

**RAUSI Research Brief Volume 3 Issue 3
October 2022**



Legal and Diplomatic Impacts of Russia's Annexation and Withdrawal, Ukraine, Autumn 2022

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Prepared for The Royal Alberta United Services Institute (RAUSI)

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Summary

The contrast of Russia's formalized annexation of Ukraine's sovereign territory 30 September 2022 with its strategic withdrawal of armed forces from Lyman in the Southwest corner of Luhansk Oblast (circled on map, page 3) the next day demands diagnostic, predictive and prescriptive analyses. This article offers an overview.

The absence of lawfulness and the lack of political and diplomatic adroitness in Russia's state practice, which are apparent from its annexation of Ukraine's sovereign territory by armed force, drive several outputs. They engender a constructive and effective collective defense regime advantageous to Ukraine that remains outside the legal bounds of the North Atlantic Treaty Organization (NATO). They invite the international order to urgently revise the voting calculus of the UN Security Council concerning Ch VII resolutions, more so given developing situations elsewhere in the international community. They demand an update to the body of international law circumscribing the threat or use of nuclear force.

Political/military

The withdrawal from Lyman may indicate either or both: **(1)** a tactical redeployment of Russian assets rearward to preserve and reconstitute logistical and defensive lines; **(2)** a strategic decision to start assigning a lower priority to defending the entire Luhansk Oblast and to consolidate remaining military assets primarily to defend the three remaining oblasts to the South/Southwest,¹ i.e., Donetsk, Kherson and Zaporizhia (see map, page 3), as well as Crimea which the Russian Federation (Russia) considers to be an autonomous region following its 2014 annexation.²

If so, such a decision is as much an output of political as military decision making. This process would not be inconsistent with reports that President Putin is managing Russian military operations more than might be/should be expected of a political leader. Arguably, these outputs portend unintended outcomes not unlike those befalling Adolf Hitler who overrode his military staff in operational matters.

Russia formally annexed the four oblasts as Russian sovereign territory on 30 September 2022. If Russia were to consider one or more of the remaining three oblasts as 'key ground' in the current dispute, then defending such ground may incite Russia to heighten the probability of Russia's threat or use of force, up to and including nuclear force, to defend three or all four oblasts.



Map © Institute for the Study of War

International law

Such annexation breaches UN Charter Art 2(4), which prohibits the threat or use of force against the territorial integrity of a state, i.e., it breaches *jus ad bellum* or the 'law of going to war.' On the other hand, threat or use of force in anticipatory – but not pre-emptive – self-defence of sovereign territory against an armed attack is permitted per UN Charter Art 51, and comports with *jus in bello* or 'laws of conduct during war.' However, use of nuclear weapons in these two contexts is problematic for two reasons.

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Firstly, treaties and customary law prohibit the threat or use of specific weapons systems in any context, such as chemical weapons,³ biological weapons⁴ and antipersonnel land mines.⁵ On the other hand, no such treaty exists to expressly prohibit the threat or use of nuclear weapons specifically, although customary international law does. The absence of express law should not always be inferred as a permissive condition.⁶

Secondly, on 08 July 1996, following the 26 December 1991 dissolution of the USSR and during the formative period of the current Russian Federation, the International Court of Justice (ICJ) found unanimously in its Advisory Opinion that any use of nuclear weapons is subject to the principles of customary international humanitarian law governing the conduct of armed conflict⁷ (*jus in bello*). The international legal community expected same. Unusually, however, “the majority of the Court declared a [unique] non-finding (a *non liquet*) – a determination that the possibility of a legitimate use of nuclear weapons in an ‘extreme circumstance of self-defence, in which the very survival of a State would be at stake,’ *could not be ruled out*”⁸ (*jus ad bellum*). The ICJ is expected to arrive at one finding or another, making this outcome an exception, if not the only exception to date.

From a narrow interpretation, this carefully worded finding, reflecting a gap in legal reasoning, may lead Russia to believe further that the threat or use of nuclear weapons is not unlawful, and hence enable it to proceed more comfortably with deployment as it chooses. However, adverse consequences may follow, further to the following.

Ukraine's initiative in collective defense following Russia's formalization of annexation

On 30 September 2022, the same day of the formalization, Ukraine initiated a bid to join the 30 Member States of the collective defense treaty regime, NATO.⁹ Notably, on 05 May 2022, Finland and Sweden had applied likewise, and as of this writing, only two NATO Member States, Hungary and Turkey, have yet to ratify the bids of Finland and Sweden.

Ukraine may encounter a longer timeline given the long-standing reticence of NATO Member states to admit Ukraine, on the grounds that such a formal, legal and diplomatic manoeuvre may aggravate Russia unnecessarily *vis-à-vis* current NATO Member States. This reservation is all the stronger when recognizing that supportive ‘arms and aid diplomacy,’ as is currently being practiced by some NATO Member States such as the US, yields material and sufficient battlefield effect in practical terms without exposing NATO Member States to direct and adverse consequences of armed conflict with Russia. On the other hand, adverse consequences of Russia's ‘energy and Nord Stream diplomacy’ are being currently felt across a number of NATO Member States.

