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On the "Creative Interpretation" of ICL: Causes, Ways and Limiting Methods

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Abstract: The article examines the concept of "creative interpretation" of international criminal law (ICL), characterized as a form of "soft interpretation" driven by judicial activism. This approach aims to expand the sources of ICL in response to the international community's calls for the punishment of international crimes. The author analyzes the reasons for adopting "creative interpretation," including the lack of legal sources, the uncertainty of legal terminology, and the mixed nature of ICL. The article explores the methods used by international criminal justice institutions, such as reconstructing customary international law, resorting to natural law, and drawing analogies from national legislation. The importance of adhering to the principle of legality is emphasized, and recommendations are made to limit judicial activism: applying Article 22 of the Rome Statute to clarify the sources of ICL, affirming the priority of legal stability, developing more detailed sentencing guidelines, and introducing a "stay of proceedings" mechanism.

Keywords: principle of legality; creative interpretation; ICL; strict standard system; rank

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Introduction

The principle of legality, which originated in the Enlightenment Era, presupposes the specificity, completeness and clarity of legal norms. With the in-depth development of the human rights movement and the rule of law, the principle of legality has become the "imperial principle" of criminal law. The principle of legality is of great significance to ensuring judicial fairness and safeguarding the legal rights of defendants. Therefore, judicial institutions should strictly interpret the relationship between crime and punishment set by legislators. However, the legislative procedures of ICL are so cumbersome that it is difficult to promote legislation. Moreover, due to the uncertainty of the language and mixed nature of ICL, and the continuous emergence of new forms of crime, judicial institutions regard case judgments as the simple literal meaning of norms is not enough to respond to the international community's demand for justice. As a result, international criminal justice institutions often "respond through 'soft' interpretations of (international) criminal law when new types of behavior emerge that warrant punishment" [1]. It is undeniable that "criminal law interpretation theory should originally be purpose-oriented, substantive, responsive and consequence-oriented" [2]. However, in many judicial practices, international criminal justice institutions have adopted "creative interpretations" with a distinctive color of natural law, and "in the name of interpreting and clarifying vague provisions of ICL, they have implemented judge law making" [3], making the trial no longer credible. It was so foreseeable that the principle of legality was sidelined, triggering a crisis of legitimacy in international criminal justice. In modern society where judicial problems arise one after another, how judicial institutions adhere to the principle of legality when responding to the international community's demands for the rule of law is of great significance both in theory and in practice. It is also an important way to solve the crisis of legitimacy of international criminal justice.

The Methodology

This paper applies literature analysis method and empirical analysis method to analyze the creative interpretation actions of the International Criminal Court.

Literature analysis method – This article adopts the "creative interpretation" theory shaped by Japanese scholars, pointing out the conflict between "creative interpretation" and "rule of law principle".

Empirical analysis method – This article analyzes the practices of creative interpretation in the judicial practice of the International Criminal Court and analyzes the reasons why the International Criminal Court makes creative interpretations.

Discussion

1.The Causes of Creative Interpretation in ICL

"Creative interpretation refers to situations in which judicial organs apply criminal law creatively and flexibly" [4]. In situations where it is difficult to advance criminal legislation,

"the demand for dynamic, substantive, and functional interpretation of criminal law continues to increase," because "creative interpretation" can fill legal gaps and safeguard social justice. Recently, in criminal justice practice, the fundamental reason for creative interpretation is the lack of positive law - this is also one of the reasons why "creative interpretation" appears frequently in international criminal justice. Because ICL is an emerging legal department, its legal sources are relatively scarce and cannot effectively deal with the emerging new international criminal phenomena. For example, current ICL cannot regulate "automatic weapon systems" in war. This is also the fundamental reason why judicial institutions carry out "creative interpretations" of ICL. At the same time, "ICL is a complex legal discipline composed of several parts," [5] and each part has its own value positioning, but ICL has not established clear weighing standards. That makes judges more inclined to make judgments that embody substantive justice when facing heinous international crimes and weighing the value of legal stability and justice. In addition, ICL is a mixture of many legal departments and inherits the structural characteristic of "uncertainty" in international law. The "uncertainty of language" in ICL also provides ample space for judges to carry out "creative interpretations".

1) the fundamental cause of "creative interpretation": lack of legal sources

From the perspective of limited rationality, the gap between criminal law norms and social life is difficult to bridge. Because of that, no matter how complete a law seems to be, from the beginning of its promulgation, many difficult problems that legislators could not foresee will be put before judges. Generally speaking, in the face of omissions and shortcomings in criminal law, judicial agencies often rely on judicial activism, take existing regulations as a logical starting point, and make the norms more comprehensive and clearer through careful reasoning and explanation. But "in the face of real legal loopholes, dogma is really powerless." Because within the framework of the principle of legality, areas that are not regulated by criminal law belong to the "extra-legal space" [6] – *Nullum crimen sine lege.* If the judicial institutions make "creative interpretation" of existing laws to fill legal gaps, it is likely to violate the principle of legality.

As for ICL, as a new legal department, its legal sources were very scarce at the beginning of its birth. For example, although the Charter of the International Military Tribunal for Nuremberg provides legal basis for the trial of Nazi war criminals, the Charter's provisions on specific crimes are very brief. At that time, the specific sources of ICL were very scarce. Taking into account the necessity of punishment from the perspective of the international community, the European International Military Tribunal had to flexibly deal with the principle of legality and conduct "creative interpretations" of the Charter to expand the sources of ICL. Taking "individual criminal responsibility" as an example, at the beginning of the birth of ICL, there were no legal provisions and judicial practices on individual criminal responsibility in the field of international law. But as Robert H. Jackson said: "I cannot subscribe the perverted reasoning that society may advance and strengthen the rule of law by the expenditure of morally innocent lives but that progress in the law may never be made at the price of morally guilty livers" [7]. The European International Military Tribunal therefore provided a "creative interpretation" of the rules of criminal liability for international crimes. The Trial Chamber held that: "The pursuit of individual criminal responsibility is a trend in modern international law, and related practices are also quite abundant, including punishment for piracy and human trafficking. The attempt to

