

# ICC's jurisdiction and enforcement power—taking Bashir case as an example

## Abstract

The 1593 Resolution passed by the Security Council can provide legal foundation for the jurisdiction of ICC. However, such jurisdiction based not on the consent of Sudan, but on the authorization of the Security Council, and thus bears congenital defects with it. Accordingly, not any judicial activities or documents made by ICC in this case can constitute a legal base that require Sudan to perform its international obligations. Without further Security Council resolutions, ICC cannot compel Sudan or other States to enforce its decisions because of its crippled jurisdiction. Sudan's sovereign immunity cannot be deprived of by the Rome Statute. ICC itself has no power to enforce its decisions. The Security Council is not a legislative but just an executive organ. Going over certain key words as "shall", "urge" in the provisions of the 1593 Resolution, we can find it may create certain obligations for Sudan to cooperate with ICC, but such kind of obligations, even if really exist, are less formal, persist or strong than that of Member Parties to the Rome Statute. As to other Non-member Parties to the Rome Statute, the 1593 Resolution creates no legal obligation for them to cooperate with ICC.

**Keywords:** ICC, Rome statute, jurisdiction, enforcement, Sudan, warrant of arrest

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## The 1593 security council resolution and Bashir case

In order to solve the problem or at least to ease the humanitarian crisis in Darfur, Sudan, the UN Security Council passed the 1593 Resolution on March, 31, 2005.

According to the resolution, the Security Council:

- Decides to refer the situation in Darfur since 1 July, 2002 to the Prosecutor of the International Criminal Court;
- Decides that the Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully;
- Invites the Court and the African Union to discuss practical arrangements that will facilitate the work of the Prosecutor and of the Court, including the possibility of conducting proceedings in the region, which would contribute to regional efforts in the fight against impunity;
- Also encourages the Court, as appropriate and in accordance with the Rome Statute, to support international cooperation with domestic efforts to promote the rule of law, protect human rights and combat impunity in Darfur.<sup>1</sup>

On 21, April, 2005, in accordance with article 46 of the Regulations of the Court, the International Criminal Court (hereafter ICC) decided to allocate the situation in Darfur to Pre-Trial Chamber I. In this situation, three cases were being heard: The Prosecutor v. Ahmad

Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"); The Prosecutor v. Omar Hassan Ahmad Al Bashir; and The Prosecutor v. Bahar Idriss Abu Garda. On 01 June, 2005, the prosecutor began to investigate on this situation according to article 53 of the Rome Statute of the International Criminal Court (hereafter the Rome Statute) and article 104 of the Rules of Procedure and Evidence. And on 14, July, 2008, in accordance with article 58 of the Rome Statute, the prosecutor applied for a warrant of arrest to be issued against Sudan President, Omar Hassan Ahmad Al Bashir, for crimes against humanity, war crimes and the crime of genocide during the time from 2003 to 2008. Pre-Trial Chamber I issued, on 4 March, 2009, the "Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir". In its decision, the Pre-Trial Chamber issued a warrant of arrest against Bashir for 5 crimes against humanity and 2 war crimes, but rejected the Prosecutor's application in respect of the crime of genocide. This is the first time ICC issued a warrant of arrest against a head of state that is still in office.

The Prosecutor, dissenting from the Pre-Trial Chamber I's rejection of his application in respect of the crime of genocide, filed an appeal against this decision on 6 July, 2009. On 3 February, 2010, the Appeals Chamber rendered its judgment on the Prosecutor's appeal, reversing, by unanimous decision, Pre-Trial Chamber I's decision of 4 March, 2009, to the extent that Pre-Trial Chamber I decided not to issue a warrant of arrest in respect of the charge of genocide.<sup>2</sup> On 12, July, 2010, a new warrant of Arrest was issued, which not only covered all the charges before but also covered 3 charges of genocide against Bashir. Sudan government sharply objected to the warrant of arrest, contending that she had never signed the Rome Statute and thus ICC had no jurisdiction to her. Also on 3rd, July, 2010, the African Union passed a resolution announcing that Member States will not arrest

<sup>2</sup><http://www.icc-cpi.int/NR/exeres/835A9BD1-217E-4695-B304-918B8B3F4793.htm>.

