The Darfur Crisis: The Role of the USA and the Implications for the ICC

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The Darfur Crisis:

An evaluation of the role of the USA and its implications on the effectiveness of the International Criminal Court

This report will evaluate the response of the International Criminal Court (ICC) to the crisis in Darfur. The focus will be on the role of the US and its implications on the work of the ICC. The first research aim will examine the crisis in Darfur (Kastner, 2007). This is necessary in order to facilitate a better understanding of the complexity of this crisis and the reasons for the involvement of the ICC. The second research aim is to identify and analyse the response of the ICC. This will be achieved in two steps. First, the report will outline the origin and purpose of the ICC (Seguin, 2000; Scheffer, 1999). In addition, the response by the ICC and its dependence on the UN Security Council (UNSC) in general, and the US in particular will be evaluated (Heyder, 2006). The focus will be on the role of the US and the referral of the Darfur Crisis to the ICC. The third research aim will assess the opposition of the US and institutional reforms which need to be undertaken in order to increase the efficiency of the ICC in future crises (Roach, 2005). The conclusion will summarise that the response of the ICC was insufficient due to limitations set by the UNSC. However, the efficiency can be increased by either reforming the framework in which the ICC and the UNSC cooperate or by the US if it accepts the legitimacy of the ICC.

The population of Sudan is divided into African farmers and Arab herdsmen. During the 1980s the Arab-Islamist Government of Sudan (GoS) emphasized the difference between these groups and marginalised the Sudanese of African origin by implementing a racist ideology (Lipscomb, 2006, pp.188-189). The Sudan Liberation Army, the military wing of the Sudan Liberation Movement (SLA/M), and the Justice and Equality Movement (JEM) started their struggle against the GoS as a response to the neglect and deliberate underdevelopment of the Darfur region. As a response the GoS armed Arab militiamen described as *Janjaweed* (Kastner, 2007, pp.158-159). Despite several ceasefire agreements the conflict continued and civilians increasingly became the targets of violence, rape and murder exercised by the parties of the conflict (Happold, 2006, p.226). The number of people killed is unclear, but estimates range from 70,000 (Lipscomb, 2006, p.187) to 300,000 (Heyder, 2006, p.651). Moreover, two million people were displaced. Evidence gathered by NGOs, news agencies and the UN led to the conclusion that the GoS is directly involved in the atrocities (Lipscomb, 2006, p.189).

Mass atrocities like the ones in the Darfur region of Sudan are not new to mankind. The twentieth century was characterised by mass atrocities committed in, *inter alia*, Nazi occupied Europe, Cambodia, the former Yugoslavia and Rwanda (Seguin, 2000, p.86). Since its early stages international justice was supported by the US. The Nuremberg Trial after World War Two was established to hold the perpetrators of the Holocaust accountable and further *ad hoc* tribunals, such as the International Criminal Tribunal for Rwanda and the former Yugoslavia followed. However, the establishment of *ad hoc* tribunals, as Ambassador Scheffer (1999, p.13), head of the US Delegation to the UN Diplomatic Conference on the Establishment of a permanent ICC, noted, demand significant time and financial support. Furthermore, a permanent court could act as deterrence. In 1992 the UN passed Resolution 47/33 in order to draft a statute for the establishment of a permanent International Criminal Court. The US, under then-

President Clinton, argued that the establishment of an ICC would support international law and serve US national interests (Seguin, 2000, p.87). The US followed its tradition of supporting international justice and contributed significantly to the negotiations leading up to the establishment of the ICC (Schabas, 2004, p.702).

Cases can be referred to the ICC by four methods: (a) a member state of the ICC refers the case; (b) a non-party state accepts ICC jurisdiction over a certain case; (c) the ICC prosecutor initiates the case after the approval of a panel consisting of three judges; (d) the case is referred to the ICC by the UNSC (Rome Statute of the ICC, pp.10-11, 2011). The principle of complementarity allowed the ICC to investigate crimes only if national courts were unable or unwilling to investigate the case. Towards the end of the negotiation the US raised concerns about several issues (Heyder, 2006, p.660). First, the US demanded that the UNSC would be the only trigger mechanism for investigations. Second, the US had concerns about the jurisdiction over nationals of non-party states. Third, the US feared that the selection of the prosecutor might be politically motivated.

