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Scientific article

On the «Governmentality» Logic of International Criminal Rule of Law

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Abstract: As the liberal movement led by the United States and the West deepens, the rule of law is gradually spilling over from domestic to international domains. International criminal law, led by the International Criminal Court and based on judicial centrism, has become a recognized and necessary governance approach in the field of international criminal law. However, the selective justice and "appearance justice" that ignores and legitimizes the systemic forces behind violent crimes has sparked political discussions in the international community about the practical significance of international criminal law. This article focuses on liberal research advocating "international criminal rule of law" and its view of marginalizing state power through judicial governance and examines the governance logic of international criminal rule of law based on Michel Foucault's governance theory. This article argues that international criminal law is a means for vested interests to dominate the global criminal field through international criminal law, rather than a means to constrain state power.

Keywords: International criminal law, international criminal rule of law, governmentality, liberalism, global governance

Introduction

In 1993, at the World Conference on Human Rights held in Vienna, the United Nations General Assembly adopted the Vienna Declaration and Programme of Action. Since then, the rule of law and international rule of law have been listed as one of the principles promoted by the UN Charter, and have aroused great enthusiasm for discussion in world affairs practice and academic research. Under the influence of Western-dominated liberalism, the international rule of law perspective, emphasizing law as a structural constraint on state behavior, has become the academic mainstream. In this atmosphere of discussion, it is difficult for anyone to credibly and

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convincingly question the necessity of domestic and international politics being subordinate to the "rule of law".

Method

This paper uses literature analysis, empirical analysis and interdisciplinary methods to analyze the governance logic of international criminal rule of law.

Literature analysis - This article reviews relevant judgments and secondary research of international criminal justice institutions, and clarifies the background of the establishment of the former Yugoslav Tribunal and the International Criminal Court by combining historical documents. It points out that international criminal justice institutions, whether in their establishment, operation, or even rule-making, reflect the governance logic of Western countries.

Empirical analysis - This article analyzes the relevant international criminal justice practices of the former Yugoslav tribunal, clarifying its viewpoint—the governance logic in international criminal rule of law—by examining its operation and related case law.

Interdisciplinary analysis - This article combines knowledge from history, political science, philosophy, and law, examining international criminal rule of law from an external perspective from a political science standpoint, and using historical knowledge to demonstrate the background of the operation of the international criminal justice system, thereby pointing out the governance logic behind international criminal rule of law.

Discussion

Liberal international criminal law theory marginalizes state power and authority, arguing that politics and law are not only separate but even antagonistic. However, this view cannot deny that the international criminal law system, with the Rome Statute as its core, is essentially a transfer of sovereignty and is fundamentally political and power-based. As realist international law scholar Louis Henkin stated, "Law is politics... international law is the normative expression of international politics." [6] This means that only by treating the relationship between power and law fairly can we have a complete understanding of the origin and operation of law. Foucault's theory of governance explains law from the perspective of the dominant relationship between power and law, which also provides us with a perspective for re-understanding international criminal law and international criminal rule of law.

Foucault's theory of "governmentality" emphasizes the power mechanism in the concept of the rule of law and the dominating power implied in such relationships, viewing the rule of law as a means for rulers to govern through laws. According to this logic, the international criminal rule of law is the practical mechanism by which the drafters/leaders of international criminal law exercise dominance in the field of international criminal law. This interpretation not only eliminates the tension between ideal and reality caused by the deliberate creation of a conflict between political power and law by liberal rule-of-law theories, but also echoes the critical claim of Third World countries that the International Criminal Court is not "a tool of the postcolonial era" [7] to "try British prime ministers and US presidents" [8].

The concept of "governmentality" was introduced by Foucault in 1978 in the introductory course on "security, territory, and population" at the Collège de France, after witnessing a paradigm shift in the operation of power. Foucault argued that the current operation of power

differs from the earlier "Machiavellian monarchical transcendental singularity" approach, and is instead a "rational" "governmentality". [9] Foucault believed that this "art of governance" is closely linked to "practice". [9] Because governance practices have shifted from "brutally imposing sovereignty on a region or territory" to "rationally" guiding the population to "voluntarily flow to a specific region or activity" with full knowledge.[9] According to this logic, the rule of law, as a governmental practice, is not intended to impose laws on individuals or society, but rather to deal with things, in other words, to use strategies rather than laws, or even to regard laws as a kind of strategy—to arrange things in a certain way in order to achieve one or another (governmental) purpose through a certain number of means. [9]

Foucault's exposition of the concept of governance provides us with an analytical framework. First, within this framework, we should move beyond a formalistic understanding of the concept of the state and delve deeper into the "governing rationality" of state power and its techniques of rule, as Foucault himself stated: "A method or system for thinking about the nature of government practices… that makes a form of activity both thought-provoking and practical for both its practitioners and those being practiced." [9] Secondly, the analysis of governance techniques does not focus on the macro-level "institutional centers of power", but rather on the more micro-level "techniques of power". [10] As Colin Gordon stated, "State theory attempts to deduce the activities of early modern government from the essential attributes and tendencies of the state, especially its tendency to expand, annex, or colonize everything outside itself. Foucault believed that the state has no inherent tendencies, or more generally, no essence. Foucault argued that the essence of state institutions is a function of the changing practices of governance, not the other way around." [10] Finally, within the analytical framework of governmentality, Foucault's analysis of governance power is dynamic because it is directed at a broad network of governance processes and practices. These governance practices and processes direct people and things toward a "convenient end", which Foucault calls the "economy" of governance practices. The concept of "economy" is an integral part of Foucault's understanding of domination, because he asserts that the "primary goal" of the art of domination is to exercise power "in economic form". This implies an economy of "truth" that directs social, cultural, and political understanding toward "the right way of doing things" [10]. In the words of Mitchell Dean, "this dynamic becomes the ultimate concern of Foucault's governance: the connection and embedding of ideas with and into the technical means of shaping and reshaping behavior, as well as with practices and institutions." [11]

