The Convenience of Norms and the ICC

A Neorealist Explanation For Non-Cooperation

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Abstract

Since the ICC has already existed for roughly 13 years, a first assessment of the manner of its operations can be made. Based on ICC cases, this thesis first argues that the way the ICC conducts itself in international relations equates to constructivist's perceptions about international institutions. It does not possess the ability to coerce states to cooperate and behaves like a teacher, educating its members about justice and international criminal law, thereby spreading the accompanying norms. But what happens, if a member state does not adhere to its obligations towards the ICC? In 2010, indicted Sudanese President al-Bashir travelled to Chad without being extradited to the ICC. This poses a puzzle, since just a year before, in 2009, Chad was adamant that it would adhere to its obligations towards the ICC and extradite him, should he enter Chadian territory. Based on the constructivist perception about the ICC, this thesis will conduct a case analysis on Chad's foreign policy shift in order to illuminate that ICC member states base their policies and alliances on neorealist security considerations. Through the chosen case study, this thesis aims to shed light on the clash between the constructivist approach the ICC is taking to reach its goals and the neorealist considerations that shape ICC member states' foreign policies.

Introduction

Since the end of the bipolar Cold War, the International Relations (IR) scholarship experienced a new wave of IR theories that attempted to account for the changing dynamics of international relations. Whilst realism prevailed throughout the years of the Cold War, new IR schools such as constructivism have emerged. IR scholars oftentimes find themselves utilizing different IR theories to explain various IR phenomena. Moreover, new international institutions are entering the global arena, each introducing its unique structure and objectives in the realm of international relations. Amongst one of the most remarkable establishments is that of the International Criminal Court (ICC or the Court). Its mere establishment baffled realists, who could have never imagined governments would pool such significant parts of their sovereignty in a multinational judicial institution. Scholars of constructivism however were well suited in explaining the creation of the ICC. Most significant is that one of the ICC's objectives is to fight impunity, which opposes a norm that has guided the conduct of conventional international politics in the past. This poses a theoretical puzzle, as the IR school of realism fails to provide an explanation for the described developments. But does this mean that realism and derivatives such as neorealism entirely lose their value in IR scholarship?

The puzzle gains complexity when examining the way in which the ICC has operated since becoming operational in June 2002. Based on the cases the ICC worked on so far, how can one characterize the approach the Court has been taking towards achieving its objectives? Moreover, according to the ICC's founding treaty, the Rome Statute, ICC member states are obliged to cooperate with the court in its investigations and prosecutions.[1] But what happens, if a member state does not adhere to its legal obligations to the Court?

As a consequence of the atrocities committed in the Darfur crisis in the early 2000's, the ICC indicted Sudanese President Omar Hussein al-Bashir for five counts of crimes against humanity, two counts of war crimes and three counts of genocide, after the United Nations Security Council (UNSC) referred the case to the ICC. Since his

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[1] *See* Rome Statute, *supra* note 6, art. 98

indictment in 2009, however, al-Bashir remains President of Sudan and continues to travel to other ICC member states without repercussions. Most remarkable amongst them is Chad, which is the first ICC member state that has welcomed a President, indicted by the ICC, without extraditing him to the ICC (Riche 2010 and Barnes 2011). Does the ICC have the power to coerce Chad into fulfilling its obligations towards the ICC? This begs the first research question: What IR theory best suits the approach the ICC is taking to achieve its objectives?

The outlined conundrum further gains complexity, when considering that a year before Chad received al-Bashir in 2010, it presented itself as a fierce supporter of the ICC, stating that it would extradite al-Bashir to the ICC, should he enter Chadian territory. However, this did not happen. Instead, al-Bashir encountered a red carpet and was given a symbolic key to Chad's capital when meeting Chadian President, Idriss Deby. This begs the second research question: What IR theory best explains Chad's shifting foreign policy towards Sudan and the ICC?

In order to illuminate the clash between the way the ICC tries to reach its objectives of fighting impunity and global injustice and the actual forces shaping countries' foreign policy decision making processes, this thesis will analyse the following issues. First, the ICC's approach on the stage of international relations will be examined, whilst highlighting its similarities to the IR theory of constructivism. Second, a qualitative single case study on Chad's foreign policy's shift towards Sudan and subsequently the ICC will be conducted under the guidance of theory-based systematic process tracing, ultimately showing how neorealist assumptions about international politics have shaped the foreign policy of Chad.

Chapter I: Constructivism and the ICC

> An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred

to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of the Statute.

– Article 1 of the Rome Statute

As stipulated in Article 1 of the founding treaty of the ICC, the Rome Statute, the Court aims to prosecute the most serious crimes of international concern. In doing so, the treaty stipulates that the official rank of the individual perpetrator does not shield him or her from an ICC persecution. Interestingly, it claims that it possesses "the power" to exercise its jurisdiction. But does the Court really posses the power to pursue and achieve its objectives? Many scholars would argue to the contrary (Tiemmessen 2014, Gegout 2013, Chapman and Chaudoin 2013, Barnes 2011). IR scholarship covers the wide spectrum of perceptions about the ICC, ranging from a sceptical realist stance, which perceive international institutions such as the ICC as a tool for states to spread their interests (Waltz 1979) to a more optimistic constructivist stance, which view the ICC as an agglomeration of ideas that derive from individual actors (Fehl 2004). Since the Court is still relatively new, most IR scholars examine the phenomena of why most nation states give up parts of their sovereignty when ratifying the Rome Statute. But now that the Court functions for roughly 13 years, can one already categorize what IR theory best suits the approach the ICC is taking to achieve its goals? In order to assess which IR theory best suits the categorization of the ICC's approach, its mission and mandate will be examined in light of constructivism.

Constructivism: A Theoretical Autopsy

In international politics the appropriate concerns… of system theory are twofold: first, to trace the expected careers of different international systems, for example, by indicating the likely durability and peacefulness; second, to show how the structure of the system affects the interacting units and how they in turn affect the structure.

-Waltz 1979: 40

Conventional constructivist political theory holds the opinion that the formation of structures and institutions derive from the interaction of shared ideas. In this way, constructivism seeks to explain systems and the interaction between systems and their parts. The systemic constructivist Alexander Wendt reduces the central focal points of neorealism and neo-liberal institutionalism revolving around anarchy and power politics, and instead argues, "anarchy is what states make of it (Wendt 1992). In line with this view, economic and military capabilities are not the primary variables influencing international politics, but rather how individual states interpret and perceive the global system and the distribution of capabilities within it (Hopf 1998:177). Since constructivists like Wendt do not disregard the systemic forces influencing nation-states' behaviours, these constructivists are referred to as systemic constructivists.

Constructivists take a more complex approach to analysing international relations by prioritizing ideas and human consciousness, thus the core assumptions are of holism and idealism (Baylis, Smith, Owens 2010). Holism is the belief that structures cannot be decomposed into individual units and their respective actions, since the structure itself is the agglomeration of individual preferences. In turn, structures construct and do not solely constrain actors, as is believed in neorealism (Baylis, Smith, Owens 2011: 163). Idealism refers to the view that ideas shape how we perceive our interests and ourselves. In this context, the value of material forces depends on what value humans ascribe to them (Baylis, Smith, Owens 2011: 163).

The two central notions of holism and idealism highlight the importance of inter-subjective meanings, which we attach to social contexts (Hopf 1998 and Katzenstein 1998: 679). Constructivists do not disagree with the mere perception of the international system as anarchic, but hold the optimistic opinion that the effects of this system are dependent upon its actors' interpretations. Moreover, scholars from this strand of IR also acknowledge that states try to survive, but that the way in which states pursue this is open to interpretation (Weber 2009: 67). According to Wendt, the neorealist notion of self-help, which derives from the constraints of the anarchic international system, is to be perceived as an institution in itself. This is the case

because all states subscribe to the same thoughts and beliefs concerning this specific matter and in turn act accordingly, thereby creating a self-fulfilling prophecy.

In moving away from the analysis of quantifiable forces (military capacities and so forth), constructivism shifts the focus towards the relationship between structure and agency, as well as the internal configurations of the state and its institutional interests. With this shift, constructivism does not possess the ability to measure the success or failure of international institutions, but rather questions the core assumptions about the international system offered by conventional IR theories. Constructivists assert that international organizations too are constructed concepts, which attempt to uphold and spread their inherent values and ideologies.

