



The ICC Double Standards on the Administration of International Criminal Justice in Europe: The Ukraine in Appraisal

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Abstract:

The International Criminal Court has been established to fight impunity resulting from international crimes. However, several Western countries and some African states have refused to join the ICC, resulting in regional imbalances and criticism of the prosecutor's office. The UN Security Council and ICC's responses to atrocities and breaches of human rights in Africa and the Middle East have been poor and criticized compared to the court's response to the Ukraine war. The ICC's selective focus on conflict-affected areas, combined with the legal and institutional failure to carry out its responsibility to protect, has resulted into impunity and a double standard in pursuit of international criminal justice. This study examines the ICC legal and institutional framework to determine gaps leading to double standards in the administration of international criminal justice. The focus is on the issue of international crimes committed in Ukraine and the general commitment of ICC to intervene the conflict as compared to the ICC's response to other countries with violation of international crimes. This study deployed doctrinal research which is qualitative in nature. The reason for adopting this method is due to the fact that it provides for necessary information on legal theories, reported court decisions and analyze the outcomes within a limited time framework by exposing the weakness in the operation of law while giving reasons behind the failure of law in the real life. Keywords: Administration of Criminal justice, ICC, Double standard, and Ukraine.

1.0 Introduction

After the adoption of the Rome Statute in 1998, the European countries through the European Union (EU) become the biggest supporter the International Criminal Court (ICC). Its member States taken together are the biggest contributor to the Court's budget.¹ Based on 2011 European Union Council Decision and action plan on its implementation,² the EU has expressed support for the objective of attaining universal acceptance for the Court. The primary objective is to maximize political

¹ International Criminal Court Achievements and challenges 20 years after the adoption of the Rome Statute

[https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625127/EPRS_BRI\(2018\)625127_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625127/EPRS_BRI(2018)625127_EN.pdf) accessed on 1 March 2022 at 03:20HRS.

² Council of the European Union, Action plan to follow up on the Decision on the International Criminal Court, July 2011. Available at <https://data.consilium.europa.eu/doc/document/ST-12080-2011-INIT/en/pdf> accessed on 1 March 2022 at 03:19 HRS.

will for the ratification and implementation of the Statute in order to achieve the desired goals universality. In realization of its objectives deferent means such as using political dialogue, demarches, clauses in agreements, letters from the High Representative or other bilateral means, statements, including at the UN and other multilateral bodies, and support for dissemination of the ICC principles and rules have been used.³

The EU has also included an ICC clause in several of its cooperation agreements with partner countries, for example the association agreements with Eastern Partnership countries (Georgia, Moldova and Ukraine) and the Cotonou Agreement ('The Parties shall seek to take steps towards ratifying and implementing the Rome Statute and related instrument', Article 11(7) of the revised Cotonou Agreement).⁴ The EU has been aiding for countries that encounter difficulties in ratifying and implementing the Rome Statute, including expert assistance and financial support; for example, through the European Instrument for Democracy and Human Rights, which has supported measures such as building legal expertise and fostering cooperation of ICC States parties the EU injected money for funding various action relating to the court.⁵

Through European Parliament, the EU has expressed its support for the ICC in numerous resolutions, for example the European Parliament Resolution on the ICC regretting United National Security Council (UNSC) Resolution 1422 asking member States not to sign bilateral agreements with the government of the United States of America (USA); the agreement intends to prevent American government officials, employees, military personnel or nationals from being surrendered to the International Criminal Court.⁶ It is now obvious that the implementations of

³ *Ibidem*

⁴ L. Zamfir, 'International Criminal Court Achievements and challenges 20 years after the adoption of the Rome Statute', (2018), European Parliamentary Research Service p. 10-11

⁵ Council of the European Union, Action plan to follow up on the Decision on the International Criminal Court, July 2011. Available at <https://data.consilium.europa.eu/doc/document/ST-12080-2011-INIT/en/pdf> accessed on 1 March 2022 at 03:19 HRS.