try the German Emperor Wilhelm II von Deutschland is also an example." As a result, the Allied Powers and Germany's confirmation of the war crimes cited in the Leipzig Trail became the source of customary international law for European International Military Tribunals to pursue individual criminal responsibility, filling the gap in the legal source of the principle of individual criminal responsibility. Although the outcome of the trial was unparalleled in justice, the Tribunal's use of customary international law and natural law to fill the legal gaps clearly broke through the limitations of the principle of legality and provided a basis for future international criminal justice institutions to resort to customary international law and natural law, providing a precedent for "creative interpretations" of existing ICL. For example, in the Furundzijia case, that the ICTY incorporated the act of "oral sex" into the constitutive elements of the crime of rape based on the abstract concept of "human dignity" is a typical example [8]. For another example, in the Celebic case, the ICTY extended the subjective constitutive element - "knowing or having reason to know"- of the commander's responsibility to "negligence" [9]. This is another example of judicial institutions resorting to natural law basis to conduct "creative interpretations" of ICL. With the continuous development of ICL, the sources of ICL, including international humanitarian law and international human rights law, have been greatly enriched. In addition, international criminal justice practices are also carried out around the world, such as the ICTY, ICTR, and the Special Tribunal for the Kosovo Region. These practices not only enhance the influence of ICL, but also enrich the sources of case laws of ICL. In addition, the Rome Statute clearly stipulates the scope of the sources of ICL and the principle of legality in Articles 21-23. Some methods of flexibly handling the principle of legality in international criminal judicial practices in the past have been clearly excluded. The richness of legal sources and the focus on the principle of legality have, to a certain extent, the effect of restricting the "creative interpretations" of judicial institutions and tightening the scope of sources of conviction. For example, in the Vasiljevic case, the Trail Chamber held that although there is a prohibition on "violence against life and person" in article 3 common to the four Geneva Conventions of 12 August 1949, the concept of "prohibition" and "crime" are not equivalent, and the degree of clearness of the provision is relatively low, so that the defendant cannot be found guilty on this basis [10]. For example, in the Kordic & Cerkez case, the ICTY clearly pointed out that "unlawful attacks against civilians" is a prohibitive provision, and its content does not meet the degree of certainty and clarity required by the elements of a crime, so it cannot be used as a basis for conviction [11].

In summary, it can be seen that the fundamental reason for the emergence of "creative interpretations" of ICL is the lack of sources of ICL. Taking into account the necessity of punishment from the perspective of the international community, international criminal justice institutions have to fill the legal gaps through "creative interpretations" to avoid impunity. With the in-depth development of ICL, the sources of ICL have become increasingly rich, and the "creative interpretations" of ICL has also been reduced under the restrictions of the principle of legality.

2) The direct cause of "creative interpretations" of ICL: the uncertainty of language

ICL has the attributes of international law, which also determines that it has the structural characteristics of "uncertainty" in international law. The "uncertainty" characteristic of international law can be traced back to the critical legal studies movement that began in the

1980s [12]. The critical legal school believes that the "uncertainty" of international law originates from multiple dimensions: in the linguistic dimension, because language is elastic, legal language itself is open and ambiguous; in the dimension of legal sources, different rules of international law conflict with each other, resulting in "uncertainty" in the effectiveness of the rules; in the dimension of judicial practice, when judicial institutions handle specific cases, it is a matter of dispute whether to apply the rules of international law or exceptions. As for ICL, because of its "uncertainty" in the dimensions of language, legal resources, and legal applications, it retains greater discretion for judges. Therefore, judges are able to conduct "creative interpretations" of ICL.

First, in the legal language dimension, "ICL emerges gradually through legislative proceedings in which the participants are diplomats rather than experts in ICL, comparative criminal law or procedural law" [5]. Due to insufficient professional knowledge, ICL formulated by diplomats has many flaws in legal terms. For example, the provisions on crime of aggression of Rome Statue cited United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974 (Article 9 of the Rome Statute). However, there is huge controversy over this provision. That is, is Article 9 of the Rome Statute citing the full text of resolution 3314 (XXIX), or the specific provisions thereof? Pursuant to Article 31(1) of the Vienna Convention on the Law of Treaties, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Therefore, the content cited in the Rome Statute should be the content on the crime of aggression in Articles 1 and 3 of the annexes to resolution 3314 (XXIX). However, from the perspective of literal interpretation, the content cited in Article 8(2) of the Rome Statute may include other articles including Articles 1 and 3 of the Annex. If it is believed that Article 8(2) of the Rome Statute quotes the full text of resolution 3314 (XXIX), then according to the provisions of Article 4, the list of acts of aggression is open-ended. Because the United Nations Security Council can decide other forms of aggression on its own in addition to the current provisions - this increases the "uncertainty" in the definition of the crime of aggression and leaves ample room for "creative interpretations" made by judicial institutions.

Secondly, in the dimension of legal sources, "all legal rules in a legal system should be as non-conflicting as possible to establish an effective order for human beings to live together" [13]. However, since there is no supranational organization in the international community and the makers of ICL come from different cultures and legal systems, "differences in style and language have led to many inconsistencies in the drafting techniques of these conventions" [5]. The "policy" element in crimes against humanity is a typical example. Article 7(2) of the Rome Statute clearly stipulates that the elements of crimes against humanity include "policy" elements – "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. However, the Charter of the International Military Tribunal, the Statute of the International Criminal Tribunal for the Former Yugoslavia, and the Statute of the International Criminal Tribunal for Rwanda, which are the early sources of ICL, did not include the "policy" element in crimes against humanity. It is worth noting that the early judicial practices of ICTY and ICTR recognized "policy" elements as constitutive elements of crimes against humanity [14], but the attitudes of the two tribunals

changed in subsequent trials. The two Tribunals held: "It is sufficient to prove the existence of a widespread or systematic attack, and there is no need to prove the existence of the 'policy' element" [15]. Furthermore, according to a report by the George Washington University Law School, "currently, more than 19 of the 34 States that have legislation specifically addressing crimes against humanity have omitted the 'policy' element, and 17 out of 19 States are parties to the Rome Statute" [16]. It shows that there are conflicts in the provisions on what constitutes crimes against humanity, whether between different sources of ICL or between domestic law and ICL. Conflicts between different rules of ICL not only endanger the implementation of the principle of legality, but also make ICL a "argumentative practice, which is about persuading target audiences such as courts, colleagues, politicians, and readers of legal texts about the legal correctness – lawfulness, legitimacy, justice, permissibility, validity, etc." [17], thereby creating space for judicial institutions to conduct "creative interpretations" of ICL.

