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Selective justice within the International Criminal Court and global inequalities

- An analysis of the International Criminal Court's bias towards African states, unmasking patterns of dominance and injustices in the international criminal law

Janette Vihinen

Department for Human Rights

Department of History

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Supervisor: Olof Beckmann

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Abstract

African states have recently claimed that international law is transforming into a new form of colonialism and a hegemonic power masquerading as the international rule of law. The International Criminal Court's bias against the Third World African states in correlation to the human right to a fair trial is investigated. The thesis overarching question addresses the Court's selective justice and if the Court promotes global inequalities. Subject areas that the thesis expands on are human rights, selective justice, the Court's African bias and jurisdiction regarding Sudan and the Democratic Republic of the Congo. Research material has been analysed through the chosen theoretical and methodological frameworks, the rule of law theory, the qualitative text analysis methodology and Third World Approaches to International Law as an analytical tool. The research review outlines existing literature and research about the thesis subject area, that is used as a basis for the research analysis and discussion. The research is limited to the court cases regarding al-Bashir and Thomas Lubanga. Based on the results, the International Criminal Court has to rely on internationally accepted human rights jurisprudence and operate according to the international communities' requirements in order to end impunity. In conclusion, the International Criminal Court is biased towards Africa through selective justice, which violates the human right to a fair trial. Furthermore, the International Criminal Court's bias contributes to global inequalities, however, the International Criminal Court has the potential to create a fairer international law, ensuring the human right to a fair trial.

***Keywords**:* International Criminal Court, selective justice, human rights, Rule of law, Third World Approaches to International Law methodology, African Union

Selektiv rättvisa inom den Internationella brottmålsdomstolen och globala ojämlikheter

- En analys av Internationella brottmålsdomstolens partiskhet mot afrikanska stater, vilket avslöjar dominansmönster och orättvisor i den internationella straffrätten

Abstrakt

Afrikanska stater har nyligen hävdat att internationell rätt är i processen att förvandlas till en ny form av kolonialism och en hegemonisk makt vilket tidigare maskerats som the rule of law. I föreliggande avhandling undersöks Internationella brottmålsdomstolens partiskhet mot den tredje världens afrikanska stater, i samband med den mänskliga rättigheten till en rättvis rättegång. Avhandlingens övergripande fråga tar upp domstolens selektiva rättvisa och om domstolen främjar globala ojämlikheter. Vidare tar avhandlingen avstamp i följande ämnesområden; mänskliga rättigheter, selektiv rättvisa, domstolens partiskhet mot afrikanska stater och jurisdiktion avseende Sudan och Demokratiska republiken Kongo. Källmaterialet analyseras utifrån de valda teoretiska och metodologiska ramverken, dvs. rättsstatsprincipen, den kvalitativa textanalysmetoden och tredje världens synsätt på internationell rätt som ett analytiskt verktyg. Ytterligare presenterar forskningsöversikten aktuell forskning inom det valda ämnesområdet som dessutom utgör en bakgrund för analys och diskussion. Därtill avgränsas undersökningen till rättsfallen beträffande al-Bashir och Thomas Lubanga. Baserat på studiens resultat måste Internationella brottmålsdomstolen förlita sig på internationellt accepterad rättspraxis för mänskliga rättigheter och verka i enlighet med de internationella samfundets krav, i syfte att avsluta straffrihet. För att konkludera är Internationella brottmålsdomstolen partisk mot Afrika genom selektiv rättvisa, vilket kränker den mänskliga rättigheten till en rättvis rättegång och bidrar dessutom till globala ojämlikheter. Avslutningsvis har dock Internationella brottmålsdomstolen potential att skapa en mer rättvis internationell lag som säkerställer den mänskliga rättigheten till en rättvis rättegång.

Nyckelord: Internationella brottmålsdomstolen, selektiv rättvisa, mänskliga rättigheter, Rule of law, Third World Approaches to International Law metodologiska ramverk, Afrikanska unionen

Abbreviations:

AC - Appeals Chamber

AU - African Union

Court - International Criminal Court

DRC- The Democratic Republic of the Congo

ICTR - International Criminal Tribunal for Rwanda

ICTY - International Criminal Tribunal for the former Yugoslavia

Non statutory party - Non statutory party to the Rome Statute

OTP, Prosecutor - Office of the Prosecutor

PTC- Pre-Trial Chamber

RS - Rome Statute

SCSL - Appeals Chamber of the Special Court for Sierra Leone

Statutory party - Statutory party to the Rome Statute

TC - Trial Chamber

TWAIL - Third World Approaches to International Law

UN - United Nations

UNSC - United Nations Security Council

Judicial vocabulary:

***Ad hoc* tribunal**- An *ad-hoc* tribunal is a temporary court that will resolve a specific conflict that has occurred during a particular time frame.

Erga omnes - are obligations that constitute the legal obligations of states to prevent and punish violations of jus cogens-norms.

Jus cogens-norms*: Jus cogens*-norms are hierarchically superior to other laws and can invalidate rules or norms that go against jus cogens-norms. The norms aim to preserve international peace and security.

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1. Introduction

"*Healthy and sustainable societies are based on three pillars: peace and security, sustainable development, the rule of law and respect for human rights. There can be no long-term security without development; there can be no long-term development without security; and no society can long remain prosperous without the rule of law and respect for human rights. But often, we take stability - peace in terms of security and economic activity - to mean a country is doing well. We forget the third and important pillar of rule of law and respect for human rights, because no country can long remain prosperous without that third pillar.*"[1]

The former Secretary-General of the United Nations, Kofi A. Annan, made this statement in 2015 in the United Nations Chronicle. The citation epitomises that no one is above the law and that no individual should be denied protection from the state. Annan elucidates that individual states and the international community must enforce the rule of law. However, for the rule of law to practically function, there needs to exist a framework of fair rules that states can adhere to. Unfortunately, the framework of fair rules is riddled with weaknesses and grey zones, and the rules are too often applied selectively and enforced arbitrarily. Annan cites the recent example of the disregard for the rule of law in Darfur, where war crimes, genocide and crimes against humanity were committed.[2]

The international community created the International Criminal Court to address deep-rooted problems and failures in international criminal law to prevent future atrocities. The Court, however, is not omnipotent and cannot exercise hegemonic power over all states. Furthermore, Annan has expressed that the Court has been lauded as a new way to promote the rule of law, end impunity, hold perpetrators accountable for the worst atrocities to humankind and a way to deter others from future crimes.[3] However, the Court is partially controlled by the United Nations Security Council and the Council's veto states. Annan mentions that the UNSC's and veto state's involvement is problematic when superficial differences of opinion prevent the Court from fulfilling actions that would benefit humanity, such as prosecuting perpetrators outside of Africa.

The Court must, nevertheless, adhere to the human right to a fair trial, bring to fruition an unbiased trial and not denounce the purpose of human rights law and the rule of law. Even though inadequacies

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[1] United Nations Chronicle, *Reflections on the UN at 70*. Nos 1 & 2 Vol. LII, 2015.09. https://www.un.org/en/chronicle/article/reflections-un-70 (Retrieved 14.05.2032)
[2] United Nations News, Addressing the UN Assembly, *Annan urges nations to restore respect for rule of law*. 21.09.2004 https://news.un.org/en/story/2004/09/115712 (Retrieved 14.05.2032)
[3] United Nations News, Addressing the UN Assembly, *Annan urges nations to restore respect for rule of law*. 21.09.2004 https://news.un.org/en/story/2004/09/115712 (Retrieved 15.05.2032)

exist in the Court's functions, the advocacy of human rights principles of accountability is cemented internationally through mutual recognition of the human right to a fair trial. Thus, creating an unbiased and fair court can bring humanity closer to pursuing the rule of law and end impunity for serious human rights violations.[4]

The International Criminal Court's first-ever judgement of the former president of the Union of Congolese Patriots, Thomas Lubanga Dylio, in the Democratic Republic of the Congo, was a quintessential milestone in the progressive development of international criminal law. In 2012, the Court found Lubanga guilty of the war crime of enlisting and conscripting children under the age of fifteen and using them to participate in hostilities actively. The Lubanga case has further historical significance since the case was the first case where a statutory party, DRC, executed a self-referral to the Court because the state could not bring the perpetrators to justice in a national court. Lastly, the prosecution of Lubanga also has historical significance since the case laid down the first-ever applications and interpretations of the provisions of the Rome Statute and regulations of the Court and demonstrated how the Court adheres to international customary law. In addition, the Lubanga case provided a framework for the Court in future cases, such as in the Omar al-Bashir case in Sudan, Darfur.[5]

The prosecution explored the effectiveness of the Rome Statute and the International Criminal Court against the sitting head-of-state, Omar al-Bashir. Al-Bashir should have enjoyed certain immunities and privileges that protected him from the jurisdiction of the Court under international customary law. However, al-Bashir was subjected to prosecution due to the UNSC's referral of the situation in Sudan to the Court, even though Sudan is not a statutory party to the Rome Statute. Consequently, al-Bashir was found guilty of crimes against humanity, war crimes and genocide.[6] However, despite the Court's interference and prosecution of al-Bashir, human rights violations are still committed in Sudan. In 2023, a fight broke out between the Sudanese Armed Forces and the Rapid Support Forces, which led to the deaths of 604 individuals, and approximately 843,130 individuals have been displaced internally.[7]

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[4] Broomhall, Bruce. *International justice and the International Criminal Court: between sovereignty and the rule of law*. Oxford University Press: Oxford, Vol. 1. 2003. p.1
[5] Coalition for the International Criminal Court, *Democratic Republic of Congo* https://www.coalitionfortheicc.org/country/democratic-republic-congo (Retrieved 26.03.2032)
[6] Ingham, Kenneth. "Omar al-Bashir". *Encyclopedia Britannica*, 2022, https://www.britannica.com/biography/Omar-Hassan-Ahmad-al-Bashir (Retrieved 14.04.2032)
[7] International Rescue Committee. *Crisis in Sudan, Fighting in Sudan: What you need to know about the crisis*. 18.04.2023 (Retrieved 20.05.2023) https://www.rescue.org/eu/article/fighting-sudan-what-you-need-know-about-crisis?gclid=Cj0KCQjwmZejBhC_ARIsAGhCqnchb-Y7fe4uATCcJX0rgIIiJd_Hy85iD8F6m3B0muRB7hPaCeiWicgaAs-pEALw_wcB

Because atrocities such as in Sudan and DRC continue to happen, the Court continuously prosecutes perpetrators. The Court symbolises an institutional change that addresses gross human rights violations, resulting in accountability through prosecution. Moreover, due to the vast number of African individuals that the Court has prosecuted, many states and scholars have begun to question whether the Court has a bias against Africa, thereby not fulfilling its obligations to the human right to a fair trial. Although, it is necessary to allude that the Court is necessary to differ from the requirement for *ad-hoc* tribunals, which are often ambiguous, costly and ineffectual.

The Court's preference to investigate and prosecute African individuals illustrates the manipulable and biased limitations of international criminal law because of the Court's need to secure veto states' interests, which neither supports the development of international human rights nor the Court's primary purpose. The Court's blatant focus on African individuals and disregard for the human right to a fair trial encumbers the betterment of international criminal law. Moreover, the Court inhibits the comprehension and improvement of human rights and disregards the international community's reputation for the rule of law. Therefore, this thesis focuses on juxtaposing the International Criminal Court's jurisdiction and the human right to a fair trial concerning the African court cases from Sudan and DRC. The research will also be conducted to raise questions about the accusations that the Court is practising selective justice and whether it is biased against African individuals. Furthermore, if the Court's bias reinforces global inequalities in relation to the methodological and theoretical frameworks, the qualitative text analysis methodology, and Third World Approaches to International as an analytical tool and the theoretical framework of the rule of law.

In the following chapters, the thesis purpose, research question, and the sources will be discussed. In addition, the following chapter outlines the thesis delimitations and the thesis research ethics assessments and criticism of sources. Thereon, the methodological and theoretical frameworks of the thesis will be explained.

1.2 Purpose of the thesis and the thesis research question

The increasing number of war crimes committed worldwide has long been a concern for the international community, especially individuals from Africa. Due to the countless amounts of international crimes that have been committed, a myriad of perpetrators have been brought to justice. However, some hearings have not been conducted according to the right to a fair trial. Moreover, while the Rome Statute compels the Court to safeguard the accused rights, these rights have not been perpetually protected, as illustrated by the Court's earliest cases, such as the Lubanga case. A *fair*

trial is a requirement to establish the truth; it is also a cornerstone of democracy, helping to ensure fair and just societies and to limit abuse by state authorities and governments. Furthermore, the Court's disregard for the human right to a fair trial and prosecution of African individuals has not been defined and researched sufficiently.

Therefore, this thesis purpose is to examine the International Criminal Court's accusations of practising selective justice and being biased towards African individuals in relation to the human right to a fair trial. The thesis will be based on court documents from the International Criminal Court to convey the Court's ineffectiveness in providing justice and the Court's reinforcement of global inequalities. The thesis will be based on court documents regarding the situation in Sudan and the Democratic Republic of Congo and their respective leaders, Omar al-Bashirs and Thomas Lubanga's involvement in war crimes. The African cases have been chosen to examine the Court's African bias and convey the African state's criticism of the Court's involvement in state functions.

