Al-Farabi Kazakh National University

UDC 341.4(043) As a manuscript

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Jurisdiction of the International Criminal Court on the Prosecution of Individuals

8D04201-International Law

Doctoral Thesis (Ph.D)

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Republic of Kazakhstan
Almaty, 2025

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NORMATIVE REFERENCES

Rome Statue of the ICC 1st July 2002
Rules of Procedure and Evidence 10th September 2002
Elements of Crimes 11th June 2010
The Charter of the United Nations 26th June 1945
Vienna Convention on Law of Treaties 27st January 1980
Protocols to the Geneva Conventions 10th June 1977

DEFINITIOIN

War Crime: For the purposes of this Statute, “war crimes” means serious acts of violations of the Geneva Conventions of 12 August 1949.

Genocide: For the purposes of this Statute, “genocide” means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group.

Crime against humanity: Crimes against humanity are murder, extermination, enslavement, deportation or forcible transfer of population, torture, etc., which is prescribed in the RS, committed as part of a widespread or systematic attack directed against any civilian population and with knowledge of the attack.

Crime of aggression: For the purposes of this Statute, “crime of aggression” means the planning, preparation, initiation or commission, by a person in a position to effectively exercise control over or direct the political or military actions of a State, of an act of aggression, which by its character, gravity and scale, represents a clear violation of the Charter of the United Nations.

ABBREVIATION

ICC	–	The International Criminal Court
RS	–	Rome Statue of the International Criminal Court
ICTY	–	International Criminal Tribunal of former Yugoslavia
ICTR	–	International Criminal Tribunal of Rwanda
The UN	–	The United Nations
The US	–	The United States of America
The UNSC	–	The United Nations Security Council
VCLT	–	Vienna Convention on the Law of Treaties
ICR	–	Individual Criminal Responsibility

INTRODUCTION

General characteristics of the work: As we all know, it is a huge and important step towards rule of ICL for the international community to establish the ICC. Just as Former UN Secretary-General Kofi Annan said 2 decades ago: “It’s such an important and huge step towards protection of universal human rights and construction of rule of law around the world” [1, p. 1]. Globalization is still the general trend of the world today and has led to profound changes unseen in a century in the international community. In the context of globalization, the rule of law has become a recognized necessary way of international governance [2. p. 34]. However, things don’t always develop smoothly. With the emergence of its shortcomings, such as “selective justice of the ICC”, “its lack of executive bodies”, especially under this context - “the duality of the international society and domestic societies”, the ICC is facing crisis of “legitimacy” and “effectiveness”. Not only that, several major sovereignties, namely the permanent members of the UNSC, such as Russia, the US and China, still don’t approve of RS and become party states to the ICC. Since these world-class powers are outside the jurisdiction of the ICC, it greatly restricts the jurisdiction of it. Apart from that, take the US for example, it not only set obstacles to hinder the establishment of the ICC, even after the Court runs, but use political means to sanction the ICC and its staff, such as the Trump administration’s sanctions resolution against prosecutors in 2017 and the “Anti-Illegal Court Act” passed in 2024, which shows that the ICC is facing a serious crisis. In 2020, ICC President Chile Eboe-Osuji made it clear that “the ICC faces provocations and threats from some powerful players in global affairs”. Yoka Brandt, who works as the Netherlands’ permanent representative to the United Nations, also said in an interview: “the ICC is definitely an important and indispensable part of the international judicial justice and accountability system. However, this system is currently facing huge political resistance” [3]. In view of this situation, it is necessary for us to understand this growing international judicial institution from a realistic perspective.

Research Status: Currently, the international community, including China and Kazakhstan, is extremely concerned about the jurisdiction of the ICC, but few people have studied the combination of individual criminal responsibility and jurisdiction. The topics related to this study include “individual criminal responsibility”, “jurisdiction” and “international criminal rule of law”. Judging from the current research situation, scholars from European countries, who did research on the ICC, their works are far more cutting-edge and in-depth based on the earlier research and rich international law theories; For nearly all of the countries from African Union are party states to the ICC and they hold high expectations of it, the depth and breadth of researches on the ICC by scholars from African countries is second only to those of European scholars. However, start from the establishment of the ICC, except for several situations investigated took place in other territory, the vast majority of judicial practices of the ICC took place in Africa, where the nation’s power is relatively weak. Thus, scholars from African states did a lot of research on the ICC, which are mostly focused on these themes, such as “political bias”, “selective justice”

- most of the cases under the jurisdiction of the International Criminal Court are not a political prejudice in Africa, but are due to the politicization of the International Criminal Court [4, p. 248] - and "the relationship between state sovereignty and universal jurisdiction of the ICC", which are highly political issues. Only 18 countries in the Asia-Pacific region signed the RS and became party states to the ICC. Moreover, most Asian countries are emerging countries that emphasize the absoluteness of sovereignty, so they pay less attention to the discussion of the ICC. Therefore, the depth and broadness of theories on the ICC in the Asia-Pacific region is relatively slow.

(1) Research on "Individual Criminal Responsibility": The research on "individual criminal responsibility" in Europe can be divided into three stages. The first stage – embryonic stage. At this stage, European international law scholars mainly focused on arguing the legitimacy of the "principle of individual criminal responsibility". The second stage is the establishment of the "principal of ICR". The writings at this stage focused on "criticizing the theory of absolute sovereignty" and "elaborating on the rationality of the system of denying national personality". The third stage is the stage of prosperous development. During this period, as environmental problems became increasingly serious, European jurists transcended the original meaning of the "principle of individual criminal responsibility" and attempted to expand the scope of "individuals" to "legal persons" and include "ecocide" acts within the jurisdiction of the ICC. Scholars from African and Asian countries started to do research on the "principle of ICR" until they signed and approved of the RS. However, at the same time, limited to the fact that most of the African and Asian states are newly emerging states and the level and skill of rule of law in these states is not yet well developed in-depth. Based on these reasons above, the scholars' research in Asian and African countries around the "principle of ICR" are mostly focused on the very theme - the relationship between "sovereignty and human rights", which is of controversary. Due to the fear of neo-colonialism of western states and the political nature of the ICC, most of African and Asian states were opposed to the "principle of ICC" penetrating national sovereignty. Therefore, although scholars from Asian and African countries have certain insights into the principle of "individual criminal responsibility", their basic theories still follow the relevant theories of European scholars. In recent years, promoted by the widespread influence human rights movement around the world as well as the emerging awareness of rule of law in African and Asian due to the development of economics, that the aim of principal of ICR is to protect human rights and prevent future crimes has unprecedentedly enhanced in Asian and African countries. More and more states in Asian and African region have gradually recognized the "principle of ICR" as a kind of general principle in international law, even some states have incorporated international crimes stipulated in RS, such as war crimes, crimes against humanity, genocide or related crimes, into their national criminal law systems [5, p. 17].

(2) Researches on the Jurisdiction of the ICC: The scholars' attitudes and positions towards the jurisdiction of the ICC in European states have undergone a transformation from idealism to realism. During the drafting of the RS, they learned from the international court of justice and strongly advocated granting universal

jurisdiction to the ICC so as to end the history of impunity. Moreover, under the influence of the world federalism movement, European countries have attempted to build the ICC into a supranational international criminal justice institution. However, the self-awareness of emerging countries, the ICC's practice of "judicial selection" and the ICC's structural dilemma have gradually shattered the ICC's ideal of universal jurisdiction by the political nature of the international community. At this stage, European countries have gradually realized the crisis of legitimacy and effectiveness faced by the ICC, and their research focus has gradually shifted from the universal jurisdiction to the issue of the "active complementary jurisdiction" of the ICC. In order to handle this structural dilemma, they argued that the ICC should abandon its ideal design of a unitary legal system, face up to its own shortcomings, and instead focus on uncovering the potential of the principle of active complementary jurisdiction to promote the construction process of the international criminal justice system in the international community. Asian and African countries' research on the jurisdiction of the ICC focuses on its norms and nature, and they focused on the conflicts between the jurisdiction principles of the ICC stipulated in the RS and judicial practice and the jurisdiction principles in their own legal systems. In the dimension of jurisdiction nature of the ICC, scholars from Asian and African states shows an obvious change. Firstly, most scholars started their researches from the political nature of the jurisdiction, and in their researches wo could conclude that the ICC was nothing more than a tool for Western countries to achieve neo-colonialism goal then realize hegemony[6, P.xi]. Based on these fears, from the realistic perspective, the African and Asian scholars advocated that African and Asian countries and their scholars should pay more attention to alternative ways, such as none-judicial measures, instead of just emphasizing the instrumentality nature of the jurisdiction or emphasizing that States Parties should strictly abide by the RS.

(3) Researches in the rule of ICL dimension: Although materials in ICL fields are relatively rich, but it hasn't been developed as well as domestic criminal law discipline. Scholars from Asian and African countries have not yet started research on the international criminal value system. Even if they have done so, they mainly analyze the reasons why the international criminal value system is difficult to establish from the perspective of political realism.

The purposes of the thesis: This paper first aims to introducing one new theory to solve the ineffectiveness of theory of mental coercion, and lay theoretical foundation to the dual criminal responsibility system so as to defend for justice of ICR. Second, this paper introduced and analyzed the dilemmas faced by the ICC when it exercised its jurisdiction. Third, this paper pointed out that the basic obstacle which hinders the exercise of jurisdiction of the ICC is the conflict between sovereignty and supranational power, and *jus cogens* reflects the common interest of human beings, so the fundamental way to solve this dilemma is to construct an axiology system to defend justice for ICL and jurisdiction of the ICC. Here are the **tasks** as following:

1.To explain the nature of the jurisdiction of the ICC on prosecution of individual:

– Denying the national personality - the essence of prosecuting individuals;

– Prosecuting individuals both limits and demonstrates state sovereignty;

2. What kinds of theoretical dilemmas in the exercise of the ICC's jurisdiction over individual prosecutions;

– Conceptual dilemma: unitary design and dual reality;

– The dilemma of the coercive force of norms: the RS lacks coercive force;

– The dilemma of regulatory clarity: vague provisions on discretionary power lead sovereign states to refuse to cooperate;

– The legal technology dilemma: functional interpretations v. legality;

3. What kinds of practical dilemmas of the ICC in exercising its jurisdiction over individual prosecutions in practical dimension;

– Political dilemma: Opposition from major powers makes it difficult to enforce the jurisdiction of the ICC;

– Execution dilemma: Arrest warrants are difficult to execute, resulting in the court's jurisdiction being vacated;

4. How to sovle these dilemmas;

– The topic of international criminal value system is proposed;

– Several core propositions in the international criminal value system;

– International criminal rule of law is both a kind of common good and protection of individual rights

Objects of dissertation: The objects of this paper are the jurisdiction of the ICC and its prerequisite - individual criminal responsibility, the obstacles faced by the ICC and the axiology system of ICL.

Subjects of dissertation: The objects of this paper include not only the cases of the ICC, the RS, the theory of ICL, but also the axiology of criminal law.

Scientific innovation of this dissertation:

– Drawing on the "piercing the corporate veil" in domestic law, this study points out that the essence of the individual criminal responsibility system is the "system of denial of state personality", that is, to prosecute individuals who support or act in the name of the state or represent the country, and who have abused their sovereignty power beyond necessary limits and violated the rules of international law advocated by international community, causing damage to others or common interests or shocking the conscious of human beings and thus constituting international crimes, and then to order individual actors to bear international criminal responsibility through ICL in order to achieve international fairness and justice - The theory of national personality denial is a theory developed after the post-war international law began to regulate state behavior and pursue individual criminal responsibility, and it is a form of restriction on state sovereign power [7, p. 91].

– This study points out that the ICC is a product of the world federal movement, and is an ideal design constructed by the international community in analogy with the domestic monistic legal system. However, the legal system of the international community is dualistic, and the international community is a society based on sovereign states. Therefore, the operation of the ICC is full of difficulties in the real international community.

– This paper introduced the "functionalist criminal law theory" raised by Germany scholar Clause Roxin and declared that the judges in ICC often uses the

functionalism interpretation method to interpret the RS in its judicial practice. Functionalist interpretation refers to not sticking to the formal meaning of the norms, and even deviating from the literal meaning of the norms and the original intention of the legislator to interpret the text of the norms in substance, and then expanding the definition of crimes under its jurisdiction and the scope of admissible cases, so as to achieve the criminal policy goal of "eliminating impunity". It also points out the reasons why the judges in ICC carried out functionalism interpretations of the RS: first, the uncertainty of the normative terms and legal interpretation methods of the RS; second, the conflict between multiple purposes all prompt the court to adopt a functionalist interpretation of the Statute. Since the functionalist interpretation violates the principle of legality of crime and punishment, undermines the human rights protection function of the Statute, and exceeds the scope of authorization of the States Parties and violates the principle of state sovereignty, the ICC has encountered a legitimacy crisis.

– This study is based on political realism and starts from the perspective of subject structure and obedience culture. It points out that the international community is still an international community supported by sovereign states. The international community and domestic society have different subject structures and obedience cultures. It also points out that the RS lacks mandatory provisions on judicial cooperation obligations, all of which determine the fragility of international criminal judicial cooperation obligations.

– This study analyzes the two major current sovereignty theories and points out their limitations. This study points out that sovereignty has historical characteristics and draws on the practice of economic sovereignty transfer to point out that judicial sovereignty also has room for transfer.

This study points out that the root cause why the jurisdiction of the ICC is difficult to implement is that the international community is still a society based on sovereign states, and the protection of international common interests cannot transcend the political preferences of sovereign states for their own interests. Therefore, the ICC can only operate effectively if the concept of international criminal rule of law is established in the international community. The specific way to establish the concept of international criminal rule of law is to establish an international criminal value system, which not only defends the legitimacy of ICL and international criminal justice, but also promotes the development of ICL and lays a theoretical and value foundation for the establishment of international criminal rule of law. This study clarifies the form and related propositions of the international criminal value system and clarifies the position that ICL scholars should have.

Research method:

– Article analysis method. This research has carefully sorted out and categorized the RS and related treaties, and elaborated and analyzed its background, meaning and scholars' opinions.

– Historical analysis method. This study inherits the judicial legacy of previous international military tribunals and ad hoc tribunals, and studies the judicial practice of the ICC. Through historical investigations of specific issues, it explores the nature, dilemmas and related solutions of individual criminal responsibility.

– Empirical analysis method. In order to gain a deeper understanding of the nature, dilemmas and causes of the ICC's system of prosecuting individuals, this study examines relevant international criminal judicial practices in detail. In addition, through the study of international criminal judicial practices, this paper summarizes the root causes of the dilemmas encountered by the ICC in exercising its jurisdiction.

– Comparative analysis method. This paper clarifies the relevant issues in horizontal comparison and vertical comparison.

The degree of scientific development of the research topic and the theoretical basis of the dissertation research: Currently, the international community, including China and Kazakhstan, is extremely concerned about the jurisdiction of the ICC, but few people have studied the combination of individual criminal responsibility and jurisdiction. The topics related to this study include "individual criminal responsibility", "jurisdiction" and "international criminal rule of law".

Research on "Individual Criminal Responsibility": The research on "individual criminal responsibility" in Europe can be divided into three stages. In the first stage, the embryonic stage, European international law scholars mainly focused on arguing the legitimacy of the "principle of individual criminal responsibility", such as *"Les Principes Modernes du Droit Penal International* written by *H. Donnedieu de Vabres"*. The second stage is the establishment of the "principal of ICR". The writings at this stage focused on "criticizing the theory of absolute sovereignty" and "elaborating on the rationality of the system of denying national personality". For example, *Die "Verantwortlichkeit der Staatsorgane nach Volkerstrafrecht"* written by H. Jescheck, C. Bassiouni's most famous work - "Introduction to ICL", as well as Jean Pictet's work "Principles of International Humanitarian Law", and "Introduction to the ICC" written by William Schabas, "General Principles of Law and the State" by Kelsen, "Legal Philosophy" by Radbruch, and a series of academic papers written by relevant scholars. The third stage is the stage of prosperous development, during which European scholars gradually deepened their research on the "principle of individual criminal responsibility". For example, "Ecocide-Puzzles and Possibilities" by Robinson Darryl, "Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities" by van der Wilt, "The Lafarge case: tackling corporate impunity in the battlefield" by Sequeira Benedita, etc. At this stage, European international law's discussion on the "principle of individual criminal responsibility" has entered deep waters. Scholars from African and Asian countries started to do research on the "principle of ICR" until they signed and approved of the RS. However, at the same time, limited to the fact that most of the African and Asian states are newly emerging states and the level and skill of rule of law in these states is not yet well developed in-depth. Due to the fear of neo-colonialism of western states and the political nature of the ICC, most of African and Asian states were opposed to the "principle of ICC" penetrating national sovereignty. For example, African scholar's work "Justice Beyond the ICC: Towards a Regional Framework in Africa", Chinese scholar Zhu Ciyun's work "Legal Research on the Denial of Corporate Personality", as well as Jiang Na's work "Multiple Subjects of International Criminal Responsibility and Its

Enlightenment - From the Perspective of New Developments in the Principles of International Criminal Responsibility", and a lot of academic papers also published and did really valuable researches. In recent years, promoted by the widespread influence human rights movement around the world as well as the emerging awareness of rule of law in African and Asian due to the development of economics, that the aim of principal of ICR is to protect human rights and prevent future crimes has unprecedentedly enhanced in Asian and African countries. Take Chinese scholar Yan Haiyan for example, in her doctoral thesis - "A Study on Individual Criminal Responsibility for Crimes Violating International Humanitarian Law - From the Perspective of the Theory and Practice of Special International Criminal Tribunals and the ICC", she was of genius constructed a system of ICR by integrating practices of the international criminal judicial organizations and relevant legal literatures and documents issued by the organizations. For example, Professor Jiang Su explained the criteria for determining the "principle of individual criminal responsibility" in "Theory of Behavior Control in ICL". For example, Kazakh scholar Danila Tatarinov discussed the principle of individual criminal responsibility in his doctoral thesis "Уголовное ответственность за применение запрещенных средств и методов ведения войны". Some scholars in Kazakhstan even go farther, like Sergey Sayapin, he devoted himself into accountability system of international crimes, and shared his views in some papers. Such as, "The Use of Force against Ukraine and International Law: Jus Ad Bellum, Jus In Bello, Jus Post Bellum", and other works. In recent years, Chinese scholars have also been influenced by European international law scholars and have begun to expand the scope of application of the "principle of ICR". Such as, Chinese scholar Zhang Yingjun, in his work named "From the Nuremberg Trials to the ICC: A Study of the Legal Person Liability System in International Criminal Justice", he attempted to examine the rationality of including legal persons – corporates or organizations - in the "principle of ICR" from the perspective of customary international law.

Researches on the Jurisdiction of the ICC: The scholars' attitudes and positions towards the jurisdiction of the ICC in European states have undergone a transformation from idealism to realism. For instance, Canada scholar Williams Schabas collected his thinkings and critics in this book - "The ICC: A Commentary on the RS". Given the US's Congress didn't approve of the RS, scholar Cherif Bassiouni from the US – the father of ICL – made impressive contribution to this issue, such as his famous work - "The Legislative History of the ICC: Introduction, Analysis and Integrated Text", etc. "ICL vs. State Sovereignty: Another Round" by Robert Cryer, "The Politics of World Federation: From World Federalism to Global Governance" by Jseph Prestion Baratta, and "The ICC: A Global Civil Society Achievement" by Marlies Glasius. However, the self-awareness of emerging countries, the ICC's practice of "judicial selection" and the ICC's structural dilemma have gradually shattered the ICC's ideal of universal jurisdiction by the political nature of the international community. European countries have gradually realized the crisis of legitimacy and effectiveness faced by the ICC, and their research focus has gradually shifted from the universal jurisdiction to the issue of the "active complementary jurisdiction" of the ICC. For example, "The Security Council as a

World Legislator" by S. Talmon, "Elements of Supranationality in the Law of International Organizations" by W. Schroeder and A.T. Muller, etc. In recent years, international law scholars in European countries have gradually attempted to expand the jurisdiction of the ICC again from the perspective of legal amendment in order to cope with the increasingly chaotic international community. For example, A.R. Coracini's "Amended Most Serious Crimes: A New Category of Core Crimes within the Jurisdiction but out of the Reach of the ICC". C. McDougall's work – "The Crime of Aggression under the RS of the ICC", etc. Asian and African countries' research on the jurisdiction of the ICC focuses on its norms and nature. Scholars from Asian and African countries focused on the conflicts between the jurisdiction principles of the ICC stipulated in the RS and judicial practice and the jurisdiction principles in their own legal systems. For example, Chinese scholar Zhang Guiling's doctoral dissertation "Research on the Jurisdiction of the ICC", Zheng Jinmo's doctoral dissertation "Research on Basic Issues of Universal Jurisdiction", and Professor Song Jianqiang's "General Theory of International Criminal Justice System". In the dimension of jurisdiction nature of the ICC, scholars from Asian and African states shows an obvious change. Take Chinese scholar Pan Junwu and his work – "On the Ideal Design and Reality-Based Orientation of the ICC" – for example, he emphasized that the ICC was just one of many solutions, and even not the most effective one. As well as another Chinese scholar Zhu Dan, in her works, like "The Application and Reflection of the Principle of Doubt Favoring the Defendant in ICL" and "Judicial Activism of the ICC: Practice, Reflection and Limitations", she also insisted on the ICC and its judges should abide by the norms of RS and it could not be the only way to end conflicts.

Researches in the rule of ICL dimension: Although materials in ICL fields are relatively rich, but it hasn't been developed as well as domestic criminal law discipline. At present, the more in-depth studies on the international criminal value system include Bassiouni's "Introduction to ICL" and F. Megret's "What Sort of Justice is International Criminal Justice". Rustam Atadjanov's work – "Building the state of law in the countries of Central Asia", and another Kazakhstan scholar Кудайбергенов, М.Б, in his work "Международная уголовная ответственность физических лиц" [145, p. 6] he slso made some contributions to this topic. However, their studies on the international criminal value system focus on the discussion of specific justice and the legitimacy of international criminal justice, and lack comparison between related propositions. Scholars from Asian and African countries have not yet started research on the international criminal value system. For instance, Chinese scholar Song Jianqiang talked this issue in his work "General Theory of International Criminal Justice System", in recent years, I also talked this issue in my own works – "The Internationality of the International Criminal Justice" and "Study on Major Issues Related to the ICC". However, unfortunately these works didn't pay attention to specific propositions.

Main provisions submitted for defense: This study points out that the root reason why the jurisdiction of the ICC is difficult to implement is that the international community is still a society based on sovereign states, and the protection of international common interests cannot transcend the political preferences of

sovereign states for their own interests. Therefore, the ICC can only operate effectively if the concept of international criminal rule of law is established in the international community. The specific way to establish the concept of international criminal rule of law is to establish an international criminal value system, which not only defends the legitimacy of rule of law in ICL field, but also promotes the development of ICL and lays a theoretical and value foundation for the establishment of international criminal rule of law. This study clarifies the form and related propositions of the international criminal value system and clarifies the position that ICL scholars should have.

1. To explain the nature of the jurisdiction of the ICC on prosecution of individual:

The establishment of the ICC is an important step and milestone for mankind towards international rule of law. The "principle of individual criminal responsibility" is essentially the specific manifestation of the "system of denial of state personality" in ICL. "Individual criminal responsibility" has promoted the development of sovereignty theory.

– Denying the national personality - the essence of prosecuting individuals;

The essence of the "individual criminal responsibility system" is the "system of denial of state personality". The "system of denial of state personality" refers to a system in which individuals who support or act in the name of the state or represent the country, and who have abused their sovereignty power beyond necessary limits and violated the rules of international law advocated by international community, causing damage to others or common interests or shocking the conscious of human beings and thus constituting international crimes, and ICL requires such individual actors to bear joint international criminal responsibility in order to achieve international fairness and justice. The "individual criminal responsibility system" pierces the veil of national sovereignty and effectively curbs collective and systematic international crimes.

– Prosecuting individuals both limits and demonstrates state sovereignty;

The purpose of establishing the "individual criminal responsibility system" is to break through the limitations of the "Westphalian sovereignty system" and thus help end the history of impunity. The "individual criminal responsibility system" has been widely recognized by the international community and has promoted the innovation of sovereignty theory. This study critically inherits the legacy of "absolute sovereignty theory" and "sovereignty is outdated theory", and combined with the development of international law theory, it believes that sovereignty is "legally irrelevant" and "morally irrelevant", but in the context of globalization, sovereignty can and needs to be partially transferred. The "individual criminal responsibility system" does not conflict with sovereignty and instead highlights sovereignty. First, the "individual criminal responsibility system" pierces the veil of state sovereignty, making sovereign behavior no longer a unilateral action, but more of a multilateral interaction and cooperation; Secondly, by separating the personality of sovereign actors from that, we can achieve purification within sovereign power, separating the stigma brought about by the abuse of sovereignty from sovereignty itself. By removing the individual from the protection of sovereignty, the seeds of the

international crimes, such as totalitarianism and Nazism, could be to some extent prevented, and a much more harmony world could be constructed; Third, the exercise of sovereign behavior should be incorporated into the legal framework, so that it is a further consolidation and improvement of the national responsibility system to ensure that every sovereign act is included in the responsibility system and that sovereign power is not abused due to lack of constraints; Third, the establishment of "ICR system" enables the execution of state power to be incorporated into a more stable and orderly international governance mechanism.

2. What kinds of theoretical dilemmas in the exercise of the ICC's jurisdiction over individual prosecutions;

Jurisdiction is the lifeline of the ICC and a prerequisite for the ICC to conduct individual prosecutions. The difficulty for the ICC in enforcing the jurisdiction on prosecution of individuals to achieve. There are both theoretical and practical reasons to ineffectiveness of exercise its jurisdiction for the ICC. The root reason to these dilemmas is that the international community is still a society based on sovereign states, and the common interests of the international community cannot transcend the political preferences of sovereign states.

– Conceptual dilemma: unitary design and dual reality;

The RS and treaty-based the ICC, both of the two were created under the influence of the world federalism movement and were designed in accordance with the domestic monistic legal system. However, the international legal system and the domestic legal system are dualistic, which leads to many difficulties for the ICC in exercising its jurisdiction. Federalists have learned from past experience that the previous international legal order had obvious flaws, namely, the previous international legal order was based on the "absolute sovereignty theory" and the principle of sovereign equality. The international community was unable to hold government officials who committed serious crimes such as genocide, war crimes, and crimes against humanity accountable, hiding behind sovereignty. As a result, these criminals went unpunished. Based on pursue of criminal judicial organization – prosecution of individuals hiding behind the sovereignty so as to prevent future crimes, the ICC was established at their advocacy. The international community on which the ICC depends is a highly politicized and competitive society, in which it is difficult to form a world government. ICL represented by the RS is not world law - restorative justice, which originated in the 1970s, has been applied to various crime response systems worldwide [8, p. 13], but this theory was not reflected in the RS - and is political in nature. Countries interpret and apply ICL based on political interests, leading to the diversification of the interpretation and application of ICL by diverse subjects, thus resulting in the politicization of ICL. In practical dimension, it is clear that the relationship between domestic legislation system and international legislation system is that they absolutely belong to two different legal systems; The ICL with the RS at its core mainly reflects the legal concepts of the Western world. It lacks universality and is difficult to be accepted by the non-Western world.

– The dilemma of the coercive force of norms: the RS lacks coercive force;

The provisions of the RS don't give coercive power to the "international cooperation obligation". The main structure and obedience culture of the

international community are different from those of domestic society. Therefore, the international community rarely chooses to cooperate with the ICC. Given that the provisions stipulated in RS provides that State Parties shall cooperate fully with the ICC in process of investigation and prosecution of international crimes or situations, other provisions are filled with exceptions and qualifications, making them only exhortations, and the RS does not provide for a strong restraining mechanism for non-cooperative party states.

– The dilemma of regulatory clarity: vague provisions on discretionary power lead sovereign states to refuse to cooperate;

Whether the State Party or the Security Council refers the situation to the ICC, the prosecutor has the right to determine after an investigation that whether the charges are sufficient and then the prosecutor shall decide according to the investigation that whether it should prosecute or not. This power of independent judgment has the potential risk of abuse and legal loopholes, among which the greatest risk is the prosecutor's self-investigation of crimes. Since prosecutors are involved in many links in initiating Court jurisdiction and have great discretion, if they are influenced by political, economic factors or values, they have every opportunity to exploit loopholes in various links, abuse their power and make decisions that endanger the sovereignty of the relevant country.

– The legal technology dilemma: functional interpretations v. legality;

Due to legislative and technical defects in the RS, the judges in the ICC frequently carried out functionalism interpretation of the RS in recent years - this weakens its basic function of protecting people's rights, violates the competences of the participating states and interferes with the principle of national sovereignty [9, p. 204] – which has aroused doubts from the international community about the legitimacy of the ICC's jurisdiction, thereby hindering judicial cooperation between the international community and the ICC. "Ending impunity" not only is an important purpose or policy for the international community to formulate the RS, but also works as the basic value and purpose of the RS. When faced with heinous international crimes, "ending impunity" often becomes an excuse for judges to implement their intentions, and they often achieve the criminal policy goal of "ending impunity" by expanding or narrowing the literal meaning of the norms. ICL is a mixture of different branches of law, and the court has not provided guidance on the order of objectives of each branch of law, which also makes the multiple objectives of the RS full of conflicts. When judges face heinous and brutal crimes which shock the conscious of the human beings, they are without any doubt likely to carry out substantive justice judgments. Since the definition and implementation of normative purposes are at the core of the process of criminal law interpretation, and the diversity of purposes of ICL makes the RS open, this also makes the purpose interpretation centered on the purpose of "ending impunity to protect the interests of victims" often become the primary interpretation approach in interpretation practice and plays the final decisive role. Language itself is flexible, which leads to ambiguity in concepts in the legal system, whether they are descriptive concepts or normative elements. The Court's functionalist interpretation not only violates international human rights standards, but also goes against the original intent of the legislature - it infringes upon the national

sovereignty of the contracting states and puts the ICC into a crisis of legitimacy and effectiveness.