In 1998 the founding treaty – The Rome Statute – was adopted and when the 60th nation signed the statute in 2002, the ICC legally came into existence (Kaye, 2011, p.120). The number of signatory states increased constantly to 120 effective as of February 2012 (International Criminal Court, 2012). The role of the permanent members of the UNSC, as one of the possible trigger mechanisms, is significant for the authority and legitimacy of the ICC. Great Britain and France signed and ratified the Rome Statute. Russia signed the statute, but has not yet ratified it. China abstained from signing the statute. The US under Clinton signed the Rome Statute despite its criticism in order for the US to be able to influence the policies of the ICC in the future (Fairlie, 2011, pp.533; 536). However, due to the US objections the Bush Administration withdrew the signature in 2002. Subsequently, three of the five permanent members of the UNSC had not ratified the Rome Statute (United Nations, Treaty Collection, 2011). The implications of the non-participation of several permanent UNSC members, especially the US, become evident in the following part of the report. The ICC was unable to investigate the atrocities in Darfur without the support of the UN as the GoS signed the Rome Statute, but did not ratify it. Article 13(b) of the Rome Statute allows the UNSC to refer cases to the ICC if these are considered as threats to international peace and security according to Chapter VII of the UN Charter. Therefore, the effectiveness of the ICC cannot be considered in isolation. The UNSC, as the only possible trigger mechanism in the case of Sudan, has to be considered in addition.

In 2004 the UNSC established the International Commission of Inquiry into Darfur (ICID) which concluded that mass atrocities occurred in Darfur (De Waal, 2008, p.30). The ICID recommended the referral of the Darfur Crisis to the ICC (Heyder, 2006, p.652). The US preferred an *ad hoc* court in order to involve African states. Moreover, this *ad hoc* court could have drawn on the experiences made in Rwanda. These arguments were considered as unconvincing by several UNSC members, especially in the light of US opposition to the ICC (Happold, 2006, pp.229-230). It became evident that the US opposition to the ICC was contradictory to the desire of the US to exercise justice for the victims in Darfur (Heyder, 2006, p.653). As a consequence the US did not veto Resolution 1593 which referred the crisis in Darfur to the ICC, but abstained instead. Had the US vetoed Resolution 1593 the efforts to protect human rights in general and the legitimacy of the ICC in particular would have been the victim of political disagreements between the US and the ICC. In 2007 the indictments were extended to include two *Janjaweed* leaders who were suspected of war crimes and crimes against humanity. Moreover, in 2008 an arrest warrant for Sudanese president Al-Bashir was issued (Arronson, 2011, p.6).

For many observers the abstention of the US was considered as a success and advocates of the ICC wrote that the work and legitimacy of the ICC was finally acknowledged by the US (Heyder, 2006, p.654). However, a closer evaluation of the crisis and the response of the international community will demonstrate that Resolution 1593 was a flawed compromise rather than a success. The first flaw can be found in paragraph 2 of the resolution. This paragraph states that only the conflict parties in Darfur and ICC member states are obliged to cooperate with the ICC. All other member states are "merely urged" to cooperate (Happold, 2006, p.230; Heyder, 2006, pp.654-655). Considering the fact that the UNSC referred the case on behalf of the UN member states – and therefore nearly the entire community of states – the resolution is not as effective as it could have been. This argument is especially strengthened by the examination of Article 86 (ff) of the Statute of Rome and Article 41 of the UN Charter. According to the Rome Statute non-party states can be obliged to cooperate with the ICC under an "appropriate basis". Article 41 of the UN Charter provides such a basis as a UN Resolution can be binding to all UN members. In this case a

ratification of the Rome Statue by the state of concern is not necessary (Heyder 2006, p.655). However, the UNSC did not invoke Article 41.