The right to impartial justice and a fair trial is a fundamental human right; these rights problematise the Court's responsibility, jurisdiction, and ineffectiveness in providing justice. In this thesis, the state's obligations under customary international law regarding African states' obligations towards other African states and the Court will be extensively examined. The state's obligation to implement the rule of law and obligations under customary law has led to a paradoxical conflict regarding the Court's goal of eliminating impunity. Therefore, the focus on juxtaposing the Court's jurisdiction and the human right to a fair trial has been chosen as a research area for the thesis.

The case of al-Bashir and Sudan is still relevant today, even after the Court's intervention in state functions, since Sudan still faces a complex humanitarian crisis.[8] Al-Bashir dominated Sudan for thirty-five years, and his legacy continues to live on even after his overthrow. The overthrow resulted in a military-civilian transnational government, where the Sudanese hoped that the states would transition into democratic rule. However, these hopes were ruined when Abdel Fattah al-Burhan led a coup in 2021.[9] Furthermore 2023, a fight broke out between the Sudanese Armed Forces and the Rapid Support Forces, indicating that the Court's intervention does not always lead to peace and security within states.[10]

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[8] UNICEF. 2023-HAC-SUDAN, Sudan, 2023. (Retrieved 21.06.2023) https://www.unicef.org/media/131721/file/2023-HAC-Sudan(1).pdf

[9] Berridge,Willow. *Sudan: How Omar al-Bashir´s legacy is playing out today*, GlobalBar Magazine - en annan bild av världen. 02.05.2023 (Retrieved 21.06.2023) https://globalbar.se/2023/05/sudan-how-omar-al-bashirs-legacy-is-playing-out-today/

[10] Fulton, Adam and Holmes, Oliver. *Sudan conflict: why is there fighting and what is at stake in the region?* The Guardian 27.04.2023. (Retrieved 21.06.2023) https://www.theguardian.com/world/2023/apr/27/sudan-conflict-why-is-there-fighting-what-is-at-stake

Many studies have been conducted on the Court's bias towards Africa. However, none have analysed and researched the Court's bias in relation to the right to a fair trial, which will be the focus of this thesis. Therefore, this thesis aims to fill this theoretical and empirical gap regarding the Court's bias in correlation to the human right to a fair trial according to the Third World Approaches to International Law methodology as an analytical tool and the theory, the rule of law.

The thesis aim is to critically examine the legal framework of the International Criminal Courts' use of selective justice. To fulfil the thesis purpose, the following research question will be answered: *How is the International Criminal Court selective in its justice, and does the Court promote some form of global inequality in relation to the rule of law and the Third World Approaches to International Law?*

1.3 Sources

In the next chapters, the primary and secondary literature will be explained and the author will also supply source criticism.

1.3.1 Primary literature

The primary sources for this thesis include the International Criminal Court's court documents and the Rome Statute. The Court is a permanent international institution with the authority to investigate and prosecute individuals for the most universally heinous crimes, genocide, crimes against humanity and crimes of aggression. The Court's indictment of Thomas Lubanga and Omar al-Bashir has been selected as case studies for the thesis, which includes seven court documents from the Court's Pre-Trial Chamber, Trial Chamber and Appeals Chamber, which have a scope of 17-624 pages per document. The thesis's primary literature is based on public material available on the Court's website[11] under documents and cases; the thesis's primary material can also be found on the Court's legal tools database, ICC Legal Tools Database (legal-tools.org).

The Lubanga case was selected because Lubanga was the first perpetrator that the Court prosecuted, and the situation in DRC was the first case where a self-referral was conducted. Furthermore, the al-Bashir case was chosen because al-Bashir was the first seated head-of-state to be indicted by the Court and was the first case where the UNSC referred a situation in a non-statutory party to the Court. The thesis author focuses on primary literature that involves the leader's involvement in the war crimes committed and the right to a fair trial to answer the thesis research question. Investigating the leader's involvement in war crimes is important because war crimes have devastating and lasting effects that may destabilise states' safety and security for decades to come and

[11] International Criminal Court's website: https://www.icc-cpi.int/

because investigations and prosecution of war crimes are central in the fight for impunity. Furthermore, the al-Bashir and Lubanga cases have been selected since both perpetrators committed war crimes, although in different ways, through enlisting child soldiers to participate in hostilities in DRC and attacks on the ethnic groups of Sudan. In addition, both perpetrators were charged as co-operators. Furthermore, whether it is advantageous to risk a state's stability at the expense of achieving international justice in the form of global inequalities will be explored. The thesis is limited to and centres solely on the indictment of Lubanga and al-Bashir; however, in exceptional circumstances, other cases or situations are pending before the Court. The other court cases that the Court has referred to include; *The Appeals Chamber of the Special Court for Sierra Leone*, *The Arrest Warrant case* and *The Prosecutor v. Radoslav Brđanin from the International Criminal Tribunal for the former Yugoslavia*.

1.3.2 Secondary literature

The thesis's secondary literature consists of books, research data from non-state governments and research articles, all peer-reviewed and searched via Lund University's database, LUBsearch. The second literature has the highest credibility and has been reviewed by credible researchers. Newspaper articles, which are considered credible newspapers are also included.

The thesis's secondary sources provide a background to the different court cases and convey pre-existing research about the subject matter. The primary and secondary sources have been selected due to their relevance and purpose for the thesis and research question. Furthermore, the thesis includes a brief historical background of the Darfur situation to differentiate the case from the commonly known Sudanese civil wars and further to distinguish the Congo conflict in 2002 from the former disputes within the state to create a contextual background for the legal issues discussed.

The secondary literature also conveys criticism that the Court has received about the Court's selective justice and not intervening and prosecuting Western states individuals. The African Union has brought to attention the Court's African bias and how the Court has ignored the African state's requests for national justice. A myriad of academic articles offer different legal conclusions about the Court, the AU and the Court's selective justice within Africa. In addition, secondary literature describes previous research and illustrates similarities and differences between scholars' viewpoints and approaches.

1.3.3 Source criticism

There are risks in using only literature in the form of court cases from the International Criminal Court since it may result in the author having a skewed view of the thesis findings. However, The author is aware that researching a controversial subject, such as the Court being biased towards African states, can affect the author's opinions. However, the author of the thesis has tried to solve this predicament by separating the author's views and instead leaning on the thesis legal analysis and being objective to the scholarly literature. On the other hand, the author of the thesis must analyse literature from the Court to fulfil the thesis purpose and answer the thesis research question. The thesis is also based on Linnaeus University's requirements for source criticism.[12]

1.4 Limitations of the thesis and research ethics assessments

The thesis is limited to researching the International Criminal Court biased towards Africa, which is researched through the al-Bashir and Lubanga in Sudan and the DRC court cases. A delimitation related to the primary literature is the period between 2002-2023 since the Court only has jurisdiction over crimes that have occurred after the Court's establishment in 2002. Furthermore, secondary literature is only used to introduce and present current research on the thesis chosen subject area. Further, the thesis focus will be on war crimes committed, and not the other crimes that the Court has jurisdiction over.

The thesis is based on public Court documents, which include Lubanga and al-Bashir who will be by name, who are public figures whose professional capacity is relevant to the subject area of the thesis. These public figures will not be anonymised as their involvement is crucial for the thesis. Furthermore, the figures will not be anonymous due to the horrific crimes that they committed and to give justice to victims.

In Chapter 2, the choice of methodology and theory, which consists of the qualitative text analysis methodology and Third World Approaches to International Law as an analytical tool and the theoretical framework of the rule of law, will be presented. The strengths and weaknesses of the methodology and theory will also be explained.

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[12] Linnaeus University. *Source criticism*, The University Library, Updated 18.03.2021, https://lnu.se/en/library/search-and-evaluate/source-criticism2/, (Retrieved 21.06.2023)

2. Methodological and theoretical framework

The following sections describe the thesis choice of methodological and theoretical framework, consisting of the qualitative text analysis, TWAIL as an analytical tool and the rule of law. There exist two versions of the rule of law. However, all explanations about the rule of law consist of three elements: government limited by law, formal legality, and the rule of law, not man. Qualitative textual analysis is beneficial when researching for hidden meanings and consists of systematically categorising results in an understandable manner and highlighting implications and ideas. The theoretical and methodological framework is illustrated in chapters 4 and 5 and is used to analyse the documents.

2.1 The rule of law: Three themes

Lautenbach Geranne notes that the rule of law is one of the most disputed conceptions within jurisprudence and that the rule of law's origin is unclear. The rule of law is complex, is defined differently by scholars, and is often closely interconnected to the scholar's political outlook, who may ascribe different attributes and understandings to the theory. Lautenbach describes that no matter what explanation and conceptualisation of the rule of law is put forth, it will inevitably only be fractionally unanimous with existing literature. Therefore, the theory is not an unambiguous and unified notion that is evenly applied throughout the field of research.[13]

Criticism against the rule of law is based on the fact that no unified hierarchical power can ensure legal application and that the theory is more concerned with the conditions under which state powers are exercised. As noted before, the rule of law implies control over states and governments through law. However, states are not equal in power, which creates severe problems for the functioning of the theory in the international legal sphere. Furthermore, Bruce Broomhall asserts that when the rule of law is invoked internationally, the theory tends to be romanticised and calls for the state's cooperation with international law.[14] Hernandez-Truyol Esperanza claims that the rule of law is a tool that powerful states use to maintain existing state affairs and protects powerful states at the cost of weaker states.[15]

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[13] Lautenbach, Geranne. *The concept of the rule of law and the European Court of Human Rights.* Oxford University Press, 2013. p.10-15
[14] Broomhall, Bruce. *International justice and the International Criminal Court: between sovereignty and the rule of law*. Oxford University Press: Oxford, Vol. 1. 2003. p.52-53
[15] Hernández-Truyol, Berta Esperanza. *The rule of law and Human Rights*. Florida Journal of International Law. *Fla. J. Int'l L.* 16, 2004. p.182

Further, criticism about the rule of law is that the usage of the rule of law casually leads to rampant uncertainty that devolves into something meaningless and that malevolent governments can proclaim it with impunity. However, even if ambiguity exists about the theory, three isolated ubiquitous themes exist. These themes are often portrayed as clusters of meaning since they are interrelated and almost inseparable, which include government limited by law, formal legality and the rule of law, not man.[16]

The first theme is government limited by the law, implying that governments and state officials are limited by the law to eliminate government tyranny. Tamanaha expresses that government officials must abide by current valid positive law and that the law can only be changed by properly authorised individuals. However, government officials cannot change customary law or human rights, meaning that the sovereign power over positive law is also restrained.[17]

Tamanaha illuminates that most international tribunals are constrained to the state's consent, meaning they only have jurisdiction over a case if the states allow it. The problem with states being able to choose which laws to be bound by is that the states will choose to be bound by laws that contribute to their interests. Furthermore, Tamanaha mentions that government leaders are held personally accountable for egregious conduct, such as through the International Criminal Court. Tamanaha adds that government officials are aware that their criminal actions are punishable.[18] Geranne Lauthenbach also expresses that the law should apply equally to all individuals, and state administrations should address failures to adhere to laws regardless of who the perpetrator is.[19] Furthermore, no individual should enjoy privileges that others do not have and therefore, no individual should have immunity from legal sanctions.[20]

The second cluster of meaning involves formal legality, which entails prospective laws that are public, equal in applications, general and certain. Formal legality implies rule-bound order upheld and inaugurated by the government and emphasises the availability of a fair hearing. Moreover, formal legality involves predictability so that individuals can, to a certain degree, predict how authorities will utilise their coercive powers. Like Tamanaha, Lautenbach highlights that there must be open and fair hearings but adds that these hearings must also be conducted without bias and

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[16] Tamanaha, Brian Z. *On the rule of law: History, politics, theory*. Cambridge University Press, 2004. p.114
[17] Tamanaha, Brian Z. *On the rule of law: History, politics, theory*. Cambridge University Press, 2004. p.118
[18] Tamanaha, Brian Z. *On the rule of law: History, politics, theory*. Cambridge University Press, 2004. p.118-119, 130-131
[19] Lautenbach, Geranne. *The concept of the rule of law and the European Court of Human Rights.* Oxford University Press, 2013. p.18, 20
[20] Choi, Naomi. *Rule of law, political philosophy*, Encyclopaedia Britannica, Lastly updated: 0.3.04.2023 https://www.britannica.com/topic/rule-of-law (Retrieved 24-04-2023)

consist of an independent judiciary. Furthermore, Tamanaha expresses that a retroactive rule is an oxymoron, for it cannot be followed, and therefore, the law must be built on the requirements within formal legality.[21]

The third theme is the rule of law, not man, meaning that legal officials and judges must interpret and apply the law unbiasedly. Tamanaha notes that the rule of law is often misconceptually attributed to the rule of man. The rule of law underlies that individuals should not fall subject to the unpredictable vagaries of government officials, judges or citizens. The law should not be based on human shortcomings such as passion, bias, prejudice, ignorance, error, avarice, or whim to modulate the potential abuse. However, the law is composed of a judiciary that personifies the law, who must remain free of passion, be unbiased, prejudiced, arbitrariness, and loyal only to the law. Tamanaha notes that judiciaries have the final say in the interpretation and application of the laws and must ensure that even government officials are held to the law. However, this may result in the rule of law becoming ruled by judges. Rule by judges poses the usurpation of power by the elite, treating political issues as if they were law matters, hiding political decisions under the guise of legal interpretations.[22]

2.2 A qualitative textual analysis

The qualitative text analysis will be used as the methodological framework for this thesis. The methodology will be combined with TWAIL as a theoretical, critical perspective, which will be discussed further in the next chapter.