3. What kinds of practical dilemmas of the ICC in exercising its jurisdiction over individual prosecutions in practical dimension;

– Political dilemma: Opposition from major powers makes it difficult to enforce the jurisdiction of the ICC – the exterritorial application of U.S. laws is also known as a "long arm jurisdiction" worldwide. "Long arm jurisdiction" is a concept based on the theory of the minimum contact of the United States, is an act of the United States' rule of law against judicial sovereignty of other countries to safeguard its "world empire" status [10, p. 144]. And this practice also reject the jurisdiction of the ICC.

Since the crimes under the jurisdiction of the ICC are highly political and its prosecutions have a significant impact on national sovereignty and national image, major powers are likely to oppose the ICC's jurisdiction, which also makes it difficult to effectively enforce the ICC's jurisdiction.

– Execution dilemma: Arrest warrants are difficult to execute, resulting in the court's jurisdiction being vacated;

Considering that the Statute does not allow trials in absentia, the execution of the arrest warrant is undoubtedly the most important of all execution issues. This is because, if the arrest warrant cannot be executed, then the court proceedings can only end with the "issuance of an arrest warrant", which objectively blocks the litigation process and hinders the ICC in exercising its jurisdiction. The curbs of the basic structure of the international community on the international criminal execution system. There is a difference between the international community and the domestic community. As mentioned above, the state is the basic unit of the international community and at the same time works as the main subject of international law. The subject of ICL is the individual. Therefore, the international legal system is necessarily not fully applicable to the international criminal legal system. The impact of the culture of obedience among countries in the international community on acceptance of jurisdiction. In the international community, the prerequisite for the law to take effect on countries is the consent of every country, in addition to mandatory law and customary international law. There is no representative system in the international community.

4. How to solve these dilemmas;

The most direct way to overcome the theoretical and practical difficulties encountered by the ICC in exercising its jurisdiction is to amend the legislation. However, the amendment procedure of the RS is extremely cumbersome and difficult, and reconciling the conflicts of interest among the numerous States Parties is a huge project that not only requires huge amounts of legal resources but also makes it difficult to achieve a fundamental solution. This study believes that the fundamental reason that restricts the effective realization of the jurisdiction of the ICC is that "rule of law in ICL field and safeguarding international common interests" have not yet gained "universal consent" from the international community. The way to solve this fundamental problem is to establish the concept of rule of law in ICL field within the international community. Given that the premise for construction of

rule of law in ICL field is the prosperity of the discipline of ICL and the universal recognition of its value, and that the academic community has not yet established a value system for ICL, the initial establishment of an international criminal value system has become the most fundamental and important task in establishing international criminal rule of law.

– The topic of international criminal value system is proposed;

The knowledge form of ICL roughly belongs to factology and normative science, and the knowledge form needs a leap. The current international criminal value system is based on the social contract theory, but there are the following drawbacks in applying the social contract theory to ICL: The social contract theory in the international community is of a stage-by-stage nature; the social contract theory in the international community is of internationality.

– Several core propositions in the international criminal value system;

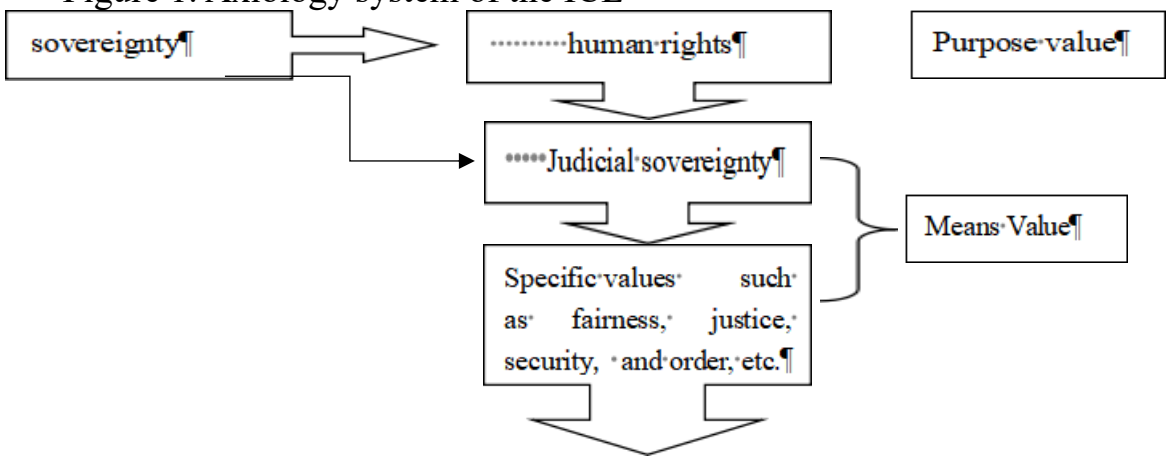
The theory of sovereignty has been updated, not only because only the transfer of state sovereignty can create space for the development of international law, but also because it is necessary for states to restrict their own behavior through cooperation and agreement in order to maintain the international order. Based on this, this study established the social contract theory that includes "internationality" and "stage-by-stage".

– International criminal rule of law is both a kind of common good and protection of individual rights

By exploring the definitions and connections of relevant propositions such as: the first group proposals are "rule of law", "rule of international law", and "rule of law in ICL field"; the second group proposals are "international community", "international public legal order", and "international criminal order"; the last but not the least group proposals are "sovereignty", "nationality", "human rights", "common good" and "individual rights". The last group proposals may be the most controversial one which takes a lot of courage. Then, the content of the international criminal value system has been enriched.

This study preliminarily established the international criminal value system (figure 1).

Figure 1. Axiology system of the ICL



The diagram was drawn up by the author

Theoretical significance: This paper clarifies and redefines the essence of the ICR system, introduces the Germany "functionalism criminal law theory" which is practiced and advocated in German, the "system of denial of corporate personality" in civil law, and the "subject structure theory" and "obedience culture theory" – derived from social contract - in sociology into ICL, so it is theoretically significant – not only descriptive, but also deconstructive and constructive; This paper also researched the establishment background of the ICC, and accurately captures the difficulties that the ICC faces. Especially, relying on the RS and case study, this paper undertakes exclusive legal debates on legal provisions and mechanisms. When coming to the solutions to these dilemmas, this paper voices out several values proposals which are novel. Accurately, this paper first draws division method of domestic criminal law and divides the ICL into three parts – factology, norm, and axiology. This paper not only critiques on the existing axiology theory of ICL, and learns from the existing theories then constructs a new theory of sovereignty and a relatively preliminary axiology system from the perspective of political realism.

Practical significance: The fundamental reason why the jurisdiction of the ICC is difficult to achieve and why individual criminal responsibility, although confirmed as a general principle of international law, is difficult to enforce is the denial of the historicity of sovereignty. With the further deepening of globalization, the ties between countries are becoming increasingly close. International treaties, agreements, and customs are all manifestations of the transfer of sovereignty - sovereignty is historic. Establishing rule of law in ICL field around the world could improve the effectiveness of the ICC, and can also fundamentally curb the abuse of sovereignty and maintain international order and human well-being.

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1. Heyong W. Study on Major Issues Related to the ICC // Ak Shagyl Publishing – 2023 - P. 1-438. ISBN: 978-601-7407-90-2

2. Heyong W., Danila T. Issues of Limitation of International Criminal Justice in the Modern World//Social and Legal Studios, 2024. – № 4. – P. DOI:

3.Heyong W., Indira S., Hongwei W., Danila T., Akmaral S. Protecting Victims of International Crimes: A Reflection on the Functional Interpretation of the Statute of the ICC//Social and Legal Studios, 2024. – № 3. – P.203-212. DOI: https://doi.org/10.32518/sals3.2024.203

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Structure and volume of the dissertation:

This dissertation is divided into 3 parts, which covers 136 pages in total.

1 REASON DIMENSON: THE ESSENCE OF PROSECUTING INDIVIDUALS IS TO DENY THE PERSONALITY OF THE STATE, AND ITS PURPOSE IS TO REGULATE SOVEREIGNTY STATES' BEHAVIORS

1.1 Denying the national personality - the essence of prosecuting individuals

1.1.1 What is national personality?

Just as Former UN Secretary-General Kofi Annan said 2 decades ago: "It's such an important and huge step towards protection of universal human rights and construction of rule of law around the world" [1, p. 226]. Annan's confident evaluation of the ICC is not only because ICL clearly defines a variety of acts that endanger human welfare as international crimes, but also because the ICC is the first permanent international criminal judicial institution to prosecute and punish individuals. By denying the personality of the state to punish individuals, it effectively regulates the sovereign behavior of states. Because since the establishment of modern states, the power of the state has become so strong that it can do anything. In this case, if the state's armed forces or violent tools lose legal constraints and are abused by a few authoritarians or politicians in non-civilized countries, the sovereign state may become an extreme force that launches wars, invades other countries, massacres civilians, harms human rights and does harm to the rule of law at domestic and abroad level, and may without control in time even develop into a terrible humanitarian disaster. The frequent occurrence of international conflicts such as the world war triggered by Nazi German, the Rohingya refugee situation in Myanmar, as well as the Israeli-Palestinian conflict, all of them show that international law, as the mainstream method to regulate the state sovereignty behaviors, needs to play its role in prohibiting the abuse of state personality rights. Therefore, the issue of state personality needs to be re-examined. How to define and punish state illegal acts and criminal acts of individuals who represent, support or act in the name of the state in the international crime system has become an unavoidable issue in modern international law; and the reality of international judicial practice is that various temporary, permanent or international special criminal tribunals since World War II have quietly established a system of denying state personality - the principle of individual criminal responsibility.

The state has the nature of a "collective personality", which has been demonstrated by many thinkers at domestic and abroad. The concept of personality is considered to be one of the most abstract concepts in law, and the academic definition of personality can be traced back to Roman law. In Roman law, the concepts of human beings include *homo*, *caput* and *persona*. "*Homo* refers to a person in the biological sense, not necessarily the subject of rights and obligations. *Caput* originally meant a head or a chapter of a book. In Roman law, it was borrowed to refer to the subject of rights and obligations, indicating a person with subject qualifications. Only when a *homo* has *caput* can he be a *persona* in the legal sense" [11, p. 2-3]. French Enlightenment thinker Jean-Jacques Rousseau once passionately expounded on the issues related to national personality in his works: "This public personality formed by the combination of all individuals was formerly called a city-state, and is now called a

republic or political body; when it is passive, its members call it a state; when it is active, it is called a sovereign; and when it is compared with its own kind, it is called a regime" [12, p. 21]. Thomas Hobbes, a famous British thinker, likened the state to an "automata" or "leviathan". He believed that art imitated rational nature to create the most exquisite work of art - "man"; The huge thing called "commonwealth" or "state" created through art is actually just an "artificial man"; In Leviathan, the "sovereign" constitutes the whole artificiality and the "fictitious soul" from which it derives its pronouncements and motives, and the magistrates and other judicial officers are the artificial joints. Finally, through "pacts" and "covenants" to establish and connect the man-made and its various parts, just as God created man, man can also create a fictitious "person" - the state [13, p. 7]. According to Hobbes, the state is a legal personality created and fictitious by man. The existence of the state has basic elements that constitute it, among which sovereignty is the "fictitious soul" on which it depends. In the theory of sovereign immunity, the "limited immunity theory" – although this theory exempts non-state sovereign acts from immunity, this theory could also be used as evidence to prove that sovereignty is the soul of the state. American scholar Louis Henkin also argues that "the most common use of the word 'sovereignty' may be sovereign immunity - immunity from the law, exemption from review and exemption from justice" [14, p. 2]. The reason why state sovereign acts can enjoy judicial immunity in other countries is due to the principle of sovereign equality of states; however, the vast majority of countries in the world that adhere to the doctrine of restrictive immunity do not grant such immunity to commercial acts of other countries because they believe that they lack sovereign content.

"State personality" is the abbreviation of "international personality of a state", which is a sub-concept of "international legal personality". The so-called "international legal personality" refers to the "legal personality" in international law field. The same goes for that, it is an entity that enjoys the rights, obligations or powers determined by international law [15, p. 59]. The state is the main type of "international legal personality". According to Oppenheim's definition in his international law theory - what is national identity? It is actually a combination of a number of characteristics, in this way, it "can be said that the equality, dignity, independence, territorial and personal supremacy and responsibilities of each state are recognized by every other state, and this fact is derived from the membership of the international community itself" [16, p. 199-200]. In this logic, it is that the existence of state personality constitutes the basis of all rights and obligations between states.

1.1.2 The inability of the state to bear criminal responsibility is the direct reason for prosecuting individuals

The state has personality in international law, which lays the foundation for the state to assume rights and obligations in international law field. Given that "ICL is a branch of criminal law" [17, p. 138], can the state itself afford criminal responsibility? C. Bassiouni, an American ICL scholar, expounded on the CR of the state in his famous work, namely - ICL: Draft International Criminal Code. He discussed the criminal acts

of the state and its criminal responsibility in his own draft International Criminal Code. First, the acts for which the state bears criminal responsibility are manifested in the following manifestations: (1) any crime committed by an authority figure acting on behalf of or in the name of the sovereign state, regardless of whether such acts are legal or illegal according to its own domestic legislations; and (2) acts conducted by individuals, enterprises or organizations in an official capacity are attributable to the sovereign states. Second, state responsibility for inaction. It manifests itself in the following ways: (1) A state's failure to fulfill its responsibilities under ICL shall constitute an international crime; (2) When a new state or government is responsible for prosecuting or extraditing individuals from a group that has violated ICL or individuals who have been expelled from the group, the state's inaction shall constitute the basis for the state's criminal responsibility [18, p. 153]. In fact, the criminal acts of states and their criminal responsibility advocated by Bassiouni in his Draft International Criminal Code have not been confirmed by international law practice, nor have they been adopted by international legislation. First, to date, the international community has never had any international law practice of states assuming international criminal liability; second, the RS does not provide any provisions for any issues relating to state crimes and state criminal responsibility, but only provides provisions for the principle of ICR.

This study believes that the current doctrine on state criminal responsibility cannot fully explain whether a state can become the subject of international crime, and that a state cannot and will not become the subject of international criminal responsibility because a state cannot bear the manifestation of international criminal responsibility - criminal punishment.

The state cannot bear the penalty and lacks criminal responsibility. The general legal principles of criminal legislation in various countries show that the criminal liability is expressed in the form of criminal power. What is the so-called criminal responsibility? It may often refer to the legal consequences of the offender's criminal actions. When it comes to the state, this responsibility of the state is mainly implied in the message placed on criminal and criminal activities by the state judicial organs in accordance with the criminal law and other forms of legal norms. Regarding the concept of criminal responsibility, Chinese and Kazakh scholars have different expressions. Some people believe that criminal responsibility is a due responsibility for the criminal legal consequences caused by the violation of formal legal obligations. From the perspective of the state, criminal responsibility is a negative evaluation of the person who commits the illegal act, that is, the criminal. In China, criminal responsibility refers to a negative moral and political evaluation made by the state judicial organs on the objects – individuals or corporates who commit the crime provided by the provisions of the criminal law [19, p. 156]. Some people also believe that criminal responsibility is the punishment imposed by the state on those who commit crimes in accordance with criminal law [20, p. 48]. The definition of criminal responsibility by scholars in Kazakhstan is similar to that by Chinese scholars. As can be seen from the above definition, criminal responsibility is closely related to crime and punishment. Criminal responsibility lies between crime and punishment, and regulates the relationship between crime and punishment. It can be expressed in the

following formula: crime - criminal responsibility - penalty. Criminal behavior is the logic start and premise for criminal responsibility. If behavior violates the criminal law and should share criminal responsibility, the judicial should send penalty on it. Criminal penalty is based on this premise - the perpetrator is of capacity and can bear criminal responsibility. According to the principal liability, no criminal will be punished if he or she is of no capacity of responsibility; and the specific form of criminal responsibility is punishment. In other words, firstly, where there is responsibility, there will be punishment followed, or no punishment without responsibility. In this way, we could say that criminal responsibility is the premise of punishment, and punishment is the consequence of criminal perpetrations; Second, the degree of criminal punishment given by the judicial organizations depends on the magnitude of criminal responsibility, which is a basic principle of proportionality we must abide by when assessing the perpetrations conducted by the actors in criminal law; Third, criminal sanctions, such as life sentences or culpable sentences, are key indicators of criminal responsibility, but criminal responsibility as a whole is primarily constrained by judicial institutions. Of course, criminal liability in China does not always come with punishment. For crimes that are obviously minor, no criminal punishment is required.

From the perspective of criminal responsibility, assuming that a sovereign state can bear criminal responsibility, then the so-called state criminal responsibility shall, to some extent, refer to the negative evaluation made by the international society or organizations on the state when the state carries out an international crime. Specifically, when a state, as the subject of an international crime, bears criminal responsibility, it should also bear criminal penalties. However, as an abstract entity, the state itself has no consciousness and is simply unable to bear the punishment of depriving life (death penalty) or depriving freedom (imprisonment). The only punishment the state can bear is a fine. A majority of scholars hold this opinion that it is the theoretical foundation for the state to afford criminal liability [21, p. 207]. In reality, on the contrast, as we all know that every international crimes conducted by the states are quite serious crimes, such as war crimes or genocide, the compensation penalty is not proportional to the severity of the crime. The principal of “proportionality” is a kind of general principle in international law field, which is generally stipulated in the legal systems of various countries and has the nature of international *jus cogens*. Simply imposing a fine on a country when it commits a serious international crime cannot reflect this criminal law principle at all. Therefore, it is clear that a country does not have the ability to bear international criminal responsibility.

It is precisely because states cannot bear criminal punishment that authoritarians or individuals who abuse sovereignty often use the state personality system to evade punishment when manipulating states to commit international crimes, making international crime essentially a “zero-cost” action. In order to end impunity and curb international crime, prosecuting individuals and denying the personality of the state is the only way.

1.1.3 Why deny national personality?

As a fictitious person in state law, the state usually acts independently in its own name. However, for the reason that the state cannot afford criminal responsibility, individuals who act on behalf of or in the name of the state may abuse state sovereignty power in some circumstances because of lack of restriction. The fascist movement is a typical example, which is characterized by large-scale and crazy state crimes. Crimes committed by the state machinery are more serious and terrible than any other crimes. In that era, "senior officials in important positions of state and at the decision-making level" used the state machinery to "under certain historical conditions and took advantage of widespread mass sentiment to launch brutal political persecutions at home or to wage horrific wars of aggression abroad, or both". The historical tragedies caused by this kind of national personality crime include: "the massacre and plunder of indigenous peoples, the unscrupulous slave trade and slavery; the bloody wars across three continents, the six million Jews who died tragically in gas chambers and crematoriums; the Nanjing Massacre and Unit 731; the Great Purge where millions of politically innocent Soviets were executed, imprisoned, and exiled..." [22, p. 401-403].

In short, such "authorities representing, supporting or acting in the name of the state" sometimes may abuse state sovereignty power, commit serious international crimes which should bear the responsibility in the name of the state, violate the interests of other states or endanger international common interests. If only the state is held accountable in such a circumstance, for one reason that it will affect the realization of the principle of sovereign equality of states, for another is that it will be difficult to curb and prevent state crimes, at the same time it will allow the individuals who hid behind the state sovereignty to go unpunished. Therefore, the various international Court trials that emerged after the war opened up a path to tracing the criminal responsibility of such individuals or groups. Although such acts are committed in the name of the state and can be attributed to the state and the state should bear the corresponding legal responsibility, because "crimes that violate international law provisions are committed by individuals rather than abstract legal enterprises" and the state cannot bear criminal responsibility, international customs or international treaties have created or promoted the definition of some state actions as international crimes. In addition to requiring states to bear corresponding responsibilities, international law also condemns and punishes such individuals. This "system of denying national personality" was created and developed in practice, and its rationality is specifically manifested in the following aspects: first, it correctly distinguishes the responsibilities of various subjects; second, it further improves the state responsibility system and effectively prevents the resurgence of large-scale international crimes; third, it deeply explains why international treaties establish the international criminal responsibility of individuals in the form of substantive law and why a large number of international criminal trials have emerged one after another.

1.1.4 Prosecuting individuals is a judicial expression of the "denial of national personality"

With the swift development of modern international law in-depth, the system of denial of national personality has already become a general-accepted fact in international judicial practice, but it lacks academic and theoretical sorting. The realization of any system must have its origin, and the same is true for the system of denial of state personality. It can be considered that the system of denying state personality is closely related to the trend of human rights protection in modern international law dimension, and promote the development of ICLs and IHLs.

First, the system of denying state personality is the legal implementation of the principle of ICR in ICL field. Article 6 of the Nuremberg Charter provides the principle of ICR; the "Nuremberg Principles" promulgated by the UNGA on Dec. 11, 1946 and further it confirmed that in international judicial practice, international judicial organizations can directly apply the principle of ICR and there is no need to take the provisions of national law into consideration [23, p. 58]. The so-called "individual" here should include two categories: (1) natural persons with specific powers, including heads of state and their relatives and confidants (such as Hitler's secretary Martin Bormann, Sudanese President Bashir, Libyan President Gaddafi and their close relatives), heads of government (for example, Japanese Prime Minister Kiichiro Hiranuma or Prussian Chancellor Hermann Wilhelm Goering, etc.), foreign ministers (for instance, Nazi Germany's first foreign minister Constantine von Neurath, and the Second Foreign Minister Joachim von Ribbentrop, etc.), supreme leaders (e.g. Chief of Staff of the German Wehmacht High Command, Field Marshal Wilhelm Kettle, Japanese Army Generals Kenji Doihara, Iwane Matsui, and Seishirō Itagaki), party leaders (such as Nazi Party legislative leader Wilhelm Frank, judicial leader Hans Frank), and other individuals with specific identities. (2) "Non-state actors" mainly include armed forces, police, paramilitary groups and other civilian organizations. For example, quasi-military groups and some armed militias committed lots of serious international crimes during the former Yugoslavia confliction; the most typical international crime which was involved in such entities is "crimes against humanity"; it should be pointed out that the "non-state actors" have even become "a prerequisite for resolving individual criminal responsibility" to some extent [23, p. 60-62]. Of course, since international criminal responsibility is individual criminal responsibility, non-state actors are not a new category of subject of ICL. The Nuremberg Tribunal pointed out that "it has long been recognized that international law imposes obligations and responsibilities on individuals just as on States... The essence of this Charter is that individuals also have international obligations, which are higher than the domestic obedience obligations imposed by various countries. Although individuals who violate the laws of war act under the authorization of the state, if the state exceeds its authority under international law at the time of authorization, the above-mentioned individuals cannot be exempted." These principles of international law created and recognized by the judges and the international community in the Nuremberg charter and the judgments of the tribunal given by the court and gained the universal acceptance were affirmed at the UN General Assembly which was held on December 11th, 1946 [24, p.

496-497]. Article 5 of the Charter of the IMTFE in 1946 also provides that any person or member of a group shall be guilty of a crime against humanity. Article 25 of the RS, enacted in 1998, explicitly stipulates the "principle of individual criminal responsibility". In short, a series of charters or statutes of temporary or permanent international tribunals or courts have stipulated the principle of ICR, and the specific implementation of these principles naturally depends on the criminal justice of the tribunal. From this we can see that with the pursuit of ICR by many post-conflict international criminal tribunals, international law has firmly established the principle of ICR, which played as milestone for the establishment of the system of denial of state personality.

Secondly, the practice of the international denying personality system. The creation of international law is different from domestic law. It is more reflected in the coordination of wills between countries, usually in the form of treaties. There are countless examples of this. Of course, the judicial determination of customary international law is also an important way to create new resources of international law. Two forms of international crimes, namely piracy and the slave trade, were established by international criminal law first when persons engaged in self-serving activities committed such crimes [23, p. 34]. Related to and depends on the identities of different conductors, individuals – who conducted international crimes - can be roughly divided into two types: the first type is "international crimes committed in a private capacity", such as piracy, drug trafficking, aircraft hijacking, hostage-taking, etc.; The second category is "international crimes carried out by individuals in their capacity as representative of a state or as persons acting on behalf of state's interest", such as war crimes, crime of aggression, genocide, etc. In the former circumstance, since the domestic criminal legislations of all countries define such acts as crimes without exception – natural crime, and most countries are willing to adopt the principle of universal jurisdiction, jurisdiction and trial are usually carried out in domestic Courts; while for the latter, it is usually implemented by temporary or permanent international criminal tribunals. Furthermore, it is becoming more and more common for the international community to accept the trail of certain international criminal cases by some specialized courts as a new trend in recent years. For example, the Iraqi High Criminal Court, which sentenced former Iraqi President Saddam to death by hanging, was the predecessor of the Iraqi Special Tribunal for Crimes against Humanity - established in accordance with the Statute of the Iraqi Special Tribunal, which came into effect on December 10, 2003. For example, the International War Crimes Tribunal, which sentenced Mohammad Mujahid, a core member of the Bangladesh Islamic Congress, to death, was established and exercised by the ruling Bangladesh Awami League government in 2010.

In terms of punishment measures, after years of development and evolution, it has become a consensus in the international law community that international law adopts the "dual responsibility principle" to punish international crimes committed by individuals who represent, support or act in the name of the state. However, the traditional concept does not solve the following problems: (1) Since the individual performs the acts as a representative of the sovereignty state or as a person acting on behalf of the sovereignty state, could the official act be absorbed by the state as a

sovereign entity? In this case, can the individual's acts be exempted? (2) If individuals acting on behalf of, in support of, or in the name of a state should be held accountable for the international crimes they commit, then on what grounds? (3) If it is believed that individuals must bear corresponding responsibilities under international law, should sovereign states also bear responsibilities at the same time? If the "dual responsibility principle" is implemented, what is the reason? The "system of denying national personality" proposed in this study obviously provides a theoretical reference for us to clearly understand the above issues. Of course, the international criminal acts related to the state personality denial system are glued together with the criminal acts of the state itself, and are often manifested as state sovereignty acts to the outside world. Therefore, international law must separate the two through the personality denial system and implement the "dual responsibility principle" in the form of punishment. For instance, 20 individuals or more who worked in Nazi government as officials had been tried in Nuremberg Tribunal from Nov. 1945. As it was with the IMTFE, from the establishment of the tribunal - January 1946 – this tribunal had tried a lot of fascist criminals in that tribunal and punished 25 individuals at last. While fascist war criminals bore personal criminal responsibility, fascist states also bore "the most serious form of international responsibility". The Allies implemented temporary military occupation and military control over Germany and Japan through the London International Agreement, and the Allied Control Council exercised this supreme power on their behalf [25, p. 105-106]. In addition, other ways of assuming state criminal responsibility include imposing fines and compensation for damages, imposing economic sanctions, depriving the right to participate in international activities, and moral condemnation. What we should mention here is that the establishment and provision of denial of state personality and the implementation of the state personality denial system are quite two different things. The state personality denial system only applies to individual cases, that is, it is implemented by applying such norms to individual cases through international judicial proceedings in international Courts.

1.2 Prosecuting individuals both limits and demonstrates state sovereignty

1.2.1 The principle of individual criminal responsibility restricts the abuse of state sovereignty

As mentioned above, the principle of ICR or the denial of national personality system is an important system that has gradually been established in international law and implemented in international judicial practices since World War II. The reason why this situation occurred is closely related to the in-depth development of the state responsibility system in the new era. The system of ICR pierces the veil of national personality and derives the individuals from sovereignty and imposes criminal responsibility on them who hide behind the sovereign power of the state through international law. As stipulated in Article 6, paragraph 1, of the Statute of the ICTR, individuals who plan, incite, order, commit and aid or abet other individuals in planning, preparing or carrying out the crimes set forth in Art. 2 to 4 of the Statute are

responsible for it and should bear the criminal responsibility [26, p. 190-197]. Since the biggest feature of this type of special international crime is that it is committed by individuals in the name of the state and appears to be an act of state sovereignty to the outside world, it is difficult to punish it through domestic criminal justice power, which is essentially a sovereign power. To effectively suppress widespread international crime and protect international community interests - human rights protection, the principal of the ICR was formally created and established around the international criminal field during the Nuremberg Trials and the Tokyo Trials following World War II. Subsequently, many temporary or permanent international criminal tribunals were established in accordance with international treaties. The successive trials and criminal prosecutions had a great impact on the criminals and made outstanding contributions to the world anti-fascist movement and the protection of peace in international community. Therefore, the establishment of the "national personality denial system" indicates that international law attempts to limit sovereign power by certain means. In the view of late modern sovereignty theory, there is no fundamental conflict between punishing international crimes and maintaining national sovereignty, because human rights issues are universal, and all countries have consistent fundamental interests in combating international crimes. In order to safeguard the comprehensive interests of the international community and their own rights and interests, it is necessary for countries to make such changes [27, p. 68]. However, the modern international society is still a society based on sovereign states, and sovereignty is still the most important power of a state. So, is there an irreconcilable conflict between the principle of individual criminal responsibility and sovereignty? Or are the two inextricably linked? This study argues that although the principle of individual criminal responsibility has imposed certain restrictions on sovereignty to a certain extent, it has demonstrated state sovereignty in a deeper dimension. Therefore, there is no conflict between the principle of individual criminal responsibility or the "national personality denial system" and state sovereignty.