Specifically in the field of international criminal law, how do the drafters/leaders of international criminal law exert their dominance through it? Following Foucault's framework of governance theory, we can conclude that: First, at the conceptual level, liberal scholars achieve the separation of politics and law, marginalize state power and authority, and thus establish the legitimacy of international criminal rule of law; Secondly, at the rule level, through individual criminal responsibility—that is, by using legal discourse to abstract individual behavior from its social context—the political, economic, and social structures in which crime is rooted are naturalized and legitimized, as Brad Roth stated: "Legal discourse will normalize insults related to the operation and maintenance of the existing order, while treating harsh responses arising from contradictions within the order itself as the exception." [12] In short, they use seemingly objective legal methods to legitimize their political and economic objectives; Finally, at the judicial level, symbolism and narrative historicism are used to construct the image of international criminal justice institutions representing "international justice" in an international

community without constitutional constraints, and then to safeguard their political interests on a larger scale through judicial intervention and functionalist interpretation.

Results

1. Ideational governance: Establishing the legitimacy of international criminal rule of law

As mentioned above, Foucault's governmentality emphasizes the importance of ideas in guiding human behavior. Therefore, if the makers/leaders of international criminal law want to achieve global governance in the field of international criminal law, they must establish the legitimacy of the claim to international criminal rule of law.

Legal realists view the international community as a state of anarchy, emphasizing the decisive role of political power. However, the two world wars and the ongoing brutal armed conflicts gradually led the international community to associate politics with competition, conflict, and struggle, while the law was shaped into a harmonious link unaffected by sovereign biases. This conception resulted in "many people concerned with international affairs having a strong tendency to view the law as something independent of politics and ethically superior to politics. 'The moral power of law' contrasts with the implicit immoral means in politics. We are urged to establish the 'rule of law', 'uphold international law and order', or 'defend international law'. And we assume that by doing so, we will shift our differences from a turbulent, self-serving political atmosphere to a purer, more tranquil atmosphere of impartial justice." [13] Thus, a clear line was drawn between law and politics, and law was considered morally superior to politics, becoming the main means of restraining political power. Grotius's proposition that "all international relations should be subject to the rule of law" [14] was also considered a necessary prerequisite for any long-term peace and the realization of human rights.

If international law represents an effort to impose neutral constraints on power, then international criminal law has been the core of the international legal system since World War II. The rapid development of international criminal law and the establishment of numerous international criminal justice institutions, in the view of many liberal scholars, have consolidated "the global political transformation achieved through the articulation of international rule of law discourse" [15]. Especially after the Cold War, the number of international criminal courts surged, such as the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the hybrid tribunals established by the United Nations in countries such as Sierra Leone, Kosovo, Cambodia, Bosnia, and Lebanon, and the International Criminal Court. With the emergence of these "outstanding institutions and procedures designed to govern current global politics" [15], many liberal scholars believe that "international rule of law has become consistent with international criminal rule of law" [15].

According to liberal scholars, international criminal law can effectively limit power, thereby safeguarding "human well-being and world peace", as international criminal law scholar Bassiouni said: "Justice will no longer be sacrificed on the altar of power politics." [16] The reason why liberal scholars are convinced that international criminal law is legitimate is that they believe that international criminal law can not only end the "history of impunity" and provide justice for victims, but also deter potential international criminals, thereby enabling the international community to operate within the framework of international criminal law and maintain international peace and order.

First, liberal scholars claim that international criminal law can end the history of impunity and provide justice for victims. Historically, individuals who represent, support, or act in the name of the state may abuse national sovereignty for political gain, a prime example being fascism. However, based on the principle of international sovereign equality, perpetrators often escape punishment by hiding behind sovereignty; in other words, their crimes are zero cost. However, the principle of individual criminal responsibility established by international criminal law pierces the veil of national sovereignty, establishes the "principle of denial of the legal personality of the state" [17], and makes "the courts a platform for condemning extreme evil" [18]. Under the framework of international criminal law, even heads of state or senior government officials will not be ignored by international criminal law; instead, justice will be served for the victims of atrocities through legal trials. For example, the trial of Milosevic by the International Criminal Tribunal for the former Yugoslavia and the prosecution and trial of Al-Bashir and Charles Taylor by the International Criminal Court have been highly praised by the international community and have enhanced the international community's confidence in the legitimacy and effectiveness of international criminal law.