Finally, in judicial practice dimension, the recognized principle of legal application in the field of international law is "lex specialis derogate legi denerali". This principle means that "whenever two or more norms deal with the same subject matter, priority should be given to the norm that is specific." According to this logic, international criminal justice institutions should give the Rome Statute the status of "lex specialis" when applying legal rules, because the content of the Rome Statute is clearer and more specific than customary international law. However, international criminal justice institutions sometimes cause "controversies" when applying ICL. For example, Article 27(2) of the Rome Statute provides that 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. In a short, "irrelevance of official capacity". However, "Immunity of State Officials from Foreign Criminal Jurisdiction" is an ancient rule of customary international law and is observed by States around the world. On March 4, 2009, the ICC issued an arrest warrant for Sudanese President Bashir in accordance with the Rome Statute, accusing President Bashir of committing crimes against humanity and war crimes. The Court issued a second arrest warrant in 2010 and sent arrest warrants together with documents requesting arrest and surrender of President al-Bashir to all States Parties to the Rome Statute. However, neither Jordan, Chad, nor other African Union countries have implemented the ICC's request for cooperation. Even though the ICC believes that "Article 27(2) of the Rome Statute is not only a treaty provision, it has also been known as customary international law" [18], there are still many scholars in the international community who believe that Article 27(2) of the Rome Statute violates the rules of traditional customary law [19]. Even many members of the International Law Commission believe that "[Crimes under ICL in respect of which immunity ratione materiae shall not apply] was essentially embarking on a policymaking exercise, as opposed to seeking the codification or progressive development of the law."

In summary, it can be seen that in the three dimensions of language, rules, and justice, ICL has the structural feature of "uncertainty", and "uncertainty" provides ample space for judicial institutions to carry out "creative interpretations" of ICL. That is the direct cause of the "creative interpretations" of ICL.

3) Indirect causes of "creative interpretation" of ICL: conflicts between multiple purposes

As pointed out above, ICL is a mixture of international law, criminal law, procedure law and many other law departments, and each law department has its own value positioning. However, ICL does not establish clear weighing standards, which also leads to conflicts among different purposes in the ICL system. For example, ICL requires that it has the purposes of "retaliation, deterrence, education, and rehabilitation"; and ICL also requires ICL to assume the responsibilities of "responding to the demands for justice of the international community", "summarizing and recording history", "regulating international social conflicts", and "conveying the concept of international rule of law and indirectly promoting the construction of trial capacity of the domestic judicial system" [20]; at the same time ICL also require it to undertake the function of "fair and impartial trial". However, there are intense tensions among the different purposes of ICL. For example, there is a conflict between the "punishment" purpose of ICL and the "recording of history" purpose. Because ICL pursues individual criminal responsibility, achieving this goal requires precise application of the law. But the purpose of "recording history" requires that the trail should be open to the play of political forces and has a certain degree of performability. It can be seen that there is a great tension among the different purposes of ICL.

So far, the international community has not developed any clear standards to deal with conflicts among different purposes. This makes judges, when faced with international crimes that "shock human conscience", whether based on their own moral cultivation, strong sympathy for the victims, or in response to the international community's call for the necessity of punishment, tend to make substantive justice judgments. When faced with situations where there is no positive legal basis, international criminal justice institutions often make "creative interpretations" of existing rules of ICL to achieve the purpose of punishing criminals. For example, Japan committed heinous crimes and caused huge disasters to Asian countries including China in World War II. However, in the context of international law at that time, except for the Charter of the International Military Tribunal, customary international law and numerous international law treaties not only did not clearly define "acts of aggression" as a crime, but also lacked provisions or precedent that individual who committed war crimes should hold criminal responsibility. In order to bring Japanese war criminals to justice, French judge Henri Bernard pointed out: "Aggression is (and always has been) a crime in the eyes of common sense and universal conscience - common sense and universal conscience embodying the natural law by which an international tribunal can and must judge the conduct of the defendants brought before it" [21]. For example, in the Furundzija case, ICTY included "sexually violent crimes" into war crimes by adopting the "ejusdem generis" [8] standard, holding that if a crime is not stipulated in the existing laws, but its gravity is the same as the crime stipulated in the laws, then the court also has jurisdiction over such conduct. These cases all show that if there are no clear standards to deal with the ranking issue among the multiple purposes of ICL, judges are likely to be inclined to make judgments of substantive justice in the balance of values, thereby conducting "creative interpretations" of ICL.

2.Common ways of "creative interpretation" in ICL

The purpose of "creative interpretations" of ICL is to expand the sources of ICL to respond to the international community's demand for the necessity of punishment. When international

criminal justice institutions expand the sources of criminal law, they mainly creatively interpret ICL by three ways – "reconstructing" customary international law, resorting to natural law basis and resorting to similar rules in domestic legislations.

1) The way of "reconstructing" customary international laws

The practice of international criminal justice institutions to regard customary international law as a source of ICL has gained widespread recognition in the international community. For example, in 1993 Boutros-Ghali, then Secretary-General of the United Nations, pointed out: "the application of the principle nullum crimen sine lege requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise." And article 21(1) of the Rome Statute lists customary international law as a formal source of ICL. International criminal justice institutions often resorts to customary international law to fill gaps in ICL when exercising jurisdiction, convicting and sentencing. However, due to the inherent characteristic of customary international law – it is always in a state of evolution and development, so the contents of customary laws are not as specific as positive laws. This provides space for international criminal justice institutions to "reconstruct" customary international law, and "reconstructing" customary international law has also become a common way for international criminal justice institutions to expand their legal sources.

For example, Articles 4 to 11 of the Responsibility of States for International Wrongful Acts(Draft) are considered to be general rules of "attribution" under customary international law, that is, if a person or group of people is actually acting in accordance with the instructions of the state or under his command or control, his act shall be considered as the act of a state referred to in international law – effective control standard. That means only when the state controls the specific behavior of the criminal at a micro level, will it assume responsibility for the crimes committed by the criminal. However, the ICTY gave a "creative interpretation" of this "attribution" standard in the Tadic case, holding that "the Nicaragua Test would not seem to be consonant with the logic of the law of State Responsibility" [14]. And the Tribunal also claimed that: "In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group" [14]. It can be seen that ICTY replaced the "effective control" standard with the "overall control" standard, which in fact "reconstructed" attribution rules in customary international law, triggering huge controversy in the international legal community. Compared with the "effective control" standard, the "overall control" standard does not require proof that a State controls the rebels to the extent of issuing specific instructions, which greatly lowers the threshold for conviction and facilitates the court's use of existing evidences. However, the ICTY's application of the "overall control" standard is not only inconsistent with the content of customary international law, but also contradicts common international judicial practices. For example, after the ICJ clearly proposed the "effective control" standard in the case of "Military and Paramilitary Activities in and against Nicaragua" [22] in 1986, it reiterated the "effective control" standard in the case of "Bosnia and Herzegovina v. Serbia and Montenegro" in 2007. The

ICJ held that: "It has to be proved that they acted in accordance with that State's instructions or under its 'effective control'. It must however be shown that this 'effective control' was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations" [22]. These judgments of the ICJ essentially rejected the "overall control" standard established by the ICTY in the Tadic case.