Qualitative text analysis is historically known as hermeneutics, according to Andreas Fejer and Robert Thornberg. Hermeneutics is a simple way of understanding, reading, and creating meaning from texts. The authors explain that social and humanistic researchers utilise text analyses to research overall social structures and issues. The methodology is characterised by a researcher gathering and interpreting information about a specific subject while simultaneously searching for a deeper understanding of the social reality in which the subject exists.[23] Qualitative textual analysis is also beneficial when researching hidden meanings, requiring a detailed examination of texts. The methodology consists of systematically categorising results in an understandable manner and highlighting structures of meanings and ideas. This is done by identifying some parts of the text as

[21] Tamanaha, Brian Z. *On the rule of law: History, politics, theory*. Cambridge University Press, 2004. p.93, 119
[22] Tamanaha, Brian Z. *On the rule of law: History, politics, theory*. Cambridge University Press, 2004. p.123-125
[23] Fejes, Andreas, and Robert Thornberg. *Handbok i kvalitativ analys*. Liber, 2009. p.194-195

more important to the analysis than other parts, which is accomplished by the researcher asking the text a research question or questions that will together constitute the solution to the research problem. In addition, the methodology focuses on certain aspects of the material, determined by the research's aim and questions. In other words, the methodology involves organising material findings into larger categories and subcategories to answer a research question. Furthermore, the methodology is suitable when researching for hidden meanings in texts that are only accessible through intensive critical reading.[24]

The authors avowed that the methodology consists of three dimensions for text interpretations. The first dimension involves an analysis of the author or a compiling editor to answer questions about the meanings that the authors attribute to a text. The second dimension focuses on the text's literary, linguistic and substantive meanings. The third dimension focuses on the text's meaning in correlation to a context outside of the text itself; the third dimension focuses on the text's meanings in relation to the surrounding society.[25]

This thesis focuses on the third analytical dimension. The third dimension aims to create an understanding of some part of the surrounding society, its cultural values, history, et cetera. The focus is to understand which social representatives put forward certain ideas, such as dominant ideals, values, and social norms, that can also be interpreted from the text. Fejer and Thornberg also explain that to prohibit further analysis, a researcher can utilise a fourth guiding analytical dimension, a so-called problematising or theoretical dimension. A problematising dimension can specify the analysis through theoretical analysis questions. For example, research may include questions about tracking how social power relations between different social groups are created and maintained in different social arenas. In this instance, TWAIL as a problematising dimension will be used and discussed below.[26]

2.3 Third World Approaches to International Law

Third World Approaches to International Law (TWAIL) has been chosen as a problematising dimension and an analytical tool.[27] The author Andrea Bianchi mentions that TWAIL unveils, identifies, or unmasks non-disclosed theoretical presuppositions, assumptions, and biases that

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[24] Schreier, M. (2012). Qualitative Content Analysis in Practice. Sage Publications. p.3,7
[25] Fejes, Andreas, and Robert Thornberg. *Handbok i kvalitativ analys*. Liber, 2009. p.195-196
[26] Fejes, Andreas, and Robert Thornberg. *Handbok i kvalitativ analys*. Liber, 2009. p.195-196
[27] Ramina, Larissa *TWAIL – "Third World Approaches to International Law" and human rights: some considerations, revisita de invistagoes* constitucionais journal of research, vol. 5, n. 1. 17.08.2017 p.264

accompany international law. Furthermore, TWAIL aims to unveil oppression, dominance, and injustice patterns in the legal system to bring about change. Bianchi expresses that these theoretical presuppositions form our comprehension of international law's power structures and authorities.[28] The author, Larissa Ramina, also highlights that TWAIL is closely linked to the human rights discourse.[29]

TWAIL aims to unveil hierarchies within the international legal system and unearth power relationships within the international community. Furthermore, the domination by the West and reproduction of colonial structures through neocolonialism and Eurocentrism in international law or colonial system are other central themes in TWAIL scholarship. TWAIL further aims to understand the rebuke of Western mechanisms used to dominate the Third World and delegitimise the claims of universality and objectivity that the international legal system has sought to make.[30]

TWAIL highlights disputes about the functionality of international law. Some scholars believe that international law is the solution to creating a fairer international law that considers differences and will repair economic, political, social, and historical injustices. However, currently, international law is built upon power structures. Bianchi vocalises that colonialism has been replaced by the formal bonds of colonial rule with a new form of Western domination, which is formidably evident in the international laws' new vocabulary, but that the core problem of trying to colonise the uncivilised people of the South remains. However, the new form of international law and the Western state's involvement has ensured respect for human rights and democratic institutions. The emergence of the new international law has allowed for a more formal and institutionalised form of direct political control by colonial powers built upon Western hegemony. Bianchi punctuates that international law has created the colonial system, but it can also be the solution since it has all the tools to bring about change. However, international law is often romanticised for its promise of change.[31]

Additionally, there exists ambiguity in determining whom the TWAIL scholars are meant to represent since the scholars that shaped the TWAIL discourse are often Western-educated and far away from the situations they represent.[32] Further, criticism against TWAIL is based on the notion

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[28] Bianchi, Andrea. *International law theories: An inquiry into different ways of thinking*. Oxford University Press, 2016. p.1-2
[29] Ramina, Larissa *TWAIL – "Third World Approaches to International Law" and human rights: some considerations, revisita de invistagoes* constitucionais journal of research, vol. 5, n. 1. 17.08.2017 p.263
[30] Bianchi, Andrea. *International law theories: An inquiry into different ways of thinking*. Oxford University Press, 2016. p.207-208
[31] Bianchi, Andrea. *International law theories: An inquiry into different ways of thinking*. Oxford University Press, 2016. p. 208, 211, 221-22
[32] Bianchi, Andrea. *International law theories: An inquiry into different ways of thinking*. Oxford University Press, 2016. p.205-207

that the word Third World is ill-conceived since it is used in myriad ways and often correlates to developing countries and the Global South. Nonetheless, Bianchi describes that no matter what metric or explanation is given to the Third World, the definition will still be unsatisfactory. Furthermore, TWAIL is often broadly characterised and differs in aim and scope and is often hard to understand. However, all scholars agree to unmask non-disclosed assumptions and biases accompanying international law. TWAIL implies critically analysing the distribution of power and resources between states and rethinking international relations.[33] TWAIL is also built on solidity between scholars who want to reform, expose, or even retrench features within the international legal system that have helped to maintain or create the unfair, unequal, or unjust global order.[34]

2.4 Compilation of material

The material for this thesis has been structured and chosen using the quantitative textual analysis methodology, which consists of categorising results into themes and categories extracted from the material and the results interpreted from the material by the theoretical and critical perspective from TWAIL. TWAIL has been used as a form of theoretical perspective-taking to unveil, identify, or unmask non-disclosed theoretical presuppositions, assumptions, and biases accompanying international law and the International Criminal Court. Further, more significant categories were also made about the human right to a fair trial and the Court's decisions. These themes were then reduced to subcategories relevant to the thesis research question. The thesis has categories of findings from the court documents based on the keywords: bias, human rights, fair trial, unbiased, injustice, errors, and violations. These categories are presented in Chapter 5, Results and Analysis. The result found from the material is also analysed through the thesis theory, the rule of law.

3. Previous research and background information

The research overview of the thesis consists of a compilation of current research that touches on the thesis's chosen subject area. The literature that the research overview is based on includes scientific articles and anthologies in the subject area, which *inter alia* concerns the the International Criminal Court, Africa and the human right to a fair trial. In order to point out existing literature in

[33] Ramina, Larissa *TWAIL – "Third World Approaches to International Law" and human rights: some considerations, revisita de invistagoes* constitucionais journal of research, vol. 5, n. 1. 17.08.2017 p.263
[34] Bianchi, Andrea. *International law theories: An inquiry into different ways of thinking*. Oxford University Press, 2016. p.207

the subject area, the research has been selected based on the following concepts: the International Criminal Court's functioning, fair trial, the human right to a fair trial, global inequalities, criticism of the Court and the Court's bias against Africa. There is a lack of research regarding the Court's prosecution of African states concerning the right to a fair trial and global inequalities. Due to the vast number of African individuals that the Court has prosecuted, many states and scholars have begun to question whether the Court has a bias against Africa, which will be explored further. Furthermore, the findings of the Court's relation to global inequalities are inadequate and only scratch the subject's surface. These subject areas will be explored more deeply to give readers a better understanding of the importance of the Court's prosecutions in relation to the human right to a fair trial.

3.1 The development of international law and the creation of the International Criminal Court

Robert Cryer explicates that the international community created the Nüremberg Tribunal and the Tokyo War Crimes Tribunal after the horrifying crimes committed during WWII. The objective of the Nüremberg proceedings was to hold individuals accountable for war and crimes against humanity, give justice to victims, and ascertain that everyone is equal before the law.[35] Compared to Cryer, Antonio Cassese concentrates on the reasonings behind the creation of the tribunals and accentuates that the perpetrators were given a fair trial to achieve democracy. Cassese expresses that the tribunals were the first to prosecute crimes of an international dimension.[36] Cryer explains that the Tokyo tribunal was implemented to prosecute martial leaders of Japan and had jurisdiction over the same heinous crimes as the Nüremberg tribunal. The tribunals were, however, unsuccessful in providing the international community with a permanent justice system.[37]

It was not until 1993 that the United Nations Security Council created the International Criminal Tribunal for the former Yugoslavia. The ICTY had, through Chapter VII of the United Nations Charter, primacy over national courts. Therefore, the tribunal had the authority to ensure that UN state members would cooperate. Cryer mentions that the ICTY brought justice to victims, developed international law, and strengthened the rule of law. Cryer and Cassese both mention that the tribunal dispensed fair justice and that the tribunal faulted in the trial proceedings taking a long time and

[35] Malcolm Daniel Evans. Cryer, Robert. *International Law*. Chapter: *International criminal law*. Fifth Edition, Oxford University Press. 2018. p.759-761
[36] Cassese, Antonio. *Cassese's international criminal law*. Oxford university press, 2013. p.256
[37] Malcolm Daniel, Evans. Cryer, Robert. *International Law*. Chapter: *International criminal law*. Fifth Edition, Oxford University Press. 2018. p.759-761

being costly.[38],[39] Cryer also notes that not long after, the UNSC established the International Criminal Tribunal for Rwanda to prosecute international crimes committed in Rwanda, even though Rwanda was not a member of the Security Council during that time. Cassese points out that the tribunals were *ad hoc* and were a substitute for states deemed unable or unwilling to allocate justice. Cryer asserts that to prevent future violations and give justice to victims, the international community started implementing a statute allowing an international court to prosecute international crimes.[40]

Cryer notes that the developments in international criminal law were crystallised in 1998 through the creation of the Rome Statute and the implementation of the International Criminal Court, which came into force in 2002. Cryer and Broomhall describe that the Court has jurisdiction to prosecute individuals for the most severe human rights violations, which include genocide, crimes against humanity, war crimes and crimes of aggression.[41],[42] Broomhall explains that by ratifying the Rome Statute, states have accepted the Court's jurisdiction over the crimes within the Statute.[43]

In this chapter, the historical roots of the Court have been explained. The next chapter will examine the jurisdiction of the Court, the crimes the Court prosecutes and how the Court can prosecute non-statutory parties.

3.2 The International Criminal Court's jurisdiction

The following chapter will highlight the Court's ability to exercise jurisdiction over states unwilling or unable to prosecute perpetrators in their territory. Further, how the Court can receive jurisdiction over situations in statutory and non-statutory parties will be discussed and analysed in Chapter 4.

