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KAMPALA INTERNATIONAL UNIVERSITY LAW JOURNAL (KIULJ) is the official journal of the School of Law, Kampala International University. It is a peer-reviewed journal providing distinctive and insightful analysis of legal concepts, operation of legal institutions and relationships between law and other concepts. It is guided in the true academic spirit of objectivity and critical investigation of topical and contemporary issues resulting from the interface between law and society. The result is a high-quality account of in-depth assessment of the strengths and weaknesses of particular legal regimes with the view to introducing reforms. In furtherance of the requirements of advanced academic scholarship, the Journal places high premium on originality and contribution to knowledge, plain and conventional language, and full acknowledgment of sources of information among other things. It is superintended by a Board of respected academics, lawyers, and other legal professionals.

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Scope

Kampala International University Law Journal (KIULJ) is the official Journal of the School of Law, Kampala International University, Uganda. It is a peer-reviewed Journal providing an objective and industry focused analysis of national and international legal, policy and ethical issues. The Journal publishes well researched articles that are in sync with sound academic interrogation and professional experience on topical, legal, business, financial, investment, economic and policy issues and other sectors.

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FROM THE EDITORIAL SUITE

The primary objective of the **KAMPALA INTERNATIONAL UNIVERSITY LAW JOURNAL (KIULJ)** is to provide as platform for a robust intellectual discourse, through the publication of incisive and insightful articles and other contributions from a variety of scholars, jurists and practitioners across jurisdictions. The desire to accomplish this objective guides the choice of the materials being presented to the reading public in every edition. The peer review and editing processes of the papers that are finally selected for publication are equally influenced largely by the pursuit of this goal.

To this end, articles from seasoned scholars and practitioners in each edition address a wide spectrum of issues from different branches of the law, such as, International Criminal Law, Law of International Institutions, Environmental Law, Human Rights Law, Medical Law, Oil and Gas Law, Constitutional Law, Corporate Governance to mention but a few. You will, no doubt, find these scholarly works a worthy contribution to knowledge in their respective fields.

On behalf of the Editorial Board, I wish to appreciate all our reviewers, internal and external, for their constructive criticisms, comments and suggestions. These go a long way to enrich the quality of the papers published in this Journal. The various contributors who painstakingly addressed the observations and suggestions of the reviewers, thus facilitating the achievement of the purpose of the review process also deserve our commendation.

We also, with a grateful heart, acknowledge the interest our teeming readers have continued to show in the succeeding editions of the journal just as we assure them of our readiness to give them the best always. We equally thank our editorial consultants for their useful advice and comments that have contributed to the continuous improvement of the quality of the journal. Legal practitioners and scholars are hereby informed that contributions to our journal are received on a rolling basis. They should feel free to send in their manuscripts and ensure they comply with the submission guidelines as spelt out in the Call for Papers obtainable from the journal's website (www.kiulj.kiu.ac.ug). All contributions should be addressed to the Editor-in-Chief and forwarded to the email addresses supplied in this edition.

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TABLE OF CONTENTS

INVASION OF UKRAINE: INTERROGATING THE CRIMINAL LAIBILITY OF RUSSIA UNDER INTERNATIONAL LAW

IFEOLU JOHN KONI, Ph.D 1

CLIMATE CHANGE, HUMAN RIGHTS AND THE RESPONSE OF THE AFRICAN HUMAN RIGHTS SYSTEM: FOCUS ON THE AFRICAN COMMISSION AND THE COURT ON HUMAN AND PEOPLES' RIGHTS

KELESE GEORGE NSHOM & GIDEON FOSOH NGWOME.....23

LEGAL MECHANISMS TO COUNTER TAX AVOIDANCE IN NIGERIA

ISAU OLATUNJI AHMED, Ph.D.....46

STATE AND INDIVIDUAL RESPONSIBILITIES FOR CRIME OF AGGRESSION UNDER THE ROME STATUTE: WHAT PROSPECT FOR INTERNATIONAL CRIMINAL JUSTICE

FON FIELDING FORSUH, Ph.D.....63

GENDER DISCRIMINATION AND THE INTERNATIONAL DIVISION OF LABOUR: A LEGAL APPRAISAL

O. F. OLUDURO& Y. F. OLUWAJOBI.....86

EROSION OF THE PHILOSOPHY OF POSITIVISM THROUGH JUDICIAL ACTIVISM: EMERGING TREND IN THE PRINCIPLE OF JUDICIAL PRECEDENT IN NIGERIA

IGBONOH A JOSHUA, Ph.D.....113

THE IMPACT OF INTERNATIONAL LAW ON DOMESTIC CORPUS: A REVIEW OF ATTORNEY-GENERAL, CROSS RIVER STATE V ATTORNEY-GENERAL OF THE FEDERATION

YAHYA DURO U. HAMBALI, Ph.D & JOSEPHINE N EGEMONU,
LLM.....130

RESISTANCE AGAINST RAPE AND KIDNAPPING IN NIGERIA: JUSTIFYING LETHAL SELF DEFENCE AGAINST VIOLENT CRIMES

ATERO AKUJOBI, Ph.D.....141

JUDICIAL IMPARTIALITY AND INDEPENDENCE IN NIGERIA: A REALITY OR A FAÇADE?

DORCAS A AKINPELU, LLM & ADEOLA O. AGBOOLA, LLM....156

THE STATUTE OF EXTRAORDINARY AFRICAN CHAMBERS: AN END TO IMPUNITY IN AFRICA?	
JOEL A ADEYEYE, Ph.D.....	170
EXPLORING THE JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN NIGERIA	
DR. AMADE ROBERTS AMANA&DR.SOLOMON A.IENLANYE.	194
REFLECTIONS ON THE CLEAVAGES OF IDENTITY AND INDIVIDUALITY OF WOMEN IN CAMEROON	
NCHOTU VERALINE N. MINANG, Ph.D.....	207