In her book (1996), the systemic constructivist scholar, Martha Finnemore, argues that international institutions can teach states how to act. She finds that norms of the international society are transmitted to states though international institutions. One the one hand, nation states learn from other states how to act and react to international institutions, but international institutions themselves have the capacity to teach states about problems and how to best resolve them. In fact, institutions are perceived as teachers who can shape attitudes of states and shape their reactions in order create norms. In a case study conducted in her book, she analyses that the International Committee of the Red Cross, for example, is able to bring attention of states to the sufferings of war. Thereby the Red Cross influences the norms and values of state actors, shaping their interests and their subsequent actions.

Zooming in on the role of constructivism in foreign policy, a final relevant remark is to be made. The constructivist Jeffrey Checkel opposes the neo-realist and neo-liberalist view that foreign policy is purely rational. He believes that these positivist approaches portray foreign policy making as asocial, since their rationalist approaches to the analysis of foreign policy assume there to be no significant effects of "meaningful interaction with broader social environment[s]." (Checkel 2008: 74-75). Lastly, he draws the distinction between conventional and interpretive constructivists. While conventional constructivist see "language as acts of arguing and persuasion that may cause a foreign policy decision maker to change his/her mind on an issues", interpretive constructivist conceive language as "structure of meaning –discourses-

that make possible certain foreign policy actions"(Checkel 2008: 76-77). In short, the type of language applied is believed to have an effect on foreign policy decisions. Before connecting constructivism to the way the ICC is conducting itself in international relations, the structure and jurisdiction of the Court will be summarized.

ICC's Jurisdiction

The objective of the ICC is to punish the most serious crimes committed at an international level and to bring the individual perpetrators to justice, regardless of their official rank.[2] The conventional norm of immunity is thereby lifted, as the Court's jurisdiction applies to all persons, regardless of their official capacity.[3] The crimes over which the Court exercises jurisdiction are categorised into a) the crime of genocide b) crimes against humanity and c) war crimes.[4] The definition of the fourth crime, the crime of aggression is scheduled to be voted upon by the ICC's Assembly of States Parties in the year 2017, after which – if it is passed successfully- it will be incorporated into the mandate of the ICC.[5] The specific definitions of these crimes are not relevant to this paper and will thus not be elaborated upon. Noteworthy, however, is that the crimes committed must be of 'severe gravity'. Based on these criteria, the prosecutor has on occasion turned down cases due to the lack of severe gravity, when contrasted with other atrocities the international community faces.[6]

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[2] *See* Rome Statute, *supra* note 19, art. 1, (informing that the ICC has the ability to punish individuals that have "committed the most serious crimes of international concern"; *see also* Prosecutor vs. al Bashir, Case No. ICC-02/05-01/09, *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir,* at 15 (March 4th, 2009), http://www.icc-cpi.int/iccdocs/doc/doc639096.pdf - accessed 09.05.2015

[3] *See* Rome Statute, art. 27(1).

[4] *See* Rome Statute, *supra* note 19, art. 5

[5] *See* http://www.icc-cpi.int/en_menus/icc/about%20the%20court/frequently%20asked%20questions/Pages/15.aspx - accessed 09.05.2015

[6] In 2010, a case was rejected by the ICC Prosecutor, as the crime did not constitute a crime of sufficient 'gravity'. *See*: http://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53%281%29-Report-06Nov2014Eng.pdf - accessed 10.05.2015; *see also Yonah, Jeremy Bob. 2014. "ICC's ruling says that the incident did not rise to the level of severity of broad-based war crimes allegations which the ICC is empowered to deal with." Jerusalem Post. 11.06.2014.*

There are three mechanisms through which one of the three crimes mentioned above can be referred to the Court. First, a member state can refer a crime to the ICC prosecutor. Second the UNSC can refer crimes to the ICC. Finally, the ICC prosecutor can open an investigation.[7] The ICC only exercises jurisdiction within the territories of its member states, unless the UNSC refers a case to the ICC, as was the case with the indictment of al Bashir.[8] In that situation, ICC's jurisdiction is expanded to the territories of the parties involved. It must be stressed that the ICC only opens an investigation, if –in line with the principle of complementarity- it finds that the domestic legal system of the country in consideration is "unwilling" or "unable" to prosecute the alleged perpetrator.[9]

The principle of complementarity gives primacy to the domestic legal system of member states of states. In order for this to occur, member state need to assimilate international legal norms into their domestic legal system and bring it on par with the standards of international criminal law, as delineated in the Rome Statute. In this way, the ICC spreads norms accompanying the definitions of international crimes to its member states, an effect that will be discussed in the final section of this chapter.

The Issue Of Non-Cooperation

> The ICC is only as strong as its enforcement capacity, and it is dependent on states for crucial assistance during all stages of proceedings, particularly for the capture and extradition of indicted individuals.
> -Eric Neumayer (2009: 660)

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http://www.jpost.com/Israel-News/ICC-rejects-pro-Turkey-war-crimes-allegations-against-IDF-in-Gaza-flotilla-raid-380955 - accessed 15.05.2015.

[7] *See* Rome Statute, art. 13

[8] *See* Relationship Agreement between the United Nation and the International Criminal Court, Oct. 4, 2004, U.N. Doc. A/58/874, arts. 2,3 (recognizing that although the ICC is independent, the ICC and the UN cooperate); *see also* Rome Statute, supra note 6, art. 13(b)

[9] *See* Rome Statute, *supra* note 19, at 11

ICC's member states are –as stipulated in the legally binding Rome Statute- obligated to cooperate with the ICC in its investigations and prosecutions.[10] If, however, a member state fails to meet this obligation, the Rome Statute does not provide an independent mechanism with the power to coerce its member state to cooperate. The Rome Statute states that in the case of non-cooperation, the ICC can "refer the matter to the Assembly of States Parties (ASP) or, where the Security Council referred the matter to the Court, to the Security Council."[11] In short, the ICC does not have independent mechanisms to coerce states to adhere to their obligations. Needless to say, this characteristic does not reflect the notion of an institution that possesses the ability to facilitate its ambitious objectives, such as fighting impunity and arresting incumbent heads of state, as in the case of al-Bashir.

In domestic state apparatuses, the judicial system makes use of other state organs, such as the police force. The ICC, on the other hand, does not posses its own police force. What happens, if a state fails to meet its obligations? Countries that did not cooperate in the arrest and surrender of al-Bashir have -at most- been subjected to verbal condemnation by the Court and NGO's.[12] Considering that al-Bashir continues his presidency in Sudan and still travels to other ICC member states[13], it has been shown that these verbal condemnations do not carry sufficient weight to make ICC member states comply with their obligations towards the ICC.

Matters are complicated even further, when the UNSC refers a crime that has not been committed in the territory of an ICC member state to the ICC. In this case, the ICC can refer the case of non-cooperation to the UNSC. This has been the case for Chad, after it allowed al-Bashir to enter its territory, despite having ratified the Rome Statute. The ICC made requests to the UNSC, ICC's ASP and Chad to support it in its

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[10] See *Rome* Statute , *supra* note 19, art. 86-87, at 60 (asserting that member states must "cooperate fully wit the Court in its investigation and prosecution of crimes within the jurisdiction of the Court" and that the ICC may make specific requests to the member states asking for cooperation).
[11] *See* Rome Statute art. 87(7), at 61; *also see Kaul & Kress,* supra note 38, at 217 (arguing that although the Rome Statute gives the ICC the ability to refer to the UNSC, there is no "explicit solution" described in the Rome Statute).
[12] *See* http://www.iccnow.org/?mod=darfur - accessed 25.05.2015
[13] *See* http://bashirwatch.org/ for updated list of countries al-Bashir has travelled to since his ICC indictment in 2009 -accessed 28.05.2015

investigations against al-Bashir on numerous occasions, but the response has been ineffectual, resulting in a deadlock for the ICC and its objectives.

The Clash Of ICC's Objectives And The Customary International Principle Of Head Of State Immunity

In the past, conventional diplomacy was facilitated through the concept of diplomatic and head of state immunity, as stipulated in the Vienna Convention on Diplomatic Relations, which was adopted on 18 April 1961 and implemented on 24 April 1964. The treaty put forth that government officials are immune to the laws and regulations of third party states. Even though the treaty is considered customary international law, recent developments in international law seem to suggest that this customary law is in flux.