The author Malcolm D. Evans explains that the Court will only exercise jurisdiction and intervene if states are unwilling or unable to prosecute perpetrators.[44] States are classified as unwilling to

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[38] Malcolm Daniel, Evans. Cryer, Robert. *International Law*. Chapter: *International criminal law*. Fifth Edition, Oxford University Press. 2018. p.759-761
[39] Cassese, Antonio. *Cassese's international criminal law*. Oxford university press, 2013. p.256, 258
[40] Cassese, Antonio. *Cassese's international criminal law*. Oxford university press, 2013. p.261-262
[41] Malcolm Daniel, Evans. Cryer, Robert. *International Law*. Chapter: *International criminal law*. Fifth Edition, Oxford University Press. 2018. p.762-763
[42] Broomhall, Bruce. *International justice and the International Criminal Court: between sovereignty and the rule of law*. Oxford University Press: Oxford, Vol. 1. 2003. p.76-77
[43] Broomhall, Bruce. *International justice and the International Criminal Court: between sovereignty and the rule of law*. Oxford University Press: Oxford, Vol. 1. 2003. p.76-77, 80-81
[44] Malcolm Daniel, Evans. Cryer, Robert. *International Law*. Chapter: *International criminal law*. Fifth Edition, Oxford University Press. 2018. p.762-763

prosecute perpetrators if national authorities shield individuals from responsibility or if there has been an unjustified delay in court proceedings proving that the authorities do not intend to prosecute perpetrators. States are also considered unwilling to prosecute individuals if proceedings are not conducted impartially or independently.[45]

Bromhall expresses that the Court does not have a police force and has limited resources for investigations and prosecutions.[46] Since the Court does not have any enforcement mechanisms, the Court must rely on state cooperation for the Court to function and fulfil its purpose. The Court must primarily rely upon state authorities and request them to assist with investigations and conduct their proceedings impartially because the Court's actions directly impact individuals and state sovereignty.[47] However, the ultimate power to enforce state cooperation lies with individual states acting accordingly with the Assembly of States Parties or the UNSC rather than with the Court itself. Although Broomhall expresses that all state parties are obligated to cooperate with the requests of the Court, the states are also obligated to provide necessary procedures and facilitate investigations under national law per Article 86 of the Rome Statute.[48]

Cole Rowland mentions that before the Court takes on situations within states, the Court must assess and investigate if a situation should be pursued further. Cryer and Rowland explain that the Court can exercise jurisdiction in three ways. According to Article 14 of the Rome Statute, a statutory party may execute a self-referral for a situation to the Court. Self-referrals often occur when the alleged crimes are committed within the state's territory when the perpetrator is a state member, when the victims demand justice or when the national courts are not providing justice. Cryer, however, mentions that this provision has led to states utilising self-referrals for the state's gain of not having to prosecute perpetrators personally, specifically perpetrators that are part of rebel groups. Cryer also highlights that the Court's acceptance of self-referrals has led to many criticising the Court for becoming a government that only wishes to prosecute crimes committed by rebels.[49],[50]

Furthermore, according to Article 15 of the RS, a Prosecutor may receive consent to initiate an investigation on behalf of the International Criminal Court's Pre-Trial Chamber at the beginning of an

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[45] Cassese, Antonio. *Cassese's international criminal law*. Oxford university press, 2013. p.297
[46] Broomhall, Bruce. *International justice and the International Criminal Court: between sovereignty and the rule of law*. Oxford University Press: Oxford, Vol. 1. 2003. p.157
[47] Cassese, Antonio. *Cassese's international criminal law*. Oxford university press, 2013. p.298
[48] Broomhall, Bruce. *International justice and the International Criminal Court: between sovereignty and the rule of law*. Oxford University Press: Oxford, Vol. 1. 2003. p.157
[49] Malcolm Daniel, Evans. Cryer, Robert. *International Law*. Chapter: *International criminal law*. Fifth Edition, Oxford University Press. 2018. p.76
[50] Cole, Rowland JV. "Africa's Relationship with the International Criminal Court: More political than legal." *Melbourne Journal of International Law* 14.2 (2013). p.670-673

investigation. Finally, the Security Council can refer any situation to the Court according to Article 13(b) of the RS using Chapter VII of the Charter of the United Nations.[51] In addition, Evans declares that the referral provides the Prosecutor with a broad scope to prevent bias and politicisation and ensures that investigations remain neutral. However, Evans and Rowland explain that many African states have complained that the UNSC's referrals are biased and that the UNSC is influenced by veto states, several of whom still need to ratify the Rome Statute. For example, the UNSC referred the cases in Sudan and Libya to the Court when the African states objected to the intervention since the states thought the Court would derail the state's peace efforts.[52],[53]

This chapter indicates that the Court will only exercise jurisdiction if states are unwilling or unable to prosecute perpetrators. The following section examines an individual's right to a fair trial when the Court prosecutes a perpetrator.

3.3 The human right to a fair trial

The human right to a fair trial is of the utmost importance since innocent individuals should not be convicted, which will be explored further in the analysis chapter.

Cassese expounds that the requirement for criminal proceedings to be fair is a universal principle.[54] Sangeeta Shah explains that the right to a fair trial adequately administrates justice and correctly secures the rule of law. Sangeeta specifies that the right to a fair trial involves rules that specify how court proceedings should be conducted for judicial proceedings to be just. However, Shah describes that there is no assurance of fairness of outcome since the right to a fair trial is not generally concerned with the outcome of a judicial proceeding but rather the process of achieving the outcome. Therefore, securing the right to a fair trial requires substantial financial resources; consequently, many states cannot fulfil their obligations to a fair trial because of the state's structural problems. Shah explains that the international community has collectively agreed that crimes such as genocide, war crimes, crimes of aggression and crimes against humanity are universally unacceptable and must be harshly punished. Considering these crimes are harshly punished, all trials must be impartial and only based on facts and evidence. Furthermore, the international community has agreed

[51] Malcolm Daniel, Evans. Cryer, Robert. *International Law*. Chapter: *International criminal law*. Fifth Edition, Oxford University Press. 2018. p.763
[52] Malcolm Daniel, Evans. Cryer, Robert. *International Law*. Chapter: *International criminal law*. Fifth Edition, Oxford University Press. 2018. p.762-763
[53] Cole, Rowland JV. "Africa's Relationship with the International Criminal Court: More political than legal." *Melbourne Journal of International Law* 14.2, 2013. p.676-677
[54] Cassese, Antonio. *Cassese's international criminal law*. Oxford university press, 2013. p.356-357

that the right to a fair trial must be considered a human right and paramount for the Court. Shah discloses that since the right to a fair trial is a human right, it imposes international obligations on states that transcend national obligations imposed by individual states. Shah also highlights that crimes are committed by individuals and not by abstract entities, and therefore, international courts have to prosecute and convict individuals who have committed crimes that affect the international community.[55]

James Stewart, notes that the right to a fair trial has its foundation in the Rome Statute and the jurisprudence of the Court. Stewart expresses that prosecutors must actively and effectively prosecute perpetrators in a manner that promotes fairness. The most fundamental right within the right to a fair trial is that the accused should be presumed innocent until the perpetrator is proven guilty. Moreover, other provisions in the Rome Statute regulate the conduct of a fair trial.[56]

The right to a fair trial is a primary part of the Court, which has been discussed. Next, criticism towards the Court by the African Union and African states, why the Court has targeted African states, and the Court's unwillingness to prosecute Western states will be illustrated.

3.4 Criticism against the African Union and International Criminal Court

Lea Schneider elucidates that Africa is a continent plagued with human rights violations. Therefore, the Court has chosen to strengthen the rule of law and bring justice to victims of human rights violations in Africa[57] and multiple victims have also asked the Court to intervene. Furthermore, Plessis, Maluwa, and O'Reilly question the Court's centric narrative and emphasise that individuals who criticise the Court's bias are often African political elites losing their control of power.[58] Schneider further points out that after the horrifying crimes committed during the genocide in Rwanda, African states fully supported the creation of the Rome Statute and the establishment of the

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[55] Moeckli, Daniel, Shah, Sangeeta, Sivakumaran, Sandesh. *International Human Rights Law*. Oxford University Press. 2018. p.521-522

[56] Stewart, James K. *Fair Trial Rights under the Rome Statute from a Prosecution Perspective ICTR Symposium Arusha, Tanzania*, 07.11.2014 p.1, 3, 6,13

[57] Schneider, Lea. *The International Criminal Court (ICC)–A Postcolonial Tool for Western States to Control Africa?*. Journal of International Criminal Law (JICL) 1.1. 2020. p.92

[58] Du Plessis, Max, Tiyanjana Maluwa, and Annie O'Reilly. "Africa and the International Criminal Court." *Criminal Justice* 11.3 2013. p.2

Court.[59] Plessis, Maluwa, and O'Reilly elucidate that the Court has only prosecuted perpetrators from African states. The authors also question whether the Court utilises selective justice within Africa. Furthermore, AU and countless scholars have questioned the effectiveness of the Court and how head-of-state immunities constrain the Court within customary international law. States from the global south have also complained about the skewed power relations within the UNSC. Plessis, Maluwa, O'Reilly, and Lucrecia Iommi illustrate that the UNSC referred the situation in Libya and Darfur to the Court, even though they are not statutory parties.[60]

However, Plessis, Maluwa and O'Reilly also convey that when African states have constituted self-referrals, the states have sometimes done so to manipulate the international criminal justice system for their political gain. The Court is seen as a neocolonial institution that unfairly targets Africa, allowing political leaders to protect themselves from investigations. The authors also note that it was not until the Court started investigating political leaders that the AU became concerned. The AU had no issue with the Court's earlier African-based investigations of rebel groups, suggesting that African states and the AU are also biased.[61] Schnider exemplifies that the Congolese government had selfish interests in allowing the Court to prosecute rebel groups within the state.[62]

Valarie Arnould elucidates that the reciprocity between normative and political factors has led to criticism against the Court. The criticism is based on the Court's perceived African bias, politicisation, justice selectivity, and disregard for the African state's argumentation on best aiming for peace within the state and providing justice. Arnould proclaims that political considerations and institutional self-interest have driven the Court's focus on Africa. Schneider and Arnould suggest that African states reckon that the Court practises selective prosecution by utilising geopolitical considerations. The authors explain that the African states were targeted since they were perceived as easy targets that would allow the Court to demonstrate its relevance and effectiveness. Arnould explains that African states also lack diplomatic and economic powers to defend themselves. Further, Arnould elucidates that the Court will not risk upsetting its biggest financial supporters, the UNSC's veto states.[63]

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[59] Schneider, Lea. *The International Criminal Court (ICC)–A Postcolonial Tool for Western States to Control Africa?*. Journal of International Criminal Law (JICL) 1.1. 2020. p.92
[60] Du Plessis, Max, Tiyanjana Maluwa, and Annie O'Reilly. "Africa and the International Criminal Court." *Criminal Justice* 11.3 2013. p.1
[61] Du Plessis, Max, Tiyanjana Maluwa, and Annie O'Reilly. "Africa and the International Criminal Court." *Criminal Justice* 11.3 2013. p.2,3,6
[62] Schneider, Lea. *The International Criminal Court (ICC)–A Postcolonial Tool for Western States to Control Africa?*. Journal of International Criminal Law (JICL) 1.1. 2020. p.99-100
[63] Arnould, Valerie. *A Court in Crisis? The ICC in Africa, and beyond.* Egmont Paper 93, 2017. p.4-5

Arnould specifies that within the UNSC, five powerful states have vetoes: China, Russia, France, the United Kingdom, and the United States. These powerful states have utilised different mechanisms to stay off the Court's radar while simultaneously aligning the Court's endeavours with their political interests, making the Court perceived as biased and politicised. Arnould describes an apparent inconsistency in the UNSC's willingness to refer certain mass human rights violations to the Court, such as Syria and Israel. For example, the United States has wielded its veto power to block Israel referrals. In contrast, Russia and China have also blocked referrals of the situation in Syria.[64] The referrals of Libya and Darfur confer the UNSC's true intentions only to prosecute African states. The UNSC's referrals of the situations in the non-statutory parties Libya and Darfur have led to individuals questioning the Court's credibility and independence. The Court's African bias is further evident since all the UNSC referrals of the situation in Syria have been vetoed, which has led to individuals accusing the Court of unwillingly protecting the veto state's interests.[65],[66]

Schneider questions whether this notion of international criminal law is universal or if it instead promotes a Western ideology that prosecutes postcolonial African states.[67] Schneider and Arnould elucidate that the Court cannot promote equal international order and highlight concerns that the Court is evolving into an instrument that powerful states can utilise to control weaker states.[68],[69] Plessis, Maluwa and O'Reilly stress that the Court must maintain its authority to fulfil its purpose, which, in some instances, involves the Court utilising universal aspirations of international criminal law by focusing on African leaders that are influential and acting with apparent impunity. The authors also emphasise that if the Court were not to prosecute African leaders, African officials would be indirectly permitted to continue to commit horrific atrocities.[70] However, failure to prosecute crimes outside of Africa does not mean that the Court approves of these crimes. Instead, the international community views Africa as having limited resources and, therefore, cannot respond to all serious violations of international law. The Court's ignorance of atrocities outside of Africa has also contributed to the image that all grave atrocities are committed in Africa.[71]

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[64] Arnould, Valerie. *A Court in crisis? The ICC in Africa and beyond*, Egmont Paper, 2017 p.12
[65] Schneider, Lea. *The International Criminal Court (ICC)–A Postcolonial Tool for Western States to Control Africa?*. Journal of International Criminal Law (JICL) 1.1. 2020. p.94-95
[66] Lucrecia, García, Iommi. *Whose justice? The ICC 'Africa problem*. Fairfield University, International Relations 2020, Vol. 34(1), 2019. p.108
[67] Schneider, Lea. *The International Criminal Court (ICC)–A Postcolonial Tool for Western States to Control Africa?*. Journal of International Criminal Law (JICL) 1.1. 2020. P.93, 97-98
[68] Arnould, Valerie. *A court in crisis? The ICC in Africa and beyond*, Egmont Paper, 2017. p.5
[69] Schneider, Lea. *The International Criminal Court (ICC)–A Postcolonial Tool for Western States to Control Africa?*. Journal of International Criminal Law (JICL) 1.1. 2020. P.93, 97-98
[70] Du Plessis, Max, Tiyanjana Maluwa, and Annie O'Reilly. "Africa and the International Criminal Court." *Criminal Justice* Chatmansn House 11.3 (2013). p.2
[71] Schneider, Lea. *The International Criminal Court (ICC)–A Postcolonial Tool for Western States to Control Africa?*. Journal of International Criminal Law (JICL) 1.1. 2020. p.98-99