INVASION OF UKRAINE: INTERROGATING THE CRIMINAL LIABILITY OF RUSSIA UNDER INTERNATIONAL LAW

IFEOLU JOHN KONI, PhD*

Abstract

The invasion of Ukraine by Russia on 24 February 2022 has been widely condemned by world leaders as an act of aggression by one State against a fellow sovereign State. The condemnation has been premised mainly on the obligations imposed by Article 2, paragraphs 3 and 4, of the United Nations Charter on Members of the Organisation to pursue peaceful means in settling international disputes and refrain from the threat or use of force against the territorial integrity or political independence of any State. This article examines the criminal liability of Russia over the invasion of Ukraine. It adopts the library based doctrinal analysis and relies on primary sources like the United Nations (UN) Charter, Rome Statute of International Criminal Court (ICC), and the Geneva Conventions on rules of engagement during armed conflict. It also makes use of secondary sources such as internet materials and periodicals. The study finds that although Russia can be held liable for the commission of crimes of international concern such as genocide, war crimes, crimes against humanity and the crime of aggression, as contained in article 5 of the ICC Statute, yet the country cannot be prosecuted by the Court because it is not a signatory to the Statute. It further finds that even though the United Nations can sanction Russia for its apparent act of aggression against Ukraine, such a possibility is quite remote due to Russia's prime status as one of the veto-wielding permanent members of the Security Council, the only principal organ of the Organisation that can order an enforcement action under Chapter VII of the Charter. In order to remedy the anomaly in the international criminal justice system thrown up by the conflict in Ukraine, the paper suggests a compressive reform of the UN system to, inter alia, make it mandatory for all Members of the Organisation to submit to the jurisdiction of ICC while considering matters affecting their obligations as contained under Articles 1 and 2 of the UN Charter.

Keywords: Invasion, Interrogating, Criminal Liability and International Law.

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Introduction

What triggered a chain of events that eventually culminated in the outbreak of the Second World War (WWII) was the invasion of Poland by Adolf Hitler of Germany in September 1939. This led Great Britain and France to declare war on Germany thus setting off a global conflict that cost the world no fewer than 60 million lives¹, besides colossal losses in money and materials. By the time the war ended in 1945, following the defeat of Nazi Germany and her allies, notably Japan, leaders of the global community had realized the grave and devastating effects of the conflict on humanity and were determined to guard against a repeat of such a needless and mindless fight in the future. Accordingly, in the Charter of the United Nations, an Organization of sovereign States established by world leaders after WWII ended in September 1945, it was agreed, *inter alia*, as follows:

*We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women... have resolved to combine our efforts to accomplish these aims.*²

In the light of the forgoing, the invasion of Ukraine by Russia on 24 February 2022 attracted global outrage and consternation. The situation became more shocking considering the remarkable role Russia played in the Second World War and its prime status in the global institution that emanated from the conflict³. The country is thus presumably a major stakeholder in world politics and impliedly in the coordinated attempt to maintain international peace and security which is one of the primary purposes of the UN.⁴

Russia's invasion of Ukraine may have attracted great concerns and indignation across the globe but the pertinent question is, has the country breached any of its obligations under international law and, if the answer is yes, is it liable to be sanctions under international criminal law? This paper intends to answer these and

¹ World War II: Summary, Combatants & Facts-HISTROY<<https://www.histroy.com>> accessed 17 May 2022.

² See the Preamble to the United Nations (UN) Charter. The Charter is the founding document of the United Nations. It was signed on 26 June 1945 at San Francisco, United States, at the conclusion of the UN Conference on International Organization. It came into force on 24 October 1945, a day recognized globally as the "United Nations Day". This document is referred subsequently as the "UN Charter" or simply "the Charter".

³ Russia, or the Union of Soviet Socialist Republic, USSR, (as it was then known), it will be recalled, was one of the 50 States that signed the UN Charter on 26 June 1945. Poland signed on 15 October 1945, thus becoming the 51st founding Member. The founding Members are the countries that were invited to participate in the 1945 San Francisco Conference at which the Charter, along with the Statute of the International Court of Justice (ICJ), was adopted. The leading role played by Russia both in the prosecution of the war on Nazi Germany and in the formation of the UN must have accounted for its prime status as one of the permanent members of the UN Security Council (UNSC). Other permanent members are; the United States, France, Britain and China.

⁴ Charter of the United Nations, Art 1.

other questions that are deemed germane to this discourse. To accomplish this objective, the paper will examine the obligations of Russia as a member of the global community under relevant multilateral instruments such as the Charter of the United Nations, the Rome Statute of the International Criminal Court (ICC), among others.

Background to the Study

In any conventional warfare, there are rules of engagement. These are contained in treaties like the Geneva Conventions, the Rome Statute of ICC, and a host of other international instruments. Under Chapter IV of the Basic Rules of Geneva Conventions and their Additional Protocols, for instance, the protection of civilian population in time of war is well recognized.⁵ Similarly, under article 8 of the ICC Statute any grave breach or serious violation of article 3 common to the four Geneva Conventions of 12 August 1949 will amount to a war crime within the meaning of the Statute. Such breaches include acts committed against persons taking no active part in the hostilities, including soldiers who have laid down their arms, otherwise known as prisoners of war, and those wounded or have fallen sick by reason of detention or any other cause.

One issue that has dominated international discourse since the launch of Russia's full-scale invasion on 24 February 2022 is whether the country and/or its leader, Vladimir V. Putin, is liable for war crimes or crimes against humanity or any other crime at all under international law by reason of the military operation and what have now turned out to be its grim consequences. According to a report by Dominic Casciani, British Broadcasting Corporation (BBC) Legal Correspondent, world leaders like the United States President, Joe Biden, and outgoing United Kingdom (UK) Prime Minister, Boris Johnson, have accused Russia of committing war crimes in Ukraine.⁶ The allegation was ostensibly born out of what reportedly happened in Bucha, a town on the outskirts of Kyiv, the Ukrainian capital, and Mariupol, another city in the Pryazovia region of Ukraine, a few days after the outbreak of hostilities. According to the BBC report, investigators and journalists have found what happened in Bucha and other nearby areas to be evidence of a deliberate killing of civilians even as Ukrainian forces claimed they found mass graves and proof that civilians had been killed after their feet and hands were allegedly bound.⁷

⁵ Basic Rules of the Geneva Conventions and their Additional Protocols, ICRC Publication ref. 0365 <<https://www.icrc.org>> accessed 27 July 2022. The provision is contained under Convention II which was adopted 12 August 1949.