⁶ European Parliament Resolution on the ICC regretting UN Security Council Resolution 1422 and asking Member States not to sign bilateral agreements with the US available at <http://www.derechos.org/nizkor/icc/ep26sep.html> accessed on 13th day of June 2022 at 19:10hrs

international criminal law place much expectation to the international community and international institutions on ending impunity and bring the culprits to justice.⁷

In a 2011 resolution on EU support for the International Criminal Court, the European Parliament called for the appointment of an EU Special Representative on International Humanitarian Law and International Justice with the mandate to promote, mainstream and represent the EU's commitment to the fight against impunity and to the ICC across EU foreign policies,⁸ however for twenty years of the ICC establishment,⁹ the administration of criminal justice has been criticized on various grounds and has become the subject of doubts to scholars and practitioners within the realm of international law¹⁰ by arguing that those indicted or suspected of international crimes brought before the international criminal court are mostly from Africa.¹¹

These arguments are backed by countries like Central African Republic, Cote d'Ivoire, Sudan, Democratic Republic of Congo, Kenya, Libya, Mali and Uganda where their individuals have been prosecuted or their cases are before international Criminal Court, though criminal proceedings against Sebastian Piñera a former President of the Republic of Chile and a former Yugoslav President and currently ICC opening investigation to Russia is a step to gain access to European countries.

However in 2009 there were reportedly human rights violations in Gaza committed by Israel, and yet there was no resolution from the United National Security Council

⁷ D. Hoon,. "The Future of the International Criminal Court. On Critique, Legalism and Strengthening the ICC'S Legitimacy", *International Criminal Law Review* 17, 4 (2017): 591-614, doi: <https://doi.org/10.1163/15718123-01704002>. accessed on 1 March 2022 at 03:24 HRS

⁸ European Parliament resolution of 17 February 2022 on human rights and democracy in the world and the European Union's policy on the matter — annual report 2021 (2021/2181(INI)) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022IP0041> accessed on 1 March 2022 at 03:11 HRS

⁹ The Rome Statute that established the International Criminal Court (ICC). It was adopted at a diplomatic conference in Rome, Italy on 17th July 1998 and it entered into force on 1st July 2002. It is well recognized by the United Nation Security Council (UNSC) as permanent court, henceforth, its jurisdiction is in conformity with Chapter VII of the United Nations Charter.

¹⁰ W. Kaleck, "Double Standards: International Criminal Law and the West", Torkel Opsahl Academic EPublisher, Brussels (2015)

¹¹ D. Plessis, M.A New Regional International Criminal Court for Africa', *African Journal of Criminal Justice*, Volume 25, 2012, pages 286.

(UNSC) to allow the ICC prosecutor to probe the crimes.¹² In March 2011 the UNSC took quick and immediate measures over the ICC to enable the court prosecutor to launch investigations into human rights violations against the late Gaddafi's government in Libya.¹³ Nevertheless the UN Security Council hasn't passed a resolution to initiate an investigation into war crimes and crimes against humanity committed by the Sri Lankan government against the Tamil ethnic population nor human rights violations by the dictatorial regime of Iran.

It's weird that the ICC has quickly acted on opening investigation of crimes committed in Ukraine while turning a blind eye to atrocities and heinous crimes committed to other places around the globe. Such inconsistency by ICC on selection of cases to be investigated or prosecuted has created a doubt to double standard in the administration of International criminal justice. This study exposes legal and institutional framework to determine gaps leading to double standards in the administration of the International crimes where Ukraine is a focal point of this studies.

2.0 The Ukraine War

History shows that, shortly after the fall of the Soviet Union in 1991, Ukraine declared independence from Moscow.¹⁴ Ukraine's tense relationship with Moscow started since it won independence in 1991.¹⁵ Back to 2013 Ukraine's president, Viktor Yanukovich had good relationship and royal to Russia. He opted not to join a trade agreement with Europe so as to keep a distance, Ukrainians disputed and decided to elect the government in favor of Europe rather than Russia, and that worried Russian President Vladimir Putin thinking that any close affiliation of

¹² M. Bozorgmehri and A. Mohammad Khan, "Palestian Issue and the security council of UN: Use of Veto prevents the establishment of the International Peace" *Geopolitics Quarterly*, Volume 7, No.4 (2011) page 78-99

¹³ T. Patrick CR. "The Libya Intervention: Neither Lawful, nor Successful." *The Comparative and International Law Journal of Southern Africa*, vol. 48, no. 2, 2015, pp. 162-82, <http://www.jstor.org/stable/24585876>. Accessed 7th May 2022.

¹⁴ <https://theconversation.com/why-did-russia-invade-ukraine-178512> accessed on 17th May 2022 at 05:50HRS

¹⁵ <https://www.reuters.com> accessed on 17th May 2022 at 05:55HRS

Ukraine to Europe would lead to joining of Military alliance with NATO and USA and that would be a threat to the Russian security¹⁶

The Relations between NATO and Ukraine date back to the early 1990s and have since developed into one of the most substantial of NATO's partnerships. Since 2014, in the wake of Russia's annexation of Crimea, cooperation has been intensified in critical areas.¹⁷ The Ukraine is a strategic area for both, NATO Countries on the stability of the Euro-Atlantic area and Russia for security purpose on its territory since it borders with Ukraine. The idea of Ukraine joining NATO is considered by Russia as sleeping with the enemy in the same bedroom. Ukraine's President Volodymyr Zelenskyy is a pro west intending to join NATO.