Current international law is showing a trend of transformation from "international law of coexistence" to "international law of cooperation" and even "international law of human rights" [28, p. 2]. The system of denying state personality embodies this trend of transformation, and thanks to this transformation, ICL has developed rapidly. "Cooperative international law" relies on the sovereign equality inter-state order constructed by "international law of coexistence" and seeks the transfer of some part of state power by states; However, international human rights law, which is dedicated to protecting people's fundamental rights, still requires international cooperation to achieve its goals [28, p. 99]. According to Professor He Jipeng's theory, the international legal system has a triangular structure between international power, national power and its rights. In the international formation stage of state power, many countries jointly cede some state power through consultation, which could authorize the international community to implement its power; In the operational phase of international power, international power limits national power in order to promote national rights. In other words, there is ultimately a mutually transformative relationship between state rights and state power.[29, p.230-236] It is precisely because of the existence of sovereignty transfer that when state rights or international common

interests are infringed upon by state power, the "national personality denial system" provides judicial relief, and the exercise of this international power is carried out by international organizations of a supranational nature (mainly the ICC, ad hoc tribunals or mixed tribunals). In this sense, the system of denying state personality is a restriction on state power to a certain extent, and of course, fundamentally it is a restriction on those who specifically perform sovereign acts. The judgment of the Nuremberg Tribunal also made it clear that such individuals' exercise of sovereignty should not exceed the authority they enjoy under international law. Once such authority is exceeded, the individual shall bear international legal responsibility without enjoying immunity.

So, in what ways does the "national personality denial system" restrict state power? This study believes that there are four aspects: (1) It makes the exercise of state power no longer arbitrary, but requires it to abide by certain bottom lines. As Professor John Jackson said, "States cannot refuse to be bound by basic international rules on the grounds of sovereignty. International cooperation obliges states to accept some minimum requirements of international law" [30, p. 76]. What is the minimum requirement here? Professor Jackson did not explain. This study believes that the basic requirement of late modern sovereignty theory is that a country cannot do evil under the halo of sovereignty, that is, the exercise of state sovereignty should be limited to not violating international *jus cogens* [23, p. 104-119]. (2) It is clear that the abuse of state power by the sovereign should be subject to the constraints of international contracts. The international contract here is a legal creation based on the "national personality denial system" and is a transfer of sovereignty formed at the stage of international conclusion of state power. All subjects of international law should obey this international authority, especially when the actions of individuals acting as representatives, supporters or in the name of a state seriously endanger the common interests of other states or the international community and constitute international crimes, the international authority should impose punishment on such individuals and states. (3) The exercise of state power is assessed within the framework of international power, specifically by the state's fulfillment of its obligations under international law. The judgement in Wimbledon case given by the permanent court of international court in 1923 and the ICJ's report on reservations in 1951 to the Convention on the Prevention and Punishment of the Crime of Genocide both confirmed the view that a state's fulfillment of treaty obligations is not a deprivation of sovereignty but a way of exercising sovereignty [29, p. 232]. (4) It increases the multiple considerations of basic human rights, international common order, peace and security for state power. C. Raj Kumar believes that: "The traditional sovereignty theory has encountered three major challenges in the past half century, and it is necessary to reflect on the sovereignty theory. These challenges are: first, human rights discourse has successfully challenged sovereignty, and currently countries can rarely justify actions that raise human rights issues under the pretext of sovereignty; second, globalization poses different types of challenges to sovereignty; and third, terrorism and issues related to national security pose challenges to sovereignty" [31, p. 254]. These challenges require the international community to reflect on the path of international governance, the source of power of modern international law, and the way international law operates. The regime of denial

of state personality is a major innovation of traditional state responsibilities system in international governance since World War II, as well as an innovative response to international law's new challenges.

1.2.2 The limitations of ICR is essentially a manifestation of sovereignty

Sovereignty is the core element of a country. It is pointed out above that individual criminal responsibility has a restrictive effect on sovereignty, in other words, it makes it exercised within the framework of ICL, but the traditional view of sovereignty holds that sovereignty is supreme and absolute. According to this logic, sovereignty conflicts with the system of individual criminal responsibility or denial of state personality. Does individual criminal responsibility exist in a merely antagonistic relationship with sovereignty? Why should the principle of ICR be accepted as a general principle of international law in contemporary society? This study argues that individual criminal responsibility and the system of denial of state personality essentially demonstrate sovereignty, and the two are not contradictory.

In his book Leviathan, Thomas Hobbes, a famous British thinker, likened "sovereignty" to the "fictitious soul" from which the "state", an artificial machine, obtains its statement and power. The "national personality denial system" is closely related to the sovereignty theory. Its quiet establishment confirms the new trend of sovereignty theory from the perspective of international law, namely, on the one hand, the fundamental principle of international law, namely respect for state sovereignty, and on the other hand, the supremacy of absolute sovereignty must be changed to a more peaceful but substantive legal effective evaluation criteria. Professor John H. Jackson, a famous American international economist, also questioned the older Westphalian concept of sovereignty and called for a new concept of sovereignty. Although Jackson's relevant theory is not without bias [32, p. 31], it at least shows that the connotation of sovereignty is changing. It is "a historical concept that has always been receptive to various historical ideas". We need to understand it from the "historical background in which the specific concept of sovereignty is clarified" [33, p. 271]. In recent years, Chinese scholar professor He Zhipeng has conducted in-depth researches and made profound reflections on the connotation and meaning of "state" and "sovereignty", and argues that "the state itself does not have ultimate or perfect meaning; sovereignty is merely the result of human beings' pursuit of order and reliance on authority in society, and it does not have any sacred and unchangeable attributes" [29, p. 215]. Professor He argues that "although the essence of sovereignty is command and regulation, it is not insurmountable, indivisible, or inalienable, nor is it an unrestrained and irresponsible power that must be constrained. Only in this way can we safeguard the independence of the country and the basic order of the international community" [29, p. 222]. It is clear that over-weaponization of the principle of state sovereignty can cause great harm, and finding elements of common ground in discussions about the concept of sovereignty should be the direction of the international community's future joint efforts. However, the problem has not changed. After World War II, the national liberation movements of nations in "national

economy-based" colonial territories around the world also revealed many problems. According to academic research, in the past 25 years, about 36 new countries have emerged to reassert the principles of national sovereignty and territorial integrity, but the international community has not resolved the issue of the national self-determination framework. A move that has tragically resulted in the deaths of more than 20 million people in "sovereignty-based conflicts" around the world [34, p. 425-427]. The root cause is the prevailing tendency in the international community to place sovereignty above all issues, which not only hinders the development of pragmatic policies but also endangers regional and global stability. In short, giving priority to sovereignty is also detrimental to the creation of a new country to a certain extent. Based on this, some scholars have proposed a "path to winning sovereignty" that includes sharing sovereignty, institutional building, and ultimate identity confirmation to solve this problem. Sharing sovereignty means gradually easing tensions, allowing the parties involved to gain mutual trust, and building confidence in the conflict resolution process [34, p. 445-449]. The sharing of sovereignty here means the transfer of sovereignty.

Furthermore, the generation of international power depends on the creation of international law through treaty-making by countries on the basis of consensus. Only by making an agreement can an international body such as the International Criminal Court be entrusted to deal with common issues that are difficult for individual countries to deal with alone. The effectiveness of international law in international governance could be clearly achieved and practiced at the same time the development of the international law could also be further promoted. Of course, the principle of individual criminal jurisdiction, or the "theory of denial of personality of the state system", is implicit in international law-making, and such international law-making is usually an expression of the transfer of sovereignty. Imagine this situation, where there was any international criminal law document for Rwanda, or there was any documents for the prevention or punishment on the Genocide which was created by the international community in Geneva stipulating about the provisions on war things, there would be no scientific, effective and authoritative court for genocide and grave violations of international humanitarian law during the Rwandan conflict on April 7, 1994. The court convicted Kambanda, the prime minister of the government during the massacre, on six counts: He was sentenced to life imprisonment for genocide, complicity in genocide, direct and public incitement to genocide, direct and public incitement to genocide, complicity in genocide, crimes against humanity (murder) and crimes against humanity (genocide) [26, p. 307]. The contribution of the International Criminal Tribunal for Rwanda to the principle of individual criminal responsibility is that it is an important court, reaffirming that international crimes committed by heads of state after trying fascist war criminals in the second world war are not exempt. The biggest difficulty faced by the International Criminal Court in the negotiation of RS, which was established on July 17th, 1998, is the conflict between the jurisdiction of the court and the protection of sovereignty. The ICC established on this basis posed a great challenge to Westphalian sovereignty. There are two specific reasons for this. First, it separates individuals from national personalities as representatives of the states, and individual criminals may violate the criminal norms established by the RS, whether

they act in their own name or in the name of state officials, regardless of whether they act in its own territory or in the territory of another country. Second, it imposes responsibilities on the state, limiting sovereignty both from within and without the state. Internally, States Parties should implement the RS in their domestic laws; externally, States Parties have an obligation to cooperate with the Court [35, p. 59-60]. The RS is a representative event in the creation of the system of denying national personality. It reveals the necessity for contemporary international law to limit sovereign power in response to international challenges, and also reveals the limitations of the old sovereignty theory. In addition, the questions it raises about how sovereignty should be handled and how it should be protected have opened up a path for us to further think about the relationship between restricting state sovereign power and maintaining the principle of state sovereignty.

Within the framework of the "national personality denial system", international law holds individuals who represent, support or act in the name of the state criminally accountable, and imposes mixed punishment measures including legal, moral, economic and political measures on sovereign states, such as those taken by the ICC. This is a condemnation of the abuse of sovereign rights by international power. On the one hand, this dual punishment principle reflects the implementation of the principal of proportionality under the international law context. On the other hand, it also reflects that state sovereignty is not supreme, unpredictable and rampant under all circumstances, but should be restricted by international power. However, such restrictions do not necessarily undermine sovereignty. Let's take the example of creating an RS. Given that sovereignty is a central institution in the international legal system, the protection of sovereignty is an integral part of RS. Therefore, the Statute stipulates that the jurisdiction of the ICC cannot supersede the jurisdiction of the national courts of member states, but complements them. The ICC can prosecute individuals only when domestic courts are unwilling or unable to prosecute, which means that the prosecution function of the state has priority. Ultimately, the ICC is instrumentalized by the international community for both domestic and international interests [35, p. 67]. Although the system of denying state personality is a form of restriction on sovereign rights, this restriction is fundamentally a deep maintenance and manifestation of the principle of state sovereignty. So, how does the system of denying state personality demonstrate sovereignty? This study believes that it is reflected in the following four aspects.

First, sovereign behavior is no longer a unilateral action, but more of a multilateral interaction and cooperation. Only sovereign power recognized multilaterally has international legitimacy. Any arbitrary unilateral exercise of sovereign power may bring destructive consequences. The rational exercise of sovereign power must be based on consultation and cooperation. Only actions through consensus can truly safeguard the international public interest and thus guarantee the sovereign integrity of each member.

Second, the sovereign actor is separated from the sovereign national personality under certain circumstances. The national personality denial system separates those individuals or groups such as heads of state, heads of government, and commanders who hide behind the national sovereignty barrier, exceed their authority and commit

crimes in the name of the state, and have decision-making power or command power from the national sovereign behavior. By imposing criminal law, it realizes the internal purification of the operation of sovereign power, prevents the resurgence of totalitarianism and Nazism, and promotes the establishment of a far more harmonious world. The trials of the ICTR changed the tradition theory of impunity for the genocide and ensured that those responsible for the crimes received the punishment they deserved. Judging from the results of the trial, whether it is the witnesses' statements in Court, the defendants' sincere confession of guilt and repentance, or the victims receiving corresponding compensation, they have all promoted social justice to a certain extent, promoted the glory of human nature, and greatly promoted national reconciliation [26, p. 309-315].

The third is to incorporate the exercise of sovereign actions into the framework of the rule of law, so that every action has reasons and responsibilities, which will further consolidate and improve the state's responsibility system. ICL imposes mixed or dual type of criminal punishments on individuals and responsible States, which not only reflects the punishment imposed by international law on individuals who commit serious international crimes, but also reflects the negative evaluation of international law on serious violations of ICL by States. Only through the dual legal responsibility evaluation of the state's fictitious personality and individuals can truly serve as a warning and punishment, which is a fundamental solution.

Fourth, the exercise of state power is incorporated into a more stable and orderly international governance mechanism. The "system of denying national personality" is a new form of punishment for those who implement state sovereignty for usurping or abusing power. It aims to combat international crimes, punish crimes committed by individuals or groups such as fascist regimes or militarist war criminals, and prevent the emergence of the "kingdom of darkness" described by Hobbes in "Leviathan" from infringing on the legitimate rights and interests of citizens under the protection of state sovereignty, so as to safeguard their natural rights obtained according to the laws of nature [13, p. 430-437]. Only in this way can the state's good image not be damaged by individual international criminal acts, and the common interests of every state or the international community can be more effectively protected and the healthy development of international governance mechanisms can be promoted.

In short, restricting sovereign power and highlighting the principle of state sovereignty are conflicting in form, but unified in essence. The two are like two sides of a coin, dialectically unified in the structure of international governance, and the result is to further safeguard national interests and international common interests.

2 THE PROBLEM DIMENSION: THE THEORETICAL AND PRACTICAL DILEMMAS AND REASONS WHY JURISDICTION IS DIFFICULT TO ACHIEVE

2.1 Conceptual dilemma: unitary design v.s. dual reality

2.1.1 The court is an ideal design constructed according to the domestic unitary legal system

Since its establishment in 2002, the ICC has met the international community's demands since the second World War to punish grave international crimes and *jus cogens* violations that seriously threaten human peace and security. The most direct purpose of the ICC is to prosecute individuals, but the means to achieve this goal is jurisdiction over specific situations. Therefore, jurisdiction is the lifeline of the ICC. Since the ICC does not have an executive body, the effective exercise of its jurisdiction is extremely dependent on judicial cooperation from the international community.

However, the specific provisions of the RS of the ICC on the jurisdiction of the Court and the features of the jurisdiction reflected in the Court's judicial practice also indicate that the Court has limitations in punishing crimes. In actual operation dimension, the Court's jurisdiction has theoretical and practical problems such as questionable fairness, insufficient international recognition, and difficulties in enforcement. The ICC's interference in national judicial sovereignty has led to a wave of African countries withdrawing from the Statute, which is a clear example. This chapter explains the theoretical and practical reasons why the ICC's jurisdiction is difficult to enforce in terms of court design concepts, legal technology, institutional structural deficiencies, rule enforcement, international social structure, and legal culture.

The ICC which is a product of idealism was established under the influence of the world federalism movement. Therefore, the ICC conflicts with the real society. In recent years, realistic challenges such as the withdrawal of African Union countries and the sanctions imposed by the US on the ICC have caused people to reflect on the ICC from a realistic perspective. The foundation of the existence of the Court is designed by the world federalists according to the domestic unitary legal system, while the real society is highly politicized and this society is with both the domestic legal system and the international legal system in co-existence, so the ideal design of the Court lacks realistic foundations. In reality, "the confrontation between the State Parties and the Court" and "the Court governance effect isn't good" also confirm this assertion. Moreover, according to the experience of the operation of International Criminal Justice Institutions in the past, if an international criminal institution can operate normally, whether it is an ad hoc court or a permanent court, the active cooperation between States and it is essential, even necessary. That is to say, international criminal trials must be based on the cooperation of sovereign states. Except for the Nuremberg Tribunal and the Tokyo Tribunal, the judicial cooperation systems of other international criminal tribunals are seriously vulnerable, and the ICC is no exception. Although the ICC was established with purpose to punish the most

gravity international crimes that shock the conscience of the entire international community, while at the same time without no police, military or law enforcement forces available for use, nor does it have the power to take coercive measures in criminal proceedings directly within national territory. As a result, it is impossible to obtain defendants and evidence without the cooperation of states. Without the defendant, the trial cannot begin; without evidence, the Court cannot determine the facts. The judicial institutions have weak law enforcement capacity, which largely depends on the close cooperation of the state in all proceedings, from judicial investigation and evidence collection to arrest or summon suspect, search, detention, custody and execution. Given that the RS has already provided comprehensive detailed contents on cooperation among nations, whether among the party state and non party state, or among the party states or among the non party states, the RS provided obligations on the party states which is about the cooperation, but also provides for numerous exceptions and limitations, and even does not provide strong sanctions mechanisms for countries that refuse to cooperate. These are theoretically the reasons why the jurisdiction of the ICC is difficult to achieve.

The ideological basis for the establishment of the ICC is world federalism, as Marlies Glasius said: “The ICC is regarded as a successful model of the world federalism movement” [36, p. 27]. The core of the world federation is to transform international society into a federal domestic society, to establish uniform “rules (world law)” [37, p. 105] and administrative and judicial institutions in international society, and to allow a world government to implement world law, ultimately achieving lasting peace.

The great disaster brought about by the first world war prompted some idealists to start working to establish a new world order to prevent the outbreak of world war again. In order to realize this ideal, federalists advocated the world government movement, namely the world federalism movement (WFM), expecting to establish a world federalism system. However, the organizational structure of the League of Nations and the United Nations didn’t satisfy federalists. They believed that: “The organizational structure of the United Nations is very similar to that of the League of nations, which is composed of sovereign states and is too loose to prevent the occurrence of World War” [38, p. 299-300]. In 1955, the federalists at the United Nations Review Conference pushed for the development of the United Nations towards a federation in accordance with Article 109 of the United Nations Charter. However, due to the lack of political will, people soon lost interest in the issue of establishing a world government. During the Cold War (1946-1991), given that the Europe after that failure still held high level of enthusiasm for multi-national federalism ideal and even finally constructed the EU, while in the mainstream of the discourse of the academic circle around the Europe, the ideal of world federalism and world government seldom appeared in it around the world [38, p. 505].

After the disintegration of the Soviet Union, the international community rekindled its enthusiasm for the establishment of a federal world government. The ICC was born under the influence of the world federalism movement. On the surface, the ICC is an international judicial institution established by the international community to safeguard world peace, security and human well-beings. However, from the

perspective of Federalists, the ICC is essentially an important part of the World Federation. In an ideal federal design, the Assembly of United Nations would act as the parliamentary body of the world federation, the United Nations Security Council would act as the world government, and the International Criminal Court would act as the world criminal court, that is, "if any member state violates the treaties (World Law) concluded by the Federation, it will be tried by the Federation (criminal justice agency) and regarded as the public enemy of the Federation" [39, p. 612]. In the view of Federalists, the most obvious weakness in the previous international legal order was that there was no accountability mechanism for officials who carried out serious crimes - genocide, war crimes and crimes against humanity or some other crimes shocking the conscience of the international community. Many world Federalist political thinkers and movement leaders recognized the need to establish an ICC. Based on this assumption, they established the Coalition for the ICC in 1995, and successfully advocated that 120 countries signed the RS in 1998, and finally established the ICC. Therefore, it is not difficult for us to understand why the ICC is full of idealism, and even driven by idealism, some optimistic scholars advocate that the ICC should have a broader jurisdiction.

From the background of the establishment of the ICC perspective, we could conclude that the premise for the effective operation of the Court is that there is a world government in the international community, and ICL is the world law. However, the real society can't fully accept the ideal of world federalism. The challenge of the environment and foundation of the ICC is the presentation of reality.

2.1.2 The ideal design of the Court lacks realistic foundation

At the beginning of its establishment, the ICC has indeed made a series of remarkable achievements, which also makes the international community full of idealistic expectations. However, if we look at the ICC from a realistic perspective, we will find that these expectations lack a realistic basis.

First of all, the international community on which the ICC depends is a highly politicized and competitive society, and it is difficult for the world government to form. "The international field is often described as anarchic, horizontal, decentralized, homogeneous and leaderless," [40, p. 43] that is, there is no world government in the international community, and each country pursues its own interests, determines its own goals and competes. In the view of political realists, this kind of "egoism and power politics are rooted in human nature" [41, p. 53] and are difficult to eliminate. Therefore, in a competitive international society, it is almost impossible to establish a world government. This also means that the premise of the international unitary legal system - the world government - doesn't exist at present.

Secondly, the ICLs represented by the RS aren't a world law and are seriously politicized. First, ICLs aren't world law. World law is closely linked with the world government. Pound clearly pointed out in his book "Viewpoints of Legal Philosophical History and Its Practical Meaning" that the final stage of legal development is world law [42, p. 233]. At the stage of world law, the laws of various countries and all kinds

of laws will eventually tend to be unified and become a law applicable to the whole world, which is implemented by the world government, resulting in the disappearance of the laws of various countries. Today, the international community is still a society based on sovereign states, and the world government doesn't exist yet. In addition, countries around the world have different levels of rule of law development, as well as significant differences in legal culture and legal systems. States' understanding of international crimes and ICL is also fraught with controversy, with only 124 states having ratified the RS. ICL covers not only the RS, but also various treaties on criminal matters that States have drawn up or ratified. However, at present, the international community doesn't have an ICL document recognized or signed by all countries. Therefore, ICLs aren't world law. Second, ICL is political in nature. ICL is produced by political decisions, "reflecting the political propositions of the inter - state system" [43, p. 5]. As Mr. Bassiouni pointed out: "In the legislative process of ICL, the participants are diplomats rather than experts in ICL, comparative criminal law or procedural law" [23, p. 60]. Diplomats fight for the interests of their respective countries. "The common interests enjoyed by the international community and often implemented jointly or separately will ultimately serve the national interests of all countries" [23, p. 40]. Moreover, unlike domestic law, international law mostly regulates political relations rather than legal relations, so "international law has been seriously politicized in many aspects" [44, p. 26]. This is the reason why Mr. Bassiouni believes that "the higher the political or ideological content of a crime, the less criminal law features it contains" [23, p. 104]. Third, countries interpret and apply ICL based on political interests, which leads to the diversification of interpretation and application of ICL. In many cases, the interpretation and application of ICLs aren't carried out by neutral and independent international criminal justice institutions or other quasi-judicial institutions, but by the state itself or international political institutions such as the Security Council. Here is a situation we need to mention, the AU, who has been opposing the ICC since 2010s, for this reason – it interpretated the ICC according to the Art. 98(1) unilaterally, like the definition power of the UNSC on crime of aggression. Political entities often don't determine their rights or obligations from the rules of ICL, but constantly integrate their national policies into the language of ICL and express the interests of countries through ICL, as justice Rosalyn Higgins, the former president of the ICJ, said: "There are essential differences between the international law interpreted and applied by the Security Council and the international law interpreted and applied by a purely judicial body such as the International Court of justice" [45, p. 16].

In a highly politicized international society, international competition is the norm. As a scarce resource representing moral authority, the competition for the discourse power of ICL is also an important part of the competition among major powers. The competition between countries not only makes it difficult to establish the world government, but also makes the interpretation and application of ICL diversified, and it is difficult to form a universal world criminal code.

Third, the international community is a binary legal system, and the current ICL isn't universal First of all, from the perspective of practice, the relationship between domestic law and international law obviously belongs to two different legal systems.

Objectively speaking, it is still impossible to build a pyramid like legal structure under the monistic system. The ICC is an ideal design made by federalists in accordance with the domestic unitary legal system. There seems to be a degree of authority in the international community that even exceeds the limits of the principle of national sovereignty. But reality is built on a dual legal system. Therefore, the superstructure based on a unified legal system is bound to conflict with the reality of the dual foundation, which is a difficult difficulty to overcome. Because law isn't a set of rules and principles without background, but a system containing a large number of local knowledges. Due to the differences in the history, culture and ideology of various countries, there are also great differences in the legal concepts and legal culture of various countries. For example, the ICTY and the ICTR are judicial practices under the guidance of monism. Their purpose is not only to promote the R2P concept, but also to create a world law. However, just like the embarrassing situation encountered by the ICTY, those "international criminals convicted and punished by the International Criminal Tribunal are sought after as heroes by their domestic people. When they are released, the domestic people ceremoniously welcome them with flowers and red carpet". This phenomenon reflects that the two systems will form different value orientations, that is, the opposition between universalism and particularism, order and justice. The Court's practice of ignoring the differences between the domestic system and the international system is divorced from reality, which will lead to all kinds of confusion about the ICC. Moreover, the international criminal law represented by the RS mainly reflects the legal ideas of the Western world, and its generality is somewhat insufficient, which is difficult for non-Western countries to accept.

The problem of multiple equilibria often appears in the system design. Scholar Krasner explained the system design with the coordination game model. He believed that: "The distribution of national strength can better explain the essence of institutional arrangements" [46, p. 337]. Generally speaking, the powerful countries have a strong ability to shape the game of society, and the preferences of the weak are difficult to be fully reflected. Taking the RS as an example, the western world played a leading role in the creation of the RS. During the preparation phase of the regulation, "like-minded reasons", - Canada, Australia, Germany, Finland and other middle-sized countries of Europe and the America were the main bodies and almost monopolized all the nominations for the chairmanship of the working group. Moreover, because the representatives of western countries with more developed rule of law can get clear and detailed instructions and full authorization at home, the representatives of developing countries often can only get relatively rigid or rough general replies at home, which also enables western developed countries to conduct more extensive and productive consultations. Therefore, the content of the RS more reflects the legal concepts of western developed countries. For example, in the system design, one of the debates between the western world and African countries is the extent to which the elements of "restorative justice" [47, p. 13] are incorporated. The traditional retaliatory justice and the emerging restorative justice constitute the two paradigms of justice path. "Western legal models pay more attention to the retaliatory elements of justice, while many societies in Africa and other regions prefer to restorative justice" [48, p. 219]. Retaliatory justice relies on the ancient tradition of "eye for eye", which also

constitutes the dominant form of justice in western developed countries in the post-World War Two period. Restorative justice takes the Truth and Reconciliation Commission as the main carrier, and confesses the truth as the pardon condition, so as to avoid the intervention of public power. During the formulation of the RS, norms advocates in the western world 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 the Truth and Reconciliation Commission system. For example, Archbishop Desmond Tutu, the Nobel Peace Prize laureate and chairman of the Truth and Reconciliation Commission of South Africa, believes that this model of the Truth and Reconciliation Commission is the "third way" [49, p. 11] between the Nuremberg model and national forgetting, and is more in line with the spirit of Africa's "Ubuntu". However, the initiative of African countries for restorative justice did not receive the support of western countries. The final RS document was also silent on the amnesty issue, and said nothing about the Truth and Reconciliation Commission. That "actually discards unconditional amnesty and conditional amnesty without distinction" [50, p. 698, 700]. The ICC has neglected the role of restorative justice in Africa, so when the Court exercises jurisdiction over some situations, it has played a negative role. For example, the ICC's arrest warrant against Sudanese President Bashir undermined peace negotiations in Sudan, so that the head of the African Union Commission issued a statement condemning the ICC: "this new decision made by the ICC is counterproductive and will complicate the ongoing efforts and increase the risk of instability, with far-reaching consequences for Sudan, the region and Africa as a whole" [51, p. 27].

2.1.3 The conflict between the two weakened the willingness around the world to cooperate with the court

Since the ICC has no executive branch, the exercise of its jurisdiction relies heavily on international cooperation. However, as noted above, the ICC is an ideal design of the idealists under the influence of WFM, modeled after a domestic monopolistic legal system. There are two types of legal systems in the international community. Therefore, the operation of the ICC is fraught with difficulties, which creates a crisis in the legitimacy and effectiveness of the ICC and weakens the will of the international community to cooperate with the ICC.

First, confrontations between the Court and States Parties frequently occur. Federalists take the "world government" as the logical starting point, and envisage that there should be a cooperative relationship between countries and the ICC. More specifically, countries should cooperate with the work of the ICC and jointly build a just environment for the international community. Thus, Article 86 of the RS provides that all parties are obliged to "fully cooperate" in the investigation and prosecution of the International Criminal Court. Article 87 has the meaning of "threat" [51, p. 58], that is, the ICC may make referral of its the non-cooperation situation of States parties to the United Nations General Assembly or the Security Council. Article 89 also stipulates the obligation of all parties to arrest the criminal suspect and transfer the

suspect to the ICC. However, since there is no world government constructed by the international community, the obligation of all parties to cooperate is not a mandatory guarantee - because there is a lack of coercive force to guarantee it from an international government. The characteristics of international criminal justice cases - in which the individuals prosecuted are often state leaders or people who hold important positions in national governments - determine the interests that states must consider when prosecuting such crimes and punishing suspects, namely the impact on domestic peace or security or the stability, maybe even much worse, the direction of the political situation. The basic purpose of the ICC is to end history of impunity – send the criminals in trail - and practice the responsibility mechanism. In an abstract sense, it is not too much to regard this goal as one of the common values of the international community. However, when the object of trial is a government official or even the current president of a country, based on the particularity of the actor's identity and the representativeness of his behavior, the crimes prosecuted or adjudicated by the Court may originally reflect the sovereign will of his country to a large extent. Although it is important to prevent and punish international crimes, this value goal can't exceed the political preference of nation states for national security and stability. Therefore, the state and the ICC often form a confrontation, which is mainly reflected in "the admissibility of the case" and "the execution of the arrest warrant". The issue of execution of the arrest warrant will be discussed in detail below, and here we will only discuss the admissibility of the case.