⁶ Dominic Casciani, What is a war crime and could Putin be Prosecuted over Ukraine? BBC News <<https://www.bbc.com/news/world>> accessed 27 July 2022.

⁷ Ibid.

Barely one month after the invasion, and after days of heavy bombardments, was a Russian strike alleged to have struck a theatre in Mariupol in what was reported by the BBC to be the confirmed case of a mass killing.⁸ The theatre in front of which the word “children” was written, had served more or less as a refugees’ camp to hundreds of civilians who fled the violence. It has been reported that the city (Mariupol) had been the scene of some of the most intense fighting since the invasion was launched, with the invading troops carrying out deadly strikes on a maternity ward and other places where over 1,000 civilians had taken shelter, with stocks of necessities like food and water dwindling.⁹

It has further been reported by the *Cable News Network (CNN)*, quoting *The New York Times*, that Russian paratroopers carried out summary executions of at least eight Ukrainian men in Bucha on 4 March 2022, adding that evidence of mass graves and civilian executions in Bucha and another neighbouring town, Borodianka, had continued to emerge since April 2022, after the withdrawal of Russian soldiers from the Kyiv region.¹⁰ In the words of the CNN report, ‘Images of bodies lying strewn the streets of Bucha have sparked international condemnation and fueled calls for an investigation into potential Russian war crimes’.¹¹

The embattled Ukrainian President, Volodymyr Zelensky, reportedly raised an alarm late May 2022 that after weeks of intense fighting, the country’s eastern Donbas region had been completely destroyed just as he accused Russia of “a deliberate and criminal attempt to kill as many Ukrainians as possible”.¹² The Ukrainian leader made the allegation after a village in Chernihiv was attacked by missiles, leaving scores of people dead.

It is to be noted that the Russian government has reportedly denied it had been targeting civilians. However, the first evidence that the litany of allegations against Kremlin might not be totally false emerged in May 2022 when a Russian soldier, Vadim Shishimarin, was apprehended and made to face the first war crimes trial in Ukraine since the war started. The 21-year-old pleaded guilty to the charge of killing an unarmed 62-year-old Ukrainian man. According to a CNN report, the trial the first day was so packed with newsmen that the venue was moved to a bigger location.¹³ The historic trial reportedly produced some dramatic moments such as a confrontation between the defendant and the widow of the deceased. Shishimarin

⁸ Ibid.

⁹ Joshua Berlinger, ‘Its nearly three months since Russia invaded Ukraine. Here where things stand’ (cable News Network, CNN 21 May 2022 <<https://edition.cnn.com/2022/05/21/europe/ukraine-war-status-intl>> accessed 21 May 2022).

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

was reported to have admitted he was responsible for the killing but that he was “sorry and sincerely repents”.¹⁴ In the words of the accused person, ‘I was nervous the moment it happened. I didn’t want to kill. But it happened and I do not deny it’.¹⁵

After listening to Shishimarin’s confessional statement and the argument by his lawyer, Viktor Ovsyannikov, that he was in a state of stress caused by the combat situation and the pressure from his commander such that he could not be said to have a direct intent (*mens rea*) for the murder, the judge held that he had committed “a crime against peace, security, humanity and the international order”¹⁶ and subsequently sentenced him to a life imprisonment.

The conviction and sentence of Shishimarin has thrown up the critical question of whether there are other allegations of war crimes in Ukraine since the stand-off with Russia began. A BBC report on 7 July 2022 quoted Ukraine’s Prosecutor-General, Iryna Venediktova, as claiming that her office had started 80 prosecutions against Russian soldiers for a variety of offences such as, killing civilians, rape, bombing civilian infrastructure and looting.¹⁷ She further claimed to have identified 600 suspects, adding that she had been receiving reports of 200 to 300 war crimes on a daily basis.¹⁸

Aside from the foregoing unilateral steps taken by Ukraine and its officials to bring alleged actors of war crimes to justice, the claim by the International Criminal Court (ICC)’s Chief Prosecutor, Karim Khan, Queen’s Counsel, that there is a reasonable basis for believing that war crimes have been carried out in Ukraine is one that cannot be dismissed as being born out of propaganda. The BBC report quoted the British lawyer as saying that the ICC would look at past and present allegations – going back as far as 2013, prior to Russia’s annexation of Crimea from Ukraine - to determine the liability of Russia for war crimes.¹⁹ The report further quoted Hugh Williamson of *Human Rights Watch*, an organization reputed for gathering evidence of war crimes in conflicts, as agreeing that there is evidence of summary executions and other grave violations of human rights by Russian forces in Ukraine.

But is it really true that war crimes have been or are being committed in Ukraine? If the answer is in the affirmative, who are the alleged offenders, the Russian soldiers or their leader(s) who ordered them? Can the ICC and UN prosecute the alleged offenders? Are there other crimes related to the invasion for which President Putin,

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Casciani (n 6).

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid.

the Russian commanders and other leaders can be prosecuted by the international courts? The rest of this paper shall be devoted to addressing these critical questions, after the historical and economic perspectives to the conflict have been considered in outline.

Understanding the Roots of Russia/Ukraine Conflict

President Vladimir Putin has consistently maintained that Ukraine is and remains an integral part of Russia. And like Donahue and Krasnolutska put it, the Russian leader has repeatedly made clear that “he considers Ukraine’s place to be under Russia’s thumb”.²⁰ This appears to be the Kremlin’s position from the days of the Russian Empire under Catherine the Great in the 18th Century through the two States’ shared history in the Soviet Union. The preceding historical account may help confirm or reject this proposition.

There is no doubt that the two nations share a long common past, dating back more than a thousand years to the creation of the first Slavic State, known as Ryivan Rus, in parts of what today have become Russia, Ukraine and Belarus.²¹ It has been stated that the territory of the present Ukraine became part of the Russian empire in the late 1700s after varying periods of rule under the Mongols or Tatars, the Poles and Lithuanians.²² The country, in 1918, a year after the communist revolution in Russia, proclaimed independence. This status was however short-lived as the Red Army conquered most of the Ukrainian territory in 1921 as a result of which the nation became a republic within the Soviet Union. The Ukrainian sense of a national identity was however not destroyed despite the 1921 conquest. It in fact became sharpened in the 1930s when Soviet policies mandating farmers to embark on collective production were resisted by Ukrainians. The resultant famine, referred to as *Holodomor*, reportedly led to the death of about seven million people, mostly women and children, of Ukrainian extraction.²³ Ukraine finally regained its political sovereignty in 1991 with the collapse of the Union of Soviets Socialist Republic (USSR) after a sustained political reform initiated and spearheaded by Mikhail Gorbachev, the eighth and final leader of the Soviet Union.