Secondly, liberal scholars believe that international criminal law has a deterrent effect and can prevent the recurrence of atrocities. For example, former ICC Prosecutor Louis Ocampo believes that "by ending impunity for perpetrators of the most serious crimes, the ICC can and will contribute to the prevention of such crimes, thereby creating a deterrent effect." [19] For example, Robert Bellelli, when discussing the specific impact of the International Criminal Court, claimed: "The court has demonstrated its deterrent effect on widespread and systematic atrocities, helped to mediate conflicts involving the most serious international crimes, and encouraged peace negotiations among the parties in Uganda, the Democratic Republic of Congo, and the Central African Republic." [20]

Regardless of the extent to which international criminal law and international criminal justice institutions can end impunity and provide criminal justice for victims, and regardless of whether the deterrent effect of international criminal law is supported by empirical evidence, the international community's firm belief in the legitimacy of international criminal rule of law has been established. Even if some in the legal community raise objections to its legitimacy and effectiveness, they at most adopt a relatively mild expression: "first acknowledging the shortcomings in the history of international criminal justice, and then praising the prospects of the field and its inevitable progress." [21] Today, in academic research and discussions on international criminal law, the language of international criminal law has become an important part of legal commentary and even political discourse. International criminal law and international criminal rule of law are also regarded by the international community as "an important means to restore or strengthen international peace and order in the face of transnational and domestic violence and instability" [22].

Once international criminal law gains conceptual legitimacy on an international scale, the first step in governance through international criminal law by its drafters/leaders has been achieved: people internally accept the authority of international criminal law. Because governance emphasizes the structure and discourse of meaning, and how they shape thought and, consequently, behavior, thus guiding people toward "convenient ends," the shaping of the concept of legitimacy in international criminal law is a crucial step for lawmakers/leaders in conducting global governance in the field of international criminal law.

2. Rule-based governance: The systemic political and economic forces that legitimize atrocities

Undeniably, the international criminal rule of law is an important step for humanity toward civilization. However, it is important to note that true progress in the "rule of law" is what General Secretary Xi Jinping calls "good laws and good governance". Without the premise of "good laws", "good governance" cannot be achieved. So, what is a "good law"? A good law should ensure its formal stability as well as its substantive justice and correctness. However, in the fiercely competitive field of international law, international law is a scarce resource, and the competition among major powers inevitably includes the struggle for legal discourse power, because international law "is not only a set of debating mechanisms and practices, but also distributes the power, wealth, resources, prestige and leadership of the international community through debating" [23]. In other words, international law, as a political norm, may largely reflect the political interests of certain dominant states, and the substantive justice and correctness of international law are questionable. As the critical school of jurisprudence has stated, "International actors must formulate legal rules and principles to conform to some political claims, but still retain the appearance of general preferences" [24]. The concept of "individual criminal responsibility" in international criminal law has the function of attributing harmful consequences to individuals through a seemingly fair trial process, thereby legitimizing the systemic, unjust political and economic interests behind atrocities. These unjust political and economic interests are largely controlled by the United States and Western countries (the drafters/dominants of international criminal law).

1)To establish the legitimacy of individual criminal responsibility and monopolize the right to define criminal justice.

In Foucault's theory of governmentality, law, as a moral reference, influences people's perception of just and legitimate behavior. Therefore, in order to guide people to act toward "a convenient end", rulers often use the art of legal rights, that is, to shape the meaning structure and discourse practice with seemingly just laws, and to achieve their political goals by realizing what people consider to be "just" legal governance on a global scale. Specifically, in order to achieve their goal of dominating the international criminal field through international criminal law, the drafters/leaders of international criminal law follow the logic of "drafting seemingly just laws - laws implying their political interests - implementing the rules" at the rule level in order to achieve their political interests.

First, establish the legitimacy of individual criminal responsibility. First, in the past, perpetrators of large-scale violence have often used the name of national sovereignty to hide themselves, and the establishment of individual criminal responsibility represents the moral conquest of justice against the "cold and ruthless sovereignty of Leviathan" [25]. Under this paradigm, the system of state personality is denied, and the lawless zone no longer exists. As Franca Baronie said when discussing the significance of the ICTY: "The tribunal sanctioned the political leaders who ordered the massacres, held them personally accountable for their decisions, and declared the cover of an abstract, irresponsible state to be invalid... Those in power can no longer hide behind the shield of national sovereignty to escape criminal responsibility." According to liberal scholars, international crimes are committed by individuals rather than abstract entities, and even the collective nature of international crimes does not absolve them of the need to determine individual responsibility. "Only by punishing the individuals who commit

such crimes can the provisions of international law be enforced." [26] Thus, the principle of individual criminal responsibility has achieved a cornerstone status in international criminal law. Secondly, in order to demonstrate the legitimacy of individual criminal responsibility, liberal scholars link individual criminal responsibility with "ending impunity", "crime prevention", and the overall "world peace, security, and well-being". Because the establishment of individual criminal responsibility can end the history of impunity, potential criminals no longer see crime as costless. Out of fear of trial and punishment, criminals are largely deterred from committing crimes, and thus, individual criminal responsibility maintains the stability of the international order through its deterrent function. As Payam Akhavan stated, "Punishment of leaders…will greatly promote the internalization of much-needed human rights norms and considerations of justice in the international political culture…Over time, as a culture of deterrence takes root, those who incite racial hatred and genocide will eventually be punished. In the long run, it is this lofty moral ideal that will lay the foundation for lasting international peace and security." [27] Finally, international criminal law not only affirms individual criminal responsibility as a legitimate legal discourse through substantive legal texts, but also upholds the legitimacy of individual criminal responsibility by formulating procedural rules to reproduce an image of justice governed by due procedures. Since international criminal trials are generally conducted in accordance with the common law adversarial model, based on the principle of "beyond a reasonable doubt", any charge of a crime is not a given and must be proven beyond a reasonable doubt. The defendant is also given "the opportunity to contest the charges and enjoy a range of rights that enable the trial process to proceed in a fair and just manner and to protect the defendant from excessive interference by third parties" [28]. Thus, with the support of procedural fairness, the principle of individual criminal responsibility not only has a substantive status of fairness, but also reflects the protection of the defendant's human rights in procedure, thereby consolidating the fairness of individual criminal responsibility.