Further criticism has to be raised in connection with the financial support of the ICC. Paragraph 7 of Resolution 1593 states that the US will not provide financial support for the ICC (Heyder, 2006, p.656). In addition, the US may withhold funding to international institutions if these were to fund the ICC. This clearly presents a flaw in the resolution as the US made clear that the perpetrators had to be held accountable. Moreover, the US was willing to fund an *ad hoc* court for the Darfur case. A third flaw becomes evident in paragraph 6 of the resolution (Neuner, 2005, pp.330-331). Individuals of non-party states involved in the Sudan conflict do not fall under the jurisdiction of the ICC. The US made the exclusive jurisdiction of their and other non-party states' personnel a precondition in order to agree to any military operations in Sudan.

It can be argued that on the one hand UN Resolution 1593 may be considered as a success since the US did not veto it. On the other hand, an abstention by the US and a lack of enforced cooperation with the ICC is a flawed compromise. Kastner (2007, p.172) writes that the ICC, without sufficient UNSC support, will not have a significant impact on the crisis in Darfur. Nonetheless, it has become evident that members of the GoS and Rebel leaders fear an indictment by the ICC (Kastner, 2007, pp.174-175). Leaders of the *Janjaweed* fear to be used as "scapegoats". Subsequently, some leaders of the *Janjaweed* changed sides and started fighting with the rebels against the GoS. Moreover, the leaders of JAM/S and JEM might be more likely to participate in negotiations as they fear prosecutions by the ICC. Further pressure is exercised by the media and the public (Kastner, 2007, pp.176-177). Both are aware of the impartiality and independence of the ICC and therefore the courts work is not simply dismissed as being politically motivated.

The compromises and exemptions which the US achieved during the draft of Resolution 1593 raise the question of the future work of the ICC. In order to understand US opposition to the court and the likelihood of increased cooperation, respectively an US membership in the ICC, it is necessary to assess the political motifs behind their opposition. The reasons for the US opposition are manifold. At the early stages of the treaty negotiations the US hoped that the UNSC would be the only trigger mechanism for investigations by the ICC (Heyder, 2000, p.669, Schabas, 2004, p.712). This would allow the US and other permanent members of the UNSC to veto any investigations against their own nationals. However, during the negotiations it became clear that an increasing number of states preferred the ICC to be an independent juridical institution (Scheffer, 1999, p.13; Seguin, 2000, p.99). This was necessary in order to ensure that the work of the ICC is based on evidence rather than national interests (Hafner, Boon, Rübesame & Huston, 1999, pp.114-115). Furthermore, the ICC, as opposed to the UNSC, can increase its legitimacy by acting upon evidence presented not only by states but also by NGOs, international institutions and individuals whose voices would not be heard otherwise (Rome Statute, Article 15; Heyder, 2006, pp.669-670).

Severe criticism was raised by Bolton (2001, pp.173-174). Bolton points towards the independent prosecutor and writes that US civilians and military personnel, especially in leading positions, may become victims of politically motivated investigations. Moreover, Bolton criticises the lack of political and democratic accountability of the ICC in general and the independent prosecutor in particular. Opponents of the Rome Statute raised additional criticism in reference to the involvement of "non-democratic" governments which might use the ICC to denounce the US (Schabas, 2004, p.712). Further objections were raised by the US in reference to the jurisdiction over nationals of non-party states. Opponents of the ICC fear that this could lead to severe problems for UN peacekeeping missions since the military personnel involved may become the subject of investigations by the ICC (Krasnor, 2004, p.87). Both arguments are unfounded since the principle of complementarity rules that foremost national courts have the possibility to investigate a case (Wedgwood, 1999, p.94; Fairlie, 2011, p.553). Only if states are unwilling or incapable of investigating a case can the ICC exercise jurisdiction. Therefore, if US courts investigate a case of concern, their nationals will be protected from ICC jurisdiction. Further, the principle of complementarity does also correspond with the National Security Strategy of the US which emphasizes the importance of national courts (Krasnor, 2004, p.86). In addition, the ICC only has jurisdiction over nationals of non-party states if they committed crimes in party-states or if the case is referred to the ICC by the UNSC (Schabas, 2004, pp.709-711; Wedgwood, 1999, p.96). Moreover, the decision of the ICC Prosecutor to investigate a case could be blocked by the Pre-Trial

Chamber of the ICC (Heyder, 2006, p.670; Seguin, 2000, pp.99-100).