Prime examples for the changing status of immunity under customary law are the *ad hoc* criminal tribunals, such as the International Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the Special Court for Sierra Leone that were established by the UNSC. All of these tribunals were founded to prosecute the most heinous crimes, many of which were orchestrated by high-ranking government officials. These tribunals clearly state the perpetrators will not be granted immunity based on their official rank.[14] As with the ICC, these tribunals were established to prosecute the worst international crimes regardless of the perpetrator's official rank. This shows that the international community acknowledges the need to prosecute those individuals that are responsible for the most heinous crimes and that their official rank should not hinder these prosecutions.

According to Article 27 of the Rome Statute, the ICC will "apply equally to all persons without any distinction based on official capacity. In particular, official capacity of Head of State of Government… shall in no case exempt a person from criminal responsibility under this statute."[15] This Article however appears to clash not

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[14] *See* Statute of the Special Court for Sierra Elone, *supra* note 107, art. 6(2); ICTR Statute, *supra* note 110, art. 6(2); ICTY Statute, *supra* note 107, art. 6(2).
[15] *See* Rome Statute, *supra* note 6. Art. 27(I).

only with the customary international principle of head of state immunity, but also with Article 98, which states "The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with obligations under international law with respect to the State of diplomatic immunity of a person or property of a third state, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity."[16] Thereby Article 98 is designed to avoid any tensions between requests from the Court, with which States Parties are to comply, and customary international law providing immunity from national proceedings for officials of third states.

The most common interpretation of the effects of these two Articles is that a state party may not claim immunity for its own officials, but must respect the immunity of the officials of non-state parties. But what happens, when the UNSC refers the case to the Court. Is a third party then still to be considered as such, since ICC's jurisdiction widens to all UN members? Unfortunately the Rome Statute does not provide for a clear distinction, leaving this matter open to interpretations. Consequently, organisations like the African Union and Arab League that oppose the indictment of al-Bashir, utilize this ambiguity to substantiate their opposing views.[17] Opposing this ambiguity, Bohlen (2010) correctly notes that since Sudan is a member of the UN and the UNSC has a special relationship with the ICC, al-Bashir's indictment is sound. This is so, because the UNSC has the power under Chapter VII of the UN Charter to maintain peace. Resolution 1674 affirms it to have "the responsibility to protect populations from genocide war crimes, ethnic cleansing and crimes against humanity."[18] Nothing is mentioned about the UNSC not being allowed to utilize a third party to achieve this goal, thereby legitimizing the use of the ICC. This means that despite arguable ambiguities, the ICC continues to contribute to the demise of the customary law revolving around impunity.

Teaching About Justice

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[16] *See* Rome Statute, *supra* note 6, Art. 98(1).
[17] *See* Trevelyan Laura. 2008. "UN Urged to Support Sudan Arrest." BBC News. 04.12.2008. http://news.bbc.co.uk/2/hi/africa/7892063.stm - accessed 29.05.2015.
[18] *See* UNSC Resolution 1674 | 4, U.N. Doc. S/RES/1674 (28.04.2006).

> This court is not just a system for punishment, it established law … [.s]o, one case in the Court makes the reality in the world.
>
> -Luis Moreno Ocampo[19]

This statement perfectly resembles the social constructivist approach the ICC is taking. As a relatively new institution, its first steps define the scholarship of international criminal law. Whatever rulings are made in the beginning, will set the precedence for the future decisions to come. With its 123 member states, it is thereby spreading norms accompanying international criminal law. But the Court does not only spread norms on an institutional level, meaning from the ICC to the domestic legal systems of its members, but also in the field in which it operates.

When engaging with victims and witnesses affected by the crimes that fall under ICC jurisdiction, ICC field workers oftentimes find themselves teaching the affected individuals about their rights. It has to be stressed that many of the affected communities live in deplorable living conditions. In the case of the Darfur crises, countless NGOs and other multilateral institutions like the UN dedicated significant resources to cope with the resultant influx of refugees. This shows that the ICC does not just establish law on an institutional level, but also teaches affected individuals about justice, as the affected communities oftentimes are not familiar with the international criminal legal system.

The Indictment Of Al-Bashir By The International Criminal Court

In 2003, two rebel groups, the Sudan Liberation Army (SLA) and the Justice and Equality Movement (JEM), launched major offensive strikes against the Sudanese government. The rebel groups felt politically marginalized and excluded from Sudan's economic development. The brutal government response and its utilization of

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[19] *See* International Criminal Court "Working to Protect African Victims", AMNESTY INT'L. 5.03.2009. http://www.amnesty.org/en/news-and updates/featurestories/in ternational-criminal-court-working-protect-african-victims-20090305 - accessed

the Janjaweed, an Arab militia, resulted in violent clashes with the rebels and the loss of countless civilian lives. According to *United To End Genocide*, so far the conflict has claimed approximately 300,000 lives and resulted in 2.7 million peoples internally displaced, of which 200,000 fled to neighbouring Chad.[20]

The deteriorating situation that resulted from the crisis in Darfur triggered a UNSC Resolution in March 2005 that referred the situation to the ICC. Four years later, on 4 March 2009, the ICC issued an arrest warrant for al-Bashir on five counts of crimes against humanity and two counts of war crimes. On 12 July 2010, the ICC issued a second arrest warrant for al-Bashir on three counts of genocide. This marked the first time the ICC issued an arrest warrant based on the crime of genocide.

Chad's Non-Cooperation In The Case Of The ICC Indictment Of Sudanese President Omar Al-Bashir

On 13 December 2011, the ICC's Pre-Trial Chamber I found that Chad had failed to cooperate with the Court in the arrest and surrender of Omar Al Bashir during his visit on 7 and 8 August 2011. On 26 March 2013, the Pre-Trail Chamber II issued a 2nd decision in relation to Chad, as Chad had again failed to cooperate with the Court in the arrest and surrender of al-Bashir on the 16 and 17 February 2014. Both decisions were referred to the President of the ICC for transmission to both the UNSC and the ASP. Neither the UNSC, nor the ASP has provided sufficient response to ICC's referrals.[21]

The lack of support has prompted the current prosecutor of the ICC, Fatou Bensouda, to halt efforts of the ICC's Office of the Prosecutor (OTP) to further investigate into

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[20] *See* Dullaghan, Neil. "The Crisis in Darfur."
http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-darfur - accessed 28.05.2015
[21] *See* United Nations Security Council Resolution 1593 and 1970, of which both do not formally express support for the Court, most likely due to China, who holds a Veto power and who still invites Bashir to Beijing.

the crimes committed in Darfur, Sudan.[22] In her statement to the UNSC on the situation in Darfur in December 2014, she clearly states: "Faced with an environment where my Office's limited resources for investigations are already overstretched, and given this Council's lack of foresight on what should happen in Darfur, I am left with no choice but to hibernate investigative activities in Darfur as I shift resources to other urgent cases, […]."[23] In addition, in the conclusion of her 20th report to the UNSC, she reiterates that "without stronger action by the Security Council and State Parties, the situation in Sudan is unlikely to improve and the alleged perpetrators of serious crimes against the civilian population will not be brought to justice."[24] The ICC Prosecutor has in her reports to the UNSC stressed that its support to the ICC is of utmost importance, when attempting to bring justice to the victims. Since the UNSC has not taken any concrete actions, the ICC's investigations can not be continued and thus, she is forced to halt investigative efforts into this case.

The lack of an independent ICC enforcement mechanisms, its high dependency on member states' cooperation, the ASP and UNSC, and the lack of action taken by these three entities in regards to ICC's operations, illuminate once again how the ICC is struggling to reach its objectives. As a result, Prosecutor Bensouda has no other choice but to stress the importance of the ICC and its objectives. In doing so, she attempts to raise awareness about the grave injustices of the world, hoping for nation states to align themselves with the stance of the ICC in its fight against the injustices. How this results in a constructivist approach to international stage will be elucidated in the final section of this chapter.

