already go beyond the borders of Ukraine. "Not yet war but not really peace", is a common political wording for this status quo.

This episode highlights Moscow's disregard for diplomatic efforts, including recent attempts at US-brokered peace negotiations. Russia does not seem to be willing to put an end to the war; it is spreading disinformation fast and may not stop until the former USSR republics are reunited with its "historical motherland". Consequently, it is high time to support Ukraine's self-defence efforts against the Russian aggressor and support Poland and Estonia as well as the whole international community in defending the prohibition on the use of force, "the cornerstone of the United Nations Charter".

All states are, in fact, obliged to cooperate in bringing the violation of the use of force, a *jus cogens* norm, to an end (Article 41 (1) ASR). The threat posed by Russia goes beyond Ukraine, Europe and the West. That NATO Article 4 consultations were triggered a second time in just one month – out of only nine instances since the Alliance's founding in 1949 – signals a marked escalation in provocation. It constitutes an attack on the international law-based order. If NATO and the international community fail to respond more decisively, Russia (and *in extenso* China) will win its fight on the international order and the use of force prohibition will eventually be dead, as Thomas Franck already claimed in 1970.