After series of warning from Russia for Ukraine not to join NATO; on 24th February 2022, Russia embarked on a full-scale invasion of Ukraine with the aim of collapsing the Western-aligned government of Volodymyr Zelenskyy.¹⁸ Just four days since the invasion of Russia to Ukraine on 28th February 2022 the ICC prosecutor Karim A.A Khan QC made a statement that he would seek authorisation to open an investigation to the situation in Ukraine.¹⁹ Six days later on 2nd march 2022 the prosecutor opened the investigation.²⁰ Since the start of the Ukraine war on 24th February 2022 nearly 5,800 people have been killed.²¹

In some places where human rights violations have occurred are outside of the ICC's jurisdiction, this means some States have not signed or ratified the Rome Statute, and henceforth they are not members of the permanent international criminal court. It's evident that neither Russia nor Ukraine are state parties to the Rome statute, thought

¹⁶ <https://theconversation.com/why-did-russia-invade-ukraine-178512> accessed on 17th May 2022 at 05:55HRS

¹⁷ https://www.nato.int/cps/en/natohq/topics_37750.htm accessed on 17th May 2022 at 05:55HRS

¹⁸ <https://www.reuters.com/world/europe/events-leading-up-russias-invasion-ukraine-2022-02-28/> on 17th May 2022 at 05:55HRS

¹⁹ Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening>

²⁰ Situation in Ukraine: <https://www.icc-cpi.int/ukraine> accessed on 17th September 2022 at 06:55HRS

²¹ <https://news.un.org/en/story/2022/09/1126391> accessed on 17th September 2022 at 05:55HRS

Ukraine has de facto declared more than once an acceptance of the ICC jurisdiction for crimes perpetrated within its territory.²²

3.0 ICC Prosecutorial Discretion in Situation and Case Selection

The Court's jurisprudence distinguishes between case situations, which are broadly defined in terms of temporal, territorial, and in some cases personal parameters which are comprised of specific incidents within a given situation during which one or more crimes within the Court's jurisdiction may have been committed.²³ In the discharge of its power, the office of the prosecutor exercises its discretion in determining which cases should be selected and prioritised for investigation and prosecution.

In relation to cases not selected for investigation or prosecution, it should be recalled that the goal of the Statute is to combat impunity and prevent the recurrence of violence, as expressed in its preamble, is to be achieved by combining the activities of the Court and national jurisdictions within a complementary system of criminal justice.²⁴ As such, the Office continue to encourage genuine national proceedings by relevant States with jurisdiction. In particular, it seeks to cooperate with States investigating and prosecuting individuals who have committed or have facilitated the commission of the international crimes.

In selection of cases to be investigated or prosecuted the court first has to consider if there is a reasonable basis to proceed with the investigation or prosecution of the alleged crime,²⁵ secondly the court has also to consider if it has jurisdiction over the alleged matter before commencement of investigation or prosecution,²⁶ and third the

²² Jaime Lopez, Brady Worthington, "The ICC Investigates the Situation in Ukraine: Jurisdiction and Potential Implications". LAWFARE, Accessed on March 10, 2022

²³ Situation in the Democratic Republic of the Congo, "Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6", ICC-01/04-101-tEN-Corr, 17 January 2006, para. 65. See also The Prosecutor vs. Thomas Lubanga Dyilo, "Decision concerning Pre-Trial Chamber's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo", ICC-01/04-01/06-8-Corr (Annex I), 24 February 2006, para. 21

²⁴ The preamble of the Statute affirms that "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation"; expresses a determination "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes"; recalls "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes"; and emphasizes that the ICC "shall be complementary to national criminal jurisdictions."

²⁵ Article 53 of the Rome Statute of the International Criminal Court.

²⁶ *Ibid* Article 19(1)

gravity of the offence is another predominant factor adopted by the Office of the Prosecutor and is embedded also into considerations of both the degree of responsibility of alleged perpetrators.²⁷ The weight given to each criterion depends on the facts and circumstances of each case and each situation, and the stage of development of the case hypothesis and investigation.