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[22] See UN News Centre. 2014. "Security Council inaction on Darfur 'can only embolden perpetrators' – ICC prosecutor". http://www.un.org/apps/news/story.asp?NewsID=49591#.VU4URtqqqko - accessed accessed 09.05.2015; *see also* AFP, Reuters and AP. 2014. " ICC suspends Darfur crime investigations over 'lack of action'. http://www.dw.de/icc-suspends-darfur-crime-investigations-over-lack-of-action/a-18126467- accessed 09.05.2015

[23] *See* Statement to the UNSC on the Situation in Darfur, pursuant to UNSCR 1593 (2005) http://www.icc-cpi.int/iccdocs/otp/stmt-20threport-darfur.pdf - accessed 09.05.2015

[24] *See* 20th report of the Prosecutor of the ICC to the UNSC pursuant to UNSCR 1593 (2005). http://www.icc-cpi.int/iccdocs/otp/20th-UNSC-Darfur-report-ENG.PDF - accessed 09.05.2015

Constructivism And The ICC

The preliminary discussion has substantiated the claim that the approach the ICC is taking to reach its objectives in the realm of the international system reveals significant similarities to the constructivist perception of international organizations. This claim is rooted in the following reasons. First and foremost, the ICC challenges the concept of immunities granted to sitting head of states, a once-thought-to-be customary international law. Moreover, it aims to teach its members about justice. Thereby, the ICC is taking upon itself the role of a teacher, teaching states about a new set of norms accompanying international criminal law, as embodied by the ICC. This heavily overlaps with the view of the constructivists Jeffrey Checkel and Martha Finnemore, who see international institutions as tools to spread the norms of the international community. According to Finnemore, international institutions have the potential to challenge and shape countries' norms and ideologies. In line with this perception, the ICC teaches nation-states how to act and behave in certain circumstances. "Constructivism is about human consciousness and its role in international life […] rests on […] the capacity and will of people to take a deliberate attitude towards the world and to lend it significance [by acting according to that attitude]" (Ruggie 1998:855). Former ICC Prosecutor, Luis Ocampo, agrees with this, stating that the ICC establishes law, meaning that it attempts to bring justice to communities that are not familiar with this construct. The claim that the ICC behaves like a teacher of international criminal law is further substantiated when considering the principle of complementarity. Through this principle, domestic legal systems have been brought on par with the standards of the ICC.[25] This shows how the ICC, in line with the constructivist view on international organizations, aims to teach its members about the importance of fighting global injustices.

Second, due to the limited mandate of the ICC, it is dependent on the UNSC and the ICC's ASP to cope with issues of non-cooperation. If however these two fail to take sufficient action, the ICC solely depends on verbal means to further its objectives.

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[25] *See* ICC OTP. 2003. "The principle of complementarily in practice." http://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf - accessed 29.05.2015

This was to be seen in the previous section, which highlighted how –in the case of Chad's non-cooperation- the inaction of the UNSC and the ASP result in a deadlock for the ICC's investigations. This overlaps with the constructivist Ruggie stating that nature of international relations depends on the willingness of its members. Current ICC Prosecutor Bensouda, made this clear when addressing the UNSC, stressing the importance of these organs to support the ICC. In doing so, she attempts to shape the norms and ideologies of the respective nation-states and assimilate them with those represented by the ICC.

In conclusion, this chapter has pointed to the IR theory of constructivism best describing the approach the ICC is taking to achieving its goals in the international arena. The ICC challenges the once customary international law of high-ranking government officials remaining immune from prosecutions when committing grave injustices. Consequently, it teaches its members, as well as other actors of the international system, a new set of norms that have by now come to be agreed upon and accepted by the international community. , Despite major powers like the US, Russia and China not ratifying the Rome Statute, the fact that the ICC currently has 123 member states further shows that a majority of the international community, which comprises 193 nation states, is in favour of the ICC and the norms accompanying its objectives.

Chapter II: Neorealism And Chad's Foreign Policy

Neorealism: A Theoretical Autopsy

In order to illuminate how systemic security considerations triggered Chad's foreign policy change, the underlying assumptions of neorealism will be outlined. Special attention will be paid to the notion of foreign aid, alliance formation, bandwagoning and balancing in the context of neorealism, as they are of particular interest to the to-be-conducted case study analysis.

Unlike classical realists, who believe the root cause of conflict to derive from human nature, neorealists argue that the origin of conflict lies in the unregulated and anarchic structure of the international system (James 2002). Within this international system

there are primary and formally equal actors, namely sovereign states, who do not recognize any higher authority. The lack of authority creates a security dilemma, in which states can never be sure of each other's intentions, and therefore arm themselves for the sake of security, which in turn causes other states to feel insecure and arm more heavily (Waltz 1990:117). Subsequently, a system based on the principle of 'self-help' is created (Zakaria 1998). Due to this environment, states replicate each other on the unit level in order to stay competitive, ultimately leading to the balancing behaviour. Given this view, neorealists claim that countries base their foreign policy on the existence of what they see as a Darwinian world in which power is the key to the national survival of the fittest. Sterling-Folker writes: "In an environment as dangerous as anarchy", those who ignore realist principles will "ultimately not survive" (Sterling-Folker 1997; 18).

The renowned neorealist Kenneth Waltz (1979) dismisses classical realism, because he perceives it to be an idea revolving around power, rather than a complete theory like neorealism (Waltz 1990: 71). To date, neorealism has been divided into two main categories, namely offensive and defensive realism. Waltz's version of neorealism has been labelled as defensive neorealism, while John J. Mearsheimer is a renowned scholar of offensive neorealism. Both offensive neorealist John J. Mearsheimer and defensive neorealist Kenneth N. Waltz root their perceptions about international relations in the following assumptions: a) the international system is anarchic b) states focus on their own survival and c) states tend to balance against the strongest by developing their relative power capabilities through internal means, such as strengthening their military capabilities and, if possible, by external means, such as alliances (Mearsheimer 2001 and Waltz 1979).

Defensive and offensive neorealists differ, when interpreting the abovementioned assumptions and making predications about what strategies states pursue, when pursuing survival. Offensive neorealists believe that in order to ensure survival, states strive towards military hegemony, which implies conquering and dominating other nations. Defensive realists believe this to be unnecessary and take a more moderate position, arguing that states must be strong enough to resist potential aggression. Defensive neorealists take their analysis a step further and counter-argue offensive realists, making the claim that if states do pursue military hegemony, it antagonizes

other states, incentivising them to punish the state striving towards hegemony. According to defensive neorealists, military expansion only occurs when the setup of the international system is favourable towards it, meaning there is a power vacuum. Overall, however, defensive realists take a more nuanced stance and believe that if a state pursues security and survival, moderate strategies are the most conducive to survival.

Walt (1985) modifies the popular neorealist theory of 'balance of power' and offers interesting insights into the dynamics of alliance formation. Borrowing on Waltz's version of neorealism (1979), he suggests that when confronted with a threat, states that are weaker than the aggressor have two strategies to choose from, namely bandwagoning and balancing. Bandwagoning implies that the state under threat allies with the state that poses the major threat, while balancing entails that the state under threat allies with the opposition to the threat.

Walt further elaborates on the notions of balancing and bandwagoning, by extrapolating the role of ideology and foreign aid into the discourse of bandwagoning and balancing. The author makes interesting arguments that are of relevance to the case study of Chad's foreign policy. Walt finds that if the state is in a secure situation, it will align itself with those that are closest to its own ideological preferences. However, "when faced by great danger, one takes whatever allies one can get" (Walt 1985: 24). He draws upon the famous quote of Winston Churchill, who stated "if Hitler invaded Hell, I should at least make a favourable reference to the Devil in the House of Commons" (Churchill 1950: 370). In brief, security considerations prevail over ideological preferences and alliances that are based on ideological denominators are unlikely to survive, once pragmatic interests intrude (Walt 1985: 24).

Concerning foreign aid, Walt acknowledges that oftentimes 'aid relationships' result from ideological alignment and don't independently cause the alignment. He finds that in the case of an aid-based alliance, the recipient of foreign aid oftentimes bargains harder, as the perception of stakes is higher on that end. If the recipient's interests are not being served sufficiently, the recipient can always threaten to switch to another 'provider'. Henry Kissinger provides an interesting example when describing his bargaining process with Israel during his "step-by-step" diplomacy,

stating, "I ask [Israel Prime Minister] Rabin to make concessions, and he says he can't because Israel is weak. So I give him more arms, and he says he doesn't need to make concessions because Israel is strong."[26] Kissinger's quote portrays that despite potential dependency on foreign aid, states oftentimes have the option to defy their patrons on important issues.[27]

Finally, Walt proposes four criteria by which the threat of another state can be evaluated; first, the aggregate strength is measured by the size, population and economic capability, second, the geographical proximity, third the offensive capabilities and fourth the offensive intentions. Even though Walt fails to clarify how much weight should be attributed to each of these criteria, he holds the opinion that not solely capabilities, but also perceived intentions matter in the evaluation of threat.