Second, the drafters/dominants of international criminal law also consolidate the status of the individual criminal responsibility system by monopolizing the power to define criminal justice. Because "knowledge is localized" [29], different legal cultural traditions often have different views on things. Even with a relatively universal concept like legality, different legal traditions have different views on it because "the legality is not a set of abstract, non-contextual principles and rules, but involves a system of knowledge" [30]. Clearly, different knowledge systems construct different concepts of the rule of law. The same applies to the concept of criminal justice. Although criminal justice, represented by individual criminal responsibility and centered on "retributive justice", is dominant internationally, it does not mean that the international community has only one understanding of criminal justice. In the field of contemporary criminal law, traditional retaliatory justice and emerging restorative justice constitute two major paradigms of criminal justice pathways. Therefore, one of the debates between the Western world and African countries during the drafting of the Rome Statute was the extent to which elements of "restorative justice" were incorporated. "Western legal models focus more on the retaliatory element of the judiciary, while many societies in Africa and elsewhere tend to favor restorative justice." [31] Retribution-based justice relies on the ancient tradition of "eye for eye, blood for blood", which has constituted the dominant form of justice in Western developed countries in the post-World War II era. The system of individual criminal responsibility is a replication of Western theories of individual responsibility in the international criminal field, such as types and models of responsibility. Restorative justice, on the other hand,

takes the Truth and Mediation Commission as its main vehicle and uses confession of the truth as a condition for pardon, thereby avoiding the intervention of public authorities. During the drafting of the Rome Statute, Western normative advocates such as Amnesty International and Human Rights Watch called for an end to the history of impunity in the international community, while African countries, represented by South Africa, actively advocated for the Truth and Mediation Commission system. Nobel Peace Prize laureate and Archbishop Desmond Tutu, chairman of the Truth and Reconciliation Commission in South Africa, believes that the Truth and Reconciliation Commission model is a "third way" [32] between the Nuremberg model and universal amnesia, and is more in line with the spirit of "Ubuntu" in Africa. However, as scholar Krasner said, "The distribution of national power can better explain the nature of institutional arrangements." [33] The final text of the Rome Statute also remained silent on the issue of pardons, and made no mention of the Truth and Conciliation Commission, which "effectively rejected both unconditional and conditional pardons indiscriminately" [34]. Over the past few decades, international criminal law has become increasingly institutionalized and has become one of the main frameworks for defining justice and resolving conflict. The retaliatory justice represented by individual criminal responsibility has gradually "hindered one of its (international criminal law's) main objectives: protecting diversity... and threatened other concepts of justice," [35] thus gaining a monopoly in the dimension of criminal justice.

2)The systemic forces behind violence are justified by the idea of individual criminal responsibility.

Undeniably, the establishment of a system of individual criminal responsibility is a historical step forward, conducive to ending the history of impunity in the international community, and can make a certain contribution to maintaining international stability and peace. However, a series of drawbacks, such as the selective justice, double standards, and ignoring the social causes that give rise to violence, have become increasingly apparent, fully validating the governance logic of international criminal law itself—international criminal law is merely a means for lawmakers/dominants to exercise their power, as the critical school of jurisprudence has argued: "The liberals' advocacy of the rule of law is nothing more than a power tactic, because 'in essence, they (laws) reflect and reproduce political power relations'."[36] It is precisely in the process of viewing the law as just that legal discourse can operate at the intellectual level, not only concealing social inequalities but also making these inequalities appear to be an inevitable product of a just legal order.

The system of individual criminal responsibility serves this function. Specifically, the drafters/leaders of international criminal law, based on the principle of individual criminal responsibility, attribute the responsibility for international crimes to the actions or omissions of individuals. In other words, all forms of social conflict are directed at the trial of individuals. As far as the actual conflict addressed by the trial is concerned, it does adjudicate and resolve specific disputes—a verdict is rendered, the defendant is found guilty or not guilty—justice is served, and the rule of law is upheld. However, it is important to note that the significance of criminal trials goes far beyond this. They do not merely represent the objective application of legal principles and rules, but also reflect the image of society itself. That is, acts that infringe upon legal interests are judged as crimes, but other systemic social violence, such as economic exploitation and the social order in which exploitation is rooted, are tacitly approved or even legalized. This is especially true in the field of international criminal law, which deals with the most serious crimes that shock the human conscience. International criminal justice institutions, as the

places where authoritative judgments on society are most likely to be made, are also the places where people can most effectively reinforce the legitimacy of the existing social, economic and political order.