The ICTY's "creative interpretation" of the Draft Articles on the Responsibility of States for Wrongful Acts is essentially "reconstruction" of customary international law. It is also a classic example of international criminal justice's conflict with other institutions when it conducts "creative interpretations" of customary international law.

2) the way of resorting to natural law basis

The two world wars prompted the international community to deeply reflect on the "rule of positive law" and also promoted the revival of natural law. As Nussbaum puts it: "The renewed invocation of natural law simply expresses the awareness that treaties and customs cannot fully describe international law, and the awareness that decisions on disputed issues can only be obtained through a process of reasoning, which includes limited considerations of justice and equity in addition to given empirical materials" [23]. In the context of the revival of natural law, traditional positivism has become "softened", and the way in which international criminal justice institutions flexibly deal with the principle of legality and expound the value of natural law in the language of positive law has become acceptable. The trials after World War II are examples. However, resorting to the basis of natural law and "creatively" interpreting positive laws under the guidance of natural law is nothing more than an attempt by international criminal justice institutions to "create the appearance of conforming to the principle of legality and cover up the lack of a basis for positive laws" [24]. It will also lead to legitimacy crisis in international criminal justice.

The most typical examples are the trials after World War II. At that time, international laws did not define aggression as a crime. Even before the United Nations General Assembly adopted the Definition of Aggression on December 14, 1974, the international community did not reach an agreement on the definition of aggression. However, in face of the tremendous suffering caused by fascist Germany and Japan to the people of the world, it is obviously unreasonable to acquit war criminals. Therefore, at the International Military Tribunal for the Far East, Sir William Flood Webb from Australia resorted to natural law. Judge Webb believed: "International law can be supplemented by rules of justice and general legal principles, and rigid positive legalism is no longer consistent with international law. Natural law between States is of equal importance to positive law." Although President Webb's interpretation was recognized by all judges except Indian judge Radha Binod Pal, the two trials after World War II were considered by some scholars to be "victor's justice" [5] because of their application of interim law and ex post facto law. Since the sources of ICL include precedents, and "judgment precedents are not independent sources of law...it is not the adjudication precedent itself, but the standards declared in the adjudication that are binding."[6] Therefore, the standard of "resorting to natural law to fill legal gaps" adopted in the two trials was also inherited. For example, in the Akayesu case, which was "the first trial and conviction of genocide criminals in human history",

facing the brutal crime of genocide, ICTR broke through the restrictions on the four categories of "protected groups" in the Genocide Convention and defined Tutsi as a "protected group". The court held that: "it appears that the crime of genocide was allegedly perceived as targeting only 'stable' groups, constituted in a permanent fashion and membership of which is determined birth, with the exclusion of the more 'mobile' groups which one joins through individual voluntary commitment, such as political and economic groups" [25]. Moreover, the "stable and permanent" standard is the "legislator's original intention" [26]. Based on the legislator's original intention, protected groups are not limited to the four categories listed in the Genocide Convention. However, is the "legislator's original intention" considered by the Court really the "legislator's original intention"? If legislators intend to protect "stable and permanent" groups, and the groups protected by the Convention are not limited to the four categories of groups listed in the Convention, should legislators set up a bailout clause as in Article 3 of the Statute of the Tribunal for the Former Yugoslavia? Or should it be like Article 8(2) of the Rome Statute, setting up an abstract concept and then giving examples? The ICTR's interpretation of "protected groups" has also raised controversies in the international community, so that some scholars bluntly pointed out: "This result is inconsistent with the principle of legality that also applies to international law."

3) resorting to similar provisions in national laws

Article 21(1) of the Rome Statute stipulates that "general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime." Therefore, drawing on similar crimes and rules in domestic criminal laws to fill legal gaps has become a common way for international criminal justice institutions to expand sources of ICL. However, as stipulated in the Rome Statute, specific rules of domestic law cannot be directly used as sources of law. Only general legal principles that have become customary international law can become sources of ICL. It is worth noting that domestic law is the product of a country's public power, and its scope of effect extends to the boundaries of sovereignty, making it difficult to develop into customary international law. Because it is difficult for domestic legal rules to meet the standards of *"opinio juris"* and "consistent States practice" required by all countries in the world as required by "general legal principles", the "principle of universal jurisdiction" that has been shelved by the international community for a long time is an example. However, although it is difficult for domestic law to contribute to the emergence of customary international law, it is undeniable that domestic legislation or domestic judicial practice can sometimes be used as a preliminary basis for identifying customary international law. In addition, there is an unexplainable "timing paradox" in the definition of customary international law in Article 38(1) of the Statute of the International Court of Justice. When resorting to national laws, the international criminal justice institutions often give national legal rules the status of customary international law.

For example, in the Myanmar/Bangladesh situation, Myanmar is not a party to the Rome Statute and Myanmar has not referred this situation to the International Criminal Court. According to Article 13 of the Rome Statute, the International Criminal Court has no jurisdiction over this situation. Even if one-third of the Rohingya population migrates to Bangladesh, and Bangladesh is a party to the Rome Statute and is the place where the results occurred, the ICC cannot exercise

jurisdiction over the Myanmar/Bangladesh situation. Because according to Article 31(1) of the Vienna Convention on the Law of Treaties, Article 12(2) of the Rome Statute means that the International Criminal Court does not have jurisdiction over the State where the crime results occurred (which is not a party and has not submitted the situation). However, in order to confer legitimacy on the jurisdiction, the Pre-Trial Chamber resorted to national laws to implement a "creative interpretation" of Article 12(2) of the Rome Statute. The pre-trial court pointed out: "A brief survey of State practice reveals that States have developed different concepts for a variety of situations that enables domestic prosecuting authorities to assert territorial jurisdiction in transboundary criminal matters…the effects doctrine, according to which the State may assert territorial jurisdiction if the crime takes place outside the State territory but produces effects within the territory of the State." By drawing on the territorial jurisdiction rules in domestic criminal law, the International Criminal Court replaced the "locus criminis" principle stipulated in Article 12(2) of the Rome Statute with the "principle of territorial jurisdiction" in domestic law. This decision of the International Criminal Court has been strongly questioned by the international community. First of all, even in domestic criminal law, there are different theories on territorial jurisdiction, such as "behavioral theory", "result theory", "intermediate theory" and "ubiquitous theory". It is difficult to think that the "ubiquitous theory" has been become customary international law. For example, Article 693 of the French Criminal Procedure Code defines the principle of territorial jurisdiction as *"locus criminis".* Secondly, according to Article 21(2) of the Rome Statute, domestic law can only be applied when the Rome Statute, Elements of Crimes, Rules of Evidence and Procedure and the treaties and customary international laws listed in item 2 cannot be applied. Because the ranking of domestic law is lower than the Rome Statute, the International Criminal Court's approach of skipping the Rome Statute and directly citing domestic law obviously lacks legitimacy.