The insights offered by the IR theory of neorealism will be tested against Chad's foreign policy in the case analysis. The research question "Why does Chad not adhere to its obligations towards the ICC?" will be assessed through the analysis of bilateral relations between Chad and Sudan. In the context of this analysis, Chad's relation to the ICC will be scrutinized.

Methodology: Hall's Systematic-Process-Analysis

In order to identify the causal process behind the shift in foreign policy of Chadian President Idriss Deby, the methodology of Peter Hall's theory-orientated systematic-process-analysis (SPA) will be applied. For this, it is of utmost importance to take clear and well defined 'snap shots' of key moments that are relevant for this research (Collier 2011).

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[26] Quoted in Sheehan, Edward R.F. 1976. *The Arabs, Israelis, and Kissinger*. Pleasantville: Reader's Digest Press. Pp. 199.
[27] For an analysis of the historical record on this topic, *see* Walt, Stephen. "The Origins of Alliances," Chapter 8; *see also* Keohane, Robert O. 1971. "The Big Influence of Small Allies." *Foreign Policy.* Vol 2: pp 311-313, 350-355.

Hall's theory-orientated SPA is characterized by "elucidating and testing a theory that identifies the main determinants of a broad class of outcomes and attaches special importance to specifying the mechanisms whereby those determinants bear on the outcome […] The focus is elucidating the process whereby the relevant variables has effect" (Hall 2008: 306). He commences his model by specifying a set of assumptions put forth in the IR theories under consideration that identify relevant causal factors and assume those to interact and operate in certain ways. Depending on the theory applied, predictions about the causal mechanism of a certain phenomena are made. After having provided a clear outline of the theory's predictions, the predictions will be compared to the actual outcomes, thereby testing the theories' validity. In short, the patterns observed in the real world will determine the theory's validity (Hall 2003: 391-2). Hall maintains that systematic process analysis is an epistemologically superior methodology because it has the capability to map the ontological complexities of the social world and also rule out competing theories. A final key characteristic of this methodology is that when drawing conclusions, this methodology places emphasize on the congruence between prediction and observations, rather than between interactions and causal chains.

This methodology will be applied to the analysis of Chad's foreign policy. For this, key events that have shaped the bilateral relations between Chad and Sudan before and after they signed a peace agreement in 2010 will be examined. In doing so, Walt's four criteria of evaluating threat will be tested to help explain for Chad's shifting stance towards the Sudan and the ICC.

Case Selection

Chad is of particular interest for several reasons. First and foremost, Chad is the first ICC member state that, despite having an obligation to cooperate with the ICC, hosted Sudanese President Al Bashir in its territory after the warrant of arrest was issued against him by the ICC. After visiting Chad in 2010, al Bashir travelled to 13 more countries without any repercussions. By analysing possible explanations as to why Chad does not cooperate, light might be shed on reasons as to why other ICC member states also do not adhere to their ICC obligations. Second, Chadian President Idriss

Deby radically changed his stance towards the ICC from first fiercely supporting it to then completely disregarding it. It is this shift in Chad's foreign policy towards Sudan and subsequently the ICC that is under scrutiny in the case study.

To further sharpen the focus of the research, the time frame under consideration will be narrowed down to 2005 until 2015. The scope of this time frame is of relevance to this research, as 2005 marked the start of hostilities between the two countries, which further deepened until 2010, when the Peace Agreement between the two countries was signed. Idriss Deby was an outspoken supporter of the ICC and its norms until he signed a peace agreement with Sudan, causing him to disregard the ICC entirely.

Research Method

This research mostly utilizes peer-reviewed articles, books, government-, think tank- and NGO-reports that discuss aspects of the matter at hand. Through content analyses of these sources, this paper aims to identify Chad's foreign policy towards Sudan and the ICC. Due to language restrictions, mainly sources written in English are processed. Therefore, it is likely that the utilized sources inhibit a bias against Sudan, since the majority of the English speaking countries oppose the Sudanese leadership. Another bias that deserves acknowledgement is that most English-written sources favour the ICC, derived from the fact that a vast majority of English-speaking countries are strong supporters of the ICC.

Moreover, the validity and wholeness of the sources need to be treated with caution, because of Chad's poorly developed bureaucracy and infrastructure. This caution is emphasized by the fact that in Chad only 37% of the population that is of age 15 or older can actually read and write Arabic or French (CIA Factbook 2012). Moreover, the CIA ranks Chad 188 out of the 193 countries in energy consumption. This suggests that most of the witnesses and participants of the civil wars are not able to document and spread their experiences through modern electronic platforms.

Despite these shortcomings, the research method applied still contains significant value. The sources utilized are deemed credible by prestigious institutions and various

governments, who form their foreign policies regarding this matter based on these sources.

The Chadian-Sudanese Relation Put Into Historical Perspective

Chadian President Idriss Déby seized power from his former mentor and President Hisséne Habré in 1990, following a military coup that was backed by Libya, Sudan's al-Bashir, France and Sudanese Zaghawa (Lunn 2012). Since then, President Deby has been able to maintain in power. For Chad, low-intensity conflict in the form of armed rebellions and attempted coups by discontented politico-military factions are considered normal. The very fact that no Chadian head of state came to power by non-violent means further highlights the socio-political environment of Chad (Handy 2008).

Deby's main support group is the Zaghawa ethnic group, to which he ethnically belongs and which constitutes roughly 20 percent of Chad's population (Lunn 2012). Despite his ethnic connection to the Zaghawa, once faced with internal opposition, he applies a mixture of co-option, divide-and-rule and direct repression (Lunn 2012). Despite brutal repression against his own kin, Deby's regime still heavily depends on extended family and fellow Zaghawa members (Lunn 2012). Until the escalation of conflict in Darfur in the early 2000's, Idriss Déby was a loyal ally of the Sudanese regime in Khartoum. Since 1991, Sudanese rebels (most of which are of Zaghawa origin) from both Darfur and South Sudan had been asking Deby for support, but he refused in order to maintain good relations with Sudan (Tanner and Tubiana 2007; 20).

Chadian President Deby was able to maintain good relationship with Sudan until roughly 2005. In 2003, for example, Deby still aided Sudanese President al-Bashir in fighting both the Sudan Liberation Army (SLA) and the Justice and Equality Movement (JEM), even though the two groups have strong Zaghawa affiliations. In March and April 2003, Deby sent Chadian troops to the border town of Tiné. But, due to the Zaghawa background of the Chadian army, it was not very motivated to fight fellow Zaghawa fighters. Even though weaponry and ammunition fell into the

possession of the two rebel groups, Deby was able to maintain good relations with Sudan until 2005 (Meerpohl 2013; 4). Nonetheless, the escalation of the Darfur crises, posed a conundrum for Deby. On the one hand, he attempted to maintain good relations with neighbouring Sudan. On the other, he also tried to maintain good relations with the Zaghawa, a group that at the time being was aiming to topple al-Bashir's regime (Meerpohl 2013).

In 2005 rebel groups emerged in Chad that had the objective to overthrow Deby, as their pleas for help had been ignored since 1991. Moreover, in 2006, President Deby unilaterally changed the constitution of Chad in order to be eligible for another term of presidency. This further deepened the distrust amongst his Zaghawa ethnic group, forcing Deby to side with the Zaghawa in order to remain in power. As a result, al-Bashir changed his stance towards Chad and started to support the Chadian rebel groups, which attacked a border town in Chad that year. In retaliation, Deby increased his support for the Darfurian rebels, resulting in the commencement of a proxy war between Chad and Sudan (Tubiana 2011: 16-17).

The UN estimates that between 2003 and 2008, approximately 300,000 people have died in the Darfur crisis and 2.7 million people have been displaced.[28] Due to Chad's close proximity to Darfur, most of these displaced peoples have fled to neighbouring Chad. The refugees fleeing to Chad are one of the primary forces shaping deteriorating relations between Chad and Sudan. Resulting from the huge influx of refugees into Chad, the livelihood of more than 2 million Chadians had been affected by 2009.[29]

In January 2010, Chad and Sudan signed a peace agreement that resulted in the termination of the proxy war. The hostilities between the two countries ended and both began to jointly monitor and control the border region. The peace agreement had further far-reaching effects that will be discussed in the case study analysis.