So, what is the existing order? Which classes or countries benefit most from the social relations protected by international criminal law? Chinese scholar Jiang Shigong points out: "Since World War II, the United States has been constructing a new world empire according to the logic of 'liberal Leviathan.' Especially since the post-Cold War era, the United States has gradually built a complex world imperial system. This is an economic system with a 'center of gravity-periphery' pattern, supported by the mutual support of technology, trade and finance; a rules-based hegemonic system, supported by the mutual support of military, alliances and law; and a history-ending ideology, supported by the mutual support of Protestantism, English and human rights." [37] In other words, the United States and other Western countries are the dominant forces in the current international order. Correspondingly, international criminal law, with the Rome Statute at its core, primarily reflects the legal philosophies of the Western world. For example, the Western world played a leading role in the creation of the Rome Statute. During the drafting phase of the statutes, a "like-minded group", mainly composed of middle-powered countries in Europe and America, such as Canada, Australia, Germany, and Finland, monopolized the selection of chairpersons for almost all working groups. Furthermore, because representatives from Western countries with more developed rule of law receive clear and detailed instructions and full authorization from their home countries, while representatives from developing countries often only receive rigid or vague general responses from their home countries, this allows developed Western countries to conduct more extensive and fruitful consultations. Therefore, the content of the Rome Statute reflects more the legal concepts of developed Western countries.

In conclusion, it can be seen that the drafters of international criminal law, led by the United States and the West, strive to maintain the fairness and authority of individual criminal responsibility. Apart from curbing crime (which lacks empirical support) and providing criminal justice for victims (which may not be what the victims want, such as the African Union's refusal to intervene in situations involving the International Criminal Court), they focus more on separating individuals from systemic forces and legitimizing the unjust political and economic forces behind violent crimes with their own constructed image of justice. These forces largely belong to the United States and the West.

3)The Practice of Rule-Based Governance: A Case Study of the ICTY

The International Criminal Tribunal for the former Yugoslavia (ICTY) enjoys an extremely high reputation in the international community. It is considered a cross-century trial representing the "victory of liberal law" and a key element in the unfolding of the international legal narrative, as Baronie stated: "The establishment of the ICTY is undoubtedly a breakthrough in the implementation of international humanitarian law and marks the beginning of a new era in international criminal justice." [38] The indictment and trial of suspects accused of international crimes in the Balkans, especially the trial of Milosevic, have been widely praised as a crucial step toward bringing justice and the rule of law to the Balkans. However, liberal scholars—mainly those from the US and the West—deliberately attributed the atrocities that occurred in the former Yugoslavia to Milosevic personally, calling him "the instigator of the disaster" [39], "the mastermind behind the ten-year ethnic war in the Balkans" [40], and "the one who intimidated the people of the turbulent Balkans for ten years" [41]. Even the former

Yugoslav tribunal itself agreed with this assessment. [42] Ultimately, the International Criminal Tribunal for the former Yugoslavia (ICTY) used a seemingly fair trial to abstract Milosevic from the complex political and economic relationships behind the massive atrocities, making him an isolated case. Then, through an authoritative trial, it attributed the guilt to Milosevic personally, thereby legitimizing the political and economic forces dominated by the US and the West that triggered the riots in the former Yugoslavia.

The reason for considering the political and economic forces behind the atrocities as a major factor is not to downplay Milosevic's individual responsibility, but rather to highlight the more significant connection between the political, economic, and legal interventions by external forces led by the US and the West, including the demands from international financial institutions (IFI) and the International Monetary Fund (IMF) for the former Yugoslavia to implement neo-liberal economic liberalization and restructuring plans.

Specifically, in the 1970s, the former Yugoslavia was affected by the European economic recession. In order to avoid the recession, the former Yugoslavia borrowed a lot of foreign debt, and thus, its foreign debt crisis emerged. In response to the debt crisis, the former Yugoslavia sought assistance from the IMF. While the IMF provided aid, it imposed political conditions, namely, "economic reforms must be implemented, including cuts to government spending (including social spending), trade and price liberalization, restrictions on imports, and promotion of exports, etc." [43]. The demands of neoliberal economic reforms led to a rapid economic decline in the former Yugoslavia, which in turn eroded social stability. In the 1980s, the IMF made constitutional and institutional reforms a condition for credit access, thereby prompting political reforms in the former Yugoslavia. For example, the IFI exacerbated nationalism and the ensuing political divisions by "rapidly reorganizing the levels of the (former Yugoslav) republic and federal government" [44] and "implementing policies that caused social division". By the early 1990s, the economy of the former Yugoslavia was in dire straits, the federal government was bankrupt, and its political legitimacy and authority were increasingly challenged by the constituent republics. Furthermore, the severe economic crisis prevented the federal government from providing the necessary material incentives to unite the constituent republics, and "these subsidies have always been a core means for Tito to maintain balance after World War II" [45]. The elimination of subsidies exacerbated ethnic tensions among the former Yugoslav republics. As David Chandler put it, "Without the security guarantees provided by the federal state's balancing mechanism, security issues become closely linked to issues of nationalism or nationalist tendencies." [46] In short, even if the atrocities in the former Yugoslavia were not directly caused by the political and economic policies adopted by the IFI and IMF, which are dominated by the United States and the West, they were still inextricably linked to these policies. However, the Western-led International Criminal Tribunal for the former Yugoslavia (which will be discussed below in terms of how the Western intervention in the judicial independence of the tribunal) used legal power and techniques to completely attribute the guilt to Milosevic, thereby legitimizing the systemic political and economic forces behind the atrocities.