On the admissibility of cases, states parties often have disagreements with the ICC due to political intervention, resulting in tension between the prosecutors of the ICC and crime - relevant countries. Art. 19 of the RS gives the parties the right to challenge the admissibility of the case. Whenever countries question the admissibility of the cases, there is a great possibility for national political forces to intervene, and the problem will become complicated. If the Court cannot handle it properly, the credibility and authority of the ICC will be greatly damaged. Taking Kenya and Libya as examples, both countries have questioned the admissibility of cases of the ICC. Kenya had raised an objection to the admissibility of the case involving six senior government officials. Pre-trial chamber II rejected Kenya's objection request, but the appeals chamber supported Kenya's objection. The inconsistent judgment of the ICC not only weakened its authority, but also led the Kenyan parliament to directly withdraw from the RS. Libya has challenged the admissibility of the case involving two members of Gaddafi's core group. Pre-Trial Chamber I rejected an objection to the admissibility of an indictment against one defendant and upheld the ICC's jurisdiction over the case. However, the chamber held that the case involving another defendant wasn't admissible and left the case to the domestic Court of Libya. The Court's decision led Libya to directly appeal to the entire African community to withdraw from the RS and challenge the legitimacy of the ICC. That Kenya and Libya withdrew from the RS as a way to confront the judgment of the ICC is not only greatly damaged the authority of the Court, but also provided a means for other countries to confront the Court.

Secondly, the poor governance of the ICC has caused the international community to lack confidence in the jurisdiction of the ICC. In the view of idealists, world law "is a special normative system that has been thoroughly tempered and plays

a catalytic role in the settlement of existing disputes. Like most key laws, it should be suitable for coordinating various social interests" [52, p. 298]. Therefore, when the Court was established, idealists believed optimistically that "governments were influenced by humanitarian values and recognized the importance of establishing an international criminal responsibility mechanism for maintaining world order and restoring peace. These developments reflected the emergence of the values of responsibility and justice, and that these values could be universally applied to the international community" [23, p. 420]. However, as judicial practice has evolved, the limitations and political nature of international criminal justice have provoked opposition from the international community. The purpose of the RS is to prosecute the most serious international criminals and protect world security, peace and human welfare, that is, effectively prosecute perpetrators of serious crimes and prevent the detection of new international criminals through the prosecution and sentencing of offenders who committed grave offenses by the Court, especially to rulers of a country who committed offenses listed in the statute, in order to protect the security of the entire international community and the welfare of all people. According to this logic, the Court's governance of the international community follows a linear logic, emphasizing that "no peace without justice", that is, "judicial trials help restore the truth, maintain justice, and then rebuild peace"[54, p. 79]. As the former prosecutor Ocampo claimed, "As the Prosecutor, my duty is to turn these ideals into reality. I have to unveil the facts and I have to establish who is criminally responsible, I have to apply the law without political considerations. I have three different tasks: to select situations under the jurisdiction of the Court, to investigate and to prosecute" [55, p. 5].

The ICC's operation logic: justice - peace

However, in every country or international organization people use their rationality in their social life to find solutions that can maximize their interests, based on this people interaction gradually create a set of rules that adapt to their development and social life changes. Taking the African Union as an example (given the African Union's strong opposition to the ICC), as a political organization, its governing objectives are diverse and emphasize the universal realization of peace, reconciliation and justice around the Africa. This governance model of the African Union is rooted in the rule of law and African legal traditions, and has its local characteristics. In the view of the African Union, for the sake of domestic order, the state can moderately relax the pursuit of personal justice to prevent greater injustice. Therefore, the interference of the ICC in the situation of several African countries based on linear logic is "inappropriate". Because the Court's intervention didn't make peace in the country, but prolonged the conflict and caused more serious consequences. Alyssa K. Prorok once made a quantitative study on the judicial intervention of the ICC, and the results showed that "active involvement by the ICC significantly decreases the likelihood of conflict termination when the threat of domestic punishment is relatively low" [56, p. 213].

The operation logic of the AU: Reconciliation--Justice--Peace, three are mutually dependent.

For instance, let's track back to the situation in Sudan, Darfur. On May 31, 2005, the Security Council adopted Resolution 1593, and in this resolution stipulated that the

UNSC already decided to make referral of Darfur situation to the ICC from July 1, 2002. On June 1, 2005, the Office of the Prosecutor decided to accept the situation in Darfur as submitted by the Security Council. On July 14, 2008, the OTP decided to indict Sudanese President Bashir for genocide, crimes against humanity, war crimes and other crimes committed in the Darfur region under the jurisdiction of the Republic of Sudan, and requested the court to issue an arrest warrant for Bashir [57, p. 8]. When the prosecutor initiated the prosecution, Sudanese President Bashir was presiding over the reconciliation between the government and the rebel groups. This negotiation situation was facilitated by the great efforts of the UN, also promoted by the AU and other international organizations. The intervention of the ICC directly led to the abortion of the peace negotiations and the resumption of war in Darfur. After the trial of the former president of Yugoslavia Milošević, the ICC has once again exercised its judicial jurisdiction and severely affected the domestic political situation of a country. The judicial intervention of the ICC has triggered great dissatisfaction of the Sudanese people. Thousands of people gathered in the capital of Sudan to support President Bashir collectively, "and vowed to fight against anyone who tried to arrest President Bashir".

Not only are Sudanese citizens deeply angry about the intervention of the ICC, but the AU also clearly stated its position in the official statement – "Mbeki report". The AU declared that "peace, justice and reconciliation are the three principal pillars of crisis resolution, and the three are inseparable" [58, p. 5], and stressed that African problems should be solved in an African way. The African Union believes that the jurisdiction of the ICC can't be divorced from reality. The Court can only deal with a small number of individuals, while the Sudanese national system can shoulder the judicial responsibility; At present, the primary task is to strengthen the domestic legal system of Sudan and compensate the victims within Sudan; In order to achieve the above objectives, Sudan can use the existing legal heritage, such as common laws, customary laws and Islamic laws; Sudan should establish a truth and reconciliation commission to encourage perpetrators to confess their crimes and release them when appropriate in order to achieve reconciliation. This kind of moderate restorative justice is more suitable for the "Ubuntu" legal culture in Africa and is more conducive to the rapid reconstruction of peace in Sudan. Based on the actual interests of the AU, the solution of the ICC isn't the only solution, or even the solution with very poor effect.

In summary, the ICC is an ideal design constructed in accordance with the domestic unitary legal system. However, because the ICC does not have an executive body, the international community is a highly politicized society, and the duality of domestic and international legal systems, these reasons make it difficult for the ICC to exercise its jurisdiction.

2.2 The coercive force of norms dilemma: the norms RS lacks coercive force

2.2.1 Provisions on international judicial cooperation in the RS

Unlike the situation in domestic - domestic courts, they can issue subpoenas or

injunctions as they see fit without having to worry about whether the writ will be enforced, the situation of international community is backed by state power, so international criminal institutions have no practical way to enforce orders issued by judges, making them highly dependent on individual countries, especially when it comes to locating or arresting defendants and obtaining necessary evidence for trial. The issue of cooperation between the ICC and international jurisdictions is implicit in every provision of the RS, and consideration of cooperation will be limited to positive acts of mutual legal assistance by States that promote the jurisdiction of the ICC. Specifically, such cooperative actions include assisting the ICC in investigations, prosecutions and the enforcement of orders issued by the ICC.

The preamble of the Rome Statute clearly states that the main goal of the International Criminal Court is to punish serious crimes that affect the international community and prevent them from going unpunished. In order to effectively combat international crimes, countries should strengthen cooperation at the international level through various means. Other provisions of the Statute also contain content on judicial cooperation. In general, the judicial cooperation obligations between the States Parties and the Court stipulated in the Statute mainly include the following issues:

First, to protect the privileges and immunities of the court and its employees. In order to perform its functions, the court and its employees must enjoy certain privileges and immunities. Article 48 of the RS provides general provisions on the privileges and immunities of the Court and its employees. The Convention on the Privileges and Immunities of the International Criminal Court entered into force on July 22, 2004, and the provisions of Article 48 on the immunities of the Prosecutor, Deputy Prosecutors and Registrar were further supplemented and detailed. Article 16 clarifies the privileges and immunities of the Deputy Registrar, the Prosecutor and the Registrar. Article 17 also stipulates the provisions of Privileges and immunities of locally recruited personnel employed by the court; Article 18 - Privileges and immunities of defense attorneys and their assistants; Articles 19, 20 and 21 of the RS respectively provide for the privileges and immunities of representatives of countries and governmental organizations and representatives of countries participating in trail activities. The relevant states or parties shall safeguard the privileges and immunities of the court and relevant personnel in accordance with the above provisions.

Secondly, execute court orders to arrest and surrender criminal suspects. This issue covers multiple aspects of RS: (1) Court orders concerning the arrest and surrender of persons and the obligations of the requested State; Under Article 89 of the Rome Statute, the Court can order the arrest and surrender of a person subject to the provision of additional information provided for in Article 91, and can request the cooperation of the State to which the person belongs, as well as compel States to arrest and surrender witnesses. States implement “hold and transfer” requirements pursuant to the provisions of Section 86-102 and procedures established by domestic law. The parties shall follow the transfer procedure prescribed in Article 184 of the RPE. (2) Competitive requirements. When a state receives a request to extradite or extradite the same person from another state or court, the two requests compete if compliance with one of the requests would mean non-compliance with the other. As a country cannot extradite a person to two countries or organizations at the same time, the competing

claims is one main issue according to the regulations should be dealt with. There are two types of competition requests under Article 90: First, when a State that receives an extradition request under Article 89 of the Court receives a request from another State to extradite that person. The court shall notify both it and the requesting State of the facts of the same conduct which constitute the basis of the offence committed by the person sought. In this case, the requested country's obligation to respond to competing claims is not the same depending on the identity of the requesting country. (3) Temporary arrest. In an emergency, the court may order the temporary arrest of the person being sought before filing an indictment and producing supporting documents in accordance with Article 91. If this situation happened - the extradition request and its additional documents were supported by the ICC more than 60 days, the release of the person arrested under the above circumstances does not prevent the subsequent arrest and transfer of the person. (4) The person requested to transfer. According to the provisions of Article 89, paragraph 2, if the party requesting surrender files a complaint with a domestic court based on the question power set forth in Article 20, the requested State shall immediately consult with the court to decide whether to proceed with the trial. (5) Request for transfer of personnel. According to Article 89, paragraph 3, when the Court requires the consent of the State concerned to extradition, that State authorizes the surrender of a person from another State in accordance with its national procedural law, thereby surrendering that person to the Court. Extradition may not be prevented or delayed through its territory or through the State through which it passes. The transferee will be detained during transportation. If the person is traveling by air and does not intend to land in the cross-border country, a permit is not required. If an unplanned landing occurs in a transit country, that country may request transportation in accordance with Article 97 and Article 89, paragraph 3, item 2. The transferring country will receive the extradition request and detain the transferee until the transfer is completed. However, the period of detention under this section shall not exceed 96 hours from the time of default. When handling transit matters in accordance with Article 89, paragraph 3, the provisions of Article 182 of the Rules of Procedure and Evidence shall also be observed.

Third, execute the Court's requests for investigation and evidence collection. The RS and domestic laws implementing it are designed to enable the Court's investigators to conduct a comprehensive and thorough investigation as soon as possible after a crime has occurred. The key factor in the success of an investigation depends on whether the state is willing to provide assistance in a timely manner. Since the Statute is based on the principle of complementarity, the Court under the complementarity system is the "last resort" Court. The best form of cooperation provided by the state to the Court is: (1) ensure that domestic criminal law provides for thorough investigation of those who are charged by the ICC and Court have the jurisdiction over that perpetration and crimes; (2) Ensure that individuals convicted of crimes within the jurisdiction of the court are prosecuted and tried under domestic criminal law; (3) Ensure that domestic legislatures, particularly in the area of criminal law, have complementary policies, procedures and practices that facilitate investigation and prosecution [59, p. 263]. In addition to providing assistance to the Court in substantive law, the state also needs to provide procedural guarantees, that is, the state

should comply with the requirements of Article 88 to implement the various criminal cooperation provisions of Part 9. In addition to the general provisions on the obligation of States to cooperate in Articles 86-88, the RS also makes specific provisions on the obligation to cooperate in Article 54, paragraph 2, item 1, 2 and paragraph 3, item 3, Articles 91, 93, 96 and 97. Article 93 provides the most specific provisions on the forms of cooperation in investigation and prosecution.

Fourth, to implement the court's request to protect victims and witnesses. The RS has comprehensive provisions on victim and witness protection. Two mechanisms established for the protection of victims and witnesses - the "Victim and Witness Unit" and the "Trust Fund". At the same time, specific measures to protect victims and witnesses: According to Article 68, Paragraph 1, the state shall take appropriate measures to protect the safety, physical and mental health, dignity, and privacy of victims and witnesses. According to the provisions of paragraph 2 of Article 68, in addition to the principle of open trial as stipulated in Article 67, the Chamber shall not publicly announce the proceedings and evidence for the protection of victims and witnesses or defendants. When the personal interests of victims are affected, they may present their opinions and concerns for consideration. In order to protect the interests of victims and witnesses, victims and witnesses units may advise the procuratorate and the court on the relevant issues specified in Article 43, Clause 6. For the safety of witnesses and their families, prosecutors may not disclose relevant evidence and information. Victims have a right to apply for compensation. In order to ensure that the victim's right to compensation is realized, Article 110, paragraph 4, provides that the convicted person can trace the property related to the fine, confiscation or compensation and use it for the benefit of the victim. The sentence should be shortened. The victim's legal representative may appeal the restitution order in accordance with the rules of procedure and evidence. In addition to the provisions of RS, more detailed safeguards are provided in Articles 87 and 88 of the Rules of Procedure and Evidence. States should fulfill the above-mentioned cooperation obligations.

Fifth, execute Court orders on fines and confiscation compensation. Under Article 77, the ICC could punish confiscation and some other kind of fine penalties on individuals who conducted international crimes within the jurisdiction of the RS. In order to guarantee the orders to be effectively implement, all of the state parties should facilitate itself in these fields, such as identification, tracing and freezing or seizure of proceeds, properties or some other assets as well as criminal instruments, for eventual confiscation, and it could not impose any prejudice to any good faith third country. In accordance to the Art.109 of the RS, the state party must comply with and implement the orders from the ICC on confiscation or fine punishments, but when implementing, the state party shall not impose any prejudice to any other third parties which are in good faith. The RS also provide provisions on this situation, where the ICC could not execute the confiscation penalty, the ICC should first confiscate the convicted persons' income, property or some other property equivalent in order to make the confiscation sense, but it should be noted that the measures taken by the ICC could not violate the interest of the third good will. In addition, States shall also comply with the provisions of Articles 146, 147 and 148 of RS. Unlike fines and forfeiture, restitution is not a penal measure but a civil remedy. Under article 75, reparations include restitution,

compensation and restitution. The Court may order reparations directly to the convicted person, and the State party is obliged to execute such orders.

Finally, the obligation to execute court decisions: Articles 103-111 of the RS set out the obligation of the parties to execute court decisions. Article 109 shall apply to the relevant parties, and other provisions, especially those related to imprisonment in Articles 103-106 and 110 The provision applies only to all parties who have expressed their willingness to accept the accused in court. These countries are obliged to use widely accepted international treaties on the treatment of prisoners, cooperate with the Courts to monitor the implementation of sentences, and respect the Courts' jurisdiction and their power to review and decide on commutations of sentences.

2.2.2 The lack of enforcement of regulations makes it difficult to fulfill the obligation to cooperate

Although the RS stipulates the obligation to cooperate, there are still many obstacles when the Court requires a country to cooperate. According to the RS, the main situations in which a country refuses or delays cooperation include:

First, challenges raised by requested country. If the person requested to be surrendered by the Court should be transferred from the domestic Court to the court, but in accordance with the principle of non bis in idem, this principle may lead to the requested country delaying or refusing to transfer the person. Second, the requested country may delay or refuse extradition if the extradited person has been convicted of a crime other than the one for which the court requested extradition, or is serving a sentence in the requested country. Third, under competing requests under Article 90, the requested State may refuse transfer. Fourth, the requested State may have the chance to refuse to execute a request for assistance based on general principles of law in force. Fifth, a State may to some extent refuse to implement the requested assistance from the ICC in whole or in part on the basis of protecting its national security interests. Seventh, if the enforcement of a current criminal claim would result in the requested State violating an obligation assumed by another State, the requesting State may delay or refuse to enforce the request, etc.

Although Part 9 contains 17 articles specifically stipulating the cooperation obligations of States, it is the part of the Statute that contains the least provisions on "supranational" factors. Art. 86 - Even all parties must cooperate fully with the Court in the investigation and prosecution of crimes, the following provisions are replete with exceptions and limitations and should not be considered as little more than gardening [59, p. 251-252]. Even the best provisions of the RS cannot prevent the Court from becoming a "paper tiger" without the effective, prompt and genuine cooperation and assistance of States under Part 9 [59, p. 252]. In addition, Part 9 does not provide strong deterrence mechanisms for non-cooperative countries. Such as the Art.87(7), though it provides that the ICC could refer to ASP when the state parties don't cooperate the ICC, but it doesn't supply any punishment for non-cooperation parties. However, the RS does not specify what countermeasures should be taken if a conclusion of non-cooperation is reached after the review. Legally, the Court has no power to force a

country to cooperate. Whether a country cooperates depends entirely on its willingness. When the Court is unable to obtain the cooperation of a country, the role of the Security Council is also limited. Only if the Security Council refers the situation to the Court can it take measures under the UN Charter against uncooperative States. However, from ICTY experience, the Security Council is often reluctant to take coercive measures against non-cooperative countries due to political considerations. States in the Darfur case referred to the ICC by the Security Council faced a situation of non-cooperation, but the Security Council, which was forced to take action, remained inactive. It is therefore unrealistic to expect the Security Council to assist the Court in international cooperation. Compared with other international criminal tribunals, the ICC has greater limitations in international judicial cooperation. In addition, the hostile attitude of some major powers, especially the US, towards the Court among non-state parties has made the prospects for cooperation between states and the Court even worse.

2.3 The dilemma of regulatory clarity: vague provisions on discretionary power lead sovereign states to refuse to cooperate

2.3.1 The discretionary limitation of the RS limits the court's jurisdiction

There are also some problems in the ICC's own system. What has attracted much attention in recent years is the power of the prosecutors in the ICC, for that the prosecutors have the power to independently initiate criminal investigations. Once he initiates an investigation into a country's head of state or senior government officials, no matter what the outcome, it will have extremely bad international and domestic social impacts. In order to prevent prosecutors from abusing their power, the RS has made restrictive provisions. Although the international community's restrictions on prosecutorial powers can, to a certain extent, prevent the abuse of prosecutorial powers and safeguard the sovereignty of contracting states, when prosecutors exercise their powers, it is like "dancing in shackles", hindering the effective exercise of the jurisdiction of the ICC. In addition, there are loopholes in the RS's provisions on the prosecutor's independent investigative power, which is also an example of the disconnect between ideals and reality in ICC practice.

Since the issue of discretion involves the status of international prosecutors, we should start with the overall picture of the prosecutor's status and explore the way in which prosecutors activate the Court's jurisdiction.

The ICC's OTP is one of the most contentious issues in the RS negotiations. The RS, which was finally issued, not only grants the prosecutor power, but also sets up a strict restriction mechanism on the exercise of the prosecutor's power. On the one hand, this practice reflects the states' compromise on the status of prosecutors; on the other hand, it reflects the states' desire to prevent prosecutors from abusing their power by restricting their power. It is undeniable that the strict restrictions on prosecutors have affected their efficiency in handling cases, and ultimately affected the overall operational efficiency of the courts and the courts' credibility in the international

community, resulting in limitation of the effective exercise of the ICC's jurisdiction.

Firstly, the argument raised over the role of the prosecutor and the prosecutor's powers during the negotiation of the RS. Prosecutors play an important role in domestic and international criminal proceedings. The Committee of Ministers of the Council of Europe emphasized that "prosecutors, not judges, bear the main responsibility for the overall effectiveness of the criminal justice system" [60, p. 512]. In domestic legislations, the domestic prosecutors not only have the right to independently investigate cases, but also have the right to analyze, screen, and filter cases based on facts, evidence, and law, and then decide whether to prosecute and what case and person to prosecute for what crime, thereby exerting substantial influence on the Court's trial activities. In a nutshell, prosecutors have considerable discretion and decision-making power over the fate of criminal cases. The central role of prosecutors in criminal proceedings has also been emphasized by the vast majority of negotiators of the RS. The dispute over the position of the prosecutor during the RS negotiations is essentially a dispute over the scope of the prosecutor's authority, the most prominent of which is whether the prosecutor has the right to conduct an investigation on his own initiative. According to the draft statute formulation record, it noted that only the States Parties to the Statute and the Security Council can initiate the jurisdiction of the ICC, and there is no provision for the prosecutor's right to conduct investigations on his own initiative [61, p. 281] The main reason is that if the prosecutor has independent powers, there is a risk that politically motivated proceedings or frivolous prosecutions may be initiated. Commenting on the draft statute, the International Law Commission said: "At the current stage of the development of the international legal system, it is not feasible to grant prosecutors independent investigative powers, so-called proprio motu powers" [60, p. 513]. At the beginning of the negotiations, some delegations insisted that the OTP should have the power to trigger the jurisdiction of the Court. During the deliberations of the Special Committee in 1995, many delegations considered that the draft regulations prepared by the International Law Commission were too restrictive on the role of the Prosecutor and argued that the prosecutor should be empowered to prosecute on his own initiative, not just on information provided by the government, and the Security Council, but also individuals and NGOs according to some other sources which are trustful [61, p. 176-177]. During the deliberations of the Preparatory Committee, more delegates supported the Prosecutor's right to support the Court's jurisdiction. NGOs strongly supported the prosecutor's right to conduct investigations on his own initiative, which they saw as an important feature of an independent and credible judiciary [61, p. 177]. NGOs argue that limiting the power to trigger the Court's jurisdiction to states or the UNSC will inevitable lead to the politicization trend of the Court. They also argue that the historical reluctance of states to use existing national complaints procedures in human rights protection mechanisms suggests that states are also unwilling to suffer the political costs of bringing cases to the Court [60, p. 514]. States that share the common interest in supporting effective and impartial Courts consider the independent feature of the prosecutor to be part of the key principles to which they adhere. On the Conference of the Preparatory Committee held in 1996, at that time even some representatives from some conservative countries held this opinion, that the development of the rule of law in international law field have not

achieved that high level at which the international community reached a consensus that it is willing to accept the OTP's discretion to initiate investigation on its own. They believe that it is unrealistic to give prosecutors such a role if the Courts are not generally accepted [61, p. 177].

At the Rome conference, the issue remained controversial, with some countries insisting that the prosecutor could only investigate and prosecute cases after countries or the Security Council had referred cases [62, p. 58]. The US proposed that the Court system needs to be provided with a "screen" by the State and the Security Council to screen which cases are worthy of trial by the Court and which are not. In addition, the US believes that the Prosecutor has no authority to investigate a case while the Security Council is considering it under its powers under Chapter 7 of the UN Charter. Since all of the permanent members of the Security Council have the power to take measures on the Security Council's agenda, under this proposal, the US would be able to deprive the Court of jurisdiction over any case. The US position was opposed. Delegates argued that formal subordination of the Court to political bodies, especially the Security Council, was inconsistent with the Court's purpose [60, p. 514]. Other countries support the creation of a Court with an independent prosecutor with the power to investigate and prosecute on its own [62, p. 58]. This difference is actually a difference between countries that emphasize sovereignty and countries that desire to achieve the rule of law in the international community. The two factions finally reached a compromise, and prosecutors have independent jurisdiction over cases, but they must be subject to strict restrictions.

After determining the status of prosecutors, the state faces two choices regarding the identity of prosecutors: (1) The Nuremberg model. Under this model, the prosecutor is an official of the state that has the right to initiate the investigation or prosecution of individuals in the case, and is therefore appointed by that country and is fully controlled by that country; (2) The model of the ICTY and the ICTY. According to this model, the prosecutor is a completely independent institution. In the end, the latter was fortunately adopted. As an independent and impartial institution, the prosecutor has the right to investigate and prosecute cases in accordance with his authority, although the prosecutor's power is subject to many restrictions [62, p. 58].

According to the Statute, the ICC Prosecutor has the following powers: (1) Privileges and immunities. Pursuant to Article 48 of these provisions, the stuffs – such as the Prosecutor in chief or deputy prosecutors, all of them have to immunity privileges as stipulated in international conventions which enjoyed by the diplomatic officials. (2) The power to initiate Court jurisdiction. (3) The power to decide to start an investigation. (4) The power to collect and examine evidence. (5) The power to question and inquire. According to Article 54, paragraph 3, item 2, the prosecutor may request the person under investigation, the victim and the witness to appear in Court and have the right to interrogate the person under investigation or the victim and the witness. (6) Power to request cooperation. The Prosecutor may request the cooperation of any State or intergovernmental organization or entity in accordance with their authority and mandatation. Pursuant to the provisions of Article 54, paragraph 3, paragraph 3, the Procuratorate may make necessary arrangements or agreements to facilitate the cooperation of States, intergovernmental organizations or individuals in

cases where such arrangements or agreements are not in accordance with the Charter. Article 15(2) also provides for the right to request cooperation. (7) The right to take necessary protective measures which stipulated in Art. 18, Clause 6, item 6, Article 19, Clause 8, item 1, and Article 56, Clause 1, the prosecutor has the right to take measures to preserve evidence. (9) The power to apply jurisdiction and admissibility over the case. (10) the prosecutor shall enjoy the right to make decision on prosecution of perpetrators. According to Art. 53(2) of the RS, the prosecutor shall, after conducting a pre-investigation, determine whether there are sufficient grounds for the accusation. If there are sufficient grounds, a decision to prosecute individuals may be made. If there are insufficient grounds, a decision not to prosecute individuals may be made. (11) Right of Inspection. According to Article 54, paragraph 4, if new facts or information are found, the prosecutor has the right to reconsider the investigation or investigation decision, to prosecute or not to prosecute. (12) Right of appeal.

Second, the restrictions on the power of the ICC prosecutor. According to the Statute, while exercising their powers, the prosecutor is subject to various restrictions that domestic prosecutors do not have.

(1) The ASP shall limit the powers of the OTP. The ASP restricts the power of prosecutors, mainly to elect and remove prosecutors and deputy prosecutors. First, elections. Candidates must have high character, exceptional professional skills and language skills. The Prosecutor is elected by the members of the ASP by absolute vote by secret ballot. The Deputy Prosecutor is also elected from a list of candidates elected in the same manner. Second, removal of the prosecutors from office. The appointment and dismissal of the Prosecutor shall be controlled by the Assembly of the Parties. The Legislature undoubtedly has a constraining role in the exercise of prosecutorial powers.

(2) State restrictions on the power of prosecutors are mainly expressed in three ways: First, the preliminary ruling procedure. However, the disadvantage of this procedure is that the state is likely to use the opportunity of premature participation in the litigation to delay the litigation, thereby ending the prosecutor's ability to investigate and collect evidence, and even depriving the Court of the chance or power to exercise its jurisdiction over the case. Second, the challenge procedure. Article 19 provides for the procedure for objections to the jurisdiction of the Court and the admissibility of a case, under which a State that has jurisdiction over a case and a State that has accepted the jurisdiction of the Court pursuant to Article 12 may object to the jurisdiction of the Court and the admissibility of a case on the grounds provided for in Article 17. Unlike Article 18, these restrictions are not applicable and may even challenge the jurisdiction of the court or the admissibility of cases which the court receives arising from the referral of the Security Council. Under Article 18(5), the prosecutor must suspend the investigation until the court decides on the admissibility challenge raised by the State. Furthermore, the challenge procedure can interrupt the prosecutor's investigation or prosecution, which is a strong constraint on the prosecutor's basic power. Third, in terms of international cooperation and judicial assistance: although the Court has jurisdiction over crimes under Article 5 of the Statute, it does not have its own police powers, nor does it have the power to directly apply the necessary coercive measures for crimes to prosecute in national territory. The Court is like a "giant without limbs" and "it needs to rely on prosthetic limbs to walk

and work"[63, p.18], "and these prosthetic limbs are the state authorities" [63, p. 17] Without the cooperation of the State, the Court cannot perform its functions. The Court can only function with the assistance from the party-state domestic judicial systems. Without the assistance, the ICC isn't able to perform their functions. They can only operate through the domestic judicial system. The weak law enforcement capacity of the Courts makes them rely heavily on the close cooperation of the state throughout the litigation. Otherwise, the Courts will be at a loss when faced with the case. The state's lack of cooperation is a fatal constraint on the power of prosecutors.