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[28] *See* UNICEF. 2008. "Chad – overview."
http://www.unicef.org/infobycountry/sudan_darfuroverview.html - accessed 25.05.2015
[29] *See* Darfur Dream Team. 2012. "Darfur Conflict Timeline."
http://darfurdreamteam.org/the-crisis/timeline - accessed 25.05.2015

There are some key aspects to be taken into consideration from the aforementioned passage. From the commencement of his presidency, Deby was faced with a conundrum of alliances, between his neighbour al-Bashir and Zaghawa rebels. He was dependent on the support of both actors to survive, yet the two warring parties were at conflict with one another. In the end, the survival of Deby's regime most heavily dependent on the support of fellow Zaghawa people, forcing him to switch alliances and oppose al-Bashir. This remained in tact until Deby and al-Bashir signed the 2010 Peace Agreement. Below, a map of Chad and Darfur, Sudan:

Chad's Shift In Foreign Policy Towards Sudan And The ICC Before And After
The 2010 Peace Agreement

Chad risks the shameful distinction of being the first ICC member state to harbour a suspected war criminal from the Court.

-Elise Keppler, Associate Director of the International Justice Program at Human Rights Watch[30]

Chad is the first ICC member state, to which a person, indicted by the ICC, has travelled without being extradited to the ICC. This is the result of a radical shift in Chad's foreign policy. In order to illuminate how neorealist assumptions have triggered a shift in Chad's foreign policy towards Sudan and subsequently the ICC, two time segments will be scrutinized; first, bilateral relations between Sudan and Chad prior to the peace agreement and then, bilateral relations after the 2010 Peace Agreement. Within both sections tackling the bilateral relations prior and after the peace agreement, a subsection in each will point to the implications for the IR theory of neorealism and the ICC.

*State Of Bilateral Relations Between Chad And Sudan Before The 2010 Peace Agreement*

By the year 2009, bilateral relations between Sudan and Chad had reached their all-time low. The year before marked the most intense military confrontations between the two countries, because rebel groups in both Chad and Sudan attempted to overthrow the respective government with the support of the other (Meerpohl 2013; 5). Previous years (since 2005) were characterised by mutual accusations of supporting each other's rebel groups (Meerpohl 2013; 5). In April 2006 and January 2008, Chadian rebel groups almost succeeded at toppling Deby's regime in Chad's capitol, N'Djaména, but due to increased military spending and the support of France and the Sudanese rebel group, JEM, President Deby was able to stay in power (Tubiana 2008). Similarly, in May 2008, the rebel group, JEM, which had helped President Deby just months earlier fight off the insurgency in Chad, penetrated into Sudanese territory, almost taking control of the capital, Khartoum. These military

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[30] *See* Human Rights Watch. 2010. "Chad: Bar Entry or Arrest Bashir". http://www.hrw.org/news/2010/07/21/chad-bar-entry-or-arrest-bashir - accessed 29.05.2015

confrontations were by far the most extreme and most threatening to the national interest of the two countries. These military tensions did not diminish in 2009, but were repeated along the border region (Sudan Tribune 2009).

The increased tensions between the two countries also prompted Chad to significantly increase its military spending. This would not have been made possible without the initiation of oil exploration in Chad. In 2003, Chad joined the league of oil-exporting countries under the facilitation of the World Bank (Gould, Winters 2012). As a result of unsatisfactory redistribution of the oil revenues, however, the World Bank withdrew its support for the oil-exploiting project in 2008 (Gould, Winters 2012). The effects of this decision can be seen below, in Table 1. The World Bank withdrew it support, because President Deby mainly used the revenues made from the oil business to further bolster his state apparatus, assimilating it into a highly authoritarian political system that was mainly based on patronage (Gould, Winters 2012). In their paper, the authors argues that it was due to these revenues that President Deby was able to maintain control of the government. Table 1 shows, how since the commencement of the oil exploration, military expenditures increased dramatically until 2008, which was plagued by the most intense military confrontations. Even though no reliable data exists for the time period after the peace agreement, the Stockholm International Peace Research Institute (SIPRI)[31] estimates it is likely that the military expenditures decreased.

Table 1: Military Expenditures of Chad
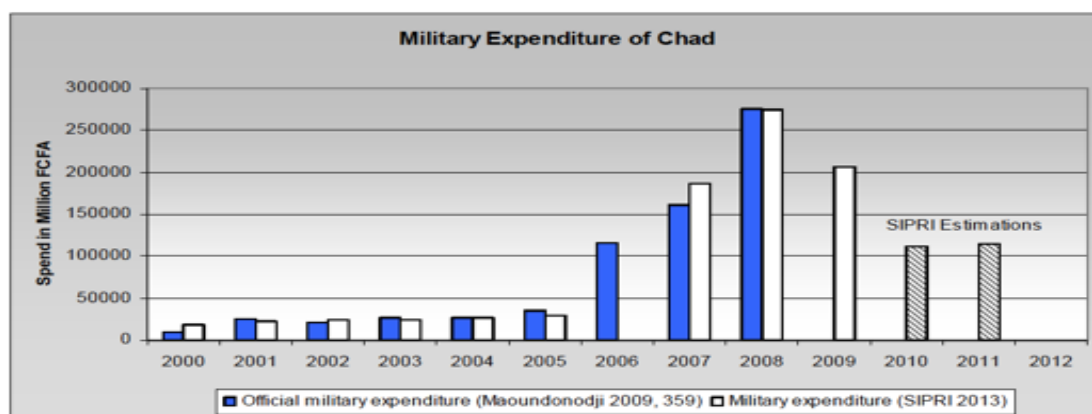
Source: SIPRI

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[31] *See* SIPRI is a renowned database that comprises the military expenditure of 171 countries since 1988. http://milexdata.sipri.org/ - accessed 28.05.2015

From 2000 until 2009, Chad increased its military expenditures by 663 percent (Perlo-Freeman and Brauner 2012: 15). The International Crisis Group (2009: 13) estimates that by 2009, Chad's army had to be "one of the best equipped in sub-Saharan Africa". As Freeman and Brauner (2012), correctly note, oil revenues played a significant role in Deby's regime survival strategies.

Unfortunately, no reliable data is available for Sudan's military expenditures from the year 2007 and onwards. The table below is particularly interesting, as it shows the military expenditure in both the percentage of Sudan's total GDP and US Dollars. This is a key distinction to be made, especially when considering that between 2005 and 2011, Sudan found itself in the transitional phase with South Sudan seceding from Sudan after decades of civil war. In this split, Sudan lost 80% of its oil reserves to South Sudan. Since this process was initiated by the 2005 peace agreement between Sudan and South Sudan, it is important to observe Sudan's military expenditures not just as a percentage of GDP, but also in total spending.

Table 2: Military Expenditures of Sudan
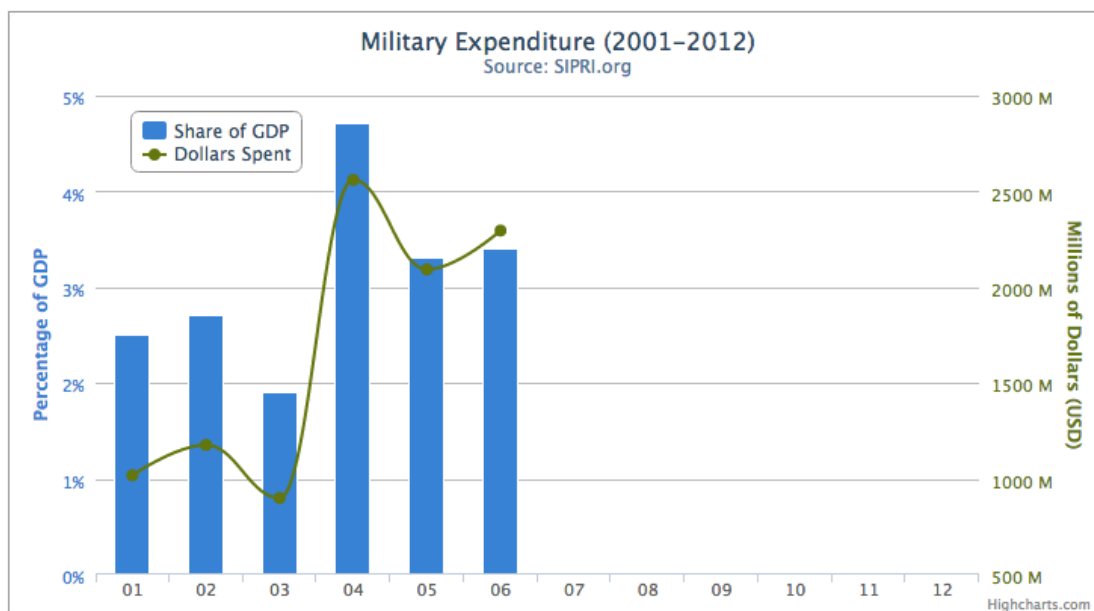
Source: SIPRI

Neorealist Security Considerations And The Role Of Foreign Aid And Alliance Formation

Next to spending a vast majority of the oil revenues on military equipment, Chad also received significant aid from the EU (mostly France) and the UN and the US, without which Deby would not have been able to remain in power. Between 2005 and 2009, Chad received a total of $10 billion in assistance to the humanitarian crisis that resulted from Darfur from the US (Hansen 2011: 587). A stable Chad is important to the US in its counterterrorism efforts in the Sahel region. In 2007, for example, the US established Africa Command, through which Deby's regime received military training, ammunition and other relevant military support (Wezeman 2009).