Results

As judicial activism rises around the world, "people have moved away from the belief in the completeness and absence of loopholes of the legal order, and since the prohibition against refusing to try without law cannot be changed, judges have been given the creative task of filling loopholes." In order to meet the international community's demand for the necessity of punishment, "creative interpretation" of ICL is reasonable to a certain extent. However, "creative interpretation" is essentially an act of "judge-made law" that deviates from the original intention of the legislators and violates the principle of legality. The principle of legality is the basic principle of ICL and an important prerequisite for establishing rule of ICL. It is also one of the basic forces for protecting human rights and maintaining the stability of the international society. Therefore, ICL, as an emerging legal department, should affirm the fundamental restrictive effect of *"nullum crimen sine lege"* on "judge-made law". Therefore, this article believes that adhering to and implementing the principle of legality in the emerging ICL and establishing a relatively strict standard system to impose necessary restrictions on "creative interpretations" is not only an effective way to solve the legitimacy crisis of international criminal justice, but also a conducive way to develop ICL rapidly.

1. Determine the scope and level of legal sources

The purpose of "creative interpretation" of ICL by international criminal justice institutions is to expand the sources of law to respond to the necessity of punishment by the international community, and there is constructive ambiguity in the definition of the sources of ICL in Article 21(1) of the Rome Statute. Therefore, clarifying the content of Article 21(1) of the Rome Statute to determine the scope of sources of ICL is crucial to controlling "creative interpretation" of ICL.

First of all, Article 21(1) of the Rome Statute clarifies the ranking of various sources of ICL, that is, the Rome Statute is at the core of various sources of ICL, and the "Elements of Crimes" and "Rules of Evidence and Procedure" are subsidiary sources and merely tools to "assist" the Court in interpreting and applying the Rome Statute, and their ranking is inferior to that of the Rome Statute. The "applicable treaties" and "principles and rules of international law" stipulated in Article 21(1)(2) have a lower level of effectiveness than the Rome Statute, the Elements of Crimes and the Rules of Evidence and Procedure, but "applicable treaties" have a higher level than "principles and rules of international law". Because according to the widespread recognized principle of *"lex specialis derogate legi denerali"* in international law – "whenever two or more norms deal with the same subject matter, priority should be given to the norm that is specific", specific treaties more clearly declare the specific content of existing rules than abstract "principles and rules of international law". The effectiveness of "general legal principles" in domestic law is at the end of the list and can only be invoked by international criminal justice institutions when no other sources are applicable. According to the principle of *"lex specialis derogate legi denerali",* any other form of legal sources shall not conflict with the content and purpose of the Rome Statute.

Secondly, strictly distinguish between "prohibitive provisions" and "crime". International humanitarian law is an important part of the origin of ICL, but the international humanitarian law "did not provide for any international criminal liability for grave breaches. Rather, grave breaches constituted a category of violations of those conventions considered so serious that states agreed to enact domestic penal legislation, search for suspects, and judge them or hand them over to another state for trial" [27]. However, prohibitive provision does not mean that it provides a legal basis for the behavior to constitute a crime, and the two cannot be confused. Therefore, when international criminal justice institutions invoke prohibitive provisions that have neither become customary international law nor are clearly expressed as crimes in judicial practice, it is easy to cause controversy. There is constructive ambiguity in the "applicable treaties and principles and rules of international law" in Article 21(1)(2) of the Rome Statute, that is, are international humanitarian laws sources of ICL as a whole? Or only those provisions that have "become customary international law" or are "clearly expressed as crimes" are sources of ICL? The principle of *nullum crimen sine lege* not only has the function of distinguishing this crime from that crime, but also has the function of distinguishing crimes from non-crimes. In accordance with Article 31(1) of the Vienna Convention on the Law of Treaties and the principle of "favoring the accused when in doubt", this provision should be interpreted restrictively, that is, only rules of international humanitarian law that have become customary international law and rules that are expressly expressed as crimes can be considered as a source of ICL. In addition, the object of international humanitarian law is the state. In other words, the subject responsible for

criminal acts is the state. While the subject responsible for criminal acts is individual in ICL, "the two (state responsibility and individual responsibility) are different in terms of the nature of responsibility and the definition standards."[22] Therefore, when the International Criminal Court invokes the provisions of international humanitarian law, it should pay attention to the difference between individual responsibility and state responsibility, and should avoid as much as possible the provisions that attribute responsibility to the state.

Thirdly, overly abstract principles of natural law are clearly prohibited from being used as a source of ICL. The logic of conviction under natural law is that "some behaviors are inherently vicious and can be convicted without the need for additional clarification of positive legal rules" [28]. Due to the moral superiority of natural law, judgments that comply with the principles of natural law are easily accepted by the international community. However, natural law does not have the clarity required by the principle of legality. If judges rely too much on natural law, positive law may be invalidated and violate the principle of legality. It is worth noting that natural law is not all abstract principles, but also includes concrete rules, such as "principle of legality", "fair trial", etc. In the view of this article, these concrete natural law rules can be regarded as sources of ICL, but overly abstract principles in natural law are strictly prohibited from being regarded as sources of ICL.

Finally, the general legal principles of domestic law should be the last applicable sources of law. Domestic criminal law principles are different from customary international law and natural law, because they are relatively clear. Moreover, domestic legislation and judicial practice are often regarded as proof that some international legal rules have developed into customary international law, and some domestic laws even have strong potential to develop into customary international law. However, as Article 21(1) of the Rome Statute stipulates, general legal principles in domestic laws may be invoked only when the sources listed in items 1 and 2 are not applicable. Therefore, international criminal justice institutions must regard general principles of domestic law as the last source of law, and rules of domestic law that have not been developed into general principles of law must not be used as sources of ICL. In addition, the Elements of Crimes has refined the four international crimes in the Rome Statute into more than 90 specific crimes. The constitutive elements of each crime are relatively clear and specific. If the specific rules in domestic law are inconsistent with the Rome Statute or the Elements of Crime, based on the principle of *"lex specialis derogate legi denerali"*, domestic laws cannot be invoked.