Since regaining independence in 1991, Ukraine is known to have nursed and pursued an ambition to align itself better with the West, including joining the North Atlantic Treaty Organisation (NATO), a military alliance of countries from Europe and North America, formed partly to deter Soviet expansion. The decision of the former Ukrainian President, Viktor Yanukovich, to cultivate closer relations with

²⁰ See Patrick Donahue and Daryna Krasnolutska, ‘Understanding the Roots of Russia’s War in Ukraine’ <<https://www.bloomberg.com/news/articles>> accessed 28 July 2022.

²¹ Ibid.

²² Ibid.

²³ Ibid.

Russia, against the wish of the teeming population of Ukraine, coupled with allegations of corruption, led to mass protests by pro-Europe agitators which eventually culminated in his ouster in February 2014.²⁴ The removal of the pro-Russian leader then paved way for the commencement of a democratic process which ended in a general election held on 25 May 2014 resulting in Petro Poroshenko being elected President after winning 54.7% of the votes cast. Poroshenko ruled the country till April 2019 when he concluded his term of five years after which he was replaced by the current President, Volodymyr Zelenskyy, an actor who portrayed a fictional President of Ukraine in a comedy television series titled “servant of the people”. Poroshenko lost his re-election bid after a second round of poll was held between him and Zelensky on 21 April 2019, when none of the 39 candidates received an absolute majority of the votes cast in the first ballot. The current President won the second ballot with 73.22% of the votes cast.²⁵ The change of government in April 2019 did not in any way lead to a change in the pro-Europe foreign policy of Ukraine. Zelensky has in fact demonstrated a greater commitment to forging a closer tie with the European countries, heightening fears in the minds of President Putin and his aides that the comedian –turned President was determined to actualize Ukraine’s interest in joining NATO.

The Economic Dimension to the War in Ukraine

A news analysis published by *The Economic Times*, an Indian English language, business-focused, daily newspaper, on 27 May 2022, gave a detailed account of the economic perspective to the Ukraine-Russia conflict.²⁶ In a massive report, the newspaper based its analysis on the following story outline:

- (a) Russia as an emerging energy giant;
- (b) American attempt at stopping Nord stream 2;
- (c) the operationalization of the pipeline in Nord stream 2; and
- (d) Russia’s daring attempt to break up the EU via Nord stream 2.

The present review shall be based on the foregoing outline, as stated by the newspaper.

Russia as an Emerging Energy Giant

After the collapse of the USSR in the early 1990s, followed by years of internal strife and economic downturns, Russia, under the leadership of President Putin, is now seen globally as an emerging energy giant.

²⁴ Ukraine President Yanukovich impeached/News/AlJazeera <www.aljazeera.com > accessed 27 July 2022.

²⁵ Ukraine election: Comedian Zelensky wins Presidency by landslide-BBC News <<https://www.bbc.com>> accessed 27 July 2022.

²⁶ News Analysis, ‘View: Root Cause of Ukraine-Russia Conflict’ (*THE ECONOMIC TIMES*, Mumbai, India) <<https://economictimes.indiatimes.com/news/defence>> accessed 27 May 2022.

According to *The Economic Times* report, the country has become the world's third largest producer of oil and the second largest producer of natural gas.²⁷ The report further states that Russia is believed to be using energy revenue to amass some \$630 billion in foreign exchange reserves and that the country in 2021 was able to balance its budget with a relatively low oil price at \$45 per barrel as against an average of nearly \$70 benchmark.

What are the implications of Russia's impressive energy exploits on the politics in the European Union (EU), particularly with respect to the threat by the United States (US) and its allies to slam grave economic sanctions on the country over the invasion of Ukraine? This question becomes germane considering that months before the invasion, US President, Joe Biden, had reportedly insisted that threats of severe economic consequences could deter Russia from invading Ukraine.²⁸ The US President was, for example, reported to have met the German Chancellor, Olaf Scholz, on 7 February 2022, during which he stressed the need for the world leaders to be united on the consequences of Russia invading Ukraine. A few days after the meeting (24 February 2022), troops from Russia crossed to Ukrainian territory on President Putin's order.

During the building-up to the invasion, according to the report by *The Economic Times*,²⁹ there was a feeling that a symbiotic relationship between the EU and Russia, over the latter's expansive energy produce, could jeopardize the constitution of a united force against the country owing to the fact that a large number of central European countries, particularly Germany, depend largely on Russia for their relatively cheap energy needs and comparatively competitive manufacturing exports.

The symbiotic relationship is better explained thus: Russia depends on Europe for its revenue while the latter relies on Russia for its energy needs. It has been estimated that Russia, overall, supplies about one-third of Europe's natural gas consumption, used mostly for heating in the winter and for electricity generation as well as industrial production.³⁰ The report further states that the European countries rely on Russia for more than one-quarter of their crude oil exports, making the latter the largest single source of energy for this group of Nations.

This inter-dependence has raised fears that imposing tougher sanctions on Russia may affect its energy supplies thereby causing serious collateral damage to EU countries, like Germany and France that are heavily dependent on Russia. The

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

report adds that whereas a few EU States, like Portugal and Spain, use little Russian energy, others get much of their natural gas from Russia. The report, in fact, singles out Germany, the largest European economy, noting that the country gets more than half of its natural gas and over 30 percent of its crude supplies from Russia.³¹ France, on the other hand, though gets most of its electricity from nuclear power, yet relies on imports from Russia for its fossil fuel needs.