Plessis, Maluwa and O'Reilly mention that the deterioration in the relationship between the Court and the AU is illustrated through the first arrest warrant against al-Bashir in Sudan.[72] Arnould notes that in the al-Bashir case, the AU submitted a request to defer the Court's investigation because the AU deemed that arresting al-Bashir would threaten the state's peace mediation efforts.[73] Moreover, Iommi mentions that the referral in Sudan demonstrates that the Court is willing to investigate and prosecute non-state parties' heads-of-state, however, the Court is unwilling to investigate leaders in the West.[74] The AU has also emphasised that pursuing sitting heads-of-state can destabilise states, highlighting the Court's importance in considering the state's infrastructure. Arnould also questions whether the Rome Statute waiver of immunities trumps the state's obligations under international law to respect the head-of-state immunity, particularly in relation to the Court.[75]

Iommi acknowledges that the problems between Africa and the Court are also based on implementing universal criminal accountability norms that consist of the Court's goal of ending impunity; African states, however, view norms that namely consist of peace, sovereignty, and anti-colonialism are of higher virtue and reject the perceived Western interference in African states.[76]

The author Torque Mude describes that the need for the Court to prosecute individuals from Africa stems from the lack of national courts with jurisdiction to prosecute international crimes.[77] The Court, therefore, has to intervene and prosecute these crimes. Arnould expounds that once referrals have been completed, many states have opposed the Court's investigations, as reflected by the state's unwillingness to allocate UN funding to cover the Court's costs. As a result, the states have opposed the Court, which is evident in state non-cooperation, such as Sudan.[78]

3.5 Global Inequalities and the International Criminal Court

This chapter illustrates the Court's relationship to global inequalities and the Court's need to prosecute human rights violations stems from colonialism's uncivilised effects, which will be analysed in the conclusion chapter.

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[72] Du Plessis, Max, Tiyanjana Maluwa, and Annie O'Reilly. "Africa and the International Criminal Court." *Criminal Justice* Chatmansn House 11.3 (2013). p.4
[73] Arnould, Valerie. *A Court in crisis? The ICC in Africa and beyond*, Egmont Paper, 2017. p.5-6
[74] Lucrecia, García, Iommi. *Whose justice? The ICC 'Africa problem*. Fairfield University, International Relations 2020, Vol. 34(1), 2019. p.108
[75] Arnould, Valerie. *A Court in crisis? The ICC in Africa and beyond*, Egmont Paper, 2017. p.6
[76] Lucrecia, García, Iommi. *Whose justice? The ICC 'Africa problem*. Fairfield University, International Relations 2020, Vol. 34(1), 2019. p.106
[77] Torque, Mude. *Demystifying the International Criminal Court (I.C.C.) Target Africa Political Rhetoric.* Midlands State University, Open Journal of Political Science. Vol. 07 No. 01 (2017). p.183
[78] Arnould, Valerie. *Court in crisis? The ICC in Africa and beyond*, Egmont Paper, 2017 p.12

Antonio Franceschet mentions that historically, states have used dominant social forces or allowed the Court to manage the most inhumane effects of global inequalities. Franceschet describes that the Court's prosecution of African states has its roots in managing and containing the so-called uncivilised impacts of inequality within former colonial states. The author mentions that applying the rule of law within the Court depends on whether the rule of law can be effectively redeployed globally and not just selectively through individual criminal acts for atrocities and human rights violations.[79] Cryer also asserts that at the beginning, the Court mainly focused on situations within Africa, which has led to criticism against the Court and individuals alleging that prosecutors are acting selectively by not confronting powerful, especially Western states.[80] The fact that the Court has concentrated on African states has caused the AU and its members to threaten to leave the Court.[81]

Broomhall mentions that international criminal law cannot be considered a unified or coherent body of law. Universally unacceptable crimes fall within a broader conception of international criminal law and constitute a specific obligation to states and individuals. Individuals accused of these heinous crimes are subject to prosecution either by a successor regime in their state, by foreign authorities acting based on universal jurisdiction, or by the UNSC. These crimes are viewed as universally unacceptable because these crimes undermine the international community's interests in peace and security. These crimes are perceived as universally accepted heinous crimes against *jus cogens*-norms that constitute *erga omnes* obligations.[82] However, the Court can only prosecute statutory parties and has therefore been unable to, for example, prosecute individuals from the United States.[83]

The Court's ability to prosecute violations of *jus cogens*-norms has been discussed. The next section will discuss the events that led to the crimes committed in Sudan and the head-of-state Omar al-Bashir's involvement.

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[79] Franceschet, Antonio. *The Rule of Law, Inequality, and the International Criminal Court*. Alternatives: Global, Local, Political. Sage Publications, Inc. Vol. 29, No. 1. p.25

[80] Malcolm D., Evans. Cryer, Robert. *International Law*. Chapter: *International criminal law*. Fifth Edition, Oxford University Press. 2018. p.764,

[81] Moeckli, Daniel, Shah, Sangeeta, Sivakumaran, Sandesh. *International Human Rights Law*. Oxford University Press. 2018. p.534-535

[82] Broomhall, Bruce. *International justice and the International Criminal Court: between sovereignty and the rule of law*. Oxford University Press: Oxford, Vol. 1. 2003. p.1,19,46-47

[83] Franceschet, Antonio. *The Rule of Law, Inequality, and the International Criminal Court*. Alternatives: Global, Local, Political. Sage Publications, Inc. Vol. 29, No. 1. p 25-27.

3.6 Al-Bashir and the crimes committed in Sudan

The following two chapters aim to give the readers a historical understanding of the situation in Sudan and DRC.

Kenneth Ingham explains that al-Bashir staged a military coup in 1989 that resulted in him becoming the chairman of the Revolutionary Command Council for National Salvation that ruled Sudan. During this time, al-Bashir established a destructive Islamist government, resulting in tensions between the Muslim population in the north and the Christian population in the south. However, in 1993, the Council was disbanded, and al-Bashir was appointed president of Sudan. In 2003, an African rebel group in Darfur began carrying out attacks against al-Bashir. To combat the group's uprising, al-Bashir utilised the Janjaweed Arab Army, which banned international organisations from delivering food and medical tools to the civilian population and forcibly displaced over 2 million individuals. In 2004 the second Sudanese civil war ended, resulting in a death toll between 100,000-400,000 individuals. However, it was not until 2005 that the UNSC referred the situation to the International Criminal Court. In 2009, the Court issued the first arrest warrant against al-Bashir and charged him with *inter alia* crimes against humanity and war crimes. In 2010, the Court issued its second arrest warrant, which also included a charge of genocide.[84]

Paola Gaeta explains that the Court received jurisdiction over Darfur for three reasons: because of the Court's purpose to eliminate impunity and maintain international peace. Furthermore, Gaeta explains that the head-of-state's immunity does not affect the Court's jurisdiction.[85] Sarah Williams and Lena Sherif clarify that the third is due to the Security Council Resolution 1593, which gave jurisdiction to the Court per Article 13(B) of the RS. The Security Council's reference illustrates that the situation in Darfur constituted a threat to international peace and security and that there was a need for the Court's intervention.[86]

To conclude, al-Bashir is criminally responsible for crimes against humanity, war crimes, and genocide. In addition, the Court was granted jurisdiction based on the UNSC's referral. The next chapter will examine the situation in DRC and Lubanga's involvement in the conflict.

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[84] Ingham, Kenneth. "Omar al-Bashir". *Encyclopedia Britannica*, 2022, https://www.britannica.com/biography/Omar-Hassan-Ahmad-al-Bashir. (Retrived 20-03-2023)
[85] Gaeta, Paola. "Does President Al Bashir enjoy immunity from arrest?." *Journal of International Criminal Justice.* Vol 7. Nr. 2. 2009. p.322-323
[86] Williams, Sarah. Sherif, Lena. "The arrest warrant for President al-Bashir: immunities of incumbent heads of state and the International Criminal Court." *Journal of Conflict and Security Law.* Vol. 14. Nr. 1. 2009. p.82

3.7 The crimes committed in the Democratic Republic of Congo

The crisis in the Democratic Republic of the Congo originates from the Second Congo War. The conflict started in 1999 in Ituri because of ethnic tensions within the state and the fight for resources between an agriculturalist ethnic group called Lendu. This group was led by the Nationalist and Integrationist Front and the pastoralist ethnic group Hema, led by the Uganda People's Defense Force. These tensions rehashed in 2002 due to an armed conflict and the support of neighbouring states for these armed groups.[87] Two major factors contributed to the conflict within the DRC. Firstly, the Rwandan genocide caused one million refugees to flee to DRC. Some of these refugees also included individuals from the former Armed Forces of Rwanda and the Interahamwe militias, who continued to launch cross-border attacks into Rwanda. These individuals contributed to the Hutus becoming a dominant force within eastern Congo, and their militias also initiated ethnic cleansing against the Congolese Tutsis. Secondly, the overthrow of the dictatorship of Joseph Mobutu and the Rwandan army invading areas of northeast Congo and their collaboration with Congolese rebel groups caused the conflict within the state. The Second Congo War caused the death of 3 million people during 1998-2002 until a peace agreement was reached. However, even after the creation of the peace agreement, more than two million people were killed, some deaths caused by war and others by starvation and disease.[88]

The Union of Congolese Patriots (UPC) was one of the regional groups that took control of the Bunia through its military wing, Forces Patriotiques pour la libération du Congo (FPLC). Under the Congolese rebel leader Thomas Lubanga's leadership, the FPLC was responsible for the massacres in Bunia and Mongbwalu. Between 2002-2003, the military group killed more than 800 civilians from the Lendu tribe. In addition, the FPLC forcibly recruited children.[89] However, in 2003, the International Criminal Courts prosecutor Luis Moreno Ocampo received messages from individuals and non-governmental organisations regarding the situation in DRC. After receiving these messages, Ocampo informed the Assembly of States Parties that he was prepared to launch a formal investigation. First, however, he encouraged the Congolese government to refer the situation to the Court, hoping the referral would expedite the investigation.[90] Because the state could not bring the

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[87] Human Rights Watch. *Covered in Blood, Ethnically targeted violence in Northern DRC*, 2003. https://www.hrw.org/report/2003/07/07/covered-blood/ethnically-targeted-violence-northern-drc
[88] Coalition for the International Criminal Court, *Democratic Republic of Congo* https://www.coalitionfortheicc.org/country/democratic-republic-congo (Retrived 26.03.2032)
[89] Human Rights Watch. *Covered in Blood,* Ethnically targeted violence in Northern DRC, 2003. https://www.hrw.org/report/2003/07/07/covered-blood/ethnically-targeted-violence-northern-drc
[90] Kenneth A. Rodman. *The Peace versus Justice Debate at the ICC: The Case of the Ituri Warlords in the Democratic Republic of the Congo*, Colby College p.13-14

perpetrators to justice in a national court, the state president, Joseph Kabila, executed a self-referral of the situation within the state to the International Criminal Court in 2004.[91] The Court investigated the alleged crimes of rape, forced displacement, torture and the illegal use of child soldiers. Due to Lubanga's involvement in the crisis, he was accused of taking part in the conscription of children, some of whom were under the age of fifteen years. Children under fifteen either voluntarily joined the FPLC or were made available because of their parents, mainly due to calls for mobilisation directed at the Hema population.[92] As a result, Lubanga was found guilty of the war crimes of enlisting and conscripting children under fifteen years and using them to participate actively in hostilities.[93]

4. Investigation/Analysis

The International Criminal Court's supposed bias against African states by prosecutions against the rebel leader Thomas Lubanga in the Democratic Republic of Congo and the former president of Sudan, Omar al-Bashir will now be investigated. The results are based on court documents using the qualitative text analysis methodology. The findings have been found by categorising the results into different categories and subcategories by using keywords such as: fair trial, human rights and the Prosecutor's and defences evidence, findings, violations and errors. The thesis findings will also be analysed through the theoretical, the rule of law and analytical framework, TWAIL. In addition, conclusions will be drawn based on the thesis findings, and my opinion on the findings and conclusions will be highlighted and lastly future research will be illustrated in chapter 5.