2. Affirming the primary value of the stability of the law

ICL is a mixture of many legal departments, and each department has its own purpose and value positioning. ICL does not determine the order of two values: substantive justice (such as protecting the rights of victims, punishing the guilty, etc.) and formal justice (fair trial, etc.). When faced with heinous international crimes, "judicial institutions can easily interpret the value of punishing international crimes as a remedy to protect the rights of victims." In other words, when faced with the lack of sources of ICL, international criminal justice institutions are more likely to be influenced by substantive justice to make "creative interpretations" of ICL.

That the international judicial institutions often interpret international human rights law and international humanitarian law based on Articles 31 and 32 of the Vienna Convention on the Law of Treaties in human rights litigations is typical example.

However, although ICL is a mixture of many legal branches, "given that the principles of ICL depend on domestic criminal law...even if some parts of ICL are not dominated by domestic criminal law, criminal law theory is still needed."[29] Therefore, it is not an exaggeration to say that ICL is a branch of criminal law. Among the many values and purposes of criminal law, the principle of *nullum crimen sine lege,* or the value of the stability of the law, is the primary value. As Radbruch said: "The existence of legal rules is more important than its justice and purposiveness; justice and purposiveness are the second major tasks of the law, and the first major task recognized by everyone is the stability of legal rules."[30] ICL pursues individual's criminal responsibility, and adhering to the principle of *nullum crimen sine lege* is an important part of protecting the human rights of criminals and maintaining a fair trial. Therefore, limiting "creative interpretation" and maintaining the stability of ICL should be the core purpose of ICL. Radbruch pointed out in his description of the relationship among the values of legal stability, justice and purposiveness: "The stability of law is a characteristic of any positive law due to its substantive nature. It occupies a remarkable intermediate position between purposiveness and justice" [31]. Specifically, when interpreting ICL, international criminal justice institutions should give priority to literal interpretation, and the interpretation of legal concepts must not go beyond the general understanding of the people, and analogical interpretations are prohibited; Secondly, the stability of law should be one of the important contents of the purpose interpretation.

First of all, it is necessary to clarify the "red line" in the interpretation of ICL, that is, the judicial body's interpretation of the law must take into account the predictability of the international community. Since ICL is a provision for everyone in the international community, legislators will make more precise statements in terms that the public can understand, "so that everyone can directly enter the world of law" [6]. For this reason, even if some concepts in ICL cannot obtain clear literal meanings from daily life language, "it is by no means a symbolic language that is completely separated from the latter" [6]. Therefore, when international criminal justice institutions interpret ICL, they must do so within the context of the text that is predictable to the international community. If an interpretation conclusion surprises or shocks the international community, it may make the international community's citizens and officials unable to foresee the possibility of criminalizing their behavior when engaging in social life, and ultimately, they will be at a loss as to what to do. The role of ICL in guiding the behavior of people in the international community cannot be developed. The huge controversy caused by the International Criminal Court's conviction of Lubanga for the purpose of "ending impunity" is an example [32].

Secondly, the purpose interpretation should be strictly applied. Generally speaking, purpose interpretation means that when interpreting ICL, we must consider the many purposes that ICL wants to achieve, and then make a reasonable interpretation that is consistent with the purpose of ICL. As pointed out above, among the many purposes of ICL, the purpose of stability of law should be at the core position. Therefore, in the practice of international criminal justice,

the purpose of interpretation by judicial institutions is not to resort to purpose interpretation to expand the scope of punishment, but to provide appropriate punishment for those cases where punishment is necessary on the surface, but the conviction and sentencing are obviously inappropriate. In other words, the main function of purposive interpretation is not to "create laws" but to achieve the balance between crime and punishment.

3. Sentencing as a restraint on conviction

In the traditional relationship between crime and punishment, crime is primary, punishment is secondary, and punishment is an accessory to crime. However, with the continuous emergence of new crimes, the problem of atypicality between crimes and punishments has gradually emerged. Accurate convictions - unfair punishments, and legal but unreasonable phenomena have made the traditional relationship between crime and punishment face more and more doubts. China has put forward the theory of "sentencing as restraint on conviction" since the 1990s, and the United States has a similar theory. For example, the American scholar Van Schaack pointed out: "any lingering concerns about the rights of the defendants can and should be mitigated by sentencing practices-to a certain extent already in place and employed by the ad hoc criminal tribunals-that are closely tethered to extant domestic sentencing rules governing analogous domestic crimes" [33]. Although Van Schaack's conclusion overstates the role of sentencing, sentencing can indeed relieve the rights of offenders to a certain extent and buffer the judicial institutions' deviation from the principle of legality during the conviction process. Moreover, this conclusion has also been confirmed in the judicial practices of ICTY and ICTR. Both the ICTY and ICTR referred to the provisions of relevant domestic laws when sentencing, because "relying upon existing penalties for the same or analogous crimes in place in the *locus commissi delicti* can minimize the tangible impact of retroactive adjudication" [33].

In addition, the Rome Statute stipulates in Article 23 that *"nulla poena sine lege"*. Since Article 21 of the Statute provides vague provisions on the sources of ICL, there is reason to believe that legislators are trying to use sentencing to control the Court's excessive expansion of the sources of ICL. If the judicial institution uses "creative interpretation" to convict acts that are not stipulated in the Rome Statute, but the Statute does not have corresponding penalty measures, or although there are penalty measures, the penalty is obviously disproportionate to the crime - this kind of situation where the contradictory results occur will prompt the judiciary to re-examine whether their judgments comply with the principle of legality. Adding statutory sentencing considerations into the process of conviction can help to achieve a more accurate understanding of the elements that constitute a crime. It is also a reflection and test on the legitimacy and legality of the Court's interpretation. Regrettably, current ICL does not provide for sentencing details. Article 78 of the Rome Statute contains only a few words on sentencing, which fails to achieve the purpose of the Statute's attempt to use sentencing to control Court's expanding the sources of law. Therefore, the International Criminal Court needs to develop more detailed sentencing guidelines.