<sup>1</sup><http://www.un.org/News/Press/docs/2005/sgsm9797.doc.htm>.

Bashir and trail him to ICC in accordance with the Rome Statute. And till now, the warrant of arrest has never been enforced; Bashir is not arrested and trailed by ICC. No wonder since the indictment of Bashir, this case has caused much media attention and scholarly scrutiny.<sup>3</sup> Scholars focus on the issue of whether ICC can establish jurisdiction to Sudan, a non-member state, and if the answer is yes, what is the foundation of such jurisdiction. However, I believe in Bashir case, we need to clarify at least two more questions in order to get a more clear view on relative legal issues: First, whether the jurisdiction of ICC in this case, suppose it can exist, has certain special character, or in other words, has certain default? Second, whether ICC has the power to enforce its judgments or decisions, especially against Non-member Parties?

## The jurisdiction of ICC

No wonder in Bashir case, the problem of jurisdiction is a heated discussed issue. Many believe, since Sudan never joined the Rome Statute, then according to the principle of *pacta tertiis nec nocent nec prosunt*,<sup>4</sup> the rights and obligations in the Rome Statute have no relations to Sudan; and since article 35 of the Vienna Convention on the Law of Treaties clearly stipulates that if the parties to a treaty intend the provision to be the means of establishing the obligation, the third State should expressly accept that obligation in writing, so from the aspect of treaty law, ICC just has no legal foundation to exercise jurisdiction to Bashir case. And the provisions in the Rome Statute can hardly meet the criteria of general practice and *opinio juris*,<sup>5</sup> which are necessary to prove the existence of international custom. Surely how can these provisions in the Rome Statute become international customs undoubtedly while many important fingers in the international society, such as US, China, Russia, India and Japan, still refuse to sign or ratify the Rome Statute? It is clear that ICC would better not to seek legal foundation for its jurisdiction in international customs. For the foregoing reasons, many people believe ICC's issuing of the warrant of arrest lacks appropriate international legal basis; someone even consider it as a reflection of ICC's discriminatory and double criteria.<sup>6</sup>

However, if we calm down and think over the Bashir Case according to relative international laws, we have to confess, first of all, that ICC had really got jurisdiction to the case. This does not mean, however, ICC's issuing of this warrant is a well-thought-out, nor will this warrant be executed or enforced at last. It just means ICC had been authorized to hear the case. In my opinion, if we confess this, then we can waste no time on this superficial question and pay more attention to some other issues which really make sense. If some suggestions should be made to Sudan, I think she would better study further on relative international laws, acknowledge ICC's authorized jurisdiction and find better arguments than stick to the unconvincing defense that ICC lacks jurisdiction.

It should be observed that in this case, there are essentially two treaties involved. One is the Rome Statute; another is the Charter of UN. Actually one of the key points in this case is the relation between these two treaties. Surely Sudan is not a Member Party to the Rome

Statute and to ICC, but she is a Member State to the UN Charter and to UN. Although Sudan bears no rights and obligations under the Rome Statute, yet she does bear rights and obligations under the UN Charter. Especially according to Chapter V and VII of the UN Charter, the resolutions made by the Security Council have binding force on Sudan, and Sudan bears the responsibility to perform such resolutions. And according to article 13 (b) and article 5 of the Rome Statute, ICC may exercise its jurisdiction with respect to the crime of genocide, crimes against humanity, war crimes and the crime of aggression if a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the UN—and this is just what had been done by the Security Council in the 1593 Resolution.