America's Attempts at Curbing Russia

Why is the United States interested in curbing Russian energy drive? As noted in *The Economic Times* report, the US has been alleging since a long time that Russia intends to capitalize on its dominance of the energy industry to tie the hands of other countries, a concern dating back to the early period of the Cold War. It will be recalled that after WWII, both the USSR and the US made spirited efforts to expand their influence over the global political space by getting into their fold non-aligned States (Nations not formally aligned with either superpower). The Soviet Union, for example, began to extend favourable trade deals and economic assistance to Warsaw Pact countries, while at the same time reaching out to other States like Finland, the United Arab Republic and India in a manner that ensured their dependence on the USSR. During this period, also, the Soviet Union began to develop oil and gas pipelines to Europe, to increase the region's energy dependence on Russia, a development that gave the US great concern. America's worry about the rising energy profile of Russia is captured in the following passage in the special report by *The Economic Times*:

*Western Europe imported six percent of its oil only from the Soviet Union in the 1960s. The new planned oil pipeline connecting the Russia far East and going through several European countries such as Ukraine and Poland, finally terminating in Germany, was bound to increase the supplies manifold. This increased dependence was to definitely give significant coercive power to the Soviet Union. Thus, these changing dynamics raised strategic concerns and rang the alarm bells in Washington.*³²

Indeed, the mounting worry that Russia's rising energy profile is giving the US is by no means a new phenomenon. As far back as the year 1963, the John F Kennedy administration had attempted to stall the construction of *Druzhba* or "friendship" oil pipeline through the imposition of an embargo on the wide-diameter pipe to Soviet-aligned nations. When this embargo could not stall the project, the US put pressure on its allies, especially West Germany, to follow suit. The United Kingdom refused

³¹ Ibid.

³² Ibid.

to toe the US line but West Germany, a major pipe exporter, gave in to the pressure, leading to a partial NATO embargo. This development, notwithstanding, the pipeline was completed and commissioned for use in 1964.³³

As stated in *The Economic Times* report, the Ronald Reagan administration faced a similar challenge nearly two decades after when in 1981 the Soviet Union started the construction of a natural gas pipeline from Siberia to Western Europe. America again tried to pressure its allies, like France and Germany, to join it in imposing an embargo on the project and when these countries declined to do the bidding of the US it resorted to sanctions to dissuade the European companies from providing money and equipment. It is important to note that the arbitrary action by the US brought about a strained relationship among the Western States, on the one hand, and between America and Europe, on the other. As the US was compelled to have a rethink and lift the unilateral sanctions, the project was completed in 1984, three years after its commencement.

It should equally be noted, and as pointed out in *The Economic Times* report, that while past Russian leaders cleverly refrained from shutting off energy exports, President Putin, apparently confirming the fears long raised by the United States, is known to have merged his economic policy with geopolitical agenda. One pertinent example cited in the report is the attitude of Putin to the energy needs of Ukraine while under a pro-Russian leadership. The country continued to receive subsidized gas shipments from Russia in the early 2000s as it did when it was part of the USSR but the narrative changed as from the end of 2004 when a pro-Russian leader was removed from office and replaced with one who sought closer ties with the West. Ukraine was then demanded to pay full market rates for its gas supplies and when the country refused to comply Russia reduced the flow of gas through the pipelines leaving only the quantum needed to meet the demands of other Western European countries. This move by Russia was calculated to put economic pressure on the pro-Western Ukrainian leadership, portray Ukraine as an unreliable gas transit country, and ultimately build support for a new pipeline named *Nord Stream*.³⁴

The commissioning of Nord Stream pipeline in 2011, according to the report, not only inflicted an annual revenue loss of \$720 million on Ukraine, it also remarkably increased Germany's dependence on oil and gas supply from Russia.³⁵ The pipeline carries gas from Northwest Russia through the Baltic Sea directly to Germany,

³³ Ibid.

³⁴ The goal, ultimately, was to bypass Ukraine and build a pipeline which directly channeled gas from Russia to Germany.

³⁵ *The Economic Times* reports that by the year 2020, Russia began to supply to Germany an estimated 75 percent of its natural gas, up from 35 percent in 2015. As noted earlier in this paper, Natural Gas is widely needed in Germany to run the power industry, generate electricity for extensive use and meet heating requirements during the winter.

bypassing Ukraine. It has been estimated that the pipeline handles one-third of all Russian gas exports to Europe.

One pertinent question to ask at this juncture is, is the conflict in Ukraine an American attempt at stopping Nord Stream 2? This question cannot be addressed without considering what Nord Stream 2 entails. It is a proposed expansion of the original Nord Stream which was approved by the German government in 2018. The construction was completed in September 2021 but its launch has been facing regulatory delays due to pressure from the United States on European leaders.

The goal of Nord Stream 2 was to ensure higher levels of export of natural gas to Germany, bypassing Ukraine and other countries currently serving as transit States. The real worry of the US seems to be that once fully functional Nord Stream 2 would free Russia from being held hostage by pro-West Nations, like Poland and Ukraine, over energy exports to EU Nations. Also, with Nord Stream 2 becoming functional, the two main transit countries- Poland and Ukraine- would be deprived of billions of dollars in annual transit fees culminating in colossal revenue losses.³⁶

According to *The Economic Times* report, as of 2019, the total demand of the 27 EU members for natural gas peaked at 390 billion cubic meters (bcm) while in the same year, gas supplies by Russia to the said EU members stood at 168 bcm, or 43 percent of the total EU gas consumption. Similarly, in 2021, the anticipated Russian natural gas exports to Europe peaked at 135 bcm.³⁷

Operationalization of Nord Stream 2

It is obvious from the above analysis that the operationalization of Nord Stream 2 would have been devastating for Ukraine and, perhaps, Poland. But is the proposed launch of Nord Stream 2 an attempt by Russia to divide or break up Europe, as being alleged by the United States? There is no doubt, and as noted in *The Economic Times* report, that Russia has persistently been making efforts to forge an alliance with Germany and other 'friendly countries' like Austria, Netherlands and Belgium, against Eastern and Northern Europe.³⁸ Germany, in fact made a clear statement in October 2015, through its Minister of Economy and Energy, that Nord Stream 2 project was in the interest of the country and that the country would continue to pursue it to finality. The implication of this statement is that Germany considers Nord Stream 2 as a geopolitical project, and not an exclusively Russian

³⁶ It is to be noted that in December 2021, shortly before the commencement of the current crisis, Europe had a taste of the grave consequences of Russia refusing to sell gas to European Nations when it stopped selling additional gas as it had in the past. The International Energy Agency quickly responded by accusing Russia of attempting to destabilize the European energy security.