4.1 The International Criminal Court and the goal of ending impunity in the Thomas Lubanga case

The Pre-Trial Chamber 1 (PTC1) issued an arrest warrant against Thomas Lubanga Dyilo after the Democratic Republic of the Congo's (DRC) President referred the situation to the Prosecutor in the

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[91] Coalition for the International Criminal Court, *Democratic Republic of Congo* https://www.coalitionfortheicc.org/country/democratic-republic-congo (Retrived 26.03.2032)
[92] Human Rights Watch. *Covered in Blood,* Ethnically targeted violence in Nothern DRC, 2003. https://www.hrw.org/report/2003/07/07/covered-blood/ethnically-targeted-violence-northern-drc
[93] Kenneth A. Rodman. *The Peace versus Justice Debate at the ICC: The Case of the Ituri Warlords in the Democratic Republic of the Congo*, Colby College p.13-14

International Criminal Court, per Article 14 of the Rome Statute (RS).[94] Due to the state's cooperation, the Court only had to execute an arrest warrant as a formality per Article 58(1) of the RS, which states that the Court can issue an arrest warrant if there are reasonable grounds to believe that the accused has committed the alleged crimes.[95]

After the DRC executed a self-referral, the state arrested Lubanga and handed him to the Court, and the PTC1 conducted a confirmation hearing to substantiate the Prosecutor's findings of Lubanga's alleged war crimes and to inform Lubanga of his rights.[96],[97] The PTC observed that for an individual to be charged with war crimes according to Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the RS, the Prosecution had to confirm that there were substantial grounds to believe that Lubanga was culpable. Furthermore, the Prosecution had to verify that there was a clear connection between the alleged crimes and the conflict that had occurred. In other words, the purpose of the hearing was for the Prosecution to submit sufficiently compelling evidence to protect the defendant against wrongful and unfounded charges. The PTC defines the concept of substantial grounds to believe that the Court should rely on internationally accepted human rights jurisprudence. Moreover, trial proceedings should be conducted expeditiously and not based on moral principles to attribute to the right to a fair trial.[98]

The defence adduced, however, that the trial could not be considered fair since the Prosecution used evidence procured in violation of the Congolese Code of Procedure and that violated internationally accepted human rights. The defence points out that the Congolese authorities had wrongfully obtained evidence per Article 69(7) of the RS. Article 69(7) propounds that evidence obtained in violation of the RS or violating international human rights should not be admissible since the evidence might be unreliable and could damage the integrity of the court proceedings.[99]

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[94] International Criminal Court. *Situation in the Democratic Republic of the Congo in the case of the prosecutor v. Thomas Lubanga Dylio. Public Redacted Version with Annex I Decision on the confirmation of charges*. ICC-01/04-01/06, 29.01.2007. p.8
[95] Rome Statute of the International Criminal Court, 2187 U.N.T.S 3, 17 July 1998, art. 58(1)
[96] International Criminal Court. *Situation in the Democratic Republic of the Congo in the case of the prosecutor v. Thomas Lubanga Dylio. Public Redacted Version with Annex I Decision on the confirmation of charges*. ICC-01/04-01/06, 29.01.2007. p.8
[97] International Criminal Court, Trial Chamber 1. *Situation in the Democratic Republic of the Congo in the case of the prosecutor v. Thomas Lubanga Dylio. Public Judgement pursuant to Article 74 of the Statute*. ICC-01/04-01/06, 14.03.2012 p.10
[98] International Criminal Court. *Situation in the Democratic Republic of the Congo in the case of the prosecutor v. Thomas Lubanga Dylio. Public Redacted Version with Annex I Decision on the confirmation of charges*. ICC-01/04-01/06, 29.01.2007. p.13,24, 99
[99] Rome Statute of the International Criminal Court, 2187 U.N.T.S 3, 17 July 1998, art. 69(7)

The Prosecution objected to the defence's disapproval of using the obtained evidence because the Prosecution argued that the defence's argumentation had no legal basis. Due to the conflict between the Prosecution and the defence about the obtained evidence, the PTC sought help from the ICTY. The PTC utilised *The Prosecutor v. Radoslav Brđanin*, where the ICTY concluded that it would be erroneous if the Prosecution could not utilise relevant evidence because of a minor breach of procedural rules. Accordingly, the PTC endorsed the ICTY's decision and international human rights jurisprudence and concluded that the Prosecutor's disregard for the violations did not affect the seized evidence's reliability.[100] Hence, the Chamber decided to admit the seized evidence due to the seriousness of the violation and the trial's fairness.[101] Therefore, one understands that the Court must find a balance between the accused rights to a fair and impartial trial and the Court's need to adhere to the international community's demand for justice, which sometimes involves the Court overlooking minor breaches of human rights, such as in the Lubanga case.

The need to confirm that there was sufficiently compelling evidence in the Lubanga case interrelates with the rule of law. Brian Tamanhan illustrates that formal legality includes a fair trial within a judicial process.[102] Moreover, Greanne Lauthebach explains that formal legality requires that individuals in a position of power not misuse their authority; officials should base their decisions on norms and laws and not on their preferences and ideologies.[103] However, Lubanga was criminally liable for committing unauthorised actions due to Lubanga misusing his authority. Considering that the DRC could not bring Lubanga to justice, the Court had to intervene to prevent arbitrary exercise of power. Thereby proving that Lubanga was not above the law and adhering to equality before the law. Protecting the accused against unfounded charges is an example of the Court adhering to formal legality. Furthermore, equivalent to formal legality, TWAIL criticises that today's international law adheres to colonialism since the West's quest to intervene in the South, such as in DRC. TWAIL accentuates the importance of sovereignty after colonialism and the primordial principles of non-intervention and sovereign equality as fundamentals to achieving a fair international regime. Furthermore, TWAIL emphasises the oxymoron that international law is romanticised for its promise of change, displayed by the Court's disappointing progress in ending impunity and giving justice to

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[100] International Criminal Court. *Situation in the Democratic Republic of the Congo in the case of the prosecutor v. Thomas Lubanga Dylio. Public Redacted Version with Annex I Decision on the confirmation of charges*. ICC-01/04-01/06, 29.01.2007. p.27-28,30, 33-36

[101] International Criminal Court. *Situation in the Democratic Republic of the Congo in the case of the prosecutor v. Thomas Lubanga Dylio. Public Redacted Version with Annex I Decision on the confirmation of charges*. ICC-01/04-01/06, 29.01.2007. p.33-36

[102] Tamanaha, Brian Z. *On the rule of law: History, politics, theory*. Cambridge University Press, 2004. p.119

[103] Lautenbach, Geranne. *The concept of the rule of law and the European Court of Human Rights.* Oxford University Press, 2013. p.75-80

victims. Thereby evidencing that the international community and the Court have all the tools to create change but prefer to continue contributing to hegemonic tendencies by the West and empty promises of objectivity and universalism within international law.[104]

The defence further states that four of the Prosecution's intermediaries solicited false testimonies from witnesses, who testified that they were child soldiers.[105] The defence further continued that the Prosecution did not verify the witness's identities, their allegation's credibility, or the reliability of the Prosecution's documents. Because of these alleged misconducts, the defence insisted that the evidence did not prove beyond reasonable doubt that children under fifteen were conscripted and enlisted by the FPLC or used to participate actively in hostilities.[106]

In addition, the defence insisted that Lubanga did not personally contribute to the armed rebellion in Bunia and that Lubanga was not involved in formulating or implementing the common plan to enlist adolescents to participate actively in hostilities. The defence argued that Lubanga's participation as President and Commander-in-chief of the UPC should not translate to Lubanga participating in a common plan for joint criminal enterprise liability or that he could ensure that every recruit was older than fifteen. The defence argued that Lubanga did not play a central role in the military structure of the FPLC. The defence contends that the evidence does not indicate that the accused knew or should have known that FPLC enlisted or recruited children under fifteen. The defence submitted that the accused did not have the required intention stated in Article 30(2)(a) and (b) of the RS for the crimes he was charged with.[107] Article 30(2)(a) states that an individual acts with intent if they mean to commit a crime.[108] Article 30(2)(b) states that an individual acts with intent if the individual is aware that the offence will occur in the ordinary course of events.[109] The defence submitted that for the Court to establish criminal liability on account of cooperation, the common plan must have been intrinsically criminal.

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[104] Bianchi, Andrea. *International law theories: An inquiry into different ways of thinking*. Oxford University Press, 2016. P.21, 211
[105] International Criminal Court, Trial Chamber 1.*Situation in the Democratic Republic of the Congo in the case of the prosecutor v. Thomas Lubanga Dylio. Public Judgement pursuant to Article 74 of the Statute*. ICC-01/04-01/06, 14.03.2012. p.27-28
[106] International Criminal Court, Trial Chamber 1.*Situation in the Democratic Republic of the Congo in the case of the prosecutor v. Thomas Lubanga Dylio. Public Judgement pursuant to Article 74 of the Statute*. ICC-01/04-01/06, 14.03.2012. p.27-28, 473
[107] International Criminal Court, Trial Chamber 1.*Situation in the Democratic Republic of the Congo in the case of the prosecutor v. Thomas Lubanga Dylio. Public Judgement pursuant to Article 74 of the Statute*. ICC-01/04-01/06, 14.03.2012. p.28-33
[108] Rome Statute of the International Criminal Court, 2187 U.N.T.S 3, 17 July 1998, art. 30(2)(a)
[109] Rome Statute of the International Criminal Court, 2187 U.N.T.S 3, 17 July 1998, art. 30(2)(b)

The Court's violation of procedural rules and the human right to a fair trial interrelate to a government limited by law under the rule of law. Tamanhan elaborates that states and their officials are aware that their grotesque actions will constitute legal sanctioning even though they try to justify their actions through law. Tamanahan informs that legal limitations, such as the International Criminal Court, hold government leaders personally accountable for egregore's conducts.[110] Furthermore, governments and officials must adhere to the law or the rule of law because otherwise, the law would transform into an empty tautology that the Court can package with any normative content the Court wishes to fulfil its goal.[111]

The PTC noted that cooperation, per Article 25(3)(a) of the RS, states that an individual is criminally responsible and liable for punishment if that individual commits a crime jointly or individually. Therefore, even if no participants have overall control over the offence, they share control because everyone could refuse to commit the crime. The PTC concluded that for a perpetrator to be prosecuted for cooperation, there must have been an agreement or common plan between two or more individuals. Moreover, according to Articles 8(2)(b)(xxvi) and 8(2)(e)(vii), the PTC found that the accused knew or should have known that the military was enlisting children under fifteen. Furthermore, TC1 concludes that criminal liability is not limited to individuals who physically execute the objective elements of an offence but also to individuals who control how the offences are committed. Therefore, cooperation includes individuals who assist in formulating the plan and control, direct other cooperators, or establish the cooperator's roles.[112]

However, even though the Court managed to bring Lubanga to trial, the Court had difficulties fulfilling some of the RS requirements. *Inter alia*, the TC1 ordered the release of Lubanga, reasoning that the Prosecutor failed to fulfil the requirements stated in Article 54(3)(e) of the RS, which addresses the non-disclosure of exculpatory material. In the PTC, the Prosecution had hundreds of documents containing exculpatory information. The TC concluded that the Prosecution had abused its competence because disclosure of exculpatory evidence is at the core of an accused's right to a fair trial. Furthermore, the non-disclosure of evidence may have led to the scale of justice being tilted against Lubanga because the defence was enfeebled in counterbalancing the Prosecution's greater resources. Although, the Prosecutor convinced the TC to reverse the Court's decision to release

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[110] Tamanaha, Brian Z. *On the rule of law: History, politics, theory*. Cambridge University Press, 2004. p.115

[111] Tamanaha, Brian Z. *On the rule of law: History, politics, theory*. Cambridge University Press, 2004. p.131

[112] International Criminal Court, Trial Chamber 1.*Situation in the Democratic Republic of the Congo in the case of the prosecutor v. Thomas Lubanga Dylio. Public Judgement pursuant to Article 74 of the Statute*. ICC-01/04-01/06, 14.03.2012. p.402-405, 433

Lubanga. However, the errors of injustice remain crucial to the Court's decision. Furthermore, the defence considered that the lack of testimonies and evidence that described the nine child soldiers rendered the trial unfair, and the defence deemed that Lubanga should have been acquitted. However, the Prosecutor insisted that due to the nature of the crimes, the children's identities were not crucial for the trial's fairness. In addition, Lubanga alleged that the Prosecutor violated their statutory duties to investigate exonerating evidence or ascertain the reliability of incriminating evidence. Therefore, the Prosecution did not remain independent and did not respect Lubanga's human rights to impartiality and fairness. Therefore, Lubanga found that the prosecutorial violations undermined the reliability of the Prosecution's evidence. Thus, the TC could not attach sufficient weight to the Prosecutor's findings.[113]

Additionally, the Prosecution informed the Court that the prohibition on recruitment of children is well established in customary international law and that a child's consent does not constitute a valid defence. The Prosecution utilised the interpretation of the *Appeals Chamber of the Special Court for Sierra Leone* for the recruitment of voluntary children, including any conduct that accepts the children as a part of the so-called militia. The Prosecution adds that child soldiers include all children under eighteen years who participate in any armed group or force, *inter alia* children who actively fight, messengers or children used for sexual purposes. The defence, however, criticises the PTC's interpretation of actively participating in hostilities because it only excludes unrelated activities.[114]

The Court's judiciary may, such as in the Lubanga case, utilise former court decisions, such as from the ICTY and SCSL, to guide them in their decisions. However, the Court's persistence to use other court documents complicates the formal legality and the rule of law, not man. Moreover, due to the judiciaries personifying the law, the rule of law may change to the rule of judges where they base their decision on human shortcomings, *inter alia* subconscious biases, desire for power and corruption. Formal legality requires the possibility to foresee with fair certainty how a judiciary will conduct their affairs, which is not ostensible in Lubanga's case.[115]