The Offices of the Prosecutor assessment of gravity includes both quantitative and qualitative considerations as stipulated in regulation, these factors for assessment include the scale, nature, manner of commission, and impact of the crimes.²⁸ The number of direct and indirect victims, the extent of the damage caused by the crimes, in particular the bodily or psychological harm caused to the victims and their families, and their geographical or temporal spread (high intensity of crimes over a short period or low intensity of crimes over an extended period) can all be used to determine the scale of the crimes.²⁹

The nature of the crimes refers to the specific factual elements of each offence, such as killings, rapes, other sexual or gender-based crimes, crimes committed against or affecting children, persecution, or the imposition of living conditions on a group with the intent of destroying it. The manner of commission of the crimes may be assessed in light of, *inter alia*, the means employed to execute the crime, the extent to which the crimes were systematic or resulted from a plan or organized policy or otherwise resulted from the abuse of power or official capacity, the existence of elements of particular cruelty, including the vulnerability of the victims, any motives involving discrimination held by the direct perpetrators of the crimes, the use of rape and other sexual or gender-based violence or crimes committed by means of, or resulting in, the destruction of the environment or of protected objects.³⁰

4.0 The Rome Statute and International Criminal Justice

The International Criminal Court (ICC) is a permanent international court established to investigate, prosecute and try individuals accused of committing the most serious crimes of international concern namely the crime of genocide, crimes against humanity, war crimes and

²⁷ *Ibid* article 17(d).

²⁸ Regulations 29(2) of the Office of the Prosecutor ICC-BD/05-01-09 of 23th April 2009.

²⁹ *Ibid* Article 53(1) (c), (53 (2) (c)

³⁰ Articles 8(2)(b)(ix) and 8(2)(e)(iv) of the Rome Statute.

the crime of aggression.³¹ On July 17, 1998, about 120 states adopted a statute in Rome, known as the Rome Statute of the International Criminal Court ("the Rome Statute"), establishing the International Criminal Court.³² For the first time in the history, states decided to accept the jurisdiction of a permanent International Criminal Court (ICC) for the prosecution of the perpetrators of the most serious crimes committed in their territories or by their nationals after the entry into force on July 1, 2002.³³

The ICC was the outcome of the Nuremberg and Tokyo tribunals which were established in the wake of the Second World War in 1948, when the Convention on the Prevention and Punishment of the Crime of Genocide was adopted; the United Nations General Assembly recognized the need for a permanent International Court to deal with the kinds of atrocities that had just been committed.³⁴ According to the Rome Statute, it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes. The ICC can only intervene where a State is unable or unwilling to carry out an investigation and prosecute the perpetrators of the international crimes.³⁵

The court may exercise its jurisdiction in situations where the alleged perpetrator is a national of a state party to the Rome Statute or where the crime was committed in the territory of a state party. Also, a state not party to the statute may decide to accept the jurisdiction of the international criminal court. These conditions do not apply when the Security Council is acting under Chapter VII of the United Nations Charter, when refers a situation to the office of the prosecutor.³⁶ The seat of the court is in the Hague Netherlands; however, the Rome Statute provides that the court may sit elsewhere whenever the judges consider it desirable.³⁷ The court has also set up offices in the areas where it is conducting investigations.³⁸

Despite the fact that the International Criminal Court vows to strengthen the idea of peace and justice by punishing and deterring the perpetrators of the international

³¹ *Ibid* Article 5,6,7 and 8.

³² *Ibid* Article 125 and 128 of the Rome Statute of International Criminal Court of 1998

³³ The International Criminal Court "Understanding the International Criminal Court" P. 1 also available at: <https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf> 4th April 2022

³⁴ Public Information and Documentation Section, Understanding the international Criminal Court, Registry, International Criminal Court, The Hague-Netherland 51 page 2-5

³⁵ *Ibid* foot note No 35

³⁶ The International Criminal Court "Understanding the International Criminal Court" P 1-5 also available at: <https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf> 4th February 2021

³⁷ Article 3 of the Rome Statute of International Criminal Court of 1998

³⁸ The International Criminal Court (ICC) of 1998

crimes, and though it has played a significant role in domesticating and regionalizing the International Criminal laws,³⁹ but still the malfunction of the Rome Statute has prevented the court from prosecuting international crimes, since its legal mechanism extends freedom for states to cooperate in all matters related to investigation and prosecution of crimes within the jurisdiction of the court,⁴⁰ and most of the states are reluctant to cooperate, which thus hurts the functionality of the court. The court has nothing to do when the State so requested fails to cooperate, instead it will merely inform the Assembly of the State Party or inform the Security Council if the matter referred to the Court by the Security Council.⁴¹

The state cooperation is extended to the court budget; expenses of the court operations depends on the contributions of its member States,⁴² and the European countries and USA are the biggest contributor of the court budget, in that case any move to investigate or prosecute those biggest contributors of court budget, is a risk to the court, avoiding the possibilities of cutting off financial support, the court is presumed treating those countries with special attention so as to keep the relationship alive. In that case the court cannot avoid the accusation of the biasness form African and Asian countries compared to European Countries.