³⁷ With the launch of Nord Stream 2, it was estimated that out of the annual Russia gas supply of 135 bcm, nearly 110 bcm i.e. 81 percent, would have gone through the two Nord Stream pipelines.

³⁸ News Analysis: *The Economic Times* (n 26).

one. This is understandable. Like *The Economic Times* notes, Germany stands to gain \$2 billion as transit fees every year, with the project becoming fully operational.³⁹

The greatest fear of the United States, perhaps, is that with the completion and operationalization of Nord Stream 2, it will lose the EU's energy markets totally to Russia as the latter would no longer need the transit pipeline located in Ukraine to meet nearly 80 percent of its energy supply obligations to Europe. Indeed, critics of Nord Stream 2 have alleged that Russia is planning to use the extensive pipeline to arm-twist Europe with a view to realizing its geopolitical dream.

In the meantime, the United States has succeeded in pressuring Germany to stall the operationalization process of the Nord Stream 2 project. Could this then be the hidden agenda behind the war in Ukraine? Is the crisis between Russia and Ukraine a manufactured one, born out of the pursuit of economic interests by Russia and the United States? And with the stalling of Nord Stream 2 can it be said that the US has succeeded in reducing the Europe's energy markets' dependence on oil and gas from Russia? What will be the impact of the stalling of this project on European Nations, particularly Germany? Scholars interested in conducting research on the economic implications of the ongoing conflict in Ukraine may find the foregoing questions useful. As addressing these questions is clearly outside the scope of this paper, we shall now proceed to examine the liability of Russia (if any) under international law.

The Criminal Liability of Russia For The Invasion of Ukraine

What is intended to be discussed under this section is whether or not Russia is criminally liable for the invasion of Ukraine under international law. It is a basic principle of criminal law, whether in its municipal or international perspective, that there can be no offence except as declared by law. In other words, no person can be prosecuted or punished for an offence that is unknown to law.⁴⁰ This principle is well recognized under international criminal law and in the constitutional instruments of most modern States.⁴¹

To determine this question, therefore, it is important to consider whether the Russian act of invading Ukraine, as it did on 24 February 2022, would amount to any offence under the law. The relevant laws to be examined in this discourse are

³⁹ In January 2022, shortly before the outbreak of the war, Russia entered into energy agreements with Hungary to further enrich Germany and Austria with handsome potential transit fees that could come from such ventures.

⁴⁰ This principle is represented by the Latin *Maxim nullum crimen sine lege*.

⁴¹ Under article 22, paragraph 1, of the Rome Statute of the International Criminal Court, it is provided that a person shall not be criminally responsible under the Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the court. This rule is embodied in the Constitution of the Federal Republic of Nigeria, 1999 (as amended), pursuant to section 36 (12) and the Constitution of the Republic of Uganda, 1995 (as amended) by virtue of Article 28 (12).

the Rome Statute of International Criminal Court, the Charter of the United Nations, and the Geneva Conventions embodying the rules of engagement during armed conflict.

One preliminary question to consider is the meaning of the term “liability”. The *Black’s Law Dictionary* defines it as “the quality or state of being legally obligated or accountable”.⁴² It also means legal responsibility to another or to society, enforceable by civil remedy or criminal punishment.⁴³

It is clear from the above definition that to be liable for an act or omission, there must be an obligation created by law not to do the act or make the omission. And as mentioned earlier, under the principle of *nullum crimen sine lege*, the act or omission must constitute a crime or an offence as of the time it took place. The pertinent questions thus are; are there obligations imposed by law on Russia not to do what it did against Ukraine? Has the country breached its obligations under any law? If the answer is yes, are there consequences for such a breach? A critical examination of Russian liability under the relevant laws may assist in answering the above questions.

Liability of Russia under the UN Charter

The Charter of the United Nations is arguably the most important instrument regulating the relations amongst sovereign States and intergovernmental organizations. The Charter itself embodies a clause which guarantees the supremacy of its status in relation to other international instruments, treaties or agreements. Accordingly, Article 103 of the Charter states:

In the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail.

Any obligation created under the UN Charter on any Member of the Organization therefore supersedes all other obligations under any other international instrument in the event of a conflict. It is in the light of the supreme status of the Charter that we shall kick off with the obligations of Russia under this global instrument, the country being a Member, in fact one of the founding Members, of the United Nations.

The obligations of Members of the UN are embodied generally in Articles 1 and 2 of the Charter. These Articles, respectively, contain the Purposes and Principles of the Organization. They are reproduced hereunder for emphasis.

⁴² Bryan A Garner, *Black’s Law Dictionary* (Ninth Edition, Thomas Reuters 2009) 997.

⁴³ *Ibid.*

Article 1

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment and settlement of international disputes or situations which might lead to a breach of the peace;
2. to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. to achieve international cooperation in solving international problems of economic, social, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without discrimination as to race, sex, language, or religion; and
4. to be a centre for harmonizing the actions of nations in the attainment of these common ends.

Article 2

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles:

1. The organization is based on the principle of the sovereign equality of all its Members.
2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.
3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.
5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and

- shall refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action.
6. The Organization shall ensure that States which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.
 7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Charter VII.

A perusal of the aforementioned Purposes and Principles shows that the act of Russia constitutes a breach of practically all the obligations created under these Articles. But the obligations contained under Article 2, paragraphs 3 and 4, clearly stand out as the ones the act of Russia in invading Ukraine could be said to have more specifically breached. The paragraphs read as follows:

3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.⁴⁴

The question that has often been asked is, why has Russia invaded Ukraine and what does Putin (Russian President) want? The excuses given by the Russian leader for the apparent act of aggression against Ukraine can hardly convince anyone. Addressing his annual news conference in Moscow on 23 December 2021, barely two months before the invasion, President Putin had described NATO's eastward expansion as an unacceptable threat to his country. He described NATO's expansion as menacing and the prospect of Ukraine joining it as a major threat to his country. His main justification for the invasion therefore was that modern, Western-leaning, Ukraine was a constant threat and that Russia could no longer feel "safe, develop and exist".⁴⁵ At the same press conference, President Putin was reported to have tabled a list of demands needed for Russian security. Foremost among these were a guarantee that Ukraine would never join NATO, that the organization (NATO)

⁴⁴ UN Charter 1945, Article 2, paragraphs 3 and 4.