(3) The court itself limits the powers of the OTP. Here are some ways for the court to restrict the discretion of the OTP. First, every time when the OTP wants to or needs to initiate an investigation on its own according to the provisions of Article 13, paragraph 3 and Article 15, he must do so - accept judicial review of the pre-trial chamber. After analyzing the information received, at this very time, if the prosecutor believes there are reasonable grounds to initiate an investigation, he must request the Pre-Trial Chamber to authorize the investigation. Only after obtaining authorization can the investigation begin. Otherwise, there is no right to start an investigation. Second, under certain circumstances, the RS also gives the Pre-Trail Chamber power to review OTP's application and after that procedure the Pre-Trail Chamber enjoy the authority to decide whether the OTP has solid evidence to initiate the investigation. Third, the Pre-Trail Chamber enjoy the authority to decide whether to issue a warrant of arrest of the criminals or suspects when the OTP make an application to arrest individuals. Fourthly, when the suspects on his own appear in the trail or have been transferred to the ICC, according to the provisions stipulated in the Statute, the Pre-Trail Chamber shall arrange a hearing in order to confirm the charges of the transferred whether the ground for the charges is solid or not. Fifth, the Pre-Trial Chamber may hold hearings on charges submitted by the prosecutor so as to ensure the evidences are solid. The Pre-Trial Chamber's restriction on the prosecutor's power, especially the judicial review of the prosecutor's own investigation, has a decisive restraining effect on the prosecutor's exercise of power.

(4) The Security Council's restriction on the prosecutor's power. According to Article 16, the UNSC enjoys the power to delay OTP's investigation or prosecution in 12 months if they quote the provision from the UN Chater in Chapter 7. Although Security Council's decisions to delay judicial investigations or prosecutions are made in the name of maintaining or restoring international peace and security under the UN Charter, in practice the Security Council may improperly delay prosecutorial investigations and prosecutions. Moreover, such resolutions are not difficult to pass. Any permanent member of the Security Council can facilitate the Security Council to pass the resolution it desires if it can obtain the concurring votes of any other eight members and without a veto. Article 16 gives the Security Council, a political body, the power to restrict the judicial power of the prosecutor.

All in all, on the one hand, RS grants prosecutors a lot of power, but on the other hand, it sets up many barriers for prosecutors to exercise their powers. The RS carefully designs an independent prosecutor who can exercise his or her powers to initiate a criminal investigation when he or she believes there is sufficient evidence to prove that an international crime has been committed. In order to check the prosecutor's power,

the statute has made detailed restrictions. First, the prosecutor must first allow the country that wishes to cooperate to conduct its own investigation. Before starting his own investigation, the prosecutor must submit all the supporting documents he has gathered for approval by a three-member pre-investigation panel. During the investigation phase, suspects and relevant countries also have the right to challenge the actions taken by the prosecutor. During the trial phase, the countries concerned and the accused may also challenge the jurisdiction of the ICC or the admissibility of the case. This is to ensure that the Court is impartial in its decision. The prosecutor of the ICC is elected by the ASP by secret ballot method and has strict qualifications on its characteristics – prosecutors must not only be of good character but also are of professional ability and well experienced in lawsuits and criminal trials. To ensure impartiality, prosecutors should not be involved in cases that would compromise their impartiality. If any dispute around the prosecutor's recusation raised, this dispute should be decided according to the RS provisions by the ICC's Appeals Chamber. The ASP has the power to remove the prosecutor after it is determined that he has committed serious misconduct or gross irresponsibility. This design is meticulous, but in practice, loopholes for prosecutors to abuse their powers still exist.

2.3.2 Legitimate difficulties caused by normative ambiguity

According to Article 13 of the RS, the ICC could exercise its jurisdiction by three ways – first, the state could make voluntary referral of the situation in its country; the second, the OTP could initiate an investigation on its own; the third, the UNSC could refer any situation to the ICC whether the state where the situation happened is the party state to RS or not. This power of independent judgment has the potential risk of abuse and legal loopholes, among which the greatest risk is the prosecutor's self-investigation of crimes. In this approach, first, prosecutors have too much discretion to initiate investigations on their own. According to Article 15 of the RS, the OTP is conducted between sovereign states, UN agencies and intergovernmental organizations or can request additional information from non-governmental agencies or other reliable sources that the OTP deems appropriate on behalf of the recipient of written or oral testimony. If the prosecutor selects the sources of evidence during the preliminary investigation stage, it can pave the way for further proceedings. Secondly, the prosecutor faces only one obstacle when opening a formal investigation: the Pre-Trial Chamber. If it believes that there are grounds for an investigation, it will request authorization from the Pre-Trial Chamber to conduct the investigation. If the Pre-Trial Chamber agrees and finds that the Court has clear jurisdiction over the case, it will authorize the OTP to initiate a formal investigation into the situation. Thirdly, the OTP even can repeatedly request the Pre-Trial Chamber with different evidences or charges to authorize them a formal investigation. If the Pre-Trial Chamber refuses to accept the investigation, the prosecutor can also make other requests for the same case based on new facts or evidence. Finally, the prosecutor takes the lead in issuing an arrest warrant. After the formal investigation begins, the court of first instance can issue an arrest warrant at the request of the prosecutor. After receiving the Serbian arrest warrant, it is

obliged to take immediate measures to arrest the relevant persons in accordance with domestic law and Serbia's provisions on international cooperation and judicial assistance. Since prosecutors involve multiple connections in the exercise of jurisdiction and have a great deal of discretion, if they are influenced by political, economic factors or values, they have the opportunity to exploit loopholes in various connections, abuse their powers, and make decisions that harm the relevant sovereign countries. Although the prosecutor's self-examination has been approved by the Pre-Trial Chamber for formal implementation, there is no supervision mechanism at the pre-trial stage. In addition, the Pre-Trial Chamber does not strictly define the authorization standard. What is "reasonable basis to believe"? There is no minimum standard of evidence required for this, which makes it easier for prosecutors to initiate their own investigations and increases the risk of their power being abused.

Since the establishment of the principle of individual criminal responsibility by the ICC implies the risk of interfering with the judicial sovereignty of the contracting states, when the prosecutor's discretion is abused, contracting states and non-contracting states tend to be skeptical or even hostile to the effectively exercise of jurisdiction of the ICC, thus restricting the exercise of the jurisdiction of the ICC.

2.4 The legal technology dilemma: functional interpretations v. legality

2.4.1 The practice of functionalism interpretation of the ICC

The functionalist interpretation theory of criminal law is influenced by the purposive rational criminal law theory and is a kind of "purpose-centered interpretation theory" [64, p.15]. Since the theory of purposive rational criminal law emphasizes that "the construction of the criminal law system must be positioned on the task of criminal policy" [65, p.125], and criminal policy must keep pace with social development and changes and respond to the needs of society formed in the development and changes, therefore, the functionalism interpretation theory in criminal law, guided by criminal policy, has an anti-dogmatic character and emphasizes the activeness of the judiciary. And in the practice of interpretation, a trend has been formed in which the purpose of criminal policy is the guide and the purpose interpretation method is the main approach. In other words, the functionalism theory of statutory interpretation in criminal law can be said to be the product of judiciary activism in the field of criminal law. In recent years, the ICC (hereinafter referred to as the "Court") has adopted a functionalism trend in its interpretation of the RS. In interpreting the constituent elements, the Court often goes beyond the literal meaning of the statute and expand the definition of the crime or enlarge the scope of jurisdiction of the court, thereby achieving the criminal goal of "ending impunity". Although the functionalism theory of statutory interpretation in criminal law is conducive to promoting the realization of criminal policies, it focuses too much on the functionality and activism of interpretation, which not only carries the risk of undermining the rule of law, but may also open up the dangerous path of using the RS as a political tool, endangering human rights. In addition, the RS in essential dimension is quite different from domestic

criminal law, because it is essentially an international treaty. Therefore, we could conclude that the crimes and jurisdiction of the ICC which stipulated in RS are definitely created and based on national consent, in which the scope and extent of the sovereignty transfer are strictly limited. Therefore, the Court's functionalism interpretation or judicial law-making actions that go beyond the literal meaning of the treaty text and violate the original intention of the legislator violate the principle of national sovereignty and undermine the judicial authority of international criminal justice institutions and the legitimacy of their existence.

On July 4, 2019, the OTP requested Pre-Trial Chamber III to authorize an investigation into the large-scale and systematic crimes occurred in Rohingya state of Myanmar since Oct. 9, 2016. Under the Article 12(2) of the Statute, the Court according to it could execute its jurisdiction over these following situations – such as territory where the international crimes occurred, or in the aircraft or ships where the international crimes happened which registered in a state party. But what we need to mention is that Myanmar where the situation occurred is not a party state to the RS, so the question raised – does the ICC enjoy the jurisdiction over the situation which occurred in Myanmar? Or in other words, if the situation is not referred to the ICC not by the UNSC, could the ICC exercise its jurisdiction in a non party state country? Based on the request of the OTP, the Pre-Trial Chamber held that, "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, such as: (1) the objective territoriality principle according to which the State may assert territorial jurisdiction if the crime is initiated abroad but completed in the State's territory; (2) the subjective territoriality principle, according to which the State may assert territorial jurisdiction if the crime has been initiated in the State's territory but completed abroad; (3) the principle of ubiquity, according to which the State may assert territorial jurisdiction if the crime took place in whole or in part on the territory of the State irrespective of whether the part occurring on the territory is a constitutive element of the crime; (4) the constitutive element theory, according to which a State may assert territorial jurisdiction if at least one constitutive element of the crime occurred on the territory of the State; and (5) 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."[66, para.56] From this, the ICC concluded that, "The alleged deportation of civilians across the Myanmar-Bangladesh border, which involved victims crossing that border, clearly establishes a territorial link on the basis of the actus reus of this crime. This is the case under the objective territoriality principle, the ubiquity principle, as well as the constitutive elements approach. The present situation therefore falls well within the limits of what is permitted under customary international law" [66, para. 62]. However, according to Article 31(1) of the Vienna Convention on the Law of Treaties, any treaty must be interpreted in good faith and in the context of the treaty in accordance with its meaning or historical background and in the light of its purpose. Article 12(2) of the Statute provides that the Court may only exercise jurisdiction in the place where the case arose, but the article does not specifically provide for the ICC to exercise jurisdiction where the ending occurred. However, though the Pre-Trial

Chamber sent judgement and authorized the jurisdiction of the ICC to Myanmar, it did not prove whether the five "territorial jurisdiction principles" mentioned belong to customary international law. Instead, it arbitrarily believed that the five territorial jurisdiction principles belonged to customary international law. It then interpreted the provisions of Article 12, paragraph 2 of the RS beyond its literal meaning and established the Court's jurisdiction over the situation. However, according to Article 38(1) of the International Criminal Law, customary international law is "general customs accepted as law". In this logic, if the ICJ or some other international organizations want to ensure the existence of one kind of customary international law and its content, that means the ICJ or international organizations must first examine both "state practice" and "*opinio juris*", both of which are indispensable. However, it is regrettable that when the Pre-Trial Chamber determined that the five principles of territorial jurisdiction have the status of customary international law, it did not examine whether they have the status of customary international law. Therefore, there is doubt whether the five principles of territorial jurisdiction have the status of customary international law. According to Article 22(2) of the RS, the literal meaning of definition of international crimes shall be strictly complied with and shouldn't be extended by analogy. From perspective of ambiguity, the concept shall be interpreted on behalf of the person who is investigated, prosecuted or convicted. Obviously, in the Sudan and Libya situations, according to the Pre-Trial Chamber's judgment, we could clearly see that they ignored the provisions of Article 22(2) of the RS and improperly gave a functionalism interpretation of Article 12(2) of the RS. So we need to think these questions: Is the judgment of the Pre-Trial Chamber correct? In other words, does the Court have jurisdiction over Myanmar situation under the provisions of the RS?

This involves the criterion of "territory of which the conduct in question occurred". According to the universal recognized standard on determination of the territory where the conduct in question occurred - the standard established by the U.S. Court in the "North Carolina v. White" case, that is, if the "essential acts" of a crime occurred on territory, that territory is "the territory of which the conduct in question occurred". Although judicial precedent cannot become an independent source of law, but only serves as a medium for judges' cognition, "the standard declared in the judgment is forcibly, and this standard is also based on correct normative interpretation or supplementation, or on the basis of exemplary method to concretize legal principles" [67, p. 301]. So, what are "essential acts"? Based on the logical judgment of criminal acts and criminal endings, only criminal acts can lead to criminal endings. Obviously, criminal acts are the "essential acts". According to Article 7(1)(4), the elements of the crime of deportation or forcible transfer are "grounds impermissible under international law", "violation of the personal will of the displaced person", "force", "number of persons", "such persons or persons lawfully present in the territory". According to the six factors, the crime of deportation is an "expulsion or other act of coercion" that ends when the victim crosses the border into the territory of another country. In other words, in the Bangladesh/Myanmar situation, the country where the deportation occurred is Myanmar, but Myanmar until now is not a party state to the RS. Therefore, the ICC's jurisdictional ruling on the Bangladesh/Myanmar situation has no legal basis. However, considering the strong appeal from the international

community - according to United Nations estimates, there are as many as 420,000 Rohingya refugees in Southeast Asia - and the ICC's goal of "ending impunity", the Court adopted a functionalism interpretation of Article 12, paragraph 2 of the Statute, which expanded the Court's jurisdiction and established jurisdiction over the Rohingya situation in Myanmar.

On November 26, 2009, the OTP filed a review application with the 2nd Pre-Trial Chamber, asking the Pre-Trial Chamber to authorize the OTP to investigate post-election violence in Kenya between 2007 and 2008.[68, para.56] The OTP believes that political leaders of all sides, particularly from PNU and ODM, allegedly recruited gangs of youths and transported them to strategic points to unleash terror, killing and destroying property belonging to communities, and the ICC can have jurisdiction over the situation in Kenya based on *ratione materiae* jurisdiction.[68, para.72,73,74,75,80] Although the Pre-Trial Chamber finally authorized the prosecutor to investigate the situation in Kenya, the Pre-Trial Chamber's interpretation of the concept of "organization" - the subject of making "policy" - triggered widespread controversy in the international community. Article 7(2) provides that "attacks against any civilian population" shall include a wide range of acts against civilians as provided for in Art. 1 that are carried out in accordance with the policy of a state or organization or in furtherance of such attacks. However, this provision does not give any detailed information of the concept of "organization", resulting in considerable controversy in the international community over the concept of "organization". According to Article 7(2) of the RS, the "organization" is juxtaposed with "state", which means that an organization should be similar to a state, but should not be identical to a state. Otherwise, there would be no need to list organizations separately in the Statute. ICL scholar Mr. Bassiouni believes that "an independent policy formulated by the military, police or intelligence agencies that does not involve the entire country can be defined as the policy of the organization, but non-state actors cannot included" [69, p. 41]. It can be seen from Mr. Bassiouni's discussion that the judgment standard of the organization should be a relatively strict standard. Schabas shares the same view. Schabas held that: However, in practice, there are very few cases where criminals have exploited conflict situations to advance their nefarious personal agendas in international courts. Essentially all charges involve criminals acting on behalf of the state and in accordance with state policy, or those acting on behalf of a state-like organization in an attempt to control territory and seize political power, such as a *Republika Srpska*... Furthermore, the main basis for prosecuting crimes against humanity is that such atrocities usually escape prosecution in the jurisdiction of the state, either because of inter-state intervention or recognition, based on the principle of territoriality or active individuality. We do not have the same problem of impunity for non state actors in general... This problem is solved not by defining acts as international crimes, but by international cooperation [70, p. 953]. We could conclude from above argument that the "organization" in Article 7, paragraph 2 of the Statute should be a "state-like entity", whether interpreted from the context or from previous international criminal justice practice. However, the Pre-Trial Chamber did not strictly interpret the concept of "organization" in accordance with Article 22, paragraph 2 of the Statute, but gave it a broad interpretation. A majority of the judges in the Pre-Trial Chamber

held that not only “quasi-state” entities are organizations, but that the determination of whether a group is an organization should not follow fixed criteria of “formality and degree of organization”[66, para.90]. Instead, “capacity criteria” [66, para. 90] should be used to judge whether a group belongs to an organization or not. Therefore, the Chamber believes that “any group who has the capacity to commit acts that violate basic human values” is organization. According to this logic, “various groups including local leaders, businessmen and politicians associated with the two leading political parties” [66, para. 117]. in the Kenyan situation are organizations. The ICC’s broad definition of “organization” has been questioned not only by international law scholars - Scholar Carsten Stahn, this famous international criminal law scholar strongly argued that by using “capacity” instead of “formality and degree of organization” as the criteria to judge whether a group belongs to “organization” results the policy elements under Article 7 of the RS in meaningless. As well as Judge Hans-Peter Kaul, he also emphasized that it is necessary for the international community to draw a clear line between crimes against humanity and ordinary crimes in domestic legislations. Confusing the two will undermine national sovereignty, affect the jurisdiction of domestic Courts over criminal acts, and will infinitely expand the jurisdiction of the ICC [71, para. 51, 52]. The key to the distinction is a restrictive interpretation of “organization”, that is, only state-like entities that conform to the “formal nature” and “level of its organization” are “organizations” within the meaning of Article 7 of the RS. Organized criminal groups, thugs, civilian groups and criminal enterprises do not meet the requirements of Article 7 of the RS [71, para. 9, 10].

2.4.2 Reflections on the causes of functionalism interpretations

We could conclude from the above analysis that the ICC’s conduction of interpretation on RS shows a functionalism trend. The functionalism theory of interpretation in criminal law is influenced by the purposive rational theory and is a purpose-centered interpretation theory. The reason why the Court adopted a functionalism interpretation of the Statute is not only because its criminal policy purpose is to “end impunity”, but also because the Statute itself has the structural characteristic of “uncertainty”.

First, criminal policy prompts the Court to adopt functionalism interpretation. Legal interpretation should be oriented towards the purpose and value stored in legal concepts or regulations. “To the extent that the possible literal meanings of individual norms are consistent with the meaning of the law, individual provisions should be interpreted in a manner that best suits the purpose of the legal regulation and its hierarchical relationship” [67, p. 210]. This means that when the Court applies and interprets the statute, it should use the treaty purpose of the statute as a value guide and make an interpretation that is consistent with the purpose. The RS has already clearly stipulated its aims – safeguard the security and well-beings of the world and end the history of impunity - in the preamble. As we all know, the preamble is a common part of important international treaties, and its main function is to explain the background and purpose of the treaty by the contracting parties. And “as an integral part of the

treaty, the historical background, the purpose of the treaty, and the important principles described or reflected in the preamble, are the guidance and summary of the entire treaty content" [72, p. 19]. This means that "ending impunity" is not only an important purpose for the contracting states to sign the Statute, but also one of the fundamental values of the Statute. Based on the "principle of purposefulness" in legal interpretation, judges must take into account the purpose of "ending impunity" when interpreting the Statute. Therefore, when faced with heinous international crimes, the "elimination of impunity" becomes a pretext to fulfill the judges' intentions. Judges often achieve the criminal goal of "eliminating criminality" by expanding or narrowing the literal meaning of a statute. In this way of thinking, purposive interpretations and analogies can easily marry and evolve into a very broad legal expansionist trend toward "ending impunity". For example, in the Rohingya situation, the functionalism interpretation theory conducted by the Pre-Trial Chamber, it overpassed the universal accept traditional definition which stipulated in the Statute of the ICJ, and enlarge its jurisdiction from "the territory of which the conduct in question occurred" to "the area where the crime ended". This is definitely a kind of functionalism interpretation conduction, through which the ICC ignored the literal meaning of the RS and enlarge the scope of its jurisdiction in order to end the history of impunity. Take Kenya situation for another example, the Court did not interpret the concept of "organization" in context complying with the provisions of VCLT, but gave a broad interpretation to "organization". Although the ICC exercising jurisdiction over the Myanmar situation and Kenya situation has propagated criminal justice to the victims, the Court apparently did not pay attention to the possible negative effects of functionalism interpretation in ICL. That is, the Court increases the control and penetration of ICL into the international community at the interpretation level, and this is obviously not an interpretation position that a modern society governed by the rule of law should adopt. Moreover, the Court's purpose-centered interpretation method has been strongly criticized by the international community, and many contracting states have even withdrawn from the RS. For example, after the Court established jurisdiction over the situation in Kenya, Kenya questioned the admissibility of the case involving six senior government officials. That the pre-trail chamber rejected the objection request of Kenya led to the Kenyan Parliament directly announcing its withdrawal from the RS.

Second, diversification of purposes contributes to the centrality of "ending impunity". "ICL is a hybrid of different branches of law and is the product of a combination of international human rights law, international humanitarian law, domestic criminal substantive law and procedural law" [73, p. 6-7]. Different legal departments have different legal purposes. For example, the purposes of IHRL or IHL are to protect human rights, while the purpose of criminal law is to protect legal interests and end impunity, and the purpose of procedural law is to ensure procedural fairness. Different purposes contain conflicting risks due to different value orientations. Moreover, the Court has not provided guidance on the order of purposes of various departments of law, which has also made the RS full of conflicts among the multiple purposes, and the conflict has continued to intensify in practice. Generally speaking, the object and content directed by the purpose are interests. Therefore, "the problem of defining the purpose of a norm is actually the problem of how to arrange conflicting

interests" [64, p. 18]. According to this logic, legal interpretation is nothing but the result of people's value choices based on comparison, identification, coordination, and balance. Which interpretive stance and method to adopt, which factors or relationships are emphasized, and which issues are prioritized are all directly affected by the value standards of the interpreter when chosen. Since the statute does not clearly stipulate the ranking of different purposes, when a judge faces a heinous and brutal crime, it is easy for the judge to make a substantive justice judgment - bring criminals to justice - in the value weighing process based on his/her strong sympathy for the victims. "According to this, the applicator of the law first determines the correct conclusion based on his previous understanding and persuasiveness, and then goes back to find an interpretation method that can support this conclusion" [74, p. 78-79]. What we need to mention here is that, because the value of each person could affect the judgement of that individual, and the substantial value of the natural law is always justice, and the judicial judgement is essential made by the value judgements, so these elements leave a broad room for the judges to conduct functionalism interpretation. For example, in the Rohingya situation, faced with 420,000 refugees, the ICC clearly predetermined its jurisdiction over the situation. Then, through a functionalist interpretation of the "territorial jurisdiction principle", jurisdiction over this situation in non-contracting state was established. For another example, in the Hadzihasanovic case, Judge David Hunt issued a different opinion on the command responsibility. Judge Hunt cited the content of Additional Protocol I to the Geneva Conventions (International Humanitarian Law) to expand the scope of command responsibility. That is, "the situation of a commander who knows or has reasons to know that a person who has become his subordinates committed a crime before he became that person's superior reasonably falls within the principle of command responsibility" [75, para. 22]. Obviously, Judge Hunt ignored the differences in the legal purposes and liability structures between international humanitarian law and ICL. He made the above judgment by placing the goal of "ending impunity" at a higher level than protecting human rights in the balance of interests. Surprisingly, although Judge Hunt's functionalism interpretation of command responsibility violates the principle of *nullum crimen sine lege*, it is endorsed by some scholars. For example, some supporters believe that the gap caused by the different scope of punishments in different legal departments is a step back in ICL, because it allows perpetrators to go unpunished [76, p. 301].

Third, uncertainty of interpretive methods contributes to the priority of purposeful interpretation. The only condition for legal interpretation methods in RS is Article 22(2), which means that the definition of crime is strictly interpreted and not expanded by analogy. From perspective of ambiguity, the norms of RS shall be interpreted by the judges on behalf of the person who is investigated, prosecuted or convicted. "One such technique is the 'rule of lenity' - the common law doctrine, also known as 'strict construction', that directs Courts to construe statutory ambiguities in favor of criminal defendants" [77, p. 885]. However, this interpretation method is rarely applied by the ICC, largely because this interpretation method is contrary to the criminal policy - "ending impunity". In contrast, the ICC and some other earlier judicial organizations like ad hoc tribunals established by the international community, they

often referred to the VCLT to get aid to help them in interpretating relevant clauses under their own value guidance. But what we should note here is that the essence of the VCLT, it is a treaty on regulations among the states, in this logic, it is not a treaty to be used in the international humanitarian law field, because international criminal laws are about the regulations among individuals, not for states regulation. Thus, we could clearly know that the scope of the application of the interpretation method in VCLT can be seen that what kind of disputes this treaty solves is the disputes arising out of treaties between states. Since ICL addresses the issue of individual criminal responsibility, there are considerable differences in the applicable objects of the two. Therefore, we could fully believe that the use of the VCLT and conduction of its interpretation in VCLT when interpreting provisions in RS or other international criminal legislations, in this sense, does not make any sense. However, since the definition and implementation of normative purposes play a central role in the process of criminal law interpretation, purpose interpretation centered on the purpose of "ending impunity and protecting the interests of victims" often becomes the primary interpretive approach and plays the final decisive role in interpretive practice. As Chinese scholar Zhang Mingkai said: "Any interpretation more or less contains teleological interpretation. When different interpretation methods lead to multiple conclusions or cannot draw appropriate conclusions, teleological interpretation must be the highest criterion" [78, p. 216].

This also makes the relationship between purposive interpretation and other interpretation methods no longer a parallel relationship, but a relationship of "dominant" and "dominated", that is, purposive interpretation is in a dominant position. The purpose interpretation is often not constrained by the will of the legislator when legislating. It is advocated that it should be combined with the purpose of criminal policy and changes in social reality, and "it is only consistent with fairness and justice to take the specific appropriateness as the leading factor" [79, p. 101]. Therefore, taking purposive interpretation as the main interpretive approach provides sufficient space for the Court to carry out functionalism interpretation. For example, in the situation of Kenya mentioned above, the majority of the judges of the Pre-Trial Chamber believed that expanding the scope of "organizations" based on the "capacity standard" and not limiting it to "state-like organizations" would be conducive to protecting "the most basic human values". Take the "Furundzija Case" which occurred in ICTY for example, the ICTY even ignored the differences between international humanitarian law and international criminal law and conducted interpretation on catch-all provision in Art. 3 of the Statute for the ICTY by citation of common Art. 3 to the Geneva Conventions, thus using the term "ejusdem generis" principle to achieve its goal – including the acts of sextual violence into war crime so as to enlarge the scope of the war crime. The ICTY's approach to interpreting catch-all provision using purposive interpretation has been criticized by defendants' lawyers and many scholars. They pointed out: "Including crimes of sexual violence into war crimes through this standard (*ejusdem generis*) seriously violates the principle of '*nullum crimen sine lege*" [80, p. 27]. It is worth noting that Article 22, paragraph 2 of the Statute explicitly stipulates the principles of "strict interpretation" and "rule of lenity". Even compared to the VCLT, we could conclude that these two norms are in the position of special laws

and have priority status. However, the Court rarely regards them as preferential interpretation methods. This is because if the Court gives priority to the application of "strict interpretation" and "rule of lenity" interpretation methods, such as in the situation of Kenya and Rohingya, the Court will almost undoubtedly come to a conclusion that is favorable to the defendant, thus making the goal of "ending impunity" difficult to achieve. And if the interpreter does not give priority to the interpretation methods of "strict interpretation" and "rule of lenity", or puts this interpretation method and the purposive interpretation method at the same level of application priority, then this situation always results in such an ending that purposive interpretation - focusing on purpose of stability of specific norms or even comprehensive protection of the entire RS legal order will always and even unconsciously "start from the purpose ... sort out the basic clues from the mess, so as to end the disputes" [64, p. 17]. In other words, there is no need to apply the interpretation methods of "strict interpretation" and "rule of lenity". As scholar Darryl Robinson said: "The application of an interpretation aimed at maximizing victim protection in ICL means that 'rule of lenity' will no longer be necessary because all ambiguities have been interpreted against the accused" [81, p. 934]. It can be seen from this that when the interpretation methods are chaotic and disordered, the teleological interpretation method will often occupy a dominant position, thus opening the way for the interpreter to adopt broad interpretation and analogy interpretation.

Finally, the openness of the Statute provides room for functionalism interpretation. Language itself is elastic, which also leads to the problem of uncertainty in concepts in the legal system, whether they are descriptive concepts or normative elements. As the German scholar Larenz said: "The terminology often used by law is different from mathematical logic and scientific language. It is not a concept with clear denotation, but rather a more or less flexible expression. The possible meaning of the latter fluctuates between certain band widths. Due to different situations, the things referred to, the context of the speech, the position in the sentence and the emphasis of the words, they have different meanings" [67, p. 193]. It is precisely because of the uncertainty of legal norms, "including the so-called *porosität* caused by its rough structure and the so-called *vagheit* in the conceptual field when it is provided for future development and research, that it can be used to guarantee the necessary openness of a system" [82, p. 256]. The openness of the legal system makes it commonplace for legal purposes or values to be unclear or even contradictory or missing, and it is up to the judiciary to clarify specific details or fill in the gaps. This result, in turn, exacerbates uncertainty of norms, thereby creating ample room for interpreters to adopt functionalism explanations. For example, Article 21 of the Statute stipulates the sources of ICL, but here is a dilemma we have to face is that, although the Court may apply the norms and principals which it interpretated in the earlier cases, the practices of these interpretation are full of controversy. "The article could have directly provided for custom as a source of law, but they (legislators) abandoned the wording of customary law due to their consideration of the principle of legality" [72, p. 249]. However, how to define customary international law? How to determine whether a certain principle is already believed as a kind of customary international law? Given that Art. 38 of the Statute of the ICJ provides for the method to identify customary

international law for states, that is, the "two elements" standard. But how to prove that a norm or principle has been "convinced" as law? How to prove it is "universally practiced"? These standards are relatively flexible, which also provides room for the ICC or ad hoc tribunals to apply this standard broadly. For example, in the "Norman Case", a key issue that the SCSL needed to prove was "whether the crime of child recruitment stipulated in the Statute of the ICTY has already developed into and accepted as customary international law". The SCSL held that: "article 4, paragraph 3 conformed to the statement of the law existing in 1996 and as currently accepted by the international community…On the other hand, except for a very small number of countries, nearly 200 countries in the world had ratified and joined the Convention on the Rights of the Child before November 1996; Since 185 states, including Sierra Leone, were parties to the Geneva Conventions prior to 1996, it follows that the provisions of those conventions were widely recognized as customary international law. Similarly, 133 states, including Sierra Leone, ratified Additional Protocol before 1995. Due to the high number of States Parties one can conclude that many of the provisions of Additional Protocol, including the fundamental guarantees, were widely accepted as customary international law by 1996…Various state and non-state actors have also begun to commit themselves not to use child soldiers, and to end the use of child soldiers who have been recruited" [83, para. 8-24].