In carrying out its mandate, the court is hampered by adverse political winds and an inefficient legal framework in the prosecution of serious crimes that threaten humankind and the wellbeing of contemporary global society. Unfortunately, many of these violations of international law have remained unpunished.⁴³ The experience shows that; most serious international crimes are committed during armed conflicts and reflect the involvement of perpetrators who happen to be heads of states who makes every effort to cover up their responsibility for the crime committed. In the case of William Ruto and radio broadcaster Joshua Sang in April 2016, ICC judges

³⁹ It is a treaty that established the International Criminal Court (ICC). It was adopted at a diplomatic conference in Rome, Italy on 17 July 1998 and it entered into force on 1 July 2002. It is well recognized by the United Nation Security Council (UNSC) as permanent court, henceforth, its jurisdiction is in conformity with Chapter VII of the United Nations Charter.

⁴⁰ Part 9 of the Rome Statute of the International Criminal Court.

⁴¹ *Ibid* Article 87(5).

⁴² Article 115 and 117 of the Rome Statute International Criminal Court.

⁴³ Common Article 3 to the four Geneva Conventions

ended the trial due to a lack of evidence, with the ICC prosecutor alleging widespread of evidence and witness-tampering.⁴⁴

As previously indicated that, most of terrible crimes happens during war, the ICC power is restricted when it comes to crime of aggression which was activated on 17th July 2018 by assembly of State parties.⁴⁵ The Statute provides that, where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has decided of an act of aggression committed by the State concerned. The prosecutor can only proceed with the investigation if the matter so determined by the Security Council and if not, the Prosecutor has to wait for six months so as to commence his investigation provided that the Pre-Trial Division has authorized.⁴⁶ The delayment of six months waiting for the Security Council to make determination for the Prosecutor to commence investigation is justice denied.

Unlike other international Crimes such as genocide, war crimes and crimes against humanity where by the court under universal jurisdiction can prosecute the perpetrators of those international crimes regardless of being the member State to the Rome Statute, the Court have no such jurisdiction over the crime of aggression when committed by State's nationals or on its territory if not part to the Statute.⁴⁷ Taking away such jurisdiction, the aggressor can commit crimes and take advantage of not being prosecuted for the reasons that they are not party to the Statute. And since the crime of aggression is committed by most of powerful countries, the perpetrators will go unpunished and that raise the complain that the court is meant for weak States.

It is not disputed that, after the adoption of Rome Statute in 1998, and come into force on 2002, the Statute has made great contribution to the international law jurisprudence especially in Africa. Eight African leaders faced the prosecution of ICC after their involvement of commission of international crimes, these leaders come from, Sudan, the Democratic Republic of Congo, Uganda, the Central African Republic, Kenya, Libya, Côte d'Ivoire and Mali. That is, why some of African

⁴⁴ The Prosecutor V. William Samoei Ruto and Joshua Arap Sang ICC-01/09-01/11

⁴⁵ Resolution ICC-ASP/16/Res.5 Adopted at the 13th plenary meeting, on 14 December 2017, by consensus

⁴⁶ Article 15 Bis (6-8) of the Rome Statutes of the International Criminal Court.

⁴⁷ *Ibid* Article 15 Bis (5)

leaders claim unfairness of the ICC and argue that perhaps the court designed for African and go further to take an action to withdrawal from the Rome Statute; Burundi has already withdrawn, South Africa officially informed the UN an intention to withdrawal from the ICC and Rome Statutes, while Uganda, Gambia, Namibia and Kenya, not yet officially informed the UN on withdrawal from the ICC but they showed their interest.⁴⁸

5.0 The United National Security Council and Global Justice

United National Security Council consist of fifteen members, five of them Republic of China, France, Russia, the United Kingdom and the United States of America are permanent members of the Security Council. The rest ten members are considered as non- permanent members and are elected by the General assembly on the basis of contribution on the maintenance of the international peace and security and equitable geographical distributions. The non-permanent members of the Security Council save only for two years and then election took place. The UN Charter mandate the Security Council preliminary responsibility for maintenance of international peace and security.⁴⁹ It is for the Security Council to determine when and where a UN peace operation should be deployed.⁵⁰

In due course of fulfilling its mandate of maintaining peace and security, deferent measures can be implemented, including peace operations, but this depends on the nature of the conflict. The power to inject these obligations are vested under chapter VI, VII. VIII and XII of the UN Charter,⁵¹ and its decision has to be accepted and agreed by the members of the United Nation.⁵² Carrying out of these decisions depends on the votes of the permanent members; only nine affirmative votes including those of permanent members can make a resolution into effect.⁵³ This

⁴⁸ African Union, withdraw Strategy Document available at https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan_2017.pdf Accessed on 7th October 2022 at 21:02HRS.