On 28 January 2008, the EU launched a military operation, spearheaded by French forces, called European Union Force (EUFOR) in eastern Chad and the Central African Republic (CAR). With its 3,700 troops, EUFOR is the largest ever-deployed autonomous military operation, employed by the EU (Tubiana 2011). EUFOR was replaced by the UN mission, Mission des Nations Unies en Republicque centrafricaine et au Tchad (MINURCAT) on 15 March 2009. The 2000 French troops that operated in Chad and CAR under EUFOR remained in the two countries under the mandate of MINUCRAT. Moreover, due to France's bilateral security agreements with Chad, many Chadian military officials were trained in France (Hansen 2011: 589). In addition, France also provided military aid. In 2008 alone, Chad purchased military equipment worth 13 million Euros from France (Hansen 2011: 589).

In line with the previous discussion on neorealism, it can be argued that due to a) the conflict with its neighbour Sudan b) the aid it received from the Western countries, Chad aligned its foreign policy with institutions (Including the ICC) that these countries support, including the ICC. Even though the US is not a member state to the ICC, the entire European Union is. Since the EU became involved most actively, it embodied Chad's most crucial ally. Moreover, the mere fact that the ICC indicted Sudan's President, whilst tensions between Chad and Sudan were high, further explains why Chad sided with the ICC. This stance was most obvious when in 2009 the African Union reached a decision, in which it clearly states that it intends to not

cooperate with the ICC in regards to the indictment of Sudanese President al-Bashir.[32] The decision reads as follows:

> Decides that in view of the fact that the request by the African Union has never been acted upon, the AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan is a logical consequence of the stated position of the AU on the manner in which the prosecution against President Bashir has been conducted, the publicity-seeking approach of the ICC Prosecutor, the refusal by the UN Security Council to address the request made by the African Union and other important International groupings for deferment of the indictment against President Bashir of the Sudan, under Article 16 of the Rome Statute of the ICC.[33]

When the decision was taken by the AU in 2009, Chad however openly opposed the above paragraph of the decision and vowed to arrest and surrender al-Bashir, should he enter Chadian territory (Oyugi 2014). As Oyugi correctly analyses, the AU decision did not influence Chad's foreign policy. Chad only decided to side with the AU decision after the peace agreement was signed and geo-political security considerations allowed Chad to do so (Oyugi 2014). This diminishes the legitimacy of Chad's current defence (2010 onwards), arguing that it simply abides by its obligations towards the AU.[34]

Returning to Walt's four criteria for evaluating threat, relevant analysis can be made. First, with its 34 million citizens, Sudan's population is roughly three times larger than that of Chad. Second, Sudan and Chad are neighbours, which means that the threat is imminent. Third, Sudan's GDP is roughly five times that of Chad. Lastly and most importantly, Sudan has proven to have malicious intentions towards Chad, as

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[32] *See Decision* on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) of 1-3 July 2009, Doc. Assembly/AU/13(XIII).
[33] Ibid. Para 8.
[34] *See* Sudan Tribune. 2013. "Chad urged to execute arrest warrant against Sudanese leader." 16.03.2013.
http://www.sudantribune.com/spip.php?article45845 - accessed 24.05.2015

outlined above. This suggests that Sudan meets all criteria for Chad to perceive it as a threat, thus forcing it to balance against Sudan.

From a neorealist angle, this makes sense for several reasons. As Sudan embodied the greatest threat on a systemic level towards the survival of Deby's regime, Chad aligned itself with Western countries and the ICC. Without their support, it is very likely that Deby would not have survived the attempted coup d'états. Sudan was supporting rebels that tried to topple Deby's regime and Western countries supported Deby, helping him fight off these insurgencies. As a result of the geopolitical setup, especially the proxy war with Sudan, and the military support from Western countries, Chad ratified the Rome Statute as the ICC too was attempting to prosecute Chad's main source of threat, namely al-Bashir.

The Peace Agreement Of 2010 And Its Implications For Sudanese-Chadian Relations

On 15 January 2010, Sudan and Chad signed a genuine peace agreement. The two countries agreed to prevent armed groups from using each other's territories against the interest of the other and to strengthen border control. In contrast to previously signed peace agreements, this agreement actually resulted in genuine steps taken towards a peaceful resolution (Hansen 2011). Amongst the former peace agreements is most notable, the bilateral Security Protocol, also called the Tripoli Accord, which was signed in 2006. However, since neither of the two governments made any considerable concessions, affected people continued suffering.[35] After five years of mutual accusations and intensified military escalations, both governments realized that an absolute military victory was not an option and thus agreed to a peaceful resolution of the proxy war (Tubiana 2010).

Following the peace agreement, numerous gestures, speeches and agreements that were made by key actors indicate the end of the conflict. First, in his speech in Khartoum on 24 February 2010, President Deby stated that he intended "to highlight and welcome the availability and flexibility of my brother, President al-Bashir of

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[35] See Afrol News. 2010a. "AU welcomes Sudan and Chad peace agreement". 21 January 2010. http://www.afrol.com/articles/35124 -accessed 15.04.2015.

Sudan" (Hansen 2011). On the same day, rebel group JEM, which was initially supported by President Deby and which had tried to topple the regime of al-Bashir, signed a peace agreement with Sudan in Doha. As a part of the agreement, JEM leader Dr. Khalil Ibrahim was refused entry into Chad on 29 May 2010. These first actions indicate that the peace agreement is legitimate, as it led to additional peace agreements being made with other key warring parties.

In addition, on 27 May 2010, President Deby also travelled to Khartoum to take part in al-Bashir's re-inauguration. A grand gesture indicating good relations. Moreover, in Khartoum on 21 July both Presidents made promising statements, which, as Al Jazeera journalist Mohammed Adow correctly commented, "will open the door widely for concessions between the two neighbouring countries"[36]:

> We have both taken new steps to strengthen our brotherly relations. We have moved on from the issues that have come in-between us in the past, and now our common borders are safeguarded by the new Sudanese forces. Now the people of Sudan and Chad move freely and safely across the border.
> -Chadian President Idriss Deby on 21 July 2010[37]

> Everything that went on between Chad and Sudan was an accident. We regret it enormously. Now we have turned the page. We are working together for the interests for our two nations. I always thought of Chad as my second home, despite of this war that both of our countries went through."
> - Sudanese President Omar al Bashir on 21 July 2010[38]

Another decision that underscores the legitimacy of the peace agreement, is Deby's decision to expel MINURCAT. In March 2010, President Deby sent a *note verbale* to UN Secretary-General Ban Ki Moon that the UN-mission was to leave the country by

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[36] *See* Al Jazeera news report, showing interviews held with both Presidents. 21.07.2010. https://www.youtube.com/watch?v=cMT_BFQlMEs accessed 24. 05.2015
[37] Ibid.
[38] Ibid.

latest December 2010.[39] This was of utmost importance to al-Bashir, because MINUCRAT forces, which were literally on his doorstep together with the ICC arrest warrant, embodied a significant threat to his regime's survival. Lastly, Sudan expelled 4000 rebels originating from Chad back to Chad between January and November 2010 (Hansen 2011).