It is worth noting that although sentencing can to a certain extent limit the flexibility of judges in handling the principle of legality when convicting, when the judicial institution faces the same defendant, it is often the same group of people who convict and sentence the defendant. This means that if the judicial institution makes a "creative interpretation" of ICL

when convicting and violates the principle of legality, it will be difficult for the judicial institution to object or even detect the deviation from the principle of legality during sentencing, especially when international crimes are often acts that has brought huge disaster to the international community - without punishing the criminals, it is difficult to respond to the international community's demands for the necessity of punishment. Therefore, the International Criminal Court can introduce the "stay of proceedings" of the Anglo-Saxson legal system, which can provide guarantee for a fair trial. Because when the court cannot guarantee a fair trial, it can block the execution of the penalty by "stay of proceedings", thereby achieving control over "creative interpretation" by sentencing.

Conclusion

International Criminal Law (ICL) represents a synthesis of individual and collective goals, including the need to safeguard fundamental human rights from lawless states and, ultimately, to uphold human dignity and justify supranational punitive powers. [29] The emergence and development of ICL play a vital role in ensuring the well-being of humanity as a whole. However, it is undeniable that ICL remains a relatively young legal discipline, with inevitable shortcomings in both legislative techniques and law enforcement. Faced with the continuous rise of new international crimes in risk societies, international judicial bodies are understandably inclined to meet the global community's demand for justice through "creative interpretation" of ICL. Nevertheless, such "creative interpretation" inherently conflicts with the principle of legality and is not conducive to the consistent development of ICL.

From the practice of international criminal justice, this article summarizes three ways for judicial institutions to expand the sources of ICL through "creative interpretation", namely resorting to natural law basis, "reconstructing" customary international law and drawing on similar norms in domestic law. Furthermore, this article also points out that the fundamental reason for the "creative interpretation" of ICL by international criminal justice institutions is the lack of sources of ICL. As a branch of criminal law, ICL must abide by the principle of legality. The principle of legality is not only a normative source of social order [34], but also an authoritative source of political order and international governance [35]. It is also an important foundation for establishing international criminal rule of law.

Therefore, this article establishes a relatively strict standard system to restrict the "creative interpretation" of international criminal justice institutions from the three dimensions, namely sources of ICL, value positioning, and sentencing, hoping that the principle of legality can be implemented in ICL. In addition, the strict standard system established in this article aims to limit the "creative interpretation" of the judiciary that violates the principle of legality, but it does not ignore the importance of substantive justice, because the mission of ICL is to eliminate "impunity" and protect "well-beings". If those prosecuted for heinous crimes go unpunished due to lack of legal sources, international criminal justice will also be difficult to achieve. Therefore, this article advocates that the "creative interpretation" of judicial institutions that violates principle of *nullum crimen sine lege* should be strictly restricted. The problem of lack of legal sources should be actively taken by legislative bodies such as the International Law Commission and the Assembly of the International Criminal Court to promote legislation.

The Contribution of the authors:

Three authors contributed equally to this article. **Wang Heyong** wrote the first version of this article and verified the last version. **Liu Yuqin** corrected the form of this article according to the requirement of Bulletin of ENU, made comments on the first version and submitted the article. **Liu Wenhao** collected the materials according to the original idea of authors, and made comments on the first version. All of the comments given by **Liu Yuqin, Liu Wenhao** were accepted by **Wang Heyong.** All of the authors made equal contributions to publication of this article.

References:

1. Hitoshi S. The Way of Thinking of General Part of Criminal Law – The Way of Joy. - M.: China University of Political Science and Law Press, 2017. - 23C. [In Chinese]

2. Dongyan L. Judicial Activism and Criminal Law Interpretation Theory on the Functionalism//China Legal Science. - 2017. - No.5. - C.63-88. [In Chinese]

3. ICTY, Prosecutor v. Aleksovski, Appeals Judgement, Appeals Chamber, IT-95-14/1, May 30, 2001 - [Electronic Resources] - Available at: https://www.refworld.org/jurisprudence/caselaw/icty/2000/en/17044 (Accessed at 2020.3.29).

4. Guangquan Z. The Judicial Status and Control Path of "Creative Interpretation" in Criminal Law// Social Sciences Digest. - 2023. - No.5. - C.109-111. [In Chinese]

5. Bassiouni C. Introduction to International Criminal Law. - M.: Law Press, 2006. - 2C. [In Chinese]

6. Larenz K. Methodenlehre der Rechtswissenschaft. - M.: The Commercial Press, 2003. -250C. [In Chinese]

7. Robert H. J. The Nürnberg Case. - M.: Afred A. Knopf, Inc., 1947. - 8C. [In Chinese]

8. ICTY, Prosecutor v. Furundzijia, Judgement, the Trail Chamber, IT-95-17/1-T, December 10, 1998. - [Electronic Resources] - Available at: https://www.refworld.org/jurisprudence/caselaw/icty/1998/en/20418 (Accessed at 2020.3.29).

9. ICTY, Prosecutor v. Delalic, Appeal Judgement, Appeal Chamber, IT-96-21-A, February 20, 2001. - [Electronic Resources] - Available at: https://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf (Accessed at 2020.3.29).

10. ICTY, Prosecutor v. Vasiljevic, Trail Judgement, Trail Chamber, 1T-98-32-T, November 29, 2002. - [Electronic Resources] - Available at: https://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf (Accessed at 2020.3.29).

11. ICTY, Prosecutor v. Kordic & Cerkez, Trail Judgement, Trail Chamber, IT-94-14/2, December 17, 2004. - [Electronic Resources] - Available at: https://www.icty.org/en/sid/8016 (Accessed at 2020.3.29).

12. Kennedy D. Theses about International Law Discourses//German Yearbook of International Law. - 1980. - No.23. - C.353-391.

13. Hanna-Maria Z. Juristische Methodenlehre. - m: Law Press, 2019. - 126C. [In Chinese]

14. ICTY, Prosecutor v. Tadic, Opinion and Judgement, Trail Chamber, IT-94-1-T, May 7, 1997. - [Electronic Resources] - Available at: https://www.refworld.org/jurisprudence/caselaw/icty/1997/en/40193 (Accessed at 2020.3.29).

15. ICTY, Prosecutor v. Kunarac et al., Judgement, Appeals Chamber, IT-96-23&IT-96-23/1-A, June 12, 2002. - [Electronic Resources] - Available at: https://www.icty.org/en/sid/8095 (Accessed at 2020.3.29).

16. Arturo J. C. & Annalise K. N. Comparative Law Study and Analysis of National Legislation Relating to Crimes Against Humanity and Extraterritorial Jurisdiction//The George Washington International Law Review. 2014. - No.241. - C. 481-530.

17. Koskenniemi M. Methodology of International Law, in Max Planck Encyclopedia of Public International Law, 2007. - [Electronic Resources] - Available at: https://opil.ouplaw.com/view/10.1093/law:epil/978019923169/law-9780199231690-e1440 (Accessed at 2020.3.29).