⁴⁵ Paul Kirby, why has Russia invaded Ukraine and what does Putin want? BBC News 9 May 2022<<https://www.bbc.com/news>>accessed 27 May 2022.

should draw down its forces in Eastern European countries that have already joined, and that cease fire agreement made in Ukraine in 2015 be implemented.

Can the foregoing be a justification for Russia breaching its international obligations as contained under the UN Charter?⁴⁶ This question must be answered in the negative. In any case, it is strange that a country could be demanding that a fellow State, one that enjoys full sovereignty under international law, should not join a regional organization of its choice.⁴⁷

Liability of Russia under the Rome Statute of ICC

The Rome Statute of ICC provides the basic framework for holding any person liable for an act that can constitute a crime under international law. The jurisdiction of the court, it must be noted, is limited to the most serious crimes of concern to the international community.⁴⁸ In other words, an act could only amount to a crime under ICC if the Statute so declares. This is also in consonance with the principle of *nullum crimen sine lege* (no crime except as declared by law).⁴⁹ It is interesting to note that the Statute not only recognizes the Charter of the United Nations but specifically reaffirms the Purposes and Principles containing the obligations of all UN Members as imposed by the Charter.⁵⁰ Paragraph 7 of the Preamble states as follows:

Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.

There is no doubt that this aspect of the Preamble to the ICC Statute must have constituted the basis for the acts criminalized under the instrument. What will amount to criminal acts within the framework of the Statute are basically four and are listed under article 5, paragraph 1 (a) –(d) of the instrument. For emphasis and ease of reference, the provision is again reproduced thus:

The jurisdiction of the court shall be limited to the most serious crimes of concern to the international community as a whole. The court has jurisdiction in accordance with the Statute with respect to the following crimes:

⁴⁶ See again the UN Charter 1945, Article 2, paragraphs 3 and 4.

⁴⁷ Under the UN Charter, the right of any Member to join any regional organization of its choice is guaranteed, pursuant to Chapter VIII of the Charter which recognizes the existence of regional arrangements or agencies for dealing with matters relating to the maintenance of international peace and security. See generally Articles 52-54 of the Charter.

⁴⁸ See Rome Statute of ICC 2002, article 5, paragraph 1.

⁴⁹ Ibid, article 22, paragraph 1.

⁵⁰ See the Preamble to the Rome Statute of ICC 2002, particularly paragraphs 7 and 8 thereof.

- (a) The crime of genocide.
- (b) Crimes against community.
- (c) War crimes.
- (d) The crime of aggression.

The pertinent question is; can Russia be said to be liable for the commission of any or all of these offences? To answer this question requires an examination of the ingredients of these offences. And as the ingredients of a crime in criminal law are usually inferable from the definition of such a crime, we shall at this point proceed to examine the meanings of these crimes.

The Crime of Genocide

What will amount to the crime of genocide is a matter of law, as defined under article 6 of the Statute. It states thus:

For the purpose of this Statute, “genocide” means any of the following acts committed with intent⁵¹ to destroy, in whole or part, a national, ethnic, racial or religious group, as such:

- (a) Killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group; and
- (e) forcibly transferring children of the group to another group.

A critical look at these provisions will show that Russia may be held liable for committing all the acts listed under article 6 (a)-(b) of the Statute.

Crimes against Humanity

The acts that can amount to crimes against humanity are listed under article 7 of the Statute. But they can be so described only when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.⁵² The list includes; murder, extermination, enslavement, torture, rape, sexual slavery, among others.

In the background to this paper, it has been demonstrated that scores of civilians in Ukraine, particularly in places like Mariupol, Bucha and Donbas, have been murdered. A Russia soldier, Vadim Shishimarin, has in fact been sentenced to life imprisonment by a Ukrainian court, after he pleaded guilty to the charge of killing

⁵¹ The use of the term “intent” here implies that the requirement of *mens rea* (mental element of the offence) is mandatory, meaning that this is by no means a strict liability offence. For more on mental elements, see article 30 of the Statute.

⁵² The last phrase again shows that *mens rea* or the mental element of the offence must be proved before the crime can be sustained.

an unarmed 62-year-old man in Ukraine. With these grim facts which are being reported regularly as the hostilities continue, it will be difficult for Russia to exculpate itself of liability for crimes against humanity.

War Crimes

What will amount to war crimes are grave breaches of the Geneva Conventions of 12 August 1949.⁵³ They include, but are not limited to, the following: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering, or serious injury to the body or health, extensive destruction or appropriation of property, and compelling a prisoner of war or other protected persons of the rights of fair and regular trial. Included also are serious violations of the laws and customs applicable in international armed conflict e.g. intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in the hostilities and intentionally directing attacks against civilian objects- objects that are not military objectives.⁵⁴

Can Russia absolve itself of liability for doing the aforementioned acts? There is probably a window of opportunity open to Russia in the event of being charged with these breaches. The country can hide under the provision of paragraph 3 of this article to claim that it is trying to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the country, by all legitimate means. But can this defence avail it, particularly considering the fact that Russia has proven to be the aggressor in, and more or less the instigator of, the ongoing hostilities? It is indeed very doubtful.

The Crime of Aggression

Unlike the other crimes created by the Statute, what will amount to a crime of aggression is not specifically defined in any of the 128 articles of the instrument. But can it be implied that a breach of the provisions of Article 2, paragraphs 3 and 4, of the UN Charter- containing the bar against threat or use of force by one State against another State- would be tantamount to an act of aggression? It is probably not safe to do so, for liability for a crime can only be sustained when the ingredients of the crime have been proven beyond reasonable doubt.

The *Black's Law Dictionary* defines aggression as “a grave breach of international law by a nation”.⁵⁵ However, the Dictionary itself acknowledges the fact that there is no generally accepted definition of what constitutes aggression despite many attempts over the years to devise one. It recalls an attempt by the UN General

⁵³ Rome Statute of ICC 2002, article 8, paragraphs 1 and 2.

⁵⁴ For a full list of acts that will amount to war crimes within the framework of the ICC Statute, see article 8, paragraphs 1 and 2, of the Statute.

⁵⁵ Bryan A Garner (n 42) 76.