Irrespective, Ukraine's membership in NATO might lead Russia to then believe that Russia may more lawfully deploy nuclear weapons to any NATO member state in an act of anticipatory self-defence by virtue of the North Atlantic Charter (NAC) Art 5's collective defence provision. Concurrently, Ukraine, a non-nuclear weapons state, may enjoy greater protection from either of the three NATO nuclear Member States. The advantages of membership are not one sided.

Should Russia deploy, e.g., a low yield tactical nuclear device against a target in Ukraine whose radiation nevertheless drifts beyond to lethally impact other states unintentionally, such as Poland or Romania, then

a collective response per NAC Art 5 may overwhelm the Russian political decision-making process with follow-on consequences internally.

Conclusion

Firstly, the gravity of the Russia-Ukraine dispute generally, and Russia's not-unexpected vetoes of UN Security Council resolutions condemning Russia's state practice in the dispute specifically, both strengthen the case for UN reform. The effectiveness of the voting calculus at the UN Security Council requires improvement, by e.g., denying the state which is the subject of a contentious UNSC resolution a vote on that resolution. This issue may subsequently arise again in future matters concerning events in e.g., East Asia.

Secondly, the state practice of Russia may be described as acts of 'aggression.' The current and non-exhaustive definition of aggression, originally determined in 1974, reads:

Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of [UN Charter] article 2, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.¹⁰

The Russia-Ukraine dispute should accelerate further research into what currently in 2022 constitutes an "act of aggression" by a state as a breach of UN Charter Ch VII Art 39. The current definition may now be insufficient, and likewise, remedies for breach.

Relatedly, the dispute should also actualize *individual criminal responsibility* for the international crime of aggression – vice responsibility of the state for acts of aggression. This is distinct from individual criminal responsibility for war crimes and crimes against humanity. The Rome Statute (1998) Art 8 *bis* employs the same definition for aggression re the state, as stated above, but also prefaces it with its initial connecting paragraph to establish *individual criminal responsibility* for aggression of e.g., the Head of State, the Head of Government, and other leaders representing the state. Rome Statute Art 8 *bis* provides

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1. For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

2. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression: ...¹¹

Thirdly, this dispute must hasten legal research into the legality of threat or use of nuclear weapons and of other weapons of mass destruction. It should prompt disarmament conference diplomacy to strengthen and broaden treaty law in the non-proliferation of weapons of mass destruction and in their prohibited use in any circumstance, whether *jus ad bellum* or *jus in bello*. Over time, treaty law will become declaratory of customary law, both being separate and unrelated sources of law concerning the same subject matter,¹² and hence strengthen the norms of international law as a whole.

¹ Institute for the Study of War, *RUSSIAN OFFENSIVE CAMPAIGN ASSESSMENT, OCTOBER 1* (Oct 1, 2022).

² See generally Hiruni Alwishewa, *Revisiting Crimea and the Utility of International Law*, *Opinio Juris* (08 March 2022) <http://opiniojuris.org/2022/03/08/revisiting-crimea-and-the-utility-of-international-law/>

³ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (1974 UNTS 45 concluded 13 January 1993 in force 29 April 1997).

⁴ Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (1015 UNTS 163 concluded 10 April 1972 in force 26 March 1975).

⁵ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (2056 UNTS 211 concluded 18 September 1997 in force 01 March 1999).

⁶ See *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

⁷ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226, (International Court of Justice (ICJ), 8 July 1996), <https://www.icj-cij.org/en/case/95>, cited in Timothy L.H. McCormack, *A non liquet on nuclear weapons: The ICJ avoids the application of general principles of international humanitarian law*, 316 INTERNATIONAL REVIEW OF THE RED CROSS 77 (28 February 1997) <https://international-review.icrc.org/sites/default/files/S0020860400084321a.pdf>.

⁸ *Id.*, 77-78 emphasis added.

⁹ Natalia Drozdiak and Daryna Krasnolutska, *Ukraine Bids to Join NATO Despite Long Odds* (Bloomberg 30 September 2022) <https://www.bloomberg.com/news/articles/2022-09-30/ukraine-bids-to-join-nato-despite-long-odds-against-wartime-move>.

¹⁰ Definition of Aggression (UNGA Res 3314 (XXIX), 14 December 1974) 6th Committee Art 3 <http://hrlibrary.umn.edu/instree/GAres3314.html>; See also Elizabeth Wilmshurst, DEFINITION OF AGGRESSION (UN Audio Visual Library 2008) https://legal.un.org/avl/pdf/ha/da/da_e.pdf.

¹¹ Rome Statute Art 8 bis (2187 UNTS 3 concluded 17 July 1998 in force 01 July 2002) <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

¹² See *Military and Paramilitary Activities in und against Nicaragua* (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p. 14, § 173, 187.