Hence article 13 of the Rome Statute connects ICC with the Security Council, and Chapter V and VII of the UN Charter connect Sudan with the Security Council, such a situation make it possible for ICC and Sudan to be connected through certain actions of the Security Council. And then there came the 1593 Security Council Resolution, which decides to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the ICC. So here through the 1593 Resolution, the Security Council authorized the power of jurisdiction to ICC and ordered Sudan to comply with such jurisdiction, thus ICC and Sudan, which formerly had no legal relations, now was connected in the specific Bashir Case. So if we relate article 13 (b) of the Rome Statute, Chapter V and VII of the UN Charter, and the 1593 Security Council Resolution, then we can constitute a logic chain which pointing to ICC's obtaining of the jurisdiction in Bashir Case. And this is the reason that we must confess ICC's jurisdiction in Bashir Case was undoubtedly established. But here we need to point out, that such a jurisdiction obtained by ICC is nonetheless the same as that to ICC's Member Parties. Such a jurisdiction essentially came from the power of the Security Council, and this time when the Security Council took action with respect to threats to the peace, breaches of peace and acts of aggression, it choose to authorize ICC to deal with the situation in Darfur. From this point of view, all the legal actions of ICC, such as jurisdiction, investigation and other measures, can be counted as one part of the whole process the Security Council takes to deal with the situation in Darfur. No wonder, since Sudan is obliged to comply with the settlement made by the Security Council, she is also obliged to comply with the jurisdiction of ICC. We may even imagine that were it not the ICC but any other international organs, institutions or even individuals got the authorization from the Security Council Resolution, Sudan should also comply. Because they were acting on behalf of the Security Council, they were performing certain functions of the Security Council.

It follows from the above statement that the jurisdiction of ICC in Bashir Case, to some extent, bears congenital defects with itself at the beginning. Anyway, the foundation of binding force of positive international law is the consent of States, and it is always the most essential, most reliable legal foundation in the international society.<sup>7</sup> Suppose Sudan had given consent to the Rome Statute, then the jurisdiction of ICC should be of no question; and now such jurisdiction is just authorized by the Security Council, although we may consider it is still a result of Member State's consent—anyway Sudan had given consent to the UN Charter, yet such a kind of consent was not directly given to the Rome Statute, but was conducted to the Rome Statute through certain measures taken by the Security Council. And

<sup>3</sup>New York University Journal of Law and Politics. 2010;42:599.

<sup>4</sup>It is told by Anzilotti that unlike most of other international legal principles, such a principle is definite and widely accepted. Anzilotti, *Corso di diritto internazionale*, 1920, p.414. And it was applied by many international tribunals, i.e., The Chorzow Factory Case, the Palmas Case. See PCIJ, Series A, No.7, 1926; Palmas Case (United States v. Netherlands), PCA Awards, 1928.

<sup>5</sup>Wang Tieya. *International Law*. Beijing: Law Press; 1995. p.14.

<sup>6</sup>Hu Bin. *Monster Out. ICC: Arresting Sudan President*, Global; 2009. p.9.

<sup>7</sup>Luo Guoqiang. *The Nature and Foundation of Binding Force of International Law*. *Zhejiang Social Science*. 2009;3:51.

the result is, although ICC's jurisdiction can be established in Bashir Case, yet such a conducted jurisdiction cannot ensure the following powers which are necessary for ICC to continue other legal actions. In a word, although there are many objections and certain congenital defects, yet ICC's jurisdiction to Bashir Case can be established and the legal foundation for such jurisdiction really exists in international law.

## The enforcement power of ICC

Just as I have mentioned above, although ICC, in accordance with the UN Charter and the Rome Treaty, got the jurisdiction to Bashir Case through the authorization of the Security Council, yet this jurisdiction bears certain congenital defects—anyway it is not came from a direct consent but a conducted one. It is a rather crippled jurisdiction. Accordingly, the awards and decisions made by ICC, will surely meet with many problems and limitations in the following procedures and especially in the enforcement process.

### The legal foundation of ICC's decisions

Generally, when handling a case, ICC has the power to issue a warrant of arrest and render relative decisions once its jurisdiction has been established, this is a power well founded in the Rome Statute. But in Bashir Case, the circumstance is different. Now ICC's jurisdiction comes not from the Rome Statute, not from the consent of Sudan, but comes from the authorization by the Security Council. Sudan should comply with ICC's jurisdiction but the only reason for this is that Sudan is a Member State of UN and she is obliged to perform the 1593 Resolution. By all means this does not mean the Rome Statute has or can be applied to Sudan, no matter permanently or temporally. Essentially, we can observe that Sudan is just responsible to the UN Charter instead of the Rome Statute. So in Bashir Case, not any legal actions made, and not any legal documents produced by ICC, no matter it is a warrant of arrest, a trail, an award, an interim measure, a decision or judgment, can constitute a legal basis for requiring Sudan to perform her international obligations. The only legal basis for doing so is just the Security Council Resolution. That is to say, if Sudan really should be required to perform certain obligations, i.e. to arrest Bashir and bring him to ICC, to appear in court in ICC, or to make any performance that necessary to satisfy ICC's relative judgments or decisions, then specific Security Council Resolution will be needed. Since the 1593 Resolution ordered the situation in Darfur should be submitted to ICC, Sudan should respect ICC's power to make investigation, to commence a legal action and so on. Likewise, if Sudan should comply with certain interim measure, such as the warrant of arrest, taken by ICC, let the Security Council make another resolution that give such orders! Also if Sudan should make any specific performance in the Bashir Case, the only legal basis for this should always be the Security Council resolutions. If no such resolution exists, Sudan will not be obliged to make any specific performance.<sup>8</sup>