However, what we should mention here is that the ICC only provide such evidences – first, the ICC provides a lot of conventions around the children protection; second, the ICC provides that a quantity of countries have already stipulated the children protection into their domestic legislation. As mentioned above, the ICC based on such reasons concluded that the "crime of child recruitment" has already been accepted universally around the world – *"opinion juris"*; a lot of countries has stipulated the children protection into their domestic legislations – the "crime of child recruitment" is universally practiced around the world, so the ICC concluded that the crime of child recruitment has gained the position of customary law. Furthermore, due to the essence of Convention on the Rights of the Child and the Statute of SCSL is quite different – namely, the Convention on the Rights of the Child is essential a kind of international human rights law, while Statute of the SCSL is essential criminal law – so, the nature of the content is inevitable different. It is well known that, the international human rights law provide for unlawful act provisions, while the criminal law provides for the crimes – not all of "unlawful acts" can be regarded as crimes. The judges' in SCSL interpretation – which confused the two definitely different concepts: "unlawful act" and "crime" - has obviously broadened the standard of proof of customary international law, greatly expanded the openness of the Statute, and at the same time followed by a logical consequence - it set a precedent for the functionalist interpretation of the ICC and laid a legal foundation. Here is another example we shall discuss, According to Article 21, paragraph 3, of the Statute, all application and interpretation of the Rome Statute by the International Criminal Court must comply with the requirements of human rights standards recognized by the international community. However, it should be noted that although this provision was determined by the States Parties in good faith, the ambiguity of the language of this provision has caused a series of results contrary to expectations in practice. First, this provision does

not determine “what are internationally recognized human rights standards”; second, because the International Criminal Court can make substantive interpretations, this may infringe on the human rights of the accused. First of all, there is uncertainty in the nature of this provision, that is, is this provision an independent source of law? Or is it an interpretation of the rules? Through the comparation of the content of the third item and the first two items of Art. 21 of the Statute, it is clearly that the item 3 is quite different from the first two items – whether in sentence structure or content dimension, thus, it is hard to make any text reader to believe that the item 3 is essential consistent with the first two provisions in logic. Therefore, “this paragraph does not create a new source of law, but only requires that all laws applied by the Court must be consistent with internationally recognized human rights” [84, p. 385]. However, some scholars believe that this section provides an independent source of law. For example, Stephen Bailey believes that “this section has the function of filling legal gaps” [85, p. 549]. It is worth noting that in the judicial practice of the International Criminal Court interpreting the Statute, the International Criminal Court has always insisted on treating this provision as an independent source of law - which means that this provision has achieved the same status as the legal source provision of the Statute. It transcends the elements of crime and the rules of evidence and procedure and becomes the first-level source that the International Criminal Court should apply. Secondly, the concept of “human rights” in this article is also full of controversy. What are “internationally recognized” human rights? Is it basic human rights or broader human rights? The statute did not define it. This can also easily lead judges to adopt functionalism interpretation of the Statute in order to protect the human rights of victims, that is, by expanding the definition of crime or expanding Court’s jurisdiction to achieve its substantial justice or goal – to protect victims’ human rights. In judicial practice, the ICC often cites the cases of the ECHR and the IACHR to interpret the connotation of human rights, thereby refusing to apply ICL specific norms which are insufficient to realize the criminal policy goal of “ending impunity”, or filling the gaps in ICL based on the content of human rights law.

2.4.3 The legitimacy crisis raised by the functionalist interpretation

Although the functionalism theory of interpretation in criminal law centered on teleology can overcome the legal rigidity and lag caused by the traditional formal interpretation theory, the interpretation path that takes practicality and functionality as its own value pursuit and emphasizes judicial activism often makes the fairness of judicial subjects rather than the perfection of rules becomes the decisive factor in the development of the rule of law around the world. The experience of the international judicial practice give us a lesson that, it is unreliable for any state or the international community and not connotation of modern rule of law to place hope on this place – where the ethical level of the judicial subjects play a vital role. Some scholars on this point have said: “Historical experience has proven that this ideal often turns into a fantasy. Even if it achieves short-term success, it still relies heavily on accidental factors” [86, p. 8]. ICL is a combination of many legal branches and has a unique

nature. Therefore, interpreters should maintain a cautious attitude when interpreting laws. They should start from the literal meaning and end with the literal meaning, and should not change the literal meaning of the norm through interpretation without authorization. The reason goes that in two ways: first, the Court's conduction functionalism interpretation of the RS will put the RS in this situation - if the punishment is unknown, the power is unpredictable, it will inevitable violate the defenses' human rights for braking the principal *"nullum crimen sine lege"*; second, RS in essential is a kind of international treaty, and international treaty by nature is transfer of sovereignty. Due to the selfishness of the sovereignty, every party state hands over the sovereignty as little as possible to the ICC, that means the transfer consent is not a "blank cheque" on which the ICC could write what it wants. So, the ICC's functionalism interpretation of RS – whether enlarge the scope of its jurisdiction or enlarge the scope of the crimes – violates the sovereignty of the party state.

First, functionalist explanations harm human rights. In domestic criminal law theory, criminal law has the function of protecting human rights. The so-called human rights protection function refers to restricting the state's exercise of penal power by clearly classifying certain behaviors as crimes and imposing certain penalties on such behaviors. Since punishment is an extremely cruel sanction that deprives a person of life, freedom, and property, punishment should only be regarded as the ultima ratio to prevent crime. In other words, criminal law regulations should not penetrate into every corner of life and should only be controlled to the minimum necessary to maintain social order. It can be seen that in domestic criminal law theory, the human rights protection function of criminal law is mainly realized through the principle of "*nullum crimen sine lege*". That is to draw a clear line between state power and the rights and freedoms of individual citizens: "The country's legislative body can only define as crimes acts that seriously endanger society, but cannot criminalize citizens' act of basic constitutional rights; judicial organs can only identify crimes and punish crimes within the scope of the law" [87, p. 40]. - Limit state power in both legislative and judicial dimensions to make criminal law work in a modest way so as to protect citizens' basic freedom. As we all know, ICL in essence is a branch of criminal law, what it differs from domestic criminal law is that it provides international crimes which shocks the conscious of the international community and are the most serious stigmatization of perpetrators - considering that the Statute governs international crimes that "shock the conscience of mankind", ICL needs to implement the principle of legality to protect human rights. Generally speaking, the principle of legality mainly protects human rights in two dimensions: In the legislative dimension, "in order to protect basic human rights, especially the freedom, crimes and penalties must be clearly defined to citizens in advance so that they can predict whether their actions will be punished" [88, p. 41], namely, the principal of legality – norms should ensure their clarity; In the judicial practice dimension, any international criminal judicial organizations should keep modest, which means the prosecution and criminal penalty should be the last resort for the victims to refer to, this principal is to protect the freedom of civilians. In the legislative dimension, "because ICL is derived from customary international law, its development path is closer to Anglo-American common law" [23, p. 221]. Compared with statutory codes, customary law inevitably lacks clarity, predictability and

strictness. This situation leads to this conclusion – the RS and its provisions could not be as clear as provisions in domestic legislations, that means the human rights protection standard should be abided by could not authorize justice to RS, because the provisions in RS could not meet the requirement of the principal of clarity in order to protect human rights, especially for the prosecuted individuals. "Due to its special nature, ICL makes it more difficult for the principle of legality to play its due role in protecting the human rights of defendants in legislation. Therefore, more attention is paid to the function of the principle of legality as the second barrier to protect the human rights of defendants in judicial application" [89, p. 147]. For this reason, the Statute clearly stipulates in Articles 22, paragraph 2 and 22, paragraph 3 that the Court should adopt "strict interpretation", "rule of lenity" and "consistent with human rights" when interpreting and applying the RS. Specifically, "strict interpretation" requires the Court to strictly follow the literal meaning when interpreting the statute. Therefore, "the parties can know from the relevant provisions, or, if necessary, with the help of the Court's interpretation, what acts or omissions would give rise to criminal liability" [90, para. 52]. That is, the Court's interpretation shall not exceed the predicted possibility of the defendant or perpetrator. If the Court, based on criminal policy purposes, expands the definition of crime or the scope of admissible cases, or changes or overturns the literal meaning of the Statute with the assistance of other interpretation methods, it will inevitably make it impossible for the perpetrator to predict whether his behavior violates the provisions of the RS, thus endangering the freedom of the perpetrator. For the defendant, the ICC's functionalism interpretation of relevant concepts actually transfers the adverse consequences of unclear legislation to the defendant. This is equivalent to the Court depriving the defendant of relevant human rights lack of legal and just basis, which in essence – violates the principal pf legality – against the human rights protection function of ICL. It is worth to be noted that the goal of promotion of the human rights protection function of the RS does not mean that the ICC cannot make any broad interpretation or supplement to it.

Based on limited rationality, the RS is naturally backward and, coupled with the vagueness of its rules, the ICC should clarify and complement the relevant concepts in the Statute. Due to the limitation of rationality, the RS is inevitable lagging behind the development of society, and coupled with vagueness of its specific norms, the ICC should clarify and complement relevant concepts in the Statute so as to make the Statue effective work. However, when the Court clarifies or supplements the interpretation of relevant concepts in the Statute, it should comply with the requirements universally recognized in international human rights law field. That is, when there is doubt about the relevant concepts in the specification, if there doesn't exist individual cognitive bias with interpreters, in order to protect human rights in judicial practice, the interpreters shall conduct introspective interpretations in the fuzzy zones presented by the edges of fuzzy concepts under the circumstances where the interpreters couldn't form a general-accepted understanding, and cannot make radioactive interpretations.

Second, functionalist interpretation endangers national sovereignty. Given that the principle of state sovereignty remains a fundamental principle of international law, the RS and the International Criminal Court must also follow this fundamental principle. First, in the dimension of nature of the RS, the RS is not only legal source of

ICL, but also the legal basis on which the ICC is established. It is essentially an international treaty. International treaties are transfers of national sovereignty. Therefore, the content – such as definitions of crimes or the scope of jurisdiction – agreed and provided in this very statute, in essence, is reflection of the consent of the state parties. In essence, the Rome Statute is actually an agreement between states parties, so it also means that this agreement is in essence transfer of judicial sovereignty, and the consent which mentioned above means the scope and the limits established by the state parties, or in other words, it means the scope and limits of the transfer of the judicial sovereignty. So, if the ICC ignored the literal meaning of the Statute, and enlarge or reject the literal meaning of specific meaning of the provisions, it will go beyond the wildest imagination of the state parties. If this situation happened, it will inevitably violate the principal of sovereignty universally accepted by the international community, because it broke the consent of the state parties. In addition, the basic jurisdictional principal of the ICC – complementary jurisdiction, which means the ICC should work as a complementary organization to the domestic judicial organization. It should be noted that the principle of complementary jurisdiction is a direct reflection of the RS's function of safeguarding the sovereignty of contracting states. Because ICL holds individuals criminally responsible, and "individuals are always (at least partly) the figurehead for communities and nations" [91, p. 77].

From this, we can see that since the individuals prosecuted by the International Criminal Court are often individuals with high political status, and this individual often reflects the sovereign will of his country to a certain extent, therefore, when the sovereign interests of the country conflict with the common values pursued by the International Criminal Court - because the international crimes committed by individuals themselves reflect the interests of sovereign states. When the pursuit of sovereign interests conflicts with the goal of the International Criminal Court to end impunity, although the common interests represented by the International Criminal Court are extremely important and are generally pursued and recognized by the international community, in the real international community based on sovereignty, common values are difficult to transcend the selfishness of sovereignty. In other words, sovereign states often ignore common interests and cannot place common values above their pursuit of sovereign interests. For this reason, we could tell why so many representatives of the sovereignty states persisted on this argument in the process of formulation of RS - "reducing the potential risks of the RS to their government officials and limiting the boundaries within which the transferring countries exercise jurisdiction" [92, p. 182], thereby safeguarding their countries' sovereign interests. The purpose of the Court's functionalist interpretation of the Statute is to expand its jurisdiction to "end impunity". In most judicial practices, the Court often regards the situation where a state party considers the situation is outside of its territory thus outside of its judicial jurisdiction or the state party doesn't initiate investigation in time as that the state party is unwilling or unable to initiate its jurisdiction over the situation. Take the situation in Libia for example, in Libia situation, the ICC declared that "for a case to be admissible under article 17, paragraph 2, item 3, it must be shown that the proceedings were not or are not being conducted independently or impartially and that the proceedings were or are being conducted in a manner which, in the circumstances,

is inconsistent with an intent to bring the person concerned to justice. In this case, the ICC will have the right to exercise its complementary jurisdiction" [93, para. 230]. Obviously, some of the Court's functionalism interpretations not only harm the sovereign interests of the state parties, but violates the principle of complementary jurisdiction. Thirdly, the content of Article 22, paragraph 2 of the RS also reflects its function of safeguarding national sovereign interests. The literal meaning of crime definitions and the jurisdiction of the ICC authorized by the state parties reflects the breadth and extent of the transfer of judicial sovereignty from the sovereignty of the state parties, therefore, in the process of formulating the RS, "Article 22, paragraph 2 of the RS finally adopted the proposal of the US and replaced the previous proposal of Japan, that is, it replaced 'general prohibition on the application of analogies' with a clearer strict interpretation and the rule of in *dubio pro reo*" [94, p. 244]. According to this article, when interpreting the statute, the Court must strictly follow the literal meaning of the statute. Interpretations that deviate from or exceed the literal meaning are likely to violate the original intention of the legislator and harm the national sovereignty interests of the contracting states. This means that when the Court is faced with an ambiguous provision in the statute, it "should adopt a meaning that places less burden on the contracting parties, or that less interferes with the territorial and personal supremacy of the contracting parties, or imposes less general restrictions on the parties" [95, p. 1278]. In addition, strictly limiting the Court's functionalism interpretation is not only necessary to safeguard national sovereignty, but also has implications for its own survival. Since the Court has no enforcement agency, its effective operation depends on the fulfillment of the cooperation obligations of the contracting states.

The provisions on the definition of crimes and the scope of jurisdiction in the statute determine the scope of the cooperation obligations of the state parties. If the Court interprets the contents of the Statute in a functionalism manner, it is difficult for state parties to predict and foresee the scope of their cooperation obligations, thereby losing their willingness to conduct cooperation with the ICC. The warrant of arrest of Bashir issued by the ICC was generally rejected by nearly all of the African states is an outstanding and typical example [96, para. 10]. Failure to execute arrest warrants not only undermines the authority of the ICC, but also makes its trial work unsustainable. It is worth noting that the requirement to safeguard the national sovereign interests of contracting states does not mean that it completely excludes the judicial activism of the Court. As *Lauterpacht* said: "Judicial legislative behavior, as long as it does not take a form that violates existing laws, should be healthy and inevitable" [97, p. 156]. Since contracting states often constructively use some vague concepts in the process of formulating treaties to keep the treaty open and vital, it is necessary for the Court to interpret this constructive vagueness to clarify the original intention of the legislator and fill legal loopholes. For example, "the definition of 'gender' in the RS is a 'constructive unclear definition' intentionally adopted by legislators in order to reach consensus" [98, p. 57-58], leaving room for the Court to clarify the concept of "gender" in subsequent judicial practice. Of course, when interpreting relevant concepts, the Court must comply with the original intention of the legislator, that is, the vague terms need to be clarified and developed, but they must be within the scope of the literal meaning of the Statute. Because "the legitimacy of

judicial activism that goes against the original intention of the treaty and legislators is questioned"[99, p.253]. Those precisely worded norms show that legislators have reached a consensus during the legislative process, and the Court do not need to interpret them, otherwise there is a risk of infringing on legislators' national sovereign interests. For example, in the Rohingya situation, the Court's broad interpretation of the clearly defined "territorial jurisdiction principle" is a typical case of the Court's functionalism interpretation that violates the principle of national sovereignty.

2.5 Political dilemma: Opposition from major powers makes it difficult to enforce the jurisdiction of the ICC

2.5.1 US's objections to the ICC

There are 124 state parties to the RS until now. Furthermore, PRC, the US and Russia, the three permanent members of the UNSC, which have the most international influence over the world, did not participate in RS, thus resulting in great limitation on the court's territorial jurisdiction. In recent years, some African countries have developed a certain degree of distrust in the ICC, leading to a wave of withdrawal from the treaty and calling into question the fairness of the ICC's jurisdiction. All these reflect the limitations of RS. In addition, for that the crimes stipulated in the RS under the jurisdiction of the ICC are highly political and its prosecutions have a significant impact on state sovereignty and national image, major powers are likely to oppose the ICC's jurisdiction. This also makes it difficult to effectively enforce the jurisdiction of the ICC.

Historically, the US has always been actively supporting the ICC. After World War II, the Nuremberg Tribunal and the Tokyo Tribunal were established with the active efforts of the US and other allies. Half a century later, with the heavy hand of the US, the ICTY and the ICTR were established. The build of the ICC also depends on the support of the US. However, the attitude of the US towards the ICC has gone through a process from active support to firm resistance.

The US actively participated into all of the negotiation process of the RS, during these process it proposed many safeguard clauses, most of which were incorporated into the RS. However, on July 17, 1998, when 120 countries voted in favor of the RS, the US voted against it. The main reasons for the opposition include:

First, the US opposes the RS's provisions because of the ignorance of role of the UNSC. At that very time, the US argued that the UNSC should play a much greater role than that stipulated in the RS [100, p. 279]. At the plenary session of the Rome General Assembly on June 17, 1998, US Ambassador to the United Nations Bill Richardson explained the US government's policy position on the role of the Security Council: Since the International Criminal Court does not have an executive body, its effective operation depends on the strong support of the international community. If it is isolated and helpless, the International Criminal Court will be unable to operate. In other words, the International Criminal Court must be integrated into the international order and supported by the international community, otherwise it will become a castle

in the air. The UNSC plays a vital role in the construction and maintaining the international order. The United States believes that the role of the United Nations Security Council should be fully utilized. In the eyes of the United States, the United Nations Charter gives the Security Council the responsibility to maintain international peace and security, so the International Criminal Court, as part of the international order, should be subject to the constraints of the Security Council. This means that whether the International Criminal Court initiates jurisdiction or other judicial actions, it must be subject to the constraints of the United Nations Security Council. The judicial actions of the International Criminal Court can only be launched when the Security Council believes that the judicial actions of the International Criminal Court will not threaten the stability and peace of the international community. Not only that, given that the effective operation of the International Criminal Court is heavily dependent on the assistance provided by the international community, the international cooperation sought by the International Criminal Court should also be provided and supervised by the Security Council. This proposal means that all decisions of the International Criminal Court must be supervised or even decided by the Security Council - the International Criminal Court has completely become a vassal of the Security Council, and the independence of the International Criminal Court has completely disappeared. The powers of the UNSC under Chapter 7 of the Charter of the UN are integral to the exercise of the Court, not only in terms of their implementation, but also in ensuring that the Court's jurisdiction and powers are truly universal. From both a legal and policy perspective, the Court's operation must be consistent with the responsibilities and powers of the Security Council given or stipulated in the Charter of the UN [101, p. 775]. The US tried its best to make the RS to give the Security Council the role of gatekeeper of pre-trial cases before the Court [102, p. 419]. If the Court considers cases only with the permission of the Security Council, then US nationals will enjoy effective immunity from the Court's review. The US delegation only received a compromise in Rome, which allowed the Security Council to postpone the Court's investigation, so the US believed that it could not vote in favor of the final text of the RS [102, p. 419].

Secondly, we oppose the RS's provisions on jurisdiction over non-State Parties. The US objected to Article 12 of the RS, which establishes the court's jurisdiction over non-state parties. David Schaffer, then the U.S. Ambassador-at-Large for War Crimes Issues, explained the reason why the U.S. delegation voted against the treaty in Rome at the Senate Foreign Relations Committee: The potential for the ICC to exercise jurisdiction over nationals of non-state parties not only "violates the most basic principles of treaty law, but also limits the ability of the US to use its military to fulfill its allied obligations and multinational operations, including humanitarian intervention" [102, p. 419]. Pursuant to Article 12 of the RS, the party states to the RS or the nationals where the crime conducted or any state which stated by clearly expressing the country's intention to accept the jurisdiction of the International Criminal Court, it hopes that the International Criminal Court will exercise jurisdiction over situations or international crimes occurring in the country. It can be seen from this that, except for the UN Security Council referring the situation to the ICC, the only way for the ICC to exercise jurisdiction over a non-State Party is for the non-State

Party to accept the ICC's jurisdiction through an explicit declaration. In international law, territorial jurisdiction is an integral and core content of sovereignty. Therefore, the contracting countries to RS or states declaring their acceptance of the Court's jurisdiction will authorize these countries territorial jurisdiction over crimes committed outside their country. When these States exercise their jurisdiction over non-Contracting States, the consent of the non-Contracting States is not required. The state parties to RS may declare that it will transfer its own jurisdiction to the Court by "consent", which is an act of ceding part of its sovereignty based on its own interests and global interests, and is a special way of exercising sovereignty. Many international treaties to which the US is a party stipulate that a contracting state may exercise jurisdiction on criminals who conduct criminal perpetrations of any country found within its jurisdiction, regardless of whether the defendant's nationality is also a party to the convention [103, p. 220]. It should be noted that none of these conventions limits its application to crimes committed by nationals of the contracting parties, nor is the U.S. criminal law that implements these conventions limited to prosecuting nationals of the contracting parties. The US has exercised treaty-based universal jurisdiction over nationals of non-State parties even when customary international law does not consider the crimes to be subject to universal jurisdiction. Take United State v. Yunis (1991) as an example [103, p. 221]. In 1988, Fawaz Yunis, a Lebanese criminal hijacked a Jordanian plane at Beirut airport. Two US citizens were among the passengers. The US arrested and charged Yunus. Although Lebanon is not a party state to the Anti-Hostage Convention and does not agree with even protest for the US prosecution of Younes - the US jurisdiction is primarily based on the Convention. In 1991, the U.S. Appeals Court for the District of Columbia held that its jurisdiction was based on domestic law - applying the Anti-Hostage Convention - which authorized the power to the US to exercise of universal and passive personal jurisdiction over such acts of terrorism. According to customary international law, air hijacking at that time was not an international crime which was under universal jurisdiction. The case of Younis is a case in point, which was reconfirmed by *Ali Rezaq* (1998) in the United States in the case the US *v. Ali Rezaq*. Resorting to the international treaties to which the US signed and is a party state as well as its domestic judicial practices, the US holding reasons for opposing the Court's exercise of jurisdiction over nationals of non-contracting countries do not stand up to scrutiny.

Thirdly, the US opposes the RS's provisions on the prosecutor's right to conduct independent investigations. The US is concerned that OTP will gradually become "politicized" and that the Court will be overwhelmed by trivial lawsuits.[100, p.279] The Americans would rather leave the power to initiate investigations to the other two options stipulated in the RS: referrals of the situations to the ICC by the UNSC or by any state party or non-state party.[100, p.279] The OTP – the US strongly argued for - that it can only take action after a state party or the UNSC refers a situation to a court. Limiting the prosecutor's work to cases referred by the UNSC or a State Party to the OTP places the UNSC in a leading role. On the one hand, the UNSC will have the power to directly decide cases that it deems appropriate to refer to the Court; on the other, the PM to the UNSC, who have great influence among other countries in the world, will have indirect control over the Court's docket [100, p. 280]. It is

unreasonable to completely exclude the prosecutor's right to conduct an independent investigation. A country may be reluctant to bring a case to the Court for diplomatic reasons, the Security Council may not bring a case to the Court for political reasons, or it may not treat all cases equally in its filing. Therefore, retaining the prosecutor's power of investigation can, on the one hand, make up for the omissions caused by the unwillingness of countries or the Security Council to submit cases; on the other hand, it can curb the Security Council's political control over the Court.

Finally, the US opposes the RS's provision on the provisions or jurisdiction over the crime of aggression. The US opposes the RS around the provision of "crime of aggression" as one of the core crimes under the jurisdiction of the ICC. The US believes that "aggression" falls within the UNSC's special jurisdiction and, therefore, unless the UNSC can demonstrate a case of aggression, it should not be subject to the jurisdiction of the Court [100, p. 279]. The US strongly argued that the UNSC must first determine whether a country has committed aggression and then determine the behavior of individuals in that country.

Among the above reasons, a key reason for the US's opposition to the RS is the Court's concern about the jurisdiction of non-state parties over their citizens. In fact, this concern is exaggerated. If a court were to act under RS, it would be impossible for US citizens to be prosecuted by a court that has jurisdiction only over "the most serious crimes of international concern". As a non-party state, even when the prosecutors of the ICC have the right to investigate the nationality of the United States, for the US there is no obligation to submit citizens to court. It should be pointed out that the prerequisite for the ICC to exercise jurisdiction is clearly stipulated in Article 1 of the Rome Statute, namely the principle of complementary jurisdiction. This means that the ICC cannot intervene when the country where the situation occurs is investigating the situation or has completed the investigation. Unless the country where the situation occurs shields or is not sincere in prosecuting or investigating the situation - when the State Party is unwilling or unable to investigate or prosecute the situation, the ICC can intervene in the investigation based on the power granted by the Rome Statute - the prosecutor cannot investigate and prosecute individuals without this situation [104, Art. 17]. In the US's view, the preliminary hearing procedure and the admissibility challenge procedure established in Articles 18 and 19 of the RS, which set out the principle of complementary, are both obstacles to the US interfering with the Court rather than exerting authority over his nationals. In addition to these key clauses, there are other safeguard clauses that can be cited. Therefore, the possibility of American citizens being prosecuted in Court is zero. But the US still refused to give up. After the adoption of the RS, the US did its utmost and took advantage of every opportunity to implement "remedial" measures for the RS. First, there was an attempt to amend Article 98 of the RS. During a three-week preparatory committee meeting in June 2000, the US proposed rewriting Article 98, with the goal of laying the foundation for "immunity from prosecution through unspecified international agreements" [105, p. 166]. The US proposed amending Article 98 to read: "The Court shall make requests for the transfer of persons or accept into its custody persons required to be taken into custody in a manner consistent with international agreements applicable to the transfer of persons" [105, p. 166]. Thirty-nine of the all representatives at that time believed the proposal

was against for the aims and purposes of the RS [105, p. 167]. Finally, a compromise was reached, and Article 98 was amended to read: “If, under Article 98, paragraph 2, a request by the Court for transfer would result in a violation of obligations assumed under international agreements under which the transfer of a person to the Court requires the prior consent of the sending State, the Court may no longer make a request for the transfer of a person without first obtaining the consent of the sending State” [106, Art. 195]. While the US claimed victory in this rewrite, those who opposed the US exemption claim believed that the US not only failed to achieve the purpose of the exemption, but also “returned to the winding path leading to the original intention of the RS” [105, p. 167]. The US believes that the proposal is not an amendment or modification of the RS, but a “procedural remedy” consistent with the treaty that would allow the US to be a “good neighbor” to the Court [105, p. 167]. While the US does not intend to become a member of the RS, it can also make contributions to the perfection of the ICC as it has done for the ICTY and the ICTR [105, p. 167]. The U.S. proposal would allow the US and other non-signatories to continue to fulfill their international responsibilities [105, p. 167]. But the proposal would also ensure that citizens of what the U.S. calls “irresponsible states” or rogue states would still be subject to the court’s jurisdiction, since the court may not have any “international agreements” with them [105, p. 167]. Second, the US participated in the Preparatory Committee meeting held from November 27 to December 8, 2000. This conference is the last one that countries that have not signed the RS are eligible to attend: in effect, it is the last chance for the US to try to obtain immunity for its nationals through the contents of the RS. During this meeting, the discussion on the relationship between the ICC and the UN was explosively conducted by the Preparatory Commission. The Memorandum of Understanding is intended to facilitate the sharing of information and evidence between UN assistants, peacekeepers and officials, and the ICC. However, the Relationship Agreement was not adopted at the meeting and the final draft will be adopted at the next Preparatory Committee meeting in September and October 2001 [105, p. 168]. At the meeting, the US planned to add a clause to the Relationship Agreement that would prevent the transfer of its nationals to the ICC. The US expects that where a person of a foreign national is involved and his or her domestic country certifies that the person is acting under “exclusive instructions”, the Court cannot make a request for acquittal itself unless the State agrees or the UNSC adopts a resolution under Chapter 7 of the UN Charter – which means the state itself could fight against the project moving forward [1, p. 173]. Since then, the US has not continued to seek exemptions in the Relationship Agreement and has only participated in the working group on aggression. In this regard, the US representative only gave the following explanation: “The US does not support the ICC: the reason why the US only participates in the discussion of aggression is because of the role of the Security Council; the efforts made by the US in the past to meet its own needs were in vain; in the future, the US will comprehensively examine the issue of the ICC” [105, p. 169]. After that, the US did not seek exemption through the RS itself, but instead took more drastic measures and carried out actions to dismantle the ICC. Judging from the US actions, the US was not opposed to the establishment of the ICC from the beginning. Instead, the US actively participated in the entire process of the legislation negotiation.