⁴⁹ Article 23 of the UN Charter

⁵⁰ United National Peace Keeping. Role of the Security Council. Available at <https://peacekeeping.un.org/en/role-of-security-council>. Accessed on 13th April 2022 at 12:21Hrs.

⁵¹ Article 24 of the UN Charter

⁵² *Ibid* article 25

⁵³ *Ibid* article 27

means that if nine affirmative votes does not include votes of permanent members, such resolution cannot come into effect.

Upon determine the existence of any threat to peace, breach of peace or act of aggression the UN Security shall make recommendations or decide what measure shall be taken, these includes the use of armed forces, economic sanctions and any other means necessary measures deed fit to restore peace and security.⁵⁴ The Security Council has power of authorization to all regional arrangements or agencies for enforcement of the peace and security.

No enforcement action that a regional arrangement can take unless with the authorization of the UN Security Council.⁵⁵ The same to the United National General assembly has no power to make any recommendations concerning any matter or situation when security Council is exercising its power under charter unless with the consent of Security Council.⁵⁶ All UN members agree to accept and carry out the decision of the Security Council.⁵⁷ While other organs of the UN make recommendations to member States, the Council alone has the power to make decisions which members States obliged to implement.⁵⁸

6.0 The Europe and the ICC Double Standards on Dispensing International Criminal Justice

It is undisputable facts that some of the European countries through the North Atlantic Treaty Organization (NATO) have committed international crimes in deferent parties of the world, and ICC is legally bound to investigate and tries individuals who committed crimes of the international concern, however no any legal action has been taken against the officials of the particular States, and even if the ICC tries to take legal action against perpetrators, the court will have no cooperation with the state concerned.

The North Atlantic Treaty Organization was founded in 1949, it is made of 30 European countries including United Kingdom and United States of America. The

⁵⁴ *Ibid* Foot note 91

⁵⁵ Article 52 of the UN Charter

⁵⁶ *Ibid* Article 12

⁵⁷ *Ibid* article 25

⁵⁸United National Peace Keeping. Role of the Security Council. Available at <https://peacekeeping.un.org/en/role-of-security-council>. Accessed on 13th April 2022 at 12:21Hrs.

key purpose of NATO is to guarantee the freedom and security of its members through political and military means.⁵⁹ The North Atlantic Treaty provides for the collective defence principle which means that attack against one ally is considered as an attack against all allies.⁶⁰ In most cases UN Security Council uses NATO as the tool to enforce chapter VII. Among five permanent members of the UN Security Council only China and Russia are not members of NATO, but the rest three UK, USA and Germany are NATO members.

NATO has taken collective measure on several occasions, this includes response to situation in Afghanistan war in 2003, Iraq in 2004, military intervention in Libya in 2011, Syria since 2012 and now Russian invasion of Ukraine by shipping military equipment to Ukraine. The collective defence principle has been misused by some of the NATO members to fulfill their political and economic ambitions in the name of protecting civilians from serious violation of human rights. It is obvious that, some of the operations led by NATO members never had legal bases rather than fulfilling their hidden agenda. This can be justified by selection of cases to be intervened by UN Security Council using NATO as a military enforcement agent considering that three NATO members are also permanent members of UNSC.

In due course of military operations using NATO, international crimes have been committed, a good example is the situation in Afghanistan. On September 2, 2020, the United States government imposed sanctions on the International Criminal Court's (ICC) prosecutor, Fatou Bensouda, and another senior prosecution official, Phakiso Mochochoko. The US Secretary of State Michael Pompeo announced that the United States had restricted the issuance of visas for certain unnamed individuals involved in the ICC's efforts to investigate US personnel.⁶¹

To protect US citizens from being prosecuted by ICC, the USA government took a step further asking deferent States to sign bilateral agreements with them intending to prevent USA Government officials, employees, military personnel or

⁵⁹ <https://www.nato.int/nato-welcome/index.html#> accessed on 17th May 2022 at 16:00HRS

⁶⁰ Article 5 of the North Atlantic Treaty

⁶¹ U.S Sanctions on the International Criminal Court. available at <https://www.hrw.org/news/2020/12/14/us-sanctions-international-criminal-court> accessed on 10th June 2021 at 8:30hrs

nationals from being surrendered to the International Criminal Court.⁶² The failure of International Criminal Court to prosecute the alleged perpetrators of the International Crimes from super powers, especially NATO members, is an indication that some of states are untouchable and only those prosecuted are from weak state mostly Africans or none allies to NATO.