Assembly to adopt one in 1974 via Resolution 3314 (XXIX) of 14 December 1974. The resolution defines aggression as “the use of armed force by a State against the sovereignty, territorial integrity, or political independence of another country, or in a manner inconsistent with the Charter of the United Nations....” The *Black’s Law Dictionary* further notes that this definition fails to extend to measures which, under some circumstances, might amount to aggression. It also does not recognize exceptional circumstances that could make the listed acts defensive rather than offensive.⁵⁶ These defects have been cited by the Dictionary as probably the reason why the UN Security Council has never really relied on the Resolution while determining whether a particular act constitutes a “threat to the peace, breach of the peace, or act of aggression”.⁵⁷ The difficulty in devising a generally accepted definition has been compounded by the provision of article 5 of the ICC Statute which vests jurisdiction in the Court over crime of aggression only when a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.⁵⁸ What this means is that the court cannot exercise jurisdiction over a crime of aggression unless a provision to that effect is adopted in accordance with articles 121 and 123,⁵⁹ defining the crime and setting out the conditions under which the court may assume jurisdiction. This is an unfortunate provision in the Statute, one that runs contrary to a basic principle of criminal law stipulating that where a crime is created it must be properly defined and the punishment therefor duly prescribed.

Prosecution of Russia over Invasion of Ukraine

It has already been argued in this paper that Russia can be held liable for practically all the crimes of international concern listed under article 5 of the ICC Statute. The big question, however, is whether the country can be prosecuted for these offences by the ICC or the International Court of Justice (ICJ), the principal judicial organ of the United Nations?⁶⁰ The question, with regard to the ICC Statute, must be answered in the negative in view of the fact that Russia is not a signatory to the Statute. By the provision of article 12, paragraph 1, of the ICC Statute, a State is deemed to accept the jurisdiction of the court with respect to the crimes enumerated in article 5 only after it becomes a party to the Statute. The only situation in which Russia may be prosecuted by ICC is where the country makes a declaration, lodged with the Registrar of the Court, of its acceptance of the jurisdiction of the court in

⁵⁶ Ibid.

⁵⁷ As contained in Article 39 of the UN Charter.

⁵⁸ Rome Statute of ICC, article 5, paragraph 2.

⁵⁹ Articles 121 and 123 of the Statute deal respectively with amendments and review of the instrument.

⁶⁰ See the UN Charter 1945, Article 92.

accordance with article 12, paragraph 3, of the Statute. Knowing the consequences of such a declaration, it is most unlikely that Russia would be willing to make same.

How then can Russia be brought to justice? The solution seems to lie only in the UN Security Council taking up the matter. Under Article 39 of the Charter, the Council is empowered to determine whether the acts of Russia constitute a threat to the peace, breach of the peace, or act of aggression against a sovereign State. If the Council so determines, it can then order enforcement action pursuant to Chapter VII of the UN Charter.

The only challenge here is that Russia, being one of the five permanent members of the Security Council, as pointed out earlier in this paper, enjoys the power of veto. According to Article 27 of the Charter, decisions of the Security Council on non-procedural matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members, provided that in decisions under Chapter VI and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.⁶¹ This “almighty” unanimity rule is embodied in Article 27, paragraph 3, of the Charter. It is unfortunate that enforcement action under Chapter VII of the Charter is not one of the exceptions to the unanimity rule. The implication is that if the Security Council chooses to adopt a decision ordering enforcement action against Russia for acts of aggression committed against Ukraine, contrary to its obligations under Article 2, paragraphs 3 and 4 of the Charter, the former (Russia) can frustrate it, capitalizing on its position as a veto-wielding permanent member of the Security Council.

Conclusion

The difficulty in holding Russia accountable for, or liable to prosecution over, the ongoing war in Ukraine has exposed some of the notable defects in the international criminal justice system. These include the failure of the Rome Statute of ICC to clearly define what could constitute an act of aggression despite expressly making a provision for this offence.⁶² This is a serious lacuna in an important instrument that embodies, in the main, international criminal law. Another anomaly is the willful refusal of Russia to accede to the Rome Statute of the ICC despite the close link between this instrument and the UN Charter. This is inexplicable considering the prime status of Russia within the UN System. One major lesson from the ongoing hostilities in Ukraine is that the refusal of Russia to be a State party to the Rome Statute of ICC is a deliberate attempt to escape prosecution in the event of the country committing a crime of international concern against another State, as it is presently happening in Ukraine.

⁶¹ These provisions deal basically with pacific settlement of disputes.

⁶² See again Rome Statute of ICC, article 5.

The most serious anomaly detectable from the war in Ukraine, perhaps, is the grave inequity and apparent hypocrisy in the politics of the UN. The time has come for the rest of the international community to interrogate this Organization as to why the veto power still resides only in five (5) of the 194 countries that make up the membership of the UN. If the permanency of the UN Security Council must be retained, for whatever reason, why should the veto power be vested only in these five States? Russia has been able to hold the rest of the peace-loving global community hostage over the war in Ukraine just because the UN cannot adopt any decision ordering an enforcement action against it. The unfortunate part of the whole episode is that any of the veto-wielding permanent members of the Security Council can do to any State what Russia is currently doing to Ukraine and get away with it. Indeed, if the United Nations Security Council is serious about achieving its primary responsibility for the maintenance of international peace and security, as set out under Article 24 of the Charter, the time has come for the reform of the Organisation. As part of the reform proposal, it is suggested that the UN Charter should be amended to make it mandatory for the Members of the Organisation to submit to the jurisdiction of the ICC, especially whenever matters bordering on their liability under article 5 of the instrument are being considered. This will make it legally difficult, if not impossible, for any UN Member to avoid honouring its obligations with regard to the maintenance of international peace and Security as robustly set out under Article 2, paragraphs 3 and 4, of the Charter. It is further suggested that the ICC Statute should be amended to introduce a new clause which clearly defines what will amount to the crime of aggression, in the same way as other crimes of international concern created by the Statute are unambiguously defined therein. Above all, world leaders should set in motion the process of democratising the UN system, starting with a comprehensive reform of the Security Council, in order to achieve the dream of the founders of the Organization, which is to “save succeeding generations from the scourge of war which twice in our lifetime has brought untold hardship to mankind”.⁶³

⁶³ See again the Preamble to the UN Charter.

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