Later in 2011, Chad explained its radically shifting stance towards Sudan and the ICC, claiming that it based its refusal to cooperate in the arrest and surrender of al-Bashir on "the common position adopted by the African Union in respect of the international warrant of arrest issued by the Prosecutor against Mr. Omar Al Bashir." [40] This explanation however, seems inconsistent with Chad's initial opposition towards the AU decision. As Phoebe Oyugi points out, the AU decision did not influence Chad's stance towards Sudan nor the ICC. This once again stresses that, as Walt suggests, ideological preferences and moral commitments are subdued by security concerns (Walt 1985: 24). This reveals that it was not Chad's obligations towards the African Union nor the ICC that influenced its decision, but rather the regional setup that shaped Deby's regime's security concern.

The agglomeration of gestures, statements, and actions made and taken by important actors shaping Chad's foreign policy signal that relations between Chad and Sudan have significantly improved after the peace agreement of 2010. The two countries now jointly monitor the border and the rebel groups have been 'dealt with'. This allows for a relaxation of relations.

Neorealist Security Considerations And The Role Of Alliance Formation

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[39] *See* http://www.un.org/press/en/2010/sc9935.doc.htm - accessed 25.15.2015

[40] "Rapport du Greffe relatif aux observations de la République du Tchad" quoted in the Decision pusuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply wit hthe cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir of 13 December 2011, ICC-02/05-01/09-140

Contrary to Chad's Interior and Security Minister's statement in 2010, just a year before, Chad seemed adamant to cooperate with the ICC in the arrest and surrender of al-Bashir when opposing the AU decision regarding al-Bashir's indictment. The spokesperson of the ICC, Fadi El Abdallah however notes that Chad remains obliged to cooperate in the request for al Bashir's arrest.[41] It appears Chad's foreign policy experienced a radical change.

In times in which Chad was exposed to a significant threat to its regime, Chad sided with those who also opposed al-Bashir. The neorealist Walt would agree with this strategic alliance formation and states, "when faced by great danger, one takes whatever allies one can get" (Walt 1985: 24). Resulting from the 2010 peace agreement, however, Chad seems to have shifted alliances away from Western countries and the ICC, towards Sudan and the African Union. The earlier discussion revealed how neither Chad's ICC membership nor its AU membership influenced its foreign policy, but rather strict neorealist systemic security considerations. As the peace agreement unfolded into a betterment of the bilateral relations, it became more beneficial regarding Chad's own security considerations to change alliances. In line with these security considerations, Chad expelled troops of its former allies, thereby solidifying trust with its new ally Sudan, as these troops posed a threat to Sudan. This too confirms the neorealist approach, since the shift in alliance resulted from a shift in systemic forces. Walt argues that security considerations prevail over ideological preferences and alliances that are based on ideological denominators are unlikely to survive, once pragmatic interests intrude (Walt 1985: 24).

Returning to Walt, whilst the first four criteria have remained the same, Sudan's intentions have reversed. This has been shown through the above analysis of the 2010 peace agreement. Thus, as the threat disappeared, the alliances Chad formed to counter the threat became redundant.

Concluding this chapter, it has been shown that the ICC member state Chad based its foreign policy on neorealist security considerations. As a consequence, its obligations towards the ICC were neglected. After the peace agreement with Sudan, Chad's

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[41] Ibid.

Interior and Security Minister, Ahmat Mahamat Bachir, clearly stated "We are not obliged to arrest Omar Hassan al-Bashir. Bashir is a sitting president. I have never seen a sitting president arrested on his travels by the host country"[42]. The spokesperson of the ICC, Fadi El Abdallah however notes, Chad still has an obligation to cooperate in the request for al Bashir's arrest.[43]

Chapter I shed light on the ICC's approach to the realm of international relations, showing its close proximity to constructivism. It does not posses the power to coerce states to cooperate and acknowledges that it is an institution that spreads norms revolving around international criminal law. Chapter II depicted how ICC member states base their foreign policies more on security considerations, rather than legal obligations. Combining the two Chapters, the clash emerged between the ICC's approach to achieving its goals and the systemic forces shaping foreign policies of ICC member states. As previously elaborated, this the clash results in a deadlock for ICC's investigations.

Conclusion

In conclusion, the case study depicting Chad's foreign policy towards Sudan and the ICC before and after the 2010 peace agreement with Sudan has shown how neorealist security considerations have prevailed over obligations towards the ICC. Of particular interest are the observations made on Chad's alliance formation and the role foreign aid has taken within this context. Chad presents an exemplary case to confirm Walt's

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[42] *See* Al Jazeera. 2010. "Bashir defies warrant on Chad trip". 22.07.2010. http://www.aljazeera.com/news/africa/2010/07/201072183438656172.html - accessed 24.05.2015

[43] Ibid.

neorealist assumption that security consideration prevail over ideology and that alliances are formed based on strict security considerations. When the main threat to the survival of Deby's regime originated in Sudan, Chad sided with EU, the US and the UN and aligned its ideological preferences with those of the ICC. Once this setup changed due to the peace agreement between Chad and Sudan, Chad neglected its obligations towards the ICC and expelled military forces of its former allies.

In the beginning of this thesis, the claim was made that the way the ICC conducts itself in international relations shows significant overlaps with the constructivist perception of international institutions. This claim is based on the fact that it spreads norms through the principle of complementarity, does not possess its own enforcement mechanisms and solely depends on member states' cooperation and the ICC's ASP and the UNSC when attempting to fulfill its objectives. Due to the inaction of these key stakeholders in cases such as the one of al-Bashir, however, the ICC faces a deadlock. The central role of security considerations, which have surfaced throughout the case study, sheds light on the instrumentalization of norms embodied by the ICC. While it was convenient for Chad to promote ICC and its norms, it did so. The moment security considerations altered due to the 2010 peace agreement, however, Chad's membership to the ICC became inconvenient to its survival and was thus disregarded.

This thesis hopes to provide interesting insights into the IR theory of constructivism and neorealism. Constructivism sheds light on the role of the ICC in international relations. Based on the case study, it has been shown that - in line with neorealism - both alliances and ideological preferences do not operate independently, but are rather formed and shaped first and foremost by security considerations. As soon as the alliances and ideological preferences are not aligned with the best strategy that ensures regime survival, they are neglected. Ultimately, this means that neither norms by themselves nor alliances possess the ability to shape foreign policy.

Annex

Policy Recommendation

Based on the analysis of the case study and the earlier made claims stating that the ICC attempts to achieve its objectives through constructivist means, this research would humbly propose policy recommendations to the ICC in regards to cases of non-cooperation.

Before doing so, however, it must be expressed that the ICC is the result of years and years of negotiations and is, like the UN, heavily dependent on what its member states empower it to do. This means that as long as no consensus can be found as to how to improve the enforcement mechanism, the ICC might in the future face similar situations as it does with al-Bashir. The ICC is the first of its kind and its objectives are ambitious.

The author Gwen Barnes also makes policy recommendations towards the ICC, after conducting an analysis of al-Bashir's indictment, arguing for a strengthened enforcement mechanism through incorporating the mechanisms of a) suspension b) expulsion and c) UNSC sanctions (Barnes 2011: 1617). This, however, seems counter-intuitive. The steps he proposes will most likely incentivize member states to abort membership (something that is strictly legally not possible), thereby limiting the judicial reach of the ICC.

Opposing Barnes recommendations, it might be more useful to create non-legal avenues of communication between the ICC and its member states. We need to acknowledge the complexity of international politics and that some member states are simply not able to cooperate due to prevailing security concerns. Thus, the Court should further engage into dialogues with its member states and seek alternative solutions to the issues at hand. Ideally, the option to have non-judicial and non-formal meetings should be incorporated, so that representatives of non-cooperating member states can comfortably raise their concerns. As could be seen in the case of Chad, President Deby prioritized security concerns over Chad's obligation to cooperate with the ICC, as his regime was on the verge of collapse. Therefore, instead of pushing

member states away, which negatively effects the judicial reach of the ICC, the ICC should work closer with member states to find alternative solutions.

Lastly, its relation to the United Nations Security Council needs to be reassessed. Although the UNSC has the ability to refer cases to the ICC, so far it has not been supportive in regards to the cases it did refer to the ICC. This burdens the ICC and puts its legitimacy into question. The perception that the UNSC is a politicised council further questions the neutrality of the Court. Future research could further examine these recommendations and test their potency.

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