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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.<sup>28</sup> 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.<sup>29</sup>

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.<sup>30</sup>

#### **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

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<sup>27</sup> *Ibid* article 17(d).

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

<sup>29</sup> *Ibid* Article 53(1) (c), (53 (2) (c)

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

the crime of aggression.<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup>

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.<sup>34</sup> 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.<sup>35</sup>

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.<sup>36</sup> 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.<sup>37</sup> The court has also set up offices in the areas where it is conducting investigations.<sup>38</sup>

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

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<sup>31</sup> *Ibid* Article 5,6,7 and 8.

<sup>32</sup> *Ibid* Article 125 and 128 of the Rome Statute of International Criminal Court of 1998

<sup>33</sup> 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

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

<sup>35</sup> *Ibid* foot note No 35

<sup>36</sup> 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

<sup>37</sup> Article 3 of the Rome Statute of International Criminal Court of 1998

<sup>38</sup> The International Criminal Court (ICC) of 1998



crimes, and though it has played a significant role in domesticating and regionalizing the International Criminal laws,<sup>39</sup> 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,<sup>40</sup> 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.<sup>41</sup>

The state cooperation is extended to the court budget; expenses of the court operations depend on the contributions of its member States,<sup>42</sup> and the European countries and USA are the biggest contributors 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 from 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.<sup>43</sup> 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

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<sup>39</sup> 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 Nations Security Council (UNSC) as permanent court, henceforth, its jurisdiction is in conformity with Chapter VII of the United Nations Charter.

<sup>40</sup> Part 9 of the Rome Statute of the International Criminal Court.

<sup>41</sup> *Ibid* Article 87(5).

<sup>42</sup> Article 115 and 117 of the Rome Statute International Criminal Court.

<sup>43</sup> 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.<sup>44</sup>

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 17<sup>th</sup> July 2018 by assembly of State parties.<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup> 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

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

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

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

<sup>47</sup> *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.<sup>48</sup>

## 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.<sup>49</sup> It is for the Security Council to determine when and where a UN peace operation should be deployed.<sup>50</sup>

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,<sup>51</sup> and its decision has to be accepted and agreed by the members of the United Nation.<sup>52</sup> 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.<sup>53</sup> This

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<sup>48</sup> African Union, withdraw Strategy Document available at [https://www.hrw.org/sites/default/files/supporting\\_resources/icc\\_withdrawal\\_strategy\\_jan\\_2017.pdf](https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan_2017.pdf) Accessed on 7<sup>th</sup> October 2022 at 21:02HRS.

<sup>49</sup> Article 23 of the UN Charter

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

<sup>51</sup> Article 24 of the UN Charter

<sup>52</sup> *Ibid* article 25

<sup>53</sup> *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.<sup>54</sup> 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.<sup>55</sup> 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.<sup>56</sup> All UN members agree to accept and carry out the decision of the Security Council.<sup>57</sup> 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.<sup>58</sup>

### **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

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<sup>54</sup> *Ibid* Foot note 91

<sup>55</sup> Article 52 of the UN Charter

<sup>56</sup> *Ibid* Article 12

<sup>57</sup> *Ibid* article 25

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

key purpose of NATO is to guarantee the freedom and security of its members through political and military means.<sup>59</sup> 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.<sup>60</sup> 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 German are NATO members.

NATO has taken collective measure on several occasion, 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 have been misused by some of the NATO members to fulfill their political and economic ambitions in the name of protecting civilian from serious violation of human rights. It is obvious that, some of the operations lead 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 to 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.<sup>61</sup>

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

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

<sup>60</sup> Article 5 of the North Atlantic Treaty

<sup>61</sup> 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 10<sup>th</sup> June 2021 at 8:30hrs

nationals from being surrendered to the International Criminal Court.<sup>62</sup> 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,<sup>63</sup> 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.<sup>64</sup> 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

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<sup>63</sup> Article 13 of the Rome Statute of the International Criminal Court

<sup>64</sup> *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.<sup>65</sup> 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.<sup>66</sup>

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.<sup>67</sup> The charter suggests to rely on the peaceful means of dispute settlements among

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<sup>65</sup> Article 27 of the Rome Statute of the International Criminal Court.

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

<sup>67</sup> Article 2(4) of the UN Charter

conflicting States.<sup>68</sup> 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 Council<sup>69</sup> or inherent right individual or collective self-defence.<sup>70</sup> 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,<sup>71</sup> 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

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<sup>68</sup> *Ibid* article 33

<sup>69</sup> *Ibid* Article 39

<sup>70</sup> *Ibid* Article 51

<sup>71</sup> Article 12 of the Rome Statute of the International Criminal Court



practice of the ICC prosecutors is motivated by discretion vested by Rome statute<sup>72</sup> 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.<sup>73</sup> 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.<sup>74</sup> 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.<sup>75</sup>

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

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<sup>72</sup> *Ibid* Article 53

<sup>73</sup> *Ibid* foot note no. 76

<sup>74</sup> 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

<sup>75</sup> 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.<sup>76</sup>

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.

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<sup>76</sup> 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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