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[113] International Criminal Court, Trial Chamber. *Situation in the Democratic Republic of the Congo in the case of the prosecutor v. Thomas Lubanga Dylio. Public Decision on the release of Thomas Lubanga Dylio.* ICC-01/04/06, 0.2.07.2008. p.43-45, 53-54

[114] International Criminal Court, Trial Chamber 1. *Situation in the Democratic Republic of the Congo in the case of the prosecutor v. Thomas Lubanga Dylio. Public Judgement pursuant to Article 74 of the Statute*. ICC-01/04-01/06, 14.03.2012. p.263-264, 267

[115] International Criminal Court, Trial Chamber 1.*Situation in the Democratic Republic of the Congo in the case of the prosecutor v. Thomas Lubanga Dylio. Public Judgement pursuant to Article 74 of the Statute*. ICC-01/04-01/06,14.03.2012. p.587-590

4.2 The International Criminal Court's disregard for immunity in the hopes of achieving justice in Sudan

In 2005, the UNSC utilised Chapter VII of the Charter of the United Nations to adopt resolution 1593 to refer the situation in Darfur, Sudan, to the Prosecutor of the Court per Article 13(B) of the RS. The UNSC utilised resolution 1593 because the situation in Sudan threatened international peace and security, so the Sudanese government and other parties that caused the conflict would fully cooperate with the Court.[116] However, it was not until 2008 that the Prosecution filed an application requesting an arrest warrant against al-Bashir for genocide, crimes against humanity and war crimes against members of the Fur, Masalit and Zaghawa groups from 2003-2008.[117] Article 58(1) of the RS states that the Court can issue an arrest warrant if there are reasonable grounds to believe that the accused has committed crimes in the Court's jurisdiction.[118] The Sudan Workers Trade Unions Federation and the Sudan International Defence Group appealed the arrest warrant because they believed the warrant would disturb Sudan's peacebuilding processes. The groups also thought the Court should consider national interests and security within Sudan before arresting al-Bashir. Further, the defence argued that the warrant would strengthen the Court's negative perceptions and result in the state pursuing alternative means of transitional justice.[119]

Due to the UNSC's referral, the Court had jurisdiction over a non-statutory party. PTC1 noted that, according to the Preamble of the Rome Statute, one of the core goals of the Statute and the Court is to end impunity and convict perpetrators of the most heinous crimes that threaten the international community. Consequently, for the Court to end impunity, the Statute must apply equally to all individuals without differential based on official capacity. Therefore, a head-of-state's official capacity, even in a non-statutory party, does not exempt an individual from criminal responsibility or hinder the Court from exercising its jurisdiction.[120]

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[116] International Criminal Court, Pre-Trial Chamber I. *The Prosecutor v Omar Hassan Ahmad Al Bashir. Decision on the Prosecution's Application for Warrant of Arrest Against Omar Hassan Ahmad Al Bashir. Public Redacted Version, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir.* ICC-02/05-01/09. 04.03.2009. p.10,14-15

[117] International Criminal Court, Pre-Trial Chamber I. *The Prosecutor v Omar Hassan Ahmad Al Bashir. Decision on the Prosecution's Application for Warrant of Arrest Against Omar Hassan Ahmad Al Bashir. Public Redacted Version, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir.* ICC-02/05-01/09. 04.03.2009. p.5-7

[118] Rome Statute of the International Criminal Court, 2187 U.N.T.S 3, 17 July 1998, art. 58

[119] International Criminal Court, Pre-Trial Chamber I. *The Prosecutor v Omar Hassan Ahmad Al Bashir. Decision on the Prosecution's Application for Warrant of Arrest Against Omar Hassan Ahmad Al Bashir. Public Redacted Version, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir.* ICC-02/05-01/09. 04.03.2009. p.5-7

[120] International Criminal Court, Pre-Trial Chamber I. *The Prosecutor v Omar Hassan Ahmad Al Bashir. Decision on the Prosecution's Application for Warrant of Arrest Against Omar Hassan Ahmad*

The Prosecution highlights that no national court proceedings were being conducted in Sudan.[121] The Prosecution further voices the concerns of the conflict threatening international peace and security and showcasing the Court's need to intervene, correct the state's shortcomings and give justice to victims. The rule of law relates to the Court's goal to end impunity. The rule of law states that the government is limited by law and that the government and officials must operate within a limited framework of law; in addition, government officials cannot violate an individual's human rights, and if these officials commit such actions, they are liable for punishment.[122] However, Tamanahan proclaims that most international tribunals and courts operate on a consent basis, which is troublesome for the international community. This is problematic since the states can reject investigations, even when intervention might help the state.[123] However, the international communities and the Court's persistence to intervene in Sudan, even when Sudan disapproved and voiced their concerns for peacebuilding processes, also interrelates to a vital view that TWAIL scholars often vocalise. Bianchi expresses that sovereignty and independence do not suffice to free the South from its former shackles of subordination and dependence on the West. The West still inserts control over the South via political and economic powers after colonial rule. The Court's perceived insistence to intervene in the South can be insinuated as the Court exerting control over the South through international law, which is often built on European law, even when the Court's intervention is unwanted. Sudan is becoming again dependent on the West through the conviction of their national officials, defeating the purpose of former colonial states becoming sovereign and independent.[124]

The PTC explicates that the crimes the Court prosecutes include violations against basic *jus cogens*-norms, such as crimes against humanity and war crimes.[125] The Court's Prosecution of violations against *jus cogens*-norms relates to the thesis theory. Geranne explains that individuals in power and authority should not misuse their power and that even highly placed officials should be equal before the law. Officials like al-Bashir should base their decisions on well-established laws and

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Al Bashir. Public Redacted Version, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir. ICC-02/05-01/09. 04.03.2009. p.15-16

[121] International Criminal Court, Pre-Trial Chamber I. *The Prosecutor v Omar Hassan Ahmad Al Bashir. Decision on the Prosecution's Application for Warrant of Arrest Against Omar Hassan Ahmad Al Bashir. Public Redacted Version, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir.* ICC-02/05-01/09. 04.03.2009. p.18

[122] Tamanaha, Brian Z. *On the rule of law: History, politics, theory*. Cambridge University Press, 2004. p.114-115

[123] Tamanaha, Brian Z. *On the rule of law: History, politics, theory*. Cambridge University Press, 2004. p.129

[124] Bianchi, Andrea. *International law theories: An inquiry into different ways of thinking*. Oxford University Press, 2016. p.212

[125] International Criminal Court, Appeals Chamber. Situation in Darfur, Sudan in the case of *the Prosecutor v Omar Hassan Ahmad Al-Bashir*. Judgement in the Jordan Referral re Al-Bashir Appeal. ICC-02/05-01/09 OA2. 06.05.2019 p.29-30,61-62

norms, for instance, *jus cogens*-norms, rather than their own preferences or ideology. Therefore, the government should operate within a framework of law and hold perpetrators accountable through law to protect individuals from arbitrary acts. We can draw parallels to al-Bashir, who misused his power to commit war crimes and violations against *jus cogens*-norms.[126]

The Prosecution further submits that al-Bashir used *inter alia* the Janjaweed Militia and the Security Service to commit war crimes against the civilian population per Articles 8(2)(e)(i) and 8(2)(e)(v) of the RS. Article 8(2)(e)(i) stipulates that war crimes consist of severe violations of the customs and laws applicable in non-international armed conflicts, intentionally directing attacks against the civilian population or against individual civilians not taking a direct part in hostilities.[127] Article 8(2)(e)(v) mentions that pillaging a town or a territory is a war crime.[128] The PTC found that al-Bashir was criminally responsible for committing war crimes as a cooperator according to Article 25(3)(a) of the RS. Article 25(3)(a) states that an individual is criminally responsible and liable for punishment whether that individual commits a crime individually or jointly. The PTC found that there were reasonable grounds to believe that al-Bashir bears criminal responsibility as an indirect perpetrator or as an indirect co-perpetrator for war crimes since al-Bashir controlled the military branches that jointly implemented a common plan to destroy the Sudanese ethnic groups.[129]

The PTC found that head-of-state immunity, even in a non-statutory party, constitutes formal legality. Formal legality requires equality of application, that no perpetrator should be immune from criminal sanctioning and that individuals are aware that their criminal actions will lead to punishment.[130] The rule of law also implies predictability. Therefore, al-Bashir should have known that his crimes are punishable and that state authorities should have addressed failures to adhere to laws regardless of who the perpetrator is, which Sudan failed to do.[131] Furthermore, the Court's decisions regarding immunity relate to TWAIL in the form of the West's efforts to educate the South. Bianchi refers to Anthony Anghie, who explains that at the end of the nineteenth century, Anghie insinuates that the West ensured that European law became global as the only single system that

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[126] Lautenbach, Geranne. *The concept of the rule of law and the European Court of Human Rights.* Oxford University Press, 2013. p.75-80
[127] Rome Statute of the International Criminal Court, 2187 U.N.T.S 3, 17 July 1998, art. 8(2)(e)(i)
[128] Rome Statute of the International Criminal Court, 2187 U.N.T.S 3, 17 July 1998, art. 8(2)(e)(v)
[129] International Criminal Court, Pre-Trial Chamber I. *The Prosecutor v Omar Hassan Ahmad Al Bashir. Decision on the Prosecution's Application for Warrant of Arrest Against Omar Hassan Ahmad Al Bashir. Public Redacted Version, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir.* ICC-02/05-01/09. 04.03.2009. p. 19-22,25, 59-86
[130] Tamanaha, Brian Z. *On the rule of law: History, politics, theory*. Cambridge University Press, 2004. p.119
[131] Lautenbach, Geranne. *The concept of the rule of law and the European Court of Human Rights.* Oxford University Press, 2013. p.12-19-20,22

applies to all states, so Western ideas became universal. Bianchi, therefore, criticises the lack of neutrality within international law.[132]

The PTCII notes that in 2017, al-Bashir attended the Arab League Summit. However, Jordan did not arrest and surrender him to the Court. Furthermore, while issuing the first and second arrest warrant against al-Bashir, al-Bashir visited numerous state parties, such as Jordan. However, they did not arrest him. Jordan and the AU argued that al-Bashir enjoyed immunity as a sitting head-of-state according to customary international law and immunity under the 1953 convention during the Summit. Furthermore, Jordan expressed that the legal relationship between Sudan and Jordan is built on customary international law that governs the head of state's immunity. Jordan and AU thought they had no obligation to arrest and surrender al-Bashir to the Court because the 1593 resolution neither explicitly nor implicitly waived al-Bashir's immunity and did not trump the state's obligations under customary international law.[133]

The Court clarifies that no state practice nor *opinio juris* would support the existence of head-of-state immunity under customary international law or an international court. Moreover, the Court points out that immunity has never prohibited the Court from exercising jurisdiction. Therefore, no immunity would allow al-Bashir to escape Prosecution.[134] Accordingly, the PTC concluded that al-Bashir does not enjoy immunity for crimes within the Court's jurisdiction.[135] Consequently, non-cooperative state parties, such as Jordan, were obliged to execute the Court's arrest warrants and cooperation requests.[136]

The Court further emphasises that there does not exist a universal treaty that regulates all issues that concern immunity. However, it is essential to point out that specific provisions supplement existing customary international law. In addition, customary international law is a fundamental source of law in international law. The Court, for example, used the *Arrest Warrant case* that concluded that a treaty regulating specific issues of immunity could be used as a guide for similar cases. These treaties, however, do not contain provisions that specifically define head-of-state immunity and therefore, the Court must base its decisions on customary international law, which can arguably be the

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[132] Bianchi, Andrea. *International law theories: An inquiry into different ways of thinking*. Oxford University Press, 2016 p.215,219

[133] Summary, Judgment of Appeals Chamber in the Prosecutor v. Al-Bashir read by Judge Eboe-Osuji Presiding, The Hague, 06.05.2019 p.3-4, 8

[134] International Criminal Court, Appeals Chamber. Situation in Darfur, Sudan in the case of *the Prosecutor v Omar Hassan Ahmad Al-Bashir*. Judgement in the Jordan Referral re Al-Bashir Appeal. ICC-02/05-01/09 OA2. 06.05.2019. p.33-34

[135] International Criminal Court, Appeals Chamber. Situation in Darfur, Sudan in the case of *the Prosecutor v Omar Hassan Ahmad Al-Bashir*. Judgement in the Jordan Referral re Al-Bashir Appeal. ICC-02/05-01/09 OA2. 06.05.2019. p.75, 94

[136] International Criminal Court, Appeals Chamber. Situation in Darfur, Sudan in the case of *the Prosecutor v Omar Hassan Ahmad Al-Bashir*. Judgement in the Jordan Referral re Al-Bashir Appeal. ICC-02/05-01/09 OA2. 06.05.2019. p.23-26, 37

most reasonable and most legitimate starting point today and seems to boil down to the issue of legal traditions between international criminal law and international customary law. Neither is more suitable; however, one can be more applicable than the other within specific circumstances.[137] One can draw parallels to TWAIL, how the European expansion has ensured that European international law is globally applied to all societies and that European international law has become universal. This has also led to the Western international legal system being seen as superior and often ignoring or removing customs within the Third World. The Court must find an appropriate balance between the Court's goal of ending impunity and the need to respect states' customs and customary law.[138]

5. Conclusion and Discussion

To recapitulate, the aim was to investigate the International Criminal Court's selective justice and the human right to a fair trial. The court documents regarding the African states have been utilised to address the Court's ineffectiveness in providing justice and the Court's reinforcement of global inequalities. The court cases from Sudan and the Democratic Republic of Congo convey the Court's prosecution of al-Bashirs and Thomas Lubanga for their involvement in the war crimes in their respective states. Furthermore, this chapter will answer the thesis research question using the qualitative text analysis methodology and Third World Approaches to International Law (TWAIL) as an analytical tool and the rule of law theory. The following research question: *How is the International Criminal Court selective in its justice, and does the Court promote some form of global inequality in relation to the rule of law and the Third World Approaches to International Law?* will be answered. The rule of law is built on three themes: government limited by law, formal legality and the rule of law, not man. The theory solicits that states must address failures to adhere to laws and norms, regardless of who the perpetrator is. Furthermore, formal legality entails prospective laws that are public, equal in applications, general and specific. Lastly, the rule of law interpolates that legal officials and judges must interpret and apply the law unbiasedly. TWAIL aims to unveil hierarchies within the international legal system and unearth power relationships within the international community. TWAIL further aims to unveil oppression, dominance, and injustice patterns in the legal system.