When the negotiation started, the US immediately showed its ambition – it strongly supported that the UNSC should decide which cases the ICC should try. In this way, the US could use its veto power to control the Court's docket, so that cases involving American citizens or nationals of its allies would never be tried by the Court. While the UNSC has jurisdiction over all cases, the numerous provisions of the International Criminal Court or the concept of the crime of aggression are of little importance to the United States. But the U.S. claim for full control of the UNSC was explosively rejected by a lot of countries attending the conference, and the Security Council only gained partial control over the Court. Therefore, the US proposed many safeguard clauses. Other countries compromised on most of the US' proposals in order to get the US to accept the RS, but the US did not get any satisfaction because its fundamental goal of completely controlling the ICC was not achieved. All efforts made to remedy the RS after its entry into force also failed to achieve its goal. Therefore, it resolutely launched a campaign against the Court.

The US government has implemented a series of increasingly fierce blocking actions against the ICC. On December 31, 2000, the last day for signing the Statute, former US President Clinton signed the Statute on behalf of the US. Clinton said that day: "We will continue to pay attention to the major flaws in the Statute. We will pay special attention to it after the establishment of the Court, because it will exercise jurisdiction not only over persons approved by the Statute, but also over persons from non-ratifying countries" [107, p. 541]. Clinton further said: "I will not recommend that my successor submit the Statute to the Senate for consideration until our fundamental concerns are satisfied" [107, p. 541]. However, Clinton stressed that he signed the Statute because, in his judgment, the US, as a signatory, would have a more effective influence on the eventual establishment of the ICC [107, p. 541]. The Clinton administration's decision to sign the bill was opposed by others. On January 3, 2001, Senator Jesse Helms, then chairman of the Senate Foreign Relations Committee, said that Clinton's decision before leaving office was "excessive and incomprehensible" [108, p. 191]. One of Helms' top concerns in his decision to overturn the decision was to "protect American servicemen and women from the jurisdiction of this ICC" [108, p. 191]. In May 2001, John Warner, Chairman of the U.S. Senate Armed Services Committee, and Helms proposed the American Servicemen Protection Act, which was passed in 2002. Key provisions of the Act include: (1) No entities of the US government – such as state, local governments, courts or other organizations – shall not be permitted to cooperate with the ICC wherever the fields in, such as arrest or transfer the suspects or execution of searches and seizures, the extraction of evidence, and similar matters; (2) No law enforcement officer of the ICC is allowed to conduct any investigative activities in the US; (3) The President shall take advantage of the voice and force of America ensuring that every decision of the UNSC that confers the privilege of UN peacekeeping operations is immune from prosecution on US citizens of the ICC; (4) Anyone who approves and issues an ICC RS and cooperates with the ICC in arresting or prosecuting suspects will receive no US military assistance; (5) The President of the United States should take whatever measures he deems necessary to ensure that citizens of the United States and its allies whom the International Criminal Court seeks to arrest or prosecute are not arrested or prosecuted in order to protect the interests of

his country's citizens; Here is a world famous words raised by the international community, it is like this way, the US president is invading the Hague [108, p. 191-192]. And the American Servicemen Protection Act also got another name, namely the Netherlands Invasion Act. Why? Because this act give the America power to rescue its soldiers or nationals who are waiting for trail through its troops [105, p. 169].

In May 2002, the US withdrew its previous signature on the Statute [107, p. 541]. The Bush administration then began to use coercion to enforce the American Servicemen Protection Act at the bilateral and UN levels. First, at the bilateral level: bilateral immunity agreements. The US, by broadly interpreting the provisions of Article 98, paragraph 2, of the Statute and threatening to cancel military assistance, forces other countries, including contracting members to the RS, to formulate bilateral agreements on immunity with it not to transfer U.S. nationals to the Court. In July 2002, the US asked its diplomats around the world to contact foreign governments to negotiate bilateral agreements. As of 2023, more than 100 state parties to the RS already have signed bilateral agreements with the US. In addition, in 2002 the Congress of the US also set a deadline for countries – who still didn't sigh bilateral agreement on immunity - to sign the bilateral agreement with US. The US announced the cancellation of military aid to 35 countries, including Colombia, the traditional largest foreign aid country of the US, and six Eastern European countries that wanted to join NATO at the time, in retaliation for their refusal to grant U.S. citizens immunity from prosecution in Court. By 2023, more than 100 states have signed bilateral agreements with the US. Furthermore, in 2002 the Congress of the US also set a deadline for countries – who still didn't sigh bilateral agreement on immunity - to sign the bilateral agreement with US. The US announced the cancellation of military aid to 35 countries, including Colombia, the traditional largest foreign aid country of the US, and six Eastern European countries that wanted to join NATO at the time, in retaliation for their refusal to grant U.S. citizens immunity from prosecution in Court [109, p. 66].

The "international agreement" in Article 98, paragraph 2 may exist between non-Contracting States, between Contracting States, or between Contracting States and non-Contracting States. From the perspective of Article 98(2) of the Rome Statute, the United States, as a non-State party, has no need to worry about its citizens. This is because the United States is not a State party to the Rome Statute, and Article 98(2) provides that non-State parties have no mandatory obligation to cooperate with the ICC. If the United States does not voluntarily refer the situation in its country to the ICC, or if the situation is not referred by the UN Security Council, the ICC's jurisdiction is meaningless to the United States, as a non-State party. As for the state parties to the RS, it works in the same way - because according to Part 9 of the RS, States Parties acting as sending States shall transfer persons to the ICC in accordance with Part 9 and its domestic legal procedures, or agree that the receiving State shall transfer persons to the ICC; The limitation on the obligation to cooperate in this provision is actually only relevant to international agreements between the receiving State, which is a party to the RS, and the sending State, which is a non-party to the RS. Article 98(2) allows States to avoid complying with the ICC's surrender requirements in order to fulfill their obligations under international agreements. The "international agreement" here specifically refers to the "Status of Force Agreement" [104, Art. 90].

The Status of Armed Personnel Agreement defines the legal status of troops and associated personnel of one country stationed in another country. The Status of Armed Personnel Agreement between NATO member states provides that when the sending state has exclusive or primary jurisdiction over a crime, it may refuse to transfer its personnel abroad to an international Court. For example, Article 7, paragraph 5, of NATO's Status of Armed Personnel Agreement provides that when the sending State has exclusive jurisdiction or parallel jurisdiction, the receiving State is obliged to assist in the arrest and transfer of the persons concerned. According to Article 7(3)(3) stipulated in the RS, it provides that even the sending state doesn't exercise the prior jurisdiction when it has this privilege, but the receiving state should first obtain the consent from the sending country so as to take against action to personnel of sending states. When a contracting party's international obligations being of the third good will conflict with its obligations under international criminal law, neither obligation takes precedence. If a state party to the RS with the very obligation violates its treaty obligations from being a third country and conducts nationals transfer of any non-state party to the ICC, it will be held accountable for violating international law. The purpose of Article 98, paragraph 2, is to resolve the conflict between these two obligations and prevent the occurrence of international disputes. Article 98(2) should be interpreted complying with the Art.31 of the VCLT – the principal of good faith. In its Memorandum on International Cooperation, Amnesty International stated that Art. 98(2) applies only to existing armed forces agreements and does not apply to replacement of armed forces agreements entered into by a State after its accession to the RS. Even if the ICC finds that these provisions are compatible with revised or newly drafted "status of arms agreements", these agreements must still be harmonized and subject to the provisions of the RS or other international law [110, p. 478].

The US has signed "Status of Armed Forces Agreements" with more than 100 countries, which give the US priority jurisdiction over their military personnel. These agreements would satisfy the exception provided for in Article 98, paragraph 2, [110, p.478] so in its memorandum Amnesty International argued that, in theory, there was no need for a separate immunity agreement. The US comments seemed to acknowledge that, if only implied, Article 98 lacked the loophole they desired. Amnesty International also argued in the memorandum that even if the US were able to successfully sign Article 98 agreements with all parties, these agreements would be legally unenforceable. If member states notify the ICC, the court's Rule of Procedure and Evidence prevails over bilateral immunity agreements [110, p. 478]. Article 195(1) of the Rules of Procedure and Evidence states: "If the requested State notifies the court that it has raised the implementation issue under Article 98 of the transfer or assistance application, the requested State shall provide all relevant information and provide assistance complying with Art. 98 of the Rule of Procedure and Evidence. At the same time, the third good will state which gets interested in could provide aid or information to support the ICC." According to the Rome Statute, in addition to complying with Article 98 (2), the prosecutor must also comply with other substantive provisions of the Statute. For example, according to Article 31 of the Vienna Convention on the Law of Treaties, when the International Criminal Court submits a request for transfer to the requested state, it must examine whether the requested state has signed relevant treaties

with third countries. In other words, if the transfer of the criminal suspect by the requested state will violate the international treaty signed with the third country, then the requested state shall not transfer the criminal suspect to the International Criminal Court. That means that the Court's power to determine in which way the RS and the Rules of Procedure and Evidence should be applied prevails over any bilateral agreement that seeks to circumvent the possibility of the Court exercising its jurisdiction. The contradictory provisions of the Rome Statute put Serbia in a dilemma - either cooperate with the ICC while circumventing the provisions of the RS for the benefit of a particular country. Therefore, any breach of the provisions of the RS by which any of the parties to the RS signed the Article 98 of the RS is an act expressly prohibited by Article 86 of the RS. The substantial meaning of the RS is to end immunity for the most serious crimes and is based on the principle of equality. Therefore, any potential exceptions or loopholes to the RS should be interpreted in a way that facilitates the achievement of its purpose and not in a way that undermines it.

Second, at the United Nations level: Security Council resolutions. The US used Article 16 of the RS to force the Security Council to pass a resolution postponing investigation and prosecution. At the same time, the end of the US peacekeeping mission in Bosnia and Croatia is approaching, and a decision needs to be made whether to extend it. As the most powerful country in the world and a permanent member of the UN Security Council, the United States threatened to withdraw from the peacekeeping operation and demanded that the Security Council grant absolute immunity to the peacekeeping forces, especially American citizens. At that time, the war in Bosnia and Croatia was raging and the people were suffering. The United States seized the opportunity and demanded that the Security Council grant it immunity, otherwise it would terminate the peacekeeping operation. It is worth noting that the peacekeeping operation must be extended with the consent of the Security Council. It was based on this opportunity that the United States forced the Security Council to compromise. In addition, as one powerful permanent members of the UNSC, the US can prevent the adoption of the UNSC resolutions if it opposes[109, p.65]. Against this backdrop, the Security Council eventually adopted Resolution 1422. This resolution also demonstrated the compromise of other Security Council members with the United States. For example, the resolution clearly stated that the International Criminal Court was prohibited from investigating and prosecuting American citizens, and the reason for refusing the International Criminal Court to investigate or prosecute American citizens was the exclusive jurisdiction over American citizens granted by the Security Council. Despite its serious flaws and the strong opposition from many countries during the Security Council meeting two days before its adoption [111, p. 203], the members of the Security Council, eager to maintain the peacekeeping operation, had little choice but to pass Resolution 1422 [111, p. 202]. Human Rights Watch stressed that the resolution clearly complies with Article 27 of the RS. Article 27 It is expressly prohibited to discriminate based on the official status of any country or international organization. This provision is a key clause in the RS as it encompasses the fundamental purpose of the RS to ensure that no one, including politicians, heads of state, or UN peacekeepers, is above the law. Contrary to that provision, resolution 1422 excludes an entire category of persons from the jurisdiction of the ICC, so that this

would facilitate immunity in the event that domestic courts that are not members of the ICC fail to prosecute their own forces and personnel in good faith [111, p. 206]. In the view of Amnesty International, UN Security Council Resolution 1422 fully demonstrates the Security Council's suppression of the independence of the International Criminal Court, and the Security Council has also ignored the significance of the Rome Statute itself. Moreover, the compromise of other permanent members of the Security Council with the United States has made the mission of the International Criminal Court to end the history of impunity only possible outside the scope of the permanent members of the Security Council. In addition, Amnesty International also believes that the Security Council is a political organization, but as a component of the United Nations, it should abide by the relevant provisions of the UN Charter, and Resolution 1422 is obviously contrary to the mission of the Security Council to maintain world peace and stability given by the UN Charter [111, p. 205].

As stipulated in the Article 39 of the UN Charter – the UNSC's resolutions regulated by Article 16 of the RS must relate to the maintenance of peace and security of the international community, but actually this is not the case. Therefore, Resolution 1422 was not in line with the purpose of Article 16 and violated the UN Charter. Although Resolution 1422 was strongly opposed by non-governmental organizations and the vast majority of countries in the world, the Security Council adopted Resolution 1487 on June 12, 2003, extending the exemption for peacekeeping forces from non-state parties for one year. Some members of the Security Council abstained from voting on this resolution, including non-permanent member Germany and permanent member France. This practice also angered then UN Secretary-General Kofi Annan, who, together with representatives of more than 70 countries, fiercely criticized Security Council Resolution 1487. Annan knew that opposition was ineffective, and in the end he had to express regretfully that he hoped this would not become a routine. Kofi Annan said. "If it does, I fear that the international community will interpret it as a sign that the UN Security Council is even willing to grant immunity from prosecution or investigation by the International Criminal Court to countries that cooperate with the Security Council or those who support them", a view that has been accepted by other countries.

On August 1, 2003, the Security Council adopted Resolution 1497. Resolution 1497 provides that: If a transnational peacekeeping force or a United Nations peacekeeping force is accused of any act or wrongdoing arising out of or in connection with a peacekeeping force in Libya, the Participant is under the exclusive jurisdiction of the State, and the ICC shall decide whether a current or former official or staff member of a participating state is participating in the RS, unless that participating State expressly waives such exclusive jurisdiction. We could conclude that if a non-party state to the RS or its persons committed crimes stipulated in the RS who serves in the transnational or UN peacekeeping action, during this period, unless the non-state party clearly declare to give up the exclusive jurisdiction of his/her own state, they are free of jurisdiction of the ICC. Resolutions 1422 and 1487 are based on Article 16 of the RS. Neither resolution can permanently exclude the Court's jurisdiction over UN forces sent by non-States Parties. They can only postpone the Court's jurisdiction. On the contrary, Resolution 1497 is silent on Article 16. Therefore, rather than deferring

the Court's jurisdiction under Article 16, it excludes it altogether. This is mainly because the resolution contains neither a time limit nor an extension clause. This means that although Resolution 1487 expired in June 2004, Resolution 1497 was not affected and remained in force until the Security Council adopted another resolution terminating its effectiveness. On May 19, 2004, the US submitted a draft resolution to the UNSC another time, in this bill, the United States strives to obtain exclusive jurisdiction for its military personnel or citizens, so that active or retired military personnel participating in the maintenance of forces will be exempted from prosecution and investigation by the International Criminal Court. If the UN Security Council resolution is approved, then UN Security Council Resolution 1487 will be extended for 12 months. However, due to various political reasons, the agenda originally scheduled for voting on May 21 was postponed indefinitely. These reasons were mainly due to the prisoner abuse incident carried out by the United States in Abu Ghraib Prison in Iraq [111, p. 195]. The United States was worried that this incident would affect its international image and thus prevent the United States from getting enough support to ensure that Resolution 1487 was passed by the Security Council [111, p. 210]. Because of these reasons, the America finally decided not to longer the period of the Resolution 1487. The final result was that the United States did not continue to insist on the request to extend Resolution 1487. However, due to various political reasons, although the United States withdrew its application, the exclusive jurisdiction enjoyed by the United States did not disappear [111, p. 196]. On the day the decision to withdraw the draft resolution was made, US State Department spokesman Richard Boucher expressed the US position: We believe that the ICC's jurisdiction cannot be based on jurisdiction over non-RS nationals and that, therefore, Americans and other non-RS nationals participating in maintenance operations of UN peacekeepers need to be protected from being unjustly prosecuted for acts that they may have committed while participating in these peacekeeping operations [111, p.196]. On March 23, 2005, France first submitted a draft resolution to the Security Council, which advocated that the situation in Darfur, Sudan, be handed over to the International Criminal Court, which would try the war crimes and crimes against humanity in Darfur. However, this proposal was strongly opposed by the United States, which was afraid that its citizens would be subject to the jurisdiction of the International Criminal Court, so it advocated taking another path, namely, setting up a special criminal court in Sudan. However, such as Britain and France and other countries with the same will insisted on transferring these suspects to the ICC. In order to ensure the US not to veto for against it, the rest members of the UNSC sacrificed a lot and made huge concessions. On March 31, 2005, the UN Security Council adopted Resolution 1593, which decided to submit the situation in Darfur, Sudan to the jurisdiction of the International Criminal Court. However, in the sixth paragraph of the resolution, the United States' ambition to seek exclusive jurisdiction was clearly revealed. For example, in the sixth paragraph, the United States asked the Security Council to limit the jurisdiction of the International Criminal Court to Sudanese nationals, and those non-contracting countries or nationals of contracting countries who are peacekeeping forces, if they do not give up their country's exclusive jurisdiction, then the International Criminal Court shall not exercise jurisdiction over the acts of these personnel. The fact is that no one who enjoys the privilege granted by

the resolution has given up this privilege. This paragraph provoked intense debate in the UNSC. Compared to Resolutions 1422, 1487 and 1497, the US's undermining of the RS and limitation of the jurisdiction of the ICC and national courts through Resolution 1593 has reached its summit. Although Resolution 1593 to some extent complies with Article 16 of the RS, paragraph 6 of the resolution has absolutely nothing to do with Article 16 of the Statute. In addition, according to the paragraph 6 of that resolution, it restricts the ICC's jurisdiction only to Sudanese as well as the state parties to RS, at the same time it excludes the non-state parties nationals from the jurisdiction of the ICC, we could conclude that it shows definitely double standard to different nationals of the citizens. Furthermore, that provisions on the one hand deprives of the jurisdiction of the ICC over the nationals of the sending state, but also deprives other countries other than the sending state that have jurisdiction over the case. Judging from paragraph 6, the first case submitted by the Security Council has dragged the ICC into a complex vortex of international politics, and the ghost of the US undermining the independence and judicial authority of the ICC will not be dispelled for a long time. Since then, the US government's attempts to seek immunity from the ICC's jurisdiction for its servicemen and personnel have not ceased, as the US continues to enter into bilateral treaties to exclude the ICC's jurisdiction over its nationals.

In summary, the measures taken by the US under Articles 98 and 16 undermine the integrity of the Court, diminish its universality, and limit its capacity. The US's confrontation with the Court was based more on political than legal reasons [112, p. 127]. The US has always chosen international law for its own benefit. It takes what is beneficial to itself and discards what is not. The motivation for withdrawing from the RS is the same as that for withdrawing from the Anti-Ballistic Missile Treaty and the Kyoto Protocol, which is to maintain its hegemonic position and interests in dominating everything in the world. The US's confrontation with the Court casts a heavy shadow on the Court's development prospects. In fact, the ICC needs the US. If the US can join the Court, it will undoubtedly be beneficial to the Court. First, it can prevent certain superpowers from taking a series of extreme actions to safeguard their own interests, for example, seeking immunity for their own citizens, or prevent superpowers from obstructing the International Criminal Court from taking effective action, thereby hindering the International Criminal Court's judicial action to exercise jurisdiction or prosecute international crimes. Secondly, it will help encourage non-signatory states influenced by the US to join the Court, thereby enhancing the universality of the Court. Finally, it is conducive to enhancing the authority of the Court. Because the US has promoted or supported the establishment of two military tribunals, two hybrid tribunals, the Sierra Leone Court and the East Timor Court, it has expertise and practical experience in trials before the ICC. If the US can join the Court, it will to some extent improve the quality of the Court's trials, thereby enhancing the Court's authority.

2.5.2 China's refusal to join the ICC

China also voted against the RS, marking the first time that China has voted

against a global international treaty that it helped negotiate. It was not the Chinese government's original intention not to join the RS. China participated in the entire process of formulating the RS and has always supported the establishment of an independent, impartial, effective and universal Court. The head of the Chinese delegation, Wang Guangya, spoke at the diplomatic conference on the establishment of the ICC: "It is a long-standing concept and ideal of the international community to establish the ICC, and it is also a great step for the international community to further and strengthen the cooperation to curb the international crimes which shocks the conscious of the international community." "The Chinese government, like other governments, supports the establishment of the ICC. The Chinese government believes that with the progress of the international community and the gradual development of international law, the process of rule of law in the international community will be further strengthened, the international judicial system will be further improved, and international peace and security will be further maintained. The Chinese government is willing to work with governments around the world to continue working towards this lofty goal."[72, p.2] The reason why the Chinese government voted against the RS after making constructive contributions to the drafting of the RS was that the government's concerns about some provisions of the RS were not taken into account, and some provisions of the Statute were inconsistent with the current domestic political situation and legislation[113, p.65-68].

China's reasons for refusing to join the ICC are mainly as follows [114, p.253-254]:

First, the delegation from China didn't accept the advocation on universal jurisdiction of the ICC which reflected in the provisions of the RS[72, p.2]. From perspective of the Chinese delegation, the jurisdiction of the ICC stipulated in the RS not only covers the states who are voluntary to accept the jurisdiction of the ICC, but the states who are not state party to RS even without their consent. Therefore, this "contradicts the principle of state sovereignty and is incompatible with the provisions of the VCLT".

Second, the Chinese delegation "resolutely maintained" the inclusion of war crimes in non-international armed conflicts under the jurisdiction of the ICC. As the Chinese delegation saw it at that time, if a country got well-built legal system in its domestic territory, it was of capacity to prosecute and punish the war criminals by itself in the domestic armed conflicts. In addition, China also believes that the provisions and definitions of war crimes in internal armed conflicts in the RS "go beyond customary international law and even beyond the provisions of Additional Protocol II to the Geneva Conventions". China argues that countries should have the "right to choose" to accept the ICC's jurisdiction over this crime.

Third, the Chinese delegation has reservations on the stipulations of the RS around the role – the UNSC – it plays. In the opinion of the Chinese delegation, "the crime of aggression is a state act, which does not yet have a legal definition." To prevent political abuse of prosecution, "the UNSC must first determine the existence of an act of aggression before imposing individual criminal responsibility. This is also stipulated in Article 39 of the UN Charter. However, the RS has not made any clear provision in this regard." Moreover, the Chinese delegation also believes that the

provision in the RS that the UNSC may request the ICC to suspend its operations within a period of 12 months in order to carry out its peacekeeping functions and international security is clearly not conducive to the UNSC performing the functions conferred by the Charter of the United Nations.

Fourth, the Chinese delegation has "serious reservations" about the prosecutor's power of investigation as stipulated in the RS. In the view of the Chinese delegation, the provision in the RS regarding the prosecutor's right to conduct independent investigations "not only empowers individuals, non-governmental organizations, and various institutions to accuse state civil servants and military personnel, but also makes prosecutors and judges, due to their excessive power, potentially become tools for interfering in a country's internal affairs". In addition, the Chinese delegation also believes that "the prosecutor's right to conduct independent investigations will not only expose the Court to too many accusations from individuals or non-governmental organizations, preventing it from concentrating human or material resources to deal with the most serious crimes in the world, but will also force prosecutors to make political decisions on whether to investigate and prosecute in the face of a large number of accusations, forcing them to be caught up in the whirlpool of politics, making it impossible for them to be truly independent and impartial".

Fifth, at that time, the Chinese delegation also held a strong "reservation" attitude towards the definition of "crimes against humanity" stipulated in the Treaty. Because in China's view, the condition for the occurrence of crimes against humanity in customary international law is wartime, but the Rome Statute violated the provisions of customary international law and deleted this element of crimes against humanity, which is unacceptable to China. Because, "from the current written law, both the Statutes of the Nuremberg and the ICTY clearly provide that this kind of crime can be applied only during wartime. However, the RS has deleted this important wartime criterion for defining crimes against humanity." The Chinese delegation also holds this opinion - the definition of "crimes against humanity" and its specific crimes stipulated in RS "goes far beyond customary law and existing statutory law. Many of the listed acts are actually part of human rights law." However, "what the international community wants to establish is not a human rights Court, but a criminal Court to punish the most serious crimes in the world. This adds human rights content and deviates from the real purpose of establishing the ICC."

On the surface, China and the US have very similar reasons for opposing the RS, because both oppose the jurisdiction clauses, which are intertwined and inseparable. If you oppose any one of them, you cannot accept the rest, and if you accept any one of them, you must accept the rest. However, China's opposition to the RS has been cautious in its wording and restrained in its actions. The real reason why China opposes the RS is the influence of domestic factors. From the perspective of foreign relations, China does not seek hegemony, or wants to conduct aggression and expansion, because China always pursues and implement a foreign policy of peaceful coexistence, which is quite different from the US's anti-RS motivation based on maintaining hegemony. China did not join the RS because some domestic affairs had not yet been resolved and the timing was not right. Therefore, even if China will not accept the RS in the near future, it is likely to accept it when the time is ripe in the future and will not always be

among the minority of opponents. China's previous attitude and practice towards international conventions can also prove this inference. Most importantly, the Chinese government has hope for the ICC. Although China voted against the passage of RS, but after the implementation of the RS and the ICC was established based on it, the Chinese government still participated in the ASP as an observer. We could draw a conclusion from this circumstance that the Chinese government has the desire to continue to improve the RS and its related documents, and it also further proves that the Chinese government has the possibility of joining the Court when the time comes. In clarifying China's position on UN reform, the Chinese government stated: "China supports the establishment of an independent, impartial, effective and universal ICC to punish the most serious international crimes. Since some shortcomings of the RS of the ICC may affect the fair and effective exercise of the Court's functions, China has not yet joined. However, there is still hope that the Court will win the confidence of non-States Parties and win general acceptance from the international community through its practical work" [115, p.187]. China has shown great flexibility and positivity in the Preparatory Committee of the International Criminal Court, and adopted a consensus on some of the elements of anti-humanity that raised serious concerns at the Rome Conference [116, p.561].

If China, as the largest developing country, could join the Court, it would encourage other third world countries, especially Asian countries, that have not yet joined the Court to join the Court, which would undoubtedly greatly expand the universality of the Court; If China becomes a member state to the court, it will without any doubt strengthen the efforts of the international community to curb serious international crimes and greatly contribute to construction of a more harmonious international community; If China becomes a member state to the court, it also could contribute a lot to prevention on certain crimes which may threaten China's security. To be honest, for right now, it is a safe option for China to choose not to be member state to RS. "Observe calmly, stand firm, deal with things calmly, and bide one's time." This is not only a reflection of the traditional Chinese way of thinking, but also a summary of the Chinese government's strategy for handling foreign affairs.

2.6 Execution dilemma: Arrest warrants are difficult to execute, resulting in the court's jurisdiction being vacated

2.6.1 The statute lacks mandatory provisions

The Court has been in operation for more than 20 years since the RS came into force. With the increasing number of cases accepted, the problem of obstruction of case execution has become increasingly apparent. Considering that the Statute does not allow *trials in absentia*, the execution of an arrest warrant is undoubtedly the most important of all execution issues. This is because if the arrest warrant cannot be executed, then the Court proceedings can only end with the "issuance of the arrest warrant", which objectively blocks the litigation process; And if the arrest warrant is executed, then the subsequent assistance in the investigation and the transfer of

information are mostly just a matter of time. Although the Court has no statute of limitations and theoretically will not block the litigation process, the Prosecutor Ocampo – the first chief prosecutor of the ICC - declared in his report on the Ninth ASP conference: "The arrest of criminal suspects is one of the most critical factors in improving the efficiency of the operation of the Statute and achieving its crime prevention function" [117, p. 5]. Judge Kosh also noted that without an arrest, there is no trial, victims are denied access to justice, and potential criminals may commit new crimes in the hope of not being punished. However, because of Kenya's withdrawal from the ICC, what the difficulty the prosecutor faced was that he was forced to withdraw the case, for the reason that the ICC lacked sufficient evidences to base the prosecution due to lack of executive organizations, which once again put the issue of the Court's enforcement at the forefront of international public opinion. We should take these two thing into consideration: first, failure to comply with the court's request has a negative impact on the court's ability to perform its duties which was mentioned in the solution of the ASP to the ICC on strengthening the relations between ASP and the ICC; second, failure to effectively operate its warrant of arrest also do harms to the goal demonstrated in the preamble of the RS – measures should be taken to strengthen the cooperation at national level to end the history of impunity. Due to those thinking, it is urgent for us international criminal scholars to find it out what kind of problems encountered by the ICC in its execution of the Court's arrest warrants and explore the factors that restrict the Court from executing its arrest warrants.