18. ICC, The Prosecutor v. Omar Hassan Ahmad Al-Bashir, Judgement, Appeals Chamber, ICC-02/05-01/09 OA2, May 6,2009. - [Electronic Resources] - Available at: https://www.icc-cpi.int/court-record/icc-02/05-01/09-73 (Accessed at 2020.3.29).

19. Arajärvi N. The Custom-Making Moment in Customary International Law, in Merkouris P., Kammerhofer J. & Arajärvi N.(eds.). The Theory, Practice, and Interpretation of Customary International Law. - M.: Cambridge University Press, 2022. - 29-61C.

20. Cassese A. Reflections on International Criminal Justice//The Modern Law Review. - 1998. - No.1. - C. 1-10.

21. Yuki T., McCormack T. and Simpson G.(eds.). Beyond Victor's Justice? The Tokyo War Crimes Trail Revisited. - M.: Shanghai Jiao Tong University Press, 2014. - 121C. [In Chinese]

22. ICJ, Application of Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Merits, Judgement, I.C.J. Report 2007. - [Electronic Resources] - Available at: https://icj-cij.org/case/91 (Accessed at 2020.3.29).

23. Nussbaum A. Conicise History of the Law of Nations. - M.: Law Press, 2011. - 212C. [In Chinese]

24. Cryer R. The Philosophy of International Criminal Law, in Orakhelashvili A.(eds.). Research Handbook on the Theory and History of International Law. - M.: Edward Elgar Publishing, 2011. - C.232-67.

25. ICTR, Prosecutor v. Akayesu, Judgement, Trail Chamber, ICTR-96-4-T, September 2, 1998. - [Electronic Resources] - Available at: https://www.refworld.org/jurisprudence/caselaw/ictr/1998/en/19275 (Accessed at 2020.3.29).

26. ICTR, Prosecutor v. Akayesu, Judgement, Trail Chamber, ICTR-96-4-T, September 2, 1998. - [Electronic Resources] - Available at: https://www.refworld.org/jurisprudence/caselaw/ictr/1998/en/19275 (Accessed at 2020.3.29).

27. Marko D. O. The Absorption of Grave Breaches into War Crime Law//International Review of the Red Cross. - 2009. - No.873. - C.163-183.

28. Hallevy G. A Modern Treatise on the Principle of Legality in Criminal Law. - M.: Springer-Verlag Berlin, Heidelberg, 2010. - 23C.

29. Ambos K. The overall function of international criminal law: striking the right balance between the Rechsgut and the harm principles: a second contribution towards a consistent theory of ICL//Journal of Soochow University (Law Edition). - 2019. - No.4. - C.137-148. [In Chinese]

30. Radbruch G. Rechtsphilosophie. - M.: Law Press, 2005. - 74C. [In Chinese]

31. Radbruch G. Aphorismen Zur Rechtsweisheit. - M.: China Legal Publishing House, 2001. -170C. [In Chinese]

32. ICC, The Prosecutor v. Thomas Lubanga Dylio, Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, Trail Chamber I, ICC-01/04-01/06-2049, July 14, 2009. - [Electronic Resources] - Available at: https://www.icc-cpi.int/court-record/icc-01/04-01/06-2049 (Accessed at 2020.3.29).

33. Beth V. S. Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals//Georgetown Law Journal. - 2008. - No.1. - C.119-92.

34. Weber M. Collected Works of Weber: Sociology of Law. - M.: Guangxi Normal University Press, 2005. - 11С. [In Chinese]

35. Habermas J. Legitimation Crisis. - M.: Shanghai Century Publishing Co., Ltd, 2009. - 200С. [In Chinese]

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О "творческой интерпретации" международного уголовного права: причины, пути и методы ограничения

Аннотация: В статье исследуется концепция «креативного толкования» международного уголовного права (МУП), характеризуемого как форма «мягкого толкования», обусловленного судебным активизмом. Такой подход направлен на расширение источников МУП в ответ на запросы международного сообщества о необходимости наказания за международные преступления. Автор анализирует причины применения «креативного толкования», включая недостаток источников права, неопределенность правовой терминологии и смешанную природу МУП. Рассматриваются методы, используемые международными уголовными правовыми институтами, такие как реконструкция норм международного обычного права, обращение к естественному праву и заимствование аналогий из национального законодательства. В статье подчеркивается важность соблюдения принципа законности и предлагаются рекомендации для ограничения судебного активизма: использование статьи 22 Римского статута для уточнения источников МУП, закрепление приоритета стабильности права, разработка более детальных руководств по вынесению приговоров и внедрение механизма «приостановления производства».

Ключевые слова: принцип законности; творческая интерпретация; МУП; строгая стандартная система; ранг

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Халықаралық қылмыстық құқықты "шығармашылық түсіндіру" туралы: себептері, жолдары және шектеу әдістері

Аннотация: Мақалада халықаралық қылмыстық құқықты (ХҚҚ) «креативті түсіндіру» ұғымы зерттеледі, ол «жұмсақ түсіндіру» ретінде сипатталып, сот белсенділігіне негізделеді. Бұл әдіс халықаралық қоғамдастықтың халықаралық қылмыстар үшін жазалау қажеттілігіне

сұранысына жауап ретінде ХҚҚ-ның дереккөздерін кеңейтуге бағытталған. Автор ХҚҚ-ны «креативті түсіндіру» себептерін талдайды, соның ішінде құқықтық дереккөздердің жеткіліксіздігі, құқықтық терминологияның айқын еместігі және ХҚҚ-ның аралас табиғаты. Халықаралық қылмыстық құқықтық институттар қолданатын әдістер қарастырылады, олардың ішінде халықаралық әдет құқығының нормаларын қайта құру, табиғи құқыққа жүгіну және ұлттық заңнамадағы ұқсастықтарды пайдалану бар. Мақалада заңдылық принципін сақтау маңыздылығы атап өтіледі және сот белсенділігін шектеу үшін келесі ұсыныстар беріледі: ХҚҚ дереккөздерін нақтылау үшін Рим статутының 22-бабын пайдалану, құқық тұрақтылығының басымдығын бекіту, айыптау үкімдерін шығару бойынша нақтырақ нұсқаулар әзірлеу және «өндірісті тоқтату» механизмін енгізу.

Түйін сөздер: заңдылық принципі; шығармашылық интерпретация; Халықаралық қылмыстық құқық; қатаң стандартты жүйе; дәреже

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