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[137] International Criminal Court, Appeals Chamber. Situation in Darfur, Sudan in the case of *the Prosecutor v Omar Hassan Ahmad Al-Bashir*. Judgement in the Jordan Referral re Al-Bashir Appeal. ICC-02/05-01/09 OA2. 06.05.2019. p.36

[138] Bianchi, Andrea. *International law theories: An inquiry into different ways of thinking*. Oxford University Press, 2016. p.219

Returning to the research question and the initial purpose of the paper, several conclusions have to be pointed out. As has been evident throughout the thesis, the Court's objective is to end impunity. However, the Court has to adhere to requirements that protect individuals' human rights, such as the right to a fair trial. The research findings state that the Court had to confirm that there was sufficiently compelling evidence to believe Lubanga committed war crimes to protect Lubanga from being wrongfully convicted or charged. This demonstrates that the Court must conduct hearings and trials in a manner that adheres to the rule of law by delivering justice within a reasonable time by competent, independent, and impartial judiciaries. The Court cannot be selective in its justice when prosecuting an individual, at least in the confirmation hearing of the Lubanga case. One can conclude that protecting the accused against unfounded charges is an example of the Court adhering to formal legality. Equivalent to formal legality, TWAIL criticises that today's international law still adheres to colonialism since the West needs to intervene in the South, such as in DRC.

However, the Court faulted in other aspects of the Lubanga case. One could argue that the Court violated the right to a fair trial, since the Prosecution utilised evidence procured in violation of the Congolese Code of Procedure, internationally accepted human rights and the Rome Statute. Furthermore, the Court violated the right to a fair trial since the Court did not verify the identities of the witnesses and the document's credibility or reliability. Because the Court is willing to use unreliable evidence that damages the proceeding's integrity to end impunity, it demonstrates that the Court is furthering selective justice. Therefore, the Court did not adhere to the rule of law in executing impartial trials.

Furthermore, the Court had difficulties fulfilling some of the Rome Statute's requirements within the Lubanga case; such as requirements stated in the RS since the Prosecution did not disclose exculpatory evidence. The Prosecution decided to exclude crucial testimonies and documents that rendered the trial unfair, thereby Lubanga should have been acquitted. One could argue that the prosecutorial violations and the disclosed exculpatory evidence undermined the reliability of the Prosecution's evidence. In consequence, the Prosecutor violated their statutory duties and did not remain independent and, more importantly, did not respect Lubanga's human rights to impartiality and fairness in court proceedings. Consequently, the trial was rendered unfair.

The rule of law asserts that equality before the law denotes that even the most highly placed officials, for instance, Lubanga and al-Bashir, are not above the law. Based on this, we can conclude that the official capacity of a head-of-state does not exempt an individual from criminal responsibility. However, this leads to the question of whether the Court should have the authority to

exempt obligations under customary law. Moreover, this begs the question of whether the Court should be able to prosecute individuals from non-statutory parties and if the UNSC should be able to refer any situation to the Court. However, as stated before, the UNSC has only referred situations within Africa and African non-statutory parties, such as Darfur. The court cases illustrate that a Prosecutor may receive consent to initiate an investigation on behalf of the PTC at the beginning of an investigation. This shows that even if the Court is not biased, the UNSC and Prosecutors can still be biased and exploit the Court to do their bidding. The UNSC and Prosecutors can align the Court's endeavours with their political interests, inevitably making or contributing to the Court being biased and politicised. However, the UNSC's and veto states predominant disposition over the Court may lead to a rule by judges or the government since they have the authority over the interpretation and application of rules and laws. Tamanahan expresses that rule by judges and government facades the apparition of usurpation of power by an inexplicable elite. The UNSC and the Prosecutors may treat political issues as law matters and hide political verdicts under the guise of legal exegesis to further their interests. One can draw parallels to TWAIL, which unveils that, in this instance, the UNSC and Prosecutors can use their power relations to further their political interests of only prosecuting African individuals. TWAIL also insists that international law is based on former colonial values, such as the West's need to educate the uncivilised South. Therefore, the UNSC and prosecutors can choose which situations will be investigated to uphold Eurocentric values and dominate African states. Thus, the Court is justified in using force in the form of humanitarian intervention to transform the African states to behave and look like the rest of the so-called civilised world.

The UNSC only referring African situations confirms that the UNSC has chosen to promote Eurocentrism. The African bias is problematic since it draws attention away from other situations that may be more troublesome, critical and display the international community's interests. The UNSC and Prosecutor's actions further the African bias and the perception that Western states must intervene and expedite their Eurocentric law on colonised states. The rule of law implies that governments or courts should not misuse their authority or power to push an ideology or preference, such as the UNSC. Veto states have also utilised different mechanisms to align the Court's investigations and proceedings with their biased political interests. As proclaimed in Chapter 3.4, veto states have blocked UNSC's referrals. However, the veto states have only blocked referrals outside Africa, such as Syria and Israel. The veto states blockage of referrals for situations outside of Africa confirms that the Court may transform into another mechanism that upholds a Western ideology.

Tamanaha emphasises that powerful and less influential states disregard international law when they deem it necessary for their interests, or to preserve the regime's power, the prime exemplar being the USA. Tamanaha expresses that the number of individuals who have escaped responsibility for their crimes far outweighs the total of individuals whom the Court has investigated. Furthermore, the Court does not have the authority to investigate and prosecute powerful states, explicitly veto states, which is also corroborated by the USA vehemently rejecting to sign the RS. Moreover, Valarie Arnould expressed that the Court cannot promote equal and universal international order and highlights the concerns that the Court is evolving into an instrument powerful states use to control weaker states. I believe the African cases and the referrals confirm that the Court has become a Western hegemonic phenomenon that unfairly prosecutes postcolonial African states while protecting the veto state's political leaders and interests. In addition, the Court's refusal to prosecute leaders from the West show-cases that the Court and the UNSC favour Western states. The refusal to prosecute non-statutory parties such as China and the USA for grave human rights violations further demonstrates the Court's African bias. This substantiates that the Court cannot be distinguished as a credible and independent international court that adheres to the rule of law and upholds the human right to a fair trial.

It must be stated that even if the Court cannot minimise inequalities between states, the Court can choose to prosecute states outside of Africa and not exploit the Third World. However, the Court has chosen to prosecute African states because they are easy targets for the Court to assert its authority, relevance, and effectiveness. The Court has also taken advantage of African states since the states do not have access to the same financial aid. Arnould further validates this, elucidating that African states lack the diplomatic and economic power to defend themselves. TWAIL also states that colonialism still exists today; the West uses conditionality policies to ensure that the alleged universal law and economic dominance do not cease to exist. In this instance, the Court uses legal mechanisms built upon Western hegemony. The Court's disregard for customary law has also led scholars like Arnould to believe that the Court should consider the state's infrastructures and that the Court's investigations disturbed peacebuilding processes, national interests, such as within Sudan. The Court's furthering of financial advantages and global inequalities is demonstrated by the Court's refusal to prosecute veto states. In my opinion, the Court is biased against Africa because the Court has chosen to prosecute weaker states and not well-functioning democracies with strong judiciaries, such as the USA or European states. One can draw parallels to the rule of law also implies that states are unequal in power and strength, which creates severe problems for the functioning of the rule of law in the international legal system.

The legal analysis has shown the unambiguous relationship between customary international law and the Court. Third World states apply higher virtue to the international customary law, which is evident in the al-Bashir case, Sudan and Jordan's relationship, and the Court needed to base its decisions on customary law to substitute for non-existing regulations of head-of-state immunity. Moreover, in the Lubanga case, the defence could not use a child's consent as a valid defence for the war crime of recruiting children since it is well established in customary international law. Nevertheless, this juxtaposes the Court's need to implement universal criminal accountability norms to end impunity, such as violations against *jus cogens-norms*. Therefore, the Court needs to rely on customary law when basing its decisions, which can arguably be the most reasonable and most legitimate starting point today. However, it seems to boil down to the issue of legal traditions between international criminal law and international customary law. Neither is more suitable; however, one can be more applicable than the other within specific circumstances. One can draw parallels to TWAIL, how the European expansion has ensured that European international law has become universal. This has also led to the Western international legal system being seen as superior and often ignoring customs within the Third World. Therefore, the Court must find an appropriate balance between the Court's goal of ending impunity and the need for international customary law.

It is worth pointing out that international law is often regarded as either the solution or the problem of the world's injustices. International law and, in this instance, the Court has the potential to create a fairer international law, for example, ensuring the human right to a fair trial. However, current international law is built upon power structures, as seen in the court proceedings. Furthermore, the international community and the Court have all the tools to create change but prefer to continue contributing to hegemonic tendencies by the West and empty promises of objectivity and universalism within international law. Therefore, international law is once again an enigma for a force for evil, good or, most plausibly, an empty shell. From this, we can conclude that the Court has the potential to end impunity and become a respectable and effective justice mechanism. However, the Court must eliminate its bias against Africa to create a fairer international law and respect the human right to a fair trial.

Moreover, the Court must also base its decisions on universality and consider the international welfare of communities when prosecuting leaders or heads of state. Although, can the Court genuinely appeal to the notion that international criminal law is universal if the Court only prosecutes African leaders and promotes a Western ideology? In this instance, we can turn to TWAIL to answer this question, which conveys that the universality of international law is a fallacy since the

international legal system is a by-product of hegemony. In my opinion, the Court does not adhere to universality since the Court will ultimately adhere to combating impunity and reassuring the end of violence, regardless of the Court's complementary system of justice and regardless of individual state interests.

Africa is marred with human rights violations and has limited resources to administer justice. Therefore, the Court's involvement in Africa has allowed the states to rid of the worst offenders. The Court's involvement has also helped African states that could not bring the perpetrators to justice in national courts. Understandably, the Court's investigations in Africa have helped victims of human rights violations, and a myriad of women are grateful for the Court prioritising situations within Africa. In addition, the Court was acting according to the DRC's self-referral; the Sudanese victims and the international community will for justice when prosecuting Lubanga and al-Bashir to end impunity.

In my opinion, the core problem with the International Criminal Court is the Court's absence of a complete enforcement instruments and the Court’s reliance on states to collect evidence, arrest, and surrender perpetrators, which can burden the fluidity of the Court's decisions. The rule of law and human rights are inextricably bound; however, in the international legal system, human rights protection paradoxically depends on state cooperation for its effectiveness. However, statutory parties' obligations are twofold since states have obligations towards the Court but also to non-statutory parties. The Court's current practices contribute to states losing confidence that the Court will fulfil its mandate and may add or lead to a downward spiral of the Court. Consequently, for the Court to end impunity, the Rome Statute must apply equally to all individuals, whether from Africa or not. The Court's bias is evident since many African statutory parties have threatened withdrawal from the Rome Statute, which would have an enormous impact on the functioning of the Court. For the Court to continue being legitimate and impacting international law, the Court should find a balance between the purpose of prosecuting persons for the most severe crimes of international concern by adhering to the rule of law and, on the other hand, adhering to state parties and the international community interests.

This research has shown that the Court is biased towards Africa through selective justice, that the Court violates the human right to a fair trial, and that the Court's bias contributes to global inequalities. In addition to the research overview, the thesis investigation has contributed to an increased understanding of the Court's bias and the jurisprudential balance between the Court's goal of ending impunity and the right to a fair trial. Based on the following, future research could

investigate why the Court has not and cannot prosecute perpetrators outside of Africa and the Court's investigation of President Vladimir Putin's crimes against Ukrainian individuals. Further research could also be conducted regarding history repeating itself in Sudan. The Security Council and the Prosecution launched an investigation into the crimes committed this year. Future research could thereby question whether the Court's intervention in Sudan helped the state or whether the Court's African bias did not lead to peace and security.

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