As pointed out above, the ICC has no police or army, and does not have its own enforcement agencies. The assistance of states and the UNSC plays a key role in the operation of its "indirect enforcement model". In the case of state implementation, Article 87(5) and 87(7) of the RS stipulates that the non-execution case may be submitted to the ASP or the UNSC if the situation is referred by the UNSC. If the first situation happened, as stipulated in article 112(2) of the Statute, the ASP shall consider any issue of non-cooperation. Accordingly, the Tenth Conference of States Parties adopted the "Conference Measures Related to Non-cooperation", which stipulates specific response measures in the event of non-cooperation, including formal and informal response measures. Formal response measures include: convening an emergency presidium meeting to discuss further measures that can be taken. The President of the General Assembly presented an open letter representing the decision of the emergency Bureau meeting, reminding the countries concerned of their obligation to cooperate and requesting a response within two weeks. Copies of the open letter are also provided to other States Parties, encouraging them to negotiate with the requested State through appropriate bilateral negotiations. If the two-week response deadline is exceeded, the Bureau will convene an ambassadorial meeting and invite representatives of the relevant country to attend. It will prepare a report on the recommendations on future measures to be taken by the country and submit it to the next session of the Conference of the States Parties for consideration. The report will be discussed in the context of the cooperation agenda for the next or ongoing session of the General Assembly. If the Bureau deems it necessary, it may hire professionals to draft specific proposals on this issue. Informal response measures include: the Bureau selects four contact persons to assist the President of the General Assembly in

mediation after balancing geographical representation; the President of the General Assembly should take the initiative to determine whether there is a situation of non-cooperation and inform the Bureau; when mediation measures are initiated, the President of the General Assembly will appropriately contact the officials of the requested country and other institutions in an informal manner to promote cooperation. Inform the relevant countries of the possibility of cooperation under Article 97. At the same time, other countries can also be asked for help. The Chairman of the Conference shall report the mediation matters and progress to the Presidium in a timely manner. Once the report is made to the Bureau, the chairman of the meeting follows up the decisions of the ministerial meeting.

Although the Measures of the General Assembly relating to non-cooperation do provide for a range of measures for non-implementation, in contrast to the provisions of the Statute. However, in terms of nature, these measures are still communication and mediation measures for the President of the General Assembly or the Bureau to further promote implementation, and are basically non-punitive. Therefore, this measure cannot play a role in restraining or even motivating countries that have the obligation to implement but are unwilling to do so. This can be concluded from the many actual cases in which the Court's non-enforcement rulings and notices were rejected or not responded to. It can be seen that the legal deterrent effect of these specific measures against non-enforcement behavior is not strong in itself.

In another case, the UN Security Council will first judge the current situation based on the power granted by Chapter VII of the UN Charter, that is, whether the impact of the situation threatens the peace and security of the international community, and then make a decision on whether to punish the country where the behavior occurred based on this judgment. It should be pointed out that the resolution of the UN Security Council is not a purely judicial resolution, but a political resolution made through various considerations. That is, "the purpose of the Security Council's power to impose sanctions is to maintain and preserve international peace and security" [23, p. 11]. The powers of the Security Council are not strictly executive powers, that is, they are not empowered to enforce court decisions. Rather, the power to punish and enforce in the event of non-compliance [23, p. 17]. Given the complexity of the actual situation, the Security Council has considerable discretion in making such decisions and how to make them, so its legal deterrent effect is unclear. In the Sudan situation, the Court submitted eight decisions to the Security Council between May 2010 and March 2015 on non-cooperation in the execution of the arrest warrant for Bashir, involving the Sudanese authorities, Chad, the DRC, Kenya, Malawi and Djibouti. However, the UNSC did not take any coercive measures to force the above-mentioned countries to push for the arrest of Bashir.

2.6.2 The subject structure and obedience culture of international society and domestic society are different

The enforcement restrictions in international criminal rule of law are essentially determined by the differences between the international community and the domestic

society in terms of subject structure and obedience culture.

First, the main structure of the international community constrains the international criminal enforcement system. There is a difference between international society and domestic society. As pointed out above, the state is the basic unit of international society and thus the main subject of international law. The subject of ICL is the individual. Therefore, the international legal system is bound to be incompletely applicable to the international criminal legal system. A typical example is that international law regulates the behavior of states and international organizations. For individuals who lack a direct enforcement system to resort to, it is difficult for international law to regulate their enforcement mechanisms. This is also the reason why the enforcement mechanisms of most international criminal institutions are comprehensive systems that do not have comprehensive and effective direct enforcement capabilities, but instead rely on an "indirect enforcement model". And because "the underlying premise of the obligation of the indirect enforcement system to punish international crimes is that the international community has common values and supports these values by enforcing the rules that embody these imposed values, thus giving the international community common interests" [23, p. 28]. Considering the reality that the indirect enforcement model of international criminal institutions does not work well, it seems reasonable to question the opposite: whether there are common values in the international community. International lawyer Louis Henkin once pointed out: "The theory of state action reminds us that behind every state are specific interests and narrow institutions" [43, p.109]. "We want to emphasize that the self-centeredness and selfishness of states are the hallmarks of the international state system... Selfishness - acting in the national interest - may sometimes have to compromise with the competing interests of other states, but even for some common good, the national interest will not be easily sacrificed. States sometimes recognize that their national interests lie in the common good, but even in the commons (as in the law of the sea), the emphasis is on competing interests of others, with few states championing the commons themselves. Occasional references to humans are merely rhetorical and have no significant normative implications. There is little social element in the international system, and certainly no community or support for any form of utilitarianism - the greatest good for the greatest number, the greatest good for humanity, or even the greatest happiness for the greatest number. There is no respect for democracy, or for the will and interests of the majority of nations (or of humanity) in this system" [43, p. 157-158]. Even those ICL scholars who advocate the use of international criminal rule of law to restrain and limit the atrocities of states that damage and violate human rights, thereby protecting basic human rights, frankly admit that there is a tension between the values and expectations commonly recognized by different people and national political interests, and that ICL rules must develop under this tension. Although immortal human values are recognized by many people, they are far from strong enough because they cannot defeat the state. This theory is most evident in the characteristics of the enforcement mechanism of ICL [23, p.26]. Some scholars argue that the increase in international cooperation has formed a network of interdependence among countries, which in turn has built mutual trust among countries. It makes countries believe, or at least accept, the fact that there are greater

gains to be gained from practicing multilateralism than from practicing unilateralism [23, p. 38]. The response to this criticism is that the new cooperative law represents a sea change, but it does not significantly detract from - but rather substantially reflects - the fundamentally national character of the system and its support for national values. Cooperation between countries is mainly for their own benefit, not for the benefit of the community or the benefit of individuals. International organizations promote cooperation between countries in technology, society and culture, and they will not make "supranational" decisions anywhere for the benefit of countries or the benefit of all mankind [43, p. 158-159]. In response to this situation, some scholars have come to the following conclusion: For all mankind, the earth is not too small, but perhaps too large to be managed in a unified way. Distance leads to unfamiliarity and differences, so race, ethnicity and country are the real masters. The earth is a whole, but nation-states have fragmented it. At present, national interests are supreme, and international common interests can only be taken into account by countries [118, p. 590]. It can be seen that the particularity of cases involving international criminal justice determines the national interests that a country is concerned about when deciding whether to try such international crimes and send punishment on criminal suspects, more precisely, in the eyes of sovereign states, national sovereign interests - such as domestic peace and stability, national security, or domestic political trends - are the core interests that sovereign states care about. However, the International Criminal Court is not concerned with these sovereign interests.

What the International Criminal Court is concerned about is arresting and prosecuting criminal suspects, ensuring that criminals are punished and thus ending impunity in the international community. In an abstract sense, it may not be controversial to regard this goal as one of the common values of the international community. However, when the subject of the trial involves a government official or even the current president of a country, based on the particularity of the identity of the subject and the representativeness of his or her behavior, the crime being prosecuted or tried may largely reflect the sovereign will of the country to which he or she belongs. Namely, while preventing and punishing the most serious international crimes is important, this value goal cannot override the nation-state's political preferences for national security and stability. Moreover, states tailor their cooperative behavior with the Courts according to their own political preferences. For example, the situations occurred in Sudan and Libya which was referred to the ICC by the UNSC, but both of the two countries at that time were not party state to the RS. It should be noted that both situations in their thinking and practices in dealing with the Court's enforcement requirements are completely different. In the case of Sudan, the Sudanese authorities have consistently refused to recognize the legitimacy of the ICC's jurisdiction and have strongly refused to execute the arrest warrant against Bashir. In contrast, the Libyan Transitional Council recognized the jurisdiction of the Court and arrested Saif very early on. However, after its attempts to raise admissibility questions and exclude the Court's jurisdiction failed, Libya forcibly tried Saif in the country instead of handing him over to the Court. Therefore, it can be said that whenever a sovereign state has to make a choice between its sovereign interests and the obligation to cooperate conferred by the International Criminal Court, in an international community based on

sovereignty, sovereignty undoubtedly has a stronger appeal than the obligations conferred by the statute.

Secondly, the impact of the culture of obedience among countries in the international community on acceptance of judicial jurisdiction. The representative system practiced in the national society has legitimately represented the will of all citizens, even if most citizens do not participate in decision-making. However, in the international community, the prerequisite for the law to take effect on countries, in addition to mandatory law and customary international law, must be the consent of each country. There is no representative system in the international community [43, p. 69]. This is also the institutional reason why non-State Parties claim that the Court has no jurisdiction. At the same time, the power of coordination in the international system is not always effective. Sometimes, it is clear that all the forces combined are not enough to stop the violation, otherwise there would be no violation of international law. External and internal motivations sometimes give way to the national interest in pursuing a particular violation. The culture of obedience between nations is not yet as strong as it is within stable domestic societies. It is not maintained by a police force that is nurtured by that culture, nor is it generally supported by authoritative judicial decisions that find that a violation has occurred, which would require respect for that culture [43, p. 69]. Just as the ICC's arrest warrant for Bashir was strongly opposed by the African Union and Arab League member states, there are also serious differences within the Security Council on whether he should be tried. These factors pose a serious threat to the effective implementation of collective actions and the enforcement of Court arrest warrants.

Since the RS explicitly prohibits trials in absentia, effective arrest of the accused is a prerequisite for individual prosecution. However, due to the main structure of the international community and the culture of obedience, it is difficult for the ICC to issue an arrest warrant, which has become an important practical reason that restricts the ICC from exercising its jurisdiction.

3 METHODOLOGICAL DIMENSION: DUILDING AN INTERNATIONAL CRIMINAL VALUE SYSTEM TO PROMOTE INTERNATIONAL CRIMINAL RULE OF LAW

3.1 The topic of international criminal value system is proposed

3.1.1 The Knowledge Form and Value Theory of ICL

As the first permanent international criminal judicial institution in world history, the ICC was different from previous international judicial institutions from the beginning of its design. Only sovereign states could become parties to the court's proceedings, and the defendants could only be individuals who had committed international crimes. The establishment of the ICC marks an important step forward for mankind towards international rule of law and is of great significance for regulating the sovereign behavior of states, safeguarding the common well-being of mankind and protecting human rights. However, the international community will remain a society based on sovereign states for the foreseeable future. From the perspective of political realism, although international common interests are important, they cannot transcend a country's political preferences for its sovereign interests. Moreover, the RS and the ICC itself have structural flaws, which makes the effective operation of the ICC's jurisdiction difficult in real society. Although the Court's jurisdiction is limited, it still has tension with the real international community due to its characteristics of "high obligation, high authorization and high precision" [119, p. 405]. Moreover, whether it is personal jurisdiction, territorial jurisdiction, protective jurisdiction or universal jurisdiction, the ICC's goal of prosecuting individuals to safeguard the overall international interest is often difficult to break through sovereignty restrictions. Even when the ICC exercises jurisdiction over international crimes through various legal interpretation techniques, sovereign states often question the ICC's jurisdiction and its legitimacy because of limitation on its sovereign interests. Ultimately, there is only one reason, that is, the common interests existing in the international community are constituted of single national interest. The fundamental principle of state sovereignty is still the basic principle of international law and even ICL. Given human rights protection is one piece of fundamental principle, the principle of human rights protection is not superior to the principle of sovereignty. In this logic, though so many ICL scholars who support the use of international criminal rule of law to restrain and limit state atrocities and protect human rights have to admit that "there is a tension between the values and expectations commonly recognized by different people and the political interests of the state, and ICL rules must develop under this tension. The immortality of human values is recognized by many, but it is far from being strong enough, because it cannot defeat the state" [23, p. 26]. Briefly speaking, the basic reason why the jurisdiction of the ICC is difficult to achieve is that – the ideal - rule of international law and safeguarding the common interests of the international community – hasn't gained the universal consent around the world.

The most direct way to overcome the theoretical and practical difficulties encountered by the ICC in exercising its jurisdiction is to amend the legislation.

However, the amendment procedure of the RS is extremely cumbersome and difficult, and reconciling the conflicts of interest among the numerous States Parties is a huge project that not only requires huge amounts of legal resources but also makes it difficult to achieve a fundamental solution. This study believes that the fundamental reason that restricts the effective realization of the jurisdiction of the ICC is that "international criminal rule of law and safeguarding international common interests" have not yet gained "universal consent" around the international community. The way to solve this fundamental problem is to establish the concept of rule of international criminal law around the world. Only until the international community recognize and accept the ideal of rule of international criminal law around the world, will the ICC's jurisdiction over international crimes and prosecution of criminals inevitably be effectively carried out with the assistance of the international community. At present, the international community's discussion on rule of international criminal law is still in the state of infancy. A prerequisite for the establishment of international criminal law is the revival of the ICL discipline and the universal recognition of its value, given that the academic community has yet to establish an ICL value system, the initial establishment of an international criminal value system has become the most fundamental and important task in establishing international criminal rule of law. This study proposes the topic of the international criminal value system and discusses the "form, proposition and position" of the international criminal value system, attempting to preliminarily establish an international criminal axiology system to promote the development of ICL. As scholars in international criminal law field, we should be autonomous in our stance and fulfill our mission.

Axiology always seems to carry the flavor of "reflection", "structure", "cleansing" or "enlightenment". Generally speaking, the proposal and construction of axiology is always to answer the question "where are we going?", indicating dissatisfaction with the status quo [120, p. 604]. It is almost an indisputable fact that ICL - an important and emerging department of public international law - seriously affects and challenges traditional principles of international law [121, p. 67]. Even so, the axiology system of ICL is not very mature either internationally or abroad. The West is only relatively mature, but there are no monographs published. Western scholars have awareness of value theory, but they have not yet formed a system, let alone an authoritative theory; However, the Chinese scientific community is still limited to the basic study of factology and norms, and the consciousness of axiology is not yet strong. At present, in the Western academic community, the relationship among ICL and globalization, public international order, the reform of the UN, human rights, as well as the theory of sovereignty has become a core issue in the axiology theory of ICL and is developing deepen and deepen. In China, however, it seems that only the core issues of the value theory of ICL are being developed in depth, and it seems that only the relationship between ICL and human rights has a clear value tendency, and its theoretical advancement is also cautious and slow [122, p. 99]. Professor Chen Xingliang has made an accurate interpretation of the relationship between criminal legal terminology and philosophy of criminal law: "rule of criminal law to some extent is a term I created. I use this term to denote the rule of law in the field of criminal law"; "Criminal rule of law itself is not a proposition of normative jurisprudence, but a

question of criminal law philosophy; It does not explore the value of criminal law norms; it is not an analysis of what is, but an ideal judgment, studying criminal law on top of criminal law. Criminal rule of law is not only the result of logical deduction, but also the result of historical and realistic analysis" [123, p. 2]. The so-called criminal law culture of a country ruled by law has not been extended to the criminal law culture of a world ruled by law. Today, the so-called international criminal rule of law is nothing more than an interpretation of the criminal law culture of a world ruled by law, that is, a philosophical, value and normative judgment of ICL, and a study of ICL above the ICL. Of course, as a knowledge system or way of thinking, the international criminal value system has its own specific attributes and is not completely equivalent to the study of international criminal rule of law itself.

The international community is currently in the context of major changes unseen in a century. The Russia-Ukraine conflict, the Israel-Palestine conflict and other issues have shown that the traditional international legal order is undergoing transformation. In short, the international legal order is in the process of transitioning from the traditional era of international law dominated by Europe and the United States to a more fair and equal era of international law. The era of transition seems to require more philosophical and rational thinking; the era of transition that calls for and yearns for the rule of law requires more philosophical thinking on the rule of law. Almost all fields of humanities and social sciences are experiencing this situation, and law and departmental legal studies are no exception. As far as the philosophizing of departmental law is concerned, we can already hear quite reassuring academic voices such as civil rule of law or international civil rule of law. Market economy and freedom of contract are the civil basis of a society ruled by law. Similarly, the free trade order between countries is also the civil basis of international rule of law. However, it should be acknowledged that China's criminal law philosophy was one step ahead after all, and was the first discipline to show the demand and trend of philosophizing. So, how did ICL become philosophical?

There are many forms of knowledge. Factology, normativity and value theory are the three basic forms of jurisprudence [124, p. 175]. The first two explore what is, while the latter explores what should be. Legal sociology, jurisprudence and legal philosophy form a certain hierarchy. Value jurisprudence is a kind of legal philosophy, the highest level of legal knowledge, and marks the highest level of a nation's perception and cognition of law. Professor Chen Xingliang believes that criminal law philosophy is an exploration of the value content of criminal law and an inquiry into the origin and foundation of criminal law, and is therefore critical of criminal law norms; the value analysis method is critical and reflective, and is a metaphysical study of law. It transcends positive law and becomes a critical force on positive law [125, p. 447]. In fact, Professor Chu Huaizhi has also made insightful discussions on this issue a long time ago, among which "relational criminal law" and "criminal integration thinking" are among his most famous ideas. He believes that "criminal law survives in relationships". As far as the external relations of criminal law are concerned, the so-called "above criminal law" refers to "political structure, ideology and criminal law" [125, p. 454]. This insight is also highly affirmed by Professor Chen Xingliang, "studying law above the law is value jurisprudence, that is, the philosophy of criminal

law" [126, p. 3]. The creation of Chinese criminal law philosophy is inseparable from the efforts of a group of scholars. Professor Chen Xingliang also finally completed several leaps in the methods and forms of criminal law. Among them, the main leap of criminal law philosophy itself is the leap from "philosophical methodology" to "philosophical value theory". "Philosophy of Criminal Law" develops through exploration, expands through reform, advances through correction, and improves through deepening. As Professor Chen Xingliang said, the main function of criminal law philosophy "is more reflective and destructive, and is a cleansing of the academic foundation, while the constructive mission still depends on the normative studies of criminal law to be completed". He has also begun to consciously "return" to the "precise, refined, and detailed" normative jurisprudence [127, p. 14]. But there is no doubt that a good normative legal system relies on deep reflection and clarification of criminal law philosophy; without the latter, the former cannot achieve rational consciousness. Therefore, what Professor Chen Xingliang calls a return now is only an epistemological return, and is by no means a submissive return to the traditional system and position. In other words, this is a reconstruction after reflection, criticism, destruction and cleansing. The international criminal value system has the same properties, but ICL has not yet undergone such an in-depth value debate, let alone reconstruction at the moment. Value positions are erratic and it is difficult for the normative system to achieve harmony, unity and relative durability.

We may need to interpret and identify the basic meanings and contexts of the keywords. Professor Chen Xingliang once discussed the philosophical issues of criminal law under the topic of the philosophize of departmental law, and also involved legal philosophy and criminal law philosophy in the investigation of the correspondence between the knowledge form of law and legal methodology. In the author's view, criminal law philosophy is an organic part of legal philosophy, and the relationship is interactive. So, what is legal philosophy? The significance of asking this question is to understand what issues criminal law or ICL, as a form of philosophy or value theory, can study. According to the authoritative interpretation raised by Walker – he believed that legal philosophy should be concerned with the following elements: first, the essence and purposes of laws; second, the relationship between laws and religion, morality and politics; third, what values the law emphasizes or promotes; fourth, the need for punishment; fifth, why people should obey the law as well as the meaning of terms such as law, duty, and responsibility. As a branch of philosophy, countless great philosophers have devoted themselves to this field at the same time [128, p. 869]. As such, legal philosophy is primarily a form of philosophy that primarily requires philosophical knowledge, thought, and perspective. Furthermore, Walker defined philosophical jurisprudence as "a general term for legal theory and law, coined by philosophers, if not exclusively, secondarily by jurists," that "emphasizes the ideals of understanding, creating, and evaluating the law, and the ideals that guide the analysis and legislative standards of law"; Among them, "the most famous and unique theory is natural law theory", and also "floating idealism", "pragmatism", "activism", "Marxist jurisprudence", etc., also belong to "philosophical jurisprudence" [128, p. 869]. It seems that although both legal philosophy and philosophical jurisprudence are investigations into the nature, purpose or ideal of law, the differences between the two

are also very obvious. The former is almost a pure theory of value, while the latter is not necessarily so - except for the natural theory, other major theories belong to philosophical jurisprudence. Professor Chen Xingliang's philosophy of criminal law belongs to the category of legal philosophy. Therefore, we need to remain cautious when discussing the philosophical issues of law or departmental law. In other words, it is not only the philosophical speculation of natural law that can be regarded as the philosophizing of departmental law, but it is certain that the thinking of legal philosophy or criminal law philosophy is mainly a kind of value speculation.

At present, the knowledge form of ICL generally belongs to factualism and *nomo*, and a leap in knowledge form may be happening. The so-called international criminal value system is not the philosophy of ICL, but a value speculation on ICL. It can be said to be an international extension of criminal law philosophy, or a criminalization expansion of international law philosophy. Whether it is extension or expansion, the things extended or expanded are either internationalized or criminalized. In the continental legal system, talking about disciplines requires system construction. System is our preference. Self-contained system is our unremitting pursuit, and system innovation is our highest ideal. In fact, in terms of ICL, the Bassiouni system has been abused and the Cassese system is being imitated. As there is no model to copy the international criminal value system, it is difficult to find a copy for the time being. It is not difficult to construct a system, but what is difficult is what problem to explain. In order to explain the problem as much as possible, we need to start with the main problem while keeping the system highly open.

The core propositions to be discussed in the following text are all key parts of the value theory of ICL, and all of them are highly controversial. Each issue can be written separately or even discussed. Here we can only give propositions and briefly explain our position. At present, the main mission of the international criminal value system is to destroy the old world and look forward to a new world. It is temporarily unable to complete the mission of building a new world. Therefore, how it looks forward to the new world is not the key issue. The key issue is whether its destruction of the old world is justified. Building a new world should and can only be accomplished by a brand new ICL normative science, which will be a new return.

3.1.2 Analysis of the Current International Criminal Value System

This issue mainly examines ontological issues of the international criminal value system, such as its knowledge form, methodology, argument orientation, purpose and mission, and is related to the autonomy and scientific nature of the international criminal value system itself. It should be admitted that the current ICL is still mainly a study of facts and norms. The most serious problem is the confusion of knowledge forms and the inability to consciously distinguish between reality and ought, facts, norms and values, which leads to the confusion of the knowledge system and unnecessary disputes in argument and rebuttal. History and reality are certainly the foundations of philosophy, but as we all know, value theory is mainly a science of what should be, which should have self-sufficient propositions and a minimum of

transcendence. The international criminal value system is only building a value theory platform to facilitate colleagues to think, which is not only a reminder and stimulation for the deepening of national self-awareness, but also a need for economic thinking. In addition, without a clear definition of knowledge forms, the development of disciplines is unlikely to go deep and prosper. The beginning, development, decline, decadence, revival, prosperity and return of the great criminal law and the great international law have provided us with sufficient experience and lessons. At present, there is no special discussion on the international criminal value system. The only related work is Mr. Bassiouni's thinking on international criminal policy and judicial philosophy in "Introduction to ICL". Of course, Professor Bassiouni's so-called philosophy and policy thinking on international criminal justice has provided us with more direct experience. Although Professor Bassiouni did not provide us with a standard sample of the international criminal value system, and he did not even directly propose the terminology of the international criminal value system, it is not difficult for us to collect his rich philosophical and policy propositions and positions in his works, which are extremely rare value theories in ICL works.

Regarding the ontological status of legal philosophy, Professor Bassiouni correctly points out: The writings of legal philosophers can be divided into general philosophical theory, legal philosophy as applied to specific branches of law, or a combination of general philosophical theory and theory as applied to a specially selected branch or branches of law. It is necessary to distinguish between philosophical theories and specific legal philosophical theories; specific legal philosophical theories cannot be automatically converted between branches of law. ICL has the characteristics of being in line with the creed and must shuttle across the boundaries of different legal departments: public international law and comparative criminal law are the two main boundaries, and jurisprudence, comparative procedural law, comparative military law and private international law cannot be ignored. This is also the difficulty of the international criminal value system. What then are the general characteristics of Professor Bassiouni's philosophy? He himself summarizes it quite clearly: The philosophy of international criminal justice plays a role in articulating specific values embedded in the historical experience of the international criminal justice system. This philosophy is complex from the outset, but can be relatively simple in practice. Its current status is complex because it encompasses several philosophical propositions that reflect different periods and cultures. However, the philosophy is also simplistic because it is nothing more than a transformation of the following core value goals: (1) prevention through strengthening social values, judicial institutions, and accountability; (2) strengthen peace through retributive and restorative justice, bringing perpetrators to justice and weakening victims' desire for revenge; (3) providing material and moral compensation to victims; (4) To record history and remember social reality. These above-mentioned values are reflected in various kind of legal philosophies. Only the international criminal justice is fair, can these goals be achieved. As for fairness, it also contains three philosophical propositions, namely, equality, liberty and personal dignity. So, what is justice? It is not needful for international criminal justice to demand for universal metaphysical consent to achieve fairness. On the one hand, fairness is broad in scope and corresponds to an extension

of the concept of metaphysical justice; on the other hand, fairness is also narrow enough within the metaphysical concept to avoid the conflict. For example, there is no need to decide whether justice is created by God or man-made or the product of force or the natural order, the moral basis of justice or social policy. Whether justice is created to satisfy individual needs or social needs, the purpose of justice is to achieve internal or social satisfaction of the individual, whether justice realizes or supports a certain form of government, or satisfies some socio-political or economic ideology, etc. It goes beyond these aforementioned ideals, but is not limited to any of them. Briefly speaking, it is a kind of philosophy of pragmatic, humane, utilitarian and process, which is aiming to modestly pursue specific values reflecting and demonstrating the broad consensus of domestic and international civil society. Globalization offered such a chance – this makes local crimes more conducive to transnational crimes and criminals committing international crimes, but it also poses some challenges to the theory of international criminal justice: human rights standards of justice are under threat. Human experience has shown that proper phase-out has never been detrimental to security, only reinforced authoritarianism. As the famous scholar Benjamin Franklin once said: "He who would give up the precious liberty to obtain a little security, will have neither liberty nor security" [23, p. 617].

It can be seen that Professor Bassiouni's philosophy is the philosophy of justice. In his view, it comes from four factors that determine the value and policy of international punishment. The first is the mutual interests of countries in cooperating to prevent and combat international and domestic crime; the second is the need for national sovereignty; the third is the promotion of human nature and humanitarian values; and the fourth is the need for world order. These factors reflect the different aspirations and needs of the international community and the international order, exacerbate the tension of conflicts in the fields of values and policies of ICL, resulting in making it very difficult to interpret the future impact of ICL and predict its evolution. A realistic conclusion is that ICL is particularly vulnerable to unexpected events and is more easily driven by facts, and therefore cannot be evaluated using traditional legal methods. The evolution of ICL has not been linear, consistent, harmonious or logical; rather, it has developed in fragments, possibly unrelated to each other, based on different empirical facts. Therefore, the historical evolution of ICL can be identified and evaluated from different perspectives, but a more appropriate approach is the functional approach, which analyzes the different functions of the direct and indirect models, as well as the common values and goals of preventing and combating international crime [23, p. 21]. This study argues that, as a "philosophy of complex beliefs", the theory of axiology of ICL is nothing more than a summary and submission to the historical and current situation of international criminal justice. It should have evolved along the philosophical path of "single-line creed", with the basis being the perfection of *jus cogens* crimes and the leap to the direct execution model. The main reason why we advocate the "single linearity" of philosophical creeds here is that the current "complex" creeds are shocking and undermine each other. If axiology theory can still be transcended to some extent, the denial of reality is the most fundamental transcendence - the nature of axiology theory does not focus on certification of rationality of reality, but on the negation and transcendence of contradictory reality.

Regarding the key issues of legal philosophy, Bassiouni once proposed and analyzed three philosophical propositions based on the Nuremberg Charter and other documents: First, is there a higher source of law that can override or revoke the positive law of states? Second, can international law override or revoke national law? Third, does the increasing codification of international law, especially when it includes moral or ethical content, allow for the existence of a legal principle that is different from the legal principle required by the positive law of states? The final conclusion is that pragmatism takes precedence [23, p. 89]. Strictly speaking, these cannot be regarded as purely philosophical issues. Four years later, Bassiouni believed that the international criminal justice system is a combination of a series of international institutions and national criminal justice systems, which are loosely connected with each other, and the issue of efficiency is crucial. In order to strengthen the institutional goal of punishing those who are responsible and ending impunity, it is necessary to establish jurisdictional principles to regulate institutional performance and strengthen overall collaboration capabilities. Therefore, strengthening responsibility is the primary philosophical topic; in order to achieve the goal of punishing those who are responsible, developing international cooperation is the most effective way. If similar procedures and substantive norms are applied to various institutions, it will not be difficult to achieve the intended goal. There is, of course, an assumption here: that national justice systems function effectively. But this is not the reality, especially in developing and underdeveloped countries where judicial personnels lack sufficient professional knowledge. The situation is even more serious after civil wars, when the judicial system is seriously damaged or has collapsed, the state often lacks the economic incentive to restore justice. At the same time, authoritarianism hinders the independence, impartiality, fairness and effective operation of the judiciary. We could conclude that there is a lack of the long-term response mechanism in the international community. Furthermore, globalization has promoted the development of international criminal justice, but this development is not in the interests of each country, especially the major powers. Major states deal with transnational crime, while the International Criminal Justice Department deals with *jus cogens* crime [23, p. 607]. It can be seen that Bassiouni's philosophical implications are becoming more and more realistic, and his philosophical flavor is becoming less and less. His philosophy is more like policy studies