7.0 Legal and Institutional Framework Contributing to ICC Double Standards on the Administration of the International Criminal Justice

The Charter of the United Nations and the Rome Statute are among of the great international instruments that contributes much on the growing of the jurisprudence of international criminal law, however there are some legal and procedural requirement that sets back the intended objectives of the International Criminal Court to dispense justice globally.

7.1 Deferral Power of Investigation or Prosecution

Despite the fact that, the ICC has power to investigate and prosecute all international crimes as referred to in article 5 of the Rome Statute concerning a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party or is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations or the Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15,⁶³ still the Security Council after the adoption of the resolution under Chapter VII may order for a stop or delay of any commenced or proceeded investigation or prosecution for a renewable period of 12 months.⁶⁴ Is too risk for the international Criminal Court to be tied up its hands by the Security Council not exceeding its statutory power. Such power of stopping or postponing the court proceedings is an insult to the court and due process of the Criminal justice and it impliedly justify the double standards in the administration of the international criminal justice. In that case

⁶³ Article 13 of the Rome Statute of the International Criminal Court

⁶⁴ *Ibid* Article 16

neither the ICC Legal frame work nor Institution frame work restrain double standard on administration of international criminal justice.

7.2 Veto Power Granted to Five Permanent Members

The Un Charter provides a voting system for passing resolution or important decision, each member of the security council has one vote. Decision of the Security Council on procedural and other matters must be made by affirmative vote of nine members including the concurring votes of the permanent members provided that in decision concerning pacific dispute settlement, a part to the dispute shall abstain from voting.⁶⁵ The five permanent members are granted special voting power known as “right to veto” and that was agreed by the drafters of the charter that if any one of the five permanent members cast negative vote in 15 members of the security council the resolution or decision cannot be approved unless it chooses to abstain, thus allowing the resolution to be adopted if it obtained the required number of nine favorable votes.⁶⁶

The right to veto has the great legal impact on the decision making in one way or another; a negative cast of a vote from a permanent member of the Security Council can be used as a killing hammer to reject important decisions or resolution to be approved on investigation or prosecution of international crimes to affected State or country, and the same vote can be used to influence other members of the Security Council to vote in favors of the resolutions against impunity to another State depending on historical, geographical, political or economic relations of the particular states with common interest. In that effect the veto power can be used as a tool to promote double standards in administration of criminal justice.

7.3 Power of the UN Security Council Acting Under Chapter VII

The UN Charter requires members of international community to refrain from threat or use of force against territorial integrity or political independence of other states.⁶⁷ The charter suggests to rely on the peaceful means of dispute settlements among

⁶⁵ Article 27 of the Rome Statute of the International Criminal Court.

⁶⁶ <https://www.un.org/securitycouncil/content/voting-system> accessed on 12th April 2022 at 00:22hrs

⁶⁷ Article 2(4) of the UN Charter

conflicting States.⁶⁸ It further suggest that, the use of force can only be used for justifiable reasons including if the action is authorized by the UN Security Council⁶⁹ or inherent right individual or collective self-defence.⁷⁰ When the UNSC is acting under Chapter VII, its decision is final and conclusive, no any international organisation can question or make any recommendation including United National General Assembly (UNGA) unless with UNSC consent,⁷¹ it is the requirement of the Chatter that member States of the General Assembly are obliged to abide all decision made by UNSC.

The extreme legal power given to few members States of the Security Council to decide on behalf of the United National General Assembly on who and when to engage military operation puts the targeted States or persons at jeopardy; sometimes reasons for the military engagement or deferral power of investigation or prosecution are not genuine. In that case it is easy for State allies to procure votes from Security Council so as to approve resolutions with dubious reasons aiming to protect their political or economic interest.