There is no useful alternative to the ICC. *Ad hoc* courts would be more expensive and require a longer period to be set up (Heyder, 2006, p.670). Further, if the *ad hoc* courts are to be established by a UN Resolution, the permanent members could veto the resolution and protect their own citizens from investigation and prosecution. The involvement of the UNSC would also raise criticism as decisions may be based on political and economical interests (Heyder, 2006, p.670). This kind of risk would not be attached to a permanent and independent ICC. The evaluation of criticism raised by the US underlines that amendments to the Rome Statute are not necessary as the US objections are already sufficiently addressed. The benefits of increased cooperation between the ICC and the UN are assessed by Roach (2005, pp.432-433). The ICC would be able to provide evidence and indict perpetrators which could increase the legitimacy of the UNSC if it decides to impose embargos or to undertake military action. The UNSC on the other hand is able to exercise more pressure if governments are unwilling to cooperate with the ICC. Franck (2003), cited by Roach (2005, p.440), claimed that evidence collected by the ICC could be evaluated by an "impartial and global jury" and decisions would be made with a two third majority. This body could be located in the Assembly of State Parties of the ICC (Roach, 2005, p.442). An independent "trigger mechanism" is also advanced by Ayoob (2002, pp.95-96) who suggests that states from different regions could participate with rotating membership.

When Obama took over the US presidency supporters of the ICC became optimistic (Fairlie, 2011, p.528). The Obama administration announced at an early stage that it would review its position on the ICC. The US took part as an observer in the annual meeting of the ICC member states and offered to support investigations of the ICC (Fairlie, 2011, p.542). The most evident support of the ICC occurred in February 2011, when the UNSC voted unanimously in favour of Resolution 1970 in order to refer the situation in Libya to the ICC (Kaye, 2011, p.118; UN Resolution 1970). The US Ambassador-at-Large for War Crime Issues, Rapp, argued that the US may increase its trust in the ICC's capabilities over time (Fairlie, 2011, pp.558-560). The main focus will be on the nature of cases investigated by the ICC as the US has to be assured that only mass atrocities and not politically motivated cases will be subject to investigations.

The Darfur Crisis demanded a decisive response by the international community. The GoS did not ratify the Rome Statute and the ICC depended on a referral by the UNSC. Resolution 1593 stands for the first referral of a crisis by the UNSC to the ICC. This has to be seen as a historical decision especially in light of the US opposition to the ICC. The fact that Resolution 1593 was adopted serves as evidence that the UNSC in general and the US in particular acknowledged the utility of the ICC. However, demands made by the US led to a resolution which was less forceful as it could have been. Subsequently, the outcome was a flawed compromise rather than a resolution adopted by an international community that is taking decisive actions to stop the crisis in Darfur. In return for permanent support of the ICC the US demands an amendment of issues related to non-party jurisdiction and the trigger mechanism. The criticism in reference to the jurisdiction of the ICC has already been sufficiently addressed with the principle of complementarity. An amendment of the trigger mechanism or the subordination of the ICC to the UNSC is unlikely. ICC member states, especially the ones that are not permanent members of the UNSC, are unwilling to pay such a high price in order to gain US support. A new trigger mechanism for investigations and indictment is also unlikely to get the support of the UNSC since the permanent members would lose their veto power. However, the crisis in Libya and the subsequent unanimous adoption of Resolution 1970 underlined the increasing respect for and legitimacy of the ICC. The fact that the US voted in favour of the referral raised the hope that the US is taking a step towards the ICC. It remains to be seen if this step will be finalised by a US signature under the Rome Statute.

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