3. Judicial governance: Interfering with a "superficially" independent judiciary to achieve its political interests.

From the perspective of governance, international criminal rule of law is essentially a means by which the formulators/leaders of international criminal law exercise global dominance in

the field of international criminal law. After establishing the legitimacy of international criminal rule of law and international criminal law, in order to realize the political interests behind international criminal law, it is also necessary to put international criminal law into practice through judicial means. International criminal law scholars, primarily liberal scholars from the US and the West, advocate for a judicial-centered governance model based on the US judicial structure in an international community lacking supreme constitutional principles. This not only leads to a lack of checks and balances on international criminal justice institutions, thus expanding the scope of application of international criminal law, but also creates opportunities for the US and Western countries to interfere with seemingly impartial judicial institutions through funding, personnel elections, and other means to achieve their political goals.

1)Building judicial authority in an international community lacking supreme constitutional principles

"In fact, the discourse on the rule of law in international relations and international law largely stems from the influence of American political and legal culture on ideal behavior in domestic and international politics." [47] The reason why American legal tradition has been able to influence the contemporary international community's understanding of the rule of law is largely due to the landmark significance of "Marbury v. Madison", to the point that both Tocqueville in the early days and Paul Kahn in the contemporary era have declared that the United States is a unique country because there "the law, not people, is the 'king'." [48] "Generation after generation of Americans and non-Americans, through a collection of ideas, values and symbols, have come to believe and take for granted that the United States is a government governed by the rule of law and that the people are ruled by law." [49]

One reason why Marbury v. Marbury is a powerful case study is that it has intuitive value for legal scholars with experience in the common law tradition. Unlike the civil law tradition, which is based on positive law, the constitutional and normative framework of common law emphasizes the separation of the judiciary from state government through case law or judge-made law. This tradition conveys the belief that judges have an independent and prestigious position in a society governed by the rule of law. The Marbury case, both in substance and in symbolic sense, reinforced and strengthened the idea that "judicial independence and prestige are an inherent part of a society governed by the rule of law". Furthermore, the Marbury case significantly elevated the status of the court itself, not only "creating a powerful and omnipotent court" [50], but also establishing its judicial review system as an important guarantee for building a government under the rule of law and achieving the rule of law rather than the rule of men.

As the liberal movement deepened, liberal scholars advocated for adopting the American model of judicial governance to achieve judicial globalization. For example, Anne-Marie Slaughter pointed out in her book <The New World Order>: "Judicial governance is the highest achievement of the U.S. government... The upcoming reality of judicial globalization reflects this best practice... Judges around the world are working together in various ways... to build a formal global legal system."[51] While people remain skeptical about whether transplanting the symbolic legacy of the Marbury case to the international community can achieve the rule of law, it is undeniable that the authority of the judiciary and judicial governance have gained relatively widespread recognition in the international community. For example, Japanese scholar Yasuaki Onuma criticized international law for being built on the concept of "judicial-centered" [52].

Undeniably, judicial independence is the guarantee for the realization of the rule of law, but an incomplete interpretation of Marbury's ideals may mistakenly lead to judicial authoritarianism.

Liberal scholars' interpretations of the Marbury case focus on the authoritative status of the judiciary and its function of judicial review, but they overlook a crucial question: why does the political, legal, and social power that American courts enjoy so highly esteemed originate? And where is that very authority from? Or rather, why do courts possess such ultimate power? In the American context, the key to granting the courts and judicial review system its power and legitimacy lies none other than the U.S. Constitution. The U.S. Constitution is made by the people, cannot be altered by the government, and grants the U.S. Supreme Court the power of interpretation—this also endows the U.S. Supreme Court with authority and political legitimacy, making it the guardian of the most fundamental laws made by the people. The claim by liberal scholars that simply transplanting American-style international judicial institutions to the international community can achieve the rule of law in the international arena, whether intentionally or unintentionally, ignores the significance of this separation of powers for American constitutionalism and provides space for international judicial institutions to expand their jurisdiction without restraint. Furthermore, the liberals' claims to the authority of the judiciary also legitimize the actions of major powers in interfering with the judiciary to achieve their political goals.

2)The International Criminal Court's practice of illegally expanding its jurisdiction

Liberal scholars transplant the American model to the international community without a constitution and grant it the authority to enforce and safeguard the rule of international law. Because there is no constitution, it may not only be unable to check state power—lacking constitutional authorization—but may also illegally expand its jurisdiction—lacking constitutional constraints. This creates conditions for lawmakers/leaders to realize their political interests on a broader scale.

Take the situation in the Rohingya region of Myanmar as an example. On July 4, 2019, the OTP requested the Third Pre-Trial Chamber to authorize an investigation into large-scale and systematic criminal activities that had occurred in the Rohingya state of Myanmar since October 9, 2016. [53] According to Article 12(2) of the Statute, the courts may exercise jurisdiction over international crimes that occur within the territory of a Contracting State or on a ship or aircraft of a Contracting State. But Myanmar is not a signatory to the Rome Statute. Can the International Criminal Court exercise jurisdiction over situations occurring in non-signatory states based on Article 12(2) of the Rome Statute? Based on the OTP's request, the pre-trial chamber held that: "In order to exercise territorial jurisdiction over transnational crimes, states have developed different concepts according to different circumstances, mainly including the following: First, the objective territorial principle, which states that if a crime begins abroad but ends within a country, that country can claim territorial jurisdiction. Second, the subjective territorial principle, which states that if a crime begins within a country but ends abroad, the country where the crime began can also claim territorial jurisdiction. Third, the principle of ubiquity, which states that if all or part of a crime occurs within a country, regardless of whether that part is part of the crime. Fourth is the principle of constituent elements, which states that if at least one element of a crime occurs within the territory of a country, that country can assert territorial jurisdiction. Fifth is the principle of effects, which states that if a crime occurs outside the territory of one country, but its effects affect the territory of another country, the affected country can assert jurisdiction."[54] Therefore, the International Criminal Court concluded that "the expulsion of civilians across the Myanmar/Bangladesh border, including the crossing of the border by the victims, clearly establishes a territorial connection based on this element of the