### The enforcement power of ICC

Although according to the Rome Statute, ICC has acquired comprehensive powers in matters like jurisdiction, hearing and adjudging, yet ICC itself do not have the power to enforce, that is

<sup>8</sup>And as a matter of fact, we cannot expect the Security Council to pass further resolutions regarding the situation in Darfur recently, and it is predictable that Sudan will not be obliged to make certain specific performance during a reasonable time.

to say, to compel certain subjects of international law to perform its decisions. In the current international society, it is widely acknowledged that only the Security Council has such powers. Only the Security Council can compel performance, ICC cannot compel performance, and the performance of ICC's decisions depend on the cooperation of its Member Parties and the consent of non-Member Parties. According to article 87 of the Rome Statute, the Court shall have the authority to make requests to States Parties for cooperation, and the Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis. But how about a State Party does not cooperate, or a non-State Party does not promise to provide assistance or fail to keep such a promise later? We must confess ICC itself lacks effective measure to deal with such problems.

Article 87 (6) and (7) of the Rome Statute just stipulates, "Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council; Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council." Such provision clearly shows that ICC itself lacks enforcement power and it can only turn to the Security Council for enforcement at last.

### The sovereign immunity of Sudan president

As the head of a State, Sudan President Bashir should have sovereign immunity, this is the requirement of one of the most widely accepted custom—*par in parem non habet jurisdictionem*.<sup>9</sup> Although in order to avoid some criminals to take advantage of sovereign immunity and escape being prosecuted, article 27 of the Rome Statute stipulates: "This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.", yet such regulations can only bind the Member parties of the Statute. Among the non-Member Parties or between a Member Party and a non-Member Party, such regulation cannot apply. As a result, requiring Sudan, a non-Member Party, or any Member Party to execute the warrant of arrest, is in against with the sovereign immunity owned by Sudan and its head of State.

As to the Member Parties of the Rome Statute, although they have the obligation to assist in executing the decisions made by ICC, they also have the obligation to respect the sovereign immunity of Sudan. Then which one shall prevail? Obviously the former one is an obligation from international treaty and applies only to Member Parties, while the latter one is an obligation from international custom

<sup>9</sup>Wang Tieya. *International Law*. Beijing: Law Press; 1995. p.362.

and applies to all States. So when it is come to the relation between Member Parties and non-Member Parties, only the latter will apply, and Sudan's sovereign immunity should be respected by the Member Parties of ICC. Even we can see that under article 59 (1) of the Rome Statute, "A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9.", yet we need to be aware of the fact that this does not mean to deprive of the sovereign immunity of a non-Member Party. Firstly, none of the domestic laws of the State Parties defy sovereign immunity; secondly, in Part 9 of the Rome Statute, article 98 (1) clearly points out, "the Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or 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." From this we can see, ICC and its Member Party have no power to arrest Bashir or take other enforcement measures against Sudan, unless Sudan waive its immunity.

### Does the 1593 resolution create an obligation for Sudan to execute ICC decisions?

Actually this question concerns with the legal nature of the Security Council and certain expressions in the Security Council Resolution. To answer this problem, we need go over certain key words in the provisions of the resolution.