8.0 Failure of the ICC to Promote Global Criminal Justice

It is an expectation of the international community that, the ICC as an international organisation vested power by the Rome Statute, is equally investigate, prosecute and punish all perpetrators of the international crimes around the globe, however, the ICC has failed to promote global peace by neglecting some of the countries affected by the international crimes. Taking into consideration of the Russian invasion to Ukraine and the ICC immediate response to the crisis as compared to ICC response to other countries suffered with international crimes especially in the Middle East and Africa is a clear indication of failure. The selection process of the case to be investigated or prosecuted is characterised by biasness, some States can immediately benefit the service of the court and other are neglected, hence raise doubt on the integrity of the court.

Double standard in selection and prosecution of international crimes as well the court intervention in areas of conflicts have been caused by Practice and Procedures. The

⁶⁸ *Ibid* article 33

⁶⁹ *Ibid* Article 39

⁷⁰ *Ibid* Article 51

⁷¹ Article 12 of the Rome Statute of the International Criminal Court

practice of the ICC prosecutors is motivated by discretion vested by Rome statute⁷² which inter alia give the office of the prosecutor to vertically select which case to prosecute and what to neglect despite the need and desire by the international community.⁷³ Through the mandate vested to him, it took just four days for the ICC Prosecutor to show the interest to investigate the situation in Ukraine and six days to open investigation after full scale invasion of Russia to Ukraine and likewise neglect other places suffered the same.

The rejection of the International Criminal Court by many States, such as Russia, the United States, India, and China, is another indication which displays a clear picture of why the court has failed to promote global peace and consequently compromised international criminal justice.⁷⁴ The armed conflicts in Europe, specifically in Ukraine, resemble the crisis engulfing Africa and some countries in Asia, such as Syria, Yemen, and Iraq. The International Criminal Court has taken an interest in Europe, and the recent ICC response to the war in Ukraine has created a potential regional imbalance, prompting criticism of the court, particularly of the prosecutor's office, for being selective and biased in dealing with international crimes.⁷⁵

With the recent Ukraine war and the international court response to the crisis, Africa and Middle east and other places with grave human rights violation, deserve fair treatment by letting these crimes be investigated or other wise to conclude double standards by the court in fighting impunity affecting criminal justice around the globe. It would be argued that, the international criminal court should in practice be committed to all parties affected by conflicts rather than selecting few cases that suits its interest and the western interest.

9.0 Conclusion

This article mainly focused on analyzing the ICC double standard in the administration of international criminal justice in Europe. It made special feature on the war in Ukraine and provides a clear understanding about existing double standard

⁷² *Ibid* Article 53

⁷³ *Ibid* foot note no. 76

⁷⁴ C. Gegout, *The International Criminal Court: limits, potential and conditions for the promotion of justice and peace*, *Third World Quarterly*, (2013) Vol. 34, No. 5, 2013, pp 800–818

⁷⁵ A. Jetschke, *“Der Kaiser hat ja gar keine Kleider an! – Strafver-folgung durch hybride Tribunale”*, in *Friedenswarte*, 2011, vol. 86, no. 1–2, pp. 103 et seq., 125.

created by the court when selecting cases to investigate and prosecute. The study further entails the mischief behind ICC incompetence and biasness in selecting cases to prosecute. The focus is based on legal and institutional challenges to determine gaps leading double standards in the administration of international criminal justice.

It is bizarre and weird for the ICC to respond so fast to the war in Ukraine and neglecting crime against humanity which is tearing apart other States like Iraq and Syria. Such puzzle provokes serious question as to what norms does the court stands for and whether it meant to fight impunity affecting international criminal justice in the first place. This study has revealed that, International Criminal Court has taken an interest in Europe, and the recent ICC response to the war in Ukraine has created a potential regional imbalance, prompting criticism of the court, particularly of the prosecutor's office, for being selective and biased in dealing with international crimes.⁷⁶

The study further found that, the excessive power mandated to 15 members of the United National Security Council to make unquestionable decision over important matters acting under chapter VII is another reason for double standards in administration of international criminal justice. It is possible for the decision to be made, founded on political or economic interest of members of the Security Council. Also, the UNSC power to stop any commenced or continued investigation or prosecution initiated by the Court, is a clear line of double standards.

With the recent experience of the ICC Responds on Ukraine war; Africa, Middle East, Asia and any other places experiencing atrocities, deserves fair treatment by immediate action to be taken by the court to investigate and prosecute offenders of the international crimes. The ICC should have universal response to conflicts as well as consistency in investigation and prosecution of perpetrators of international crimes.

⁷⁶ Anja Jetschke, "Der Kaiser hat ja gar keine Kleider an! – Strafver-folgung durch hybride Tribunale", in *Friedenswarte*, 2011, vol. 86, no. 1–2, pp. 103 et seq., 125.

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