crime (the crossing of the border by the victims). The objective territorial principle, the universal principle, and the principle of elements of the crime apply to this case. The circumstances of this case are within the scope permitted by international law." [55]

However, according to Article 31(1) of the Vienna Convention on the Law of Treaties— "A treaty shall be interpreted in good faith in accordance with its wording, in its context and with reference to the ordinary meaning of the purpose and objectives of the treaty"—and Article 12(2) of the Statute, the courts have jurisdiction only over the territory of which the conduct in question occurred, and there is no specific provision that the courts have jurisdiction over the territory of which the result of the crime occurred. In its judgment, the Pretrial Chamber did not examine the five "territorial jurisdiction principles" mentioned, but arbitrarily concluded that all five territorial jurisdiction principles were common standards of international law. It then interpreted Article 12(2) of the Rome Statute beyond its literal meaning and established the court's jurisdiction. However, according to Article 38(1) of the Statute of the International Court of Justice, customary international law is "that which is accepted as law as evidence of custom", meaning that to establish the existence and content of a customary international law, both "state practice" and "opinio juris" must be considered simultaneously, neither of which can be omitted. Regrettably, when the Pre-Trial Chamber determined that the five principles of territorial jurisdiction had the status of customary international law (internationally accepted standard), it did not examine whether they actually had the status of customary international law. Therefore, it is questionable whether the five principles of territorial jurisdiction have the status of customary international law. According to Article 22(2) of the Rome Statute, when the meaning of a norm is unclear, the interpretation of the definition should be in the best interests of the person being investigated, prosecuted, or convicted. Clearly, the Pre-Trial Chamber's decision disregarded Article 22(2) of the Rome Statute and improperly interpreted Article 12(2) of the Rome Statute in a functionalist manner.

So, was the Pre-Trail chamber's judgment correct? In other words, according to the Rome Statute, did the court have jurisdiction over the situation in Myanmar? This involves the criteria for determining the "place of the act". According to the internationally recognized standard for determining the place of crime—the standard established by the U.S. courts in North Carolina v. White [56]—if the "essential acts" of a crime occur in a certain area, that area is the place of crime. Although judicial precedents cannot be independent sources of law, but only serve as a medium for judges' cognition, "the standards declared in the judgments are binding, and these standards are based on correct normative interpretations or supplements, or concretize legal principles in an exemplary manner" [57]. So, what is a "substantive act"? Based on the logical judgment of criminal acts and criminal results, there must be a criminal act before there can be a criminal result; clearly, a criminal act is the "substantive act". According to section 7(1) of the Elements of Crime, the elements of the offence of deportation or forced migration include six elements: "illegal", "against the personal will of the person being migrated", "forced", "number of persons", "the lawful right of the person being migrated to their place of origin", and "cross-border". According to the Elements of Crime, the crime of deportation is the act of "forcibly driving the victim out of the country", and the crime occurs once the victim crosses the border to another country. In other words, in the Bangladesh/Myanmar situation, the country where the deportation occurred is still Myanmar, which is not a party-state to the Rome Statute. Therefore, the International Criminal Court's ruling on the jurisdiction of the Bangladesh/Myanmar situation has no legal basis.

An analysis of the Rohingya situation in Myanmar reveals that, without constitutional constraints, international criminal justice institutions, represented by the International Criminal Court, can adopt a functionalist interpretation of flexible international criminal law provisions, expanding their jurisdiction almost without criticism. This provides space for the implementation of international criminal law, which embodies the political interests of the US and the West, on a broader scale.

3)The practice of Western interference in judicial independence

Liberal scholars used the Marbury case to shape a symbolic image of independence and authority for the judiciary on an international scale, thereby making the international criminal justice system a leading force in maintaining international order and implementing international criminal law. However, when major powers or the drafters/dominants of international criminal law use funds, services, or equipment to interfere with the election of judicial personnel in order to obtain judicial rulings favorable to themselves, the authority of the judicial institutions themselves can give such political interests a veneer of legitimacy.