**The legal meaning of "shall":** Some experts believed that even Sudan is not a Member Party of the Rome Statute, even the jurisdiction of ICC is not originated from the Rome Statute but authorized by the Security Council, and even ICC lacks the power to compel enforcement, the warrant of arrest still should be and can be executed. Because in the 1593 Resolution, the Security Council, "decides that the Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and,.....". It seems in their point of view, in this resolution, the Security Council, through such expression as "shall...cooperate fully with and provide any necessary assistance to the Court", had created an obligation for Sudan to execute ICC decisions. And the following conclusion will be, ICC can compel Sudan to "cooperate" with itself in Darfur situation, and then whatever has been decided by ICC should be executed by Sudan.<sup>10</sup> Today if a legal document uses the word "should", surely it means certain obligations. We know the main use of "should" now is to tell somebody what they ought to do.<sup>11</sup> And the question is, is the word "shall" equal to the word "should"? And if the answer for the above question is no, then the next question is, can the word "shall" mean certain obligations?

No wonder in modern English the traditional difference between "shall" and "will" has almost disappeared, and in British English "shall" is still used when you want to make a suggestion or an offer<sup>12</sup>—which obviously do not cause obligations. That is to say, today the word "shall" is equal to "will", but not "should". And although "will"

can be used as a verb<sup>13</sup> or noun, yet in the context of this resolution the word "shall" is clearly used as a modal verb, not verb or noun, so we just need to choose the meaning from the modal verb style of the word "will". The possible meaning for "will" and thus for "shall" in this resolution are: used for asking somebody to do something or used for ordering somebody to do something.<sup>14</sup> As to whether obligations can be achieved from the word "shall" or "will", there can be three conditions.

Applying such conditions to the provisions of the resolution, we can see the Security Council has the power to make an order, but we don't know whether the Security Council really intended to use such a power in Darfur situation. Maybe it just want to persuade or suggest Sudan to cooperate but not compel or force Sudan to do so, otherwise why it avoid using the word "should" which formally points to obligations? And what's more, till now we can find no authoritative documents to prove that the Security Council really want to take certain forcible measure and compel or force Sudan to cooperate with ICC. Then what can we conclude is only that the word "shall" is possible to mean certain obligations and may cause certain obligations here. Furthermore, even if the word "shall" means certain obligations here, it can only cause obligations with less formality, persistence and strength. The first reason for this is "shall" is less formal and strong in legal binding force than "should". Just take Article 101 (2) of the Rome Statute for example and we can see clearly that these two words have different means in detail.

The Court may request a waiver of the requirements of paragraph 1 from the State which surrendered the person to the Court and, if necessary, the Court shall provide additional information in accordance with article 91. States Parties shall have the authority to provide a waiver to the Court and should endeavour to do so. Here the additional information which "shall" be provided will only be provided when necessary, while State Parties "should" always endeavour to provide a waiver to ICC. Another reason for this is Sudan's such obligations to cooperate with ICC simply comes from the 1593 Resolution instead of formal sources of international law. If ICC really can compel Sudan to "cooperate" with itself in Darfur situation and to execute any decision it make, then the real meaning of the 1593 Resolution will be that, as far as Darfur Situation is concerned, Sudan shall be treated as a Member Party of ICC and thus bear full obligation of a Member Party. However, such a meaning cannot be achieved properly. Anyway, if we consider the nature of the Security Council, we shall find it is not an international legislative organ but an international executive organ.<sup>15</sup> We may expect the Security Council to be more powerful, but the current fact is, the Security Council cannot create new laws, it can only execute and enforce existed laws. Although the resolutions made by the Security Council have binding force, yet they can only provide legal basis to certain detailed executive measures which embody the existed international obligations of the Member States of UN. By no means should these resolutions be treated as legislative documents and create new international rights and obligations to Member States of UN, in other words, the Security Council cannot impose new international obligations to the Member States by means of making resolutions.

<sup>10</sup>[EB/OL].[2009-04-06]. <http://translaw.whu.edu.cn/cn/indexnews/20090406/103437.php?cid=index>.

<sup>11</sup>Oxford Advanced Learner's English-Chinese Dictionary, the 7<sup>th</sup> edn. The Commercial Press/Oxford University Press; 2009. p.1851.

<sup>12</sup>Oxford Advanced Learner's English-Chinese Dictionary, 7<sup>th</sup> edn, The Commercial Press/Oxford University Press; 2009. p.1831.

<sup>13</sup>To want or like; to use the power of your mind to do something or to make something happen; to intend or want something to happen; to formally give your property or possessions to somebody after you have died.

<sup>14</sup>Oxford Advanced Learner's English-Chinese Dictionary, the 7<sup>th</sup> edn. The Commercial Press/Oxford University Press; 2009. p.2302.