For example, on May 25, 1993, the Security Council adopted Resolution 827, deciding to establish an international criminal tribunal in the former Yugoslavia. However, it is worth noting that the resolution stipulates the Security Council's power to select prosecutors and that courts can obtain direct support in the form of "funds, equipment and services" from any government or private entity. These provisions clearly provide room for the state to influence the former Yugoslav tribunal by combining the power to appoint prosecutors with private judicial financing. Therefore, it took the Security Council 18 months to reach an agreement on the candidate for the first prosecutor of the ICTY, as K.C. Moghalu stated: "The Security Council's long wait is not about choosing the most suitable person to prosecute war crimes in the Balkans, but about finding the minimum standards that all major powers can accept." [58]

The interference of major powers in judicial independence is not only reflected in the election of prosecutors; as mentioned above, major powers can also influence the independence of the courts through private financing. In the United States, for example, in order to achieve its political goal of not prosecuting war crimes, the U.S. government has used strategies such as timely financial aid [59], large-scale secondment of personnel (such as CIA and State Department officials) [60], and selective provision of intelligence [61] to influence the discretionary power of OTP. Because prosecutors have the power to decide which crimes to prosecute and which not to prosecute, the U.S. government's judicial financing for the ICTY is likely to be a factor that prosecutors consider when making prosecution decisions, and in fact, U.S. judicial financing has a significant impact on prosecutorial independence. For example, when asked by a reporter whether NATO forces would be investigated by the ICTY for the 1999 bombing of Yugoslavia, NATO spokesman Jamie Shea said with a hint of pride: "I think we must distinguish between theory and practice. I believe that when Judge Arbul begins her investigation, she will do so because we in NATO will allow her... If her court is allowed to enter as we would like, it will be because of NATO... NATO countries provided the funding to establish the court... I am certain that when Judge Arbul goes to Kosovo to examine the facts, she will prosecute Yugoslav nationals, and I do not expect her to prosecute anyone else at present."

Conclusion

This article takes a critical stance on the international criminal rule of law advocated primarily by liberal scholars in the United States and the West. This liberal academic research

promotes the necessity of "international criminal rule of law" in world criminal affairs. More specifically, it advocates the establishment of an international criminal law system based on the Rome Statute in the field of international criminal law, and calls on international criminal justice institutions to rule in the field of international criminal law. However, this deliberate separation of international criminal law from political power and marginalization of state power is precisely a demonstration of legal power skills, namely, emphasizing the neutrality of law and the judiciary in order to maintain their authority. In the logic of governance, international criminal rule of law is less about the dominance of international criminal law in the field of international criminal affairs, and more about the dominance of lawmakers/leaders in the field of international criminal affairs through international criminal law.

With the growing strength of international criminal law principles, China, as a rising power, inevitably has to intervene in numerous international criminal affairs and assume more responsibility. China should fully recognize the governance logic inherent in the neutrality of international criminal law. With international criminal law now accepted by most countries, China should actively participate in the revision of international criminal law to safeguard its broader interests while ensuring criminal justice.

The contributions of the authors

The three authors contributed equally to this article. **Wang Heyong** finished the first version of this article; **Xiao Shengle** and **Wang Qifei** verified the form of this article and submitted the article.

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Халықаралық қылмыстық құқықтың "үкіметтік" логикасы туралы

Аңдатпа: Америка Құрама Штаттары мен Батыс бастаған либералдық қозғалыс тереңдеген сайын, заң үстемдігі біртіндеп ішкі салалардан халықаралық ареналарға таралуда. Халықаралық қылмыстық сот басқаратын және сот центризміне негізделген халықаралық қылмыстық құқық халықаралық қылмыстық құқық саласында танылған және қажетті басқару тәсіліне айналды. Дегенмен, зорлық-зомбылық қылмыстарының артындағы жүйелік күштерді елемейтін және заңдастыратын селективті әділеттілік және «сыртқы әділеттілік» халықаралық қоғамдастықта халықаралық қылмыстық құқықтың практикалық маңыздылығы туралы саяси пікірталастарды тудырды. Бұл мақалада «халықаралық қылмыстық құқық үстемдігін» жақтайтын либералды зерттеулерге және оның сот билігі арқылы мемлекеттік билікті шеттетуге көзқарасына назар аударылады және Мишель Фуконың басқару теориясына негізделген халықаралық қылмыстық құқық үстемдігінің басқару логикасы қарастырылады. Бұл мақалада халықаралық қылмыстық құқық мемлекеттік билікті шектеу құралы емес, халықаралық қылмыстық құқық арқылы жаһандық қылмыстық салада жеке мүдделердің үстемдік ету құралы екендігі айтылады.

Кілт сөздер: Халықаралық қылмыстық құқық, халықаралық қылмыстық құқықтың үстемдігі, үкіметтік билік, либерализм, жаһандық басқару

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О логике "правительственности" международного уголовного верховенства права

Аннотация: По мере углубления либерального движения, возглавляемого Соединенными Штатами и Западом, верховенство права постепенно перетекает из внутренних в международные сферы. Международное уголовное право, возглавляемое Международным уголовным судом и основанное на судебном центризме, стало признанным и необходимым подходом к управлению в области международного уголовного права. Однако избирательное правосудие и «правосудие по видимости», которые игнорируют и легитимируют системные силы, стоящие за насильственными преступлениями, вызвали политические дискуссии в

международном сообществе о практическом значении международного уголовного права. В этой статье основное внимание уделяется либеральным исследованиям, пропагандирующим «международное уголовное верховенство права» и его взгляду на маргинализацию государственной власти посредством судебного управления, а также рассматривается логика управления международным уголовным верховенством права на основе теории управления Мишеля Фуко. В этой статье утверждается, что международное уголовное право является средством для корыстных интересов доминировать в глобальном уголовном поле посредством международного уголовного права, а не средством ограничения государственной власти.

Ключевые слова: международное уголовное право, международное уголовное право, государственное управление, либерализм, глобальное управление

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