<sup>15</sup>Wang Huhua. *Public International Law*. Hangzhou: Zhejiang University Press; 2007. p.464.

- a) The subject who makes the order has no legal right or power to do so but just rely on other sources or on purely violence;
- b) The subject who makes the order has a legal right or power to do so but it does not intend to use such right or power;
- c) The subject who makes the order has a legal right or power to do so and it intends to use such right or power. Only under the last condition can legal obligations be achieved.

Surely when the Security Council takes measure to embody the applicable international laws, certain specific obligations which have never been assumed and performed by the Member States will be affected. But issuing executive measures in accordance with existed international laws is totally different from publishing new international laws! Although the Security Council could require Sudan to make certain specific performance such as arresting Bashir, attending the trial and even enforcing the future ICC judgment through resolutions, yet it cannot, through resolutions, require Sudan to be treated as a Member Party and to bear the obligations under the Rome Statute, even just in the Darfur Situation. Sudan is not a Member Party of the Rome Statute and bear no obligation under it, and this cannot be changed even by the 1593 Resolution. Thus the Security Council Resolution can compel Sudan to perform certain obligations, but it cannot turn Sudan into a member party to ICC and cannot impose treaty law obligations on Sudan. So the legal meaning of the word “shall” is ambiguous, it is just possible to create certain obligations for Sudan, and even if the word “shall” means certain obligations here, it can only create obligations with less formality, persistence and strength.

**The legal meaning of “urge”:** Also according to the 1593 Resolution, the Security Council, “while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully.” And then the following question is, does the word “urge” create an obligation for all States, including all the non-member parties, to cooperate with ICC? The answer is obviously no. Because the word “urge” just means to advise or try hard to persuade somebody to do something; to recommend something strongly; to make a person or an animal move more quickly and/or in a particular direction; to encourage somebody to do something or support them.<sup>16</sup> None of these meanings suggest certain legal obligation. Furthermore, it can be observed that the Security Council itself had no intention of creating new international obligations similar to ICC Member Parties

for other non-member parties. It used such word as “urge” instead of “should” or “shall”, just because it wants to encourage all States to take effective measures to solve the problem in Darfur.

And essentially such expressions as “cooperate fully”, “provide any necessary assistance” is a rather abstract requirement. What does “cooperate fully” mean? What procedure shall the States follow to “cooperate fully”? What should the States do to “cooperate fully”? How to deal with the possible situation when relative States refuse to “cooperate fully”? Nearly all the detailed stipulations which are necessary for the creation of legal obligations are not mentioned. And therefore, such word as “urge” is just an expression to show the Security Council is advising or even pressing the States, and cannot be held to have created obligations, for non-member parties, to comply with the legal actions and enforce relative decisions or judgments made by ICC. So the word “urge” in the 1593 Resolution has not created any obligations for other Non-member Parties to cooperate with ICC. Then, the 1593 Resolution may create certain obligations for Sudan to cooperate with ICC, but such kind of obligations, even if really exist, are less formal, persist or strong than that of Member Parties to the Rome Statute. As to other Non-member Parties to the Rome Statute, the 1593 Resolution creates no legal obligation for them to cooperate with ICC.

## Conclusion

ICC really achieved the jurisdiction to Bashir Case, but such a jurisdiction is a crippled one because it essentially came from the Security Council Resolution 1593. Without further Security Council resolutions, ICC cannot compel Sudan or other States to enforce its decisions. Sudan's sovereign immunity cannot be deprived of by the Rome Statute. ICC itself has no power to enforce its decisions. The Security Council is not a legislative but just an executive organ. The 1593 Resolution may create certain obligations for Sudan to cooperate with ICC, but such kind of obligations, even if really exist, are less formal, persist or strong than that of Member Parties to the Rome Statute. As to other Non-member Parties to the Rome Statute, the 1593 Resolution creates no legal obligation for them to cooperate with ICC.

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## Conflicts of interest

Authors declare that there are no conflicts of interest.

<sup>16</sup>Oxford Advanced Learner's English-Chinese Dictionary, the 7<sup>th</sup> edn, The Commercial Press/Oxford University Press; 2009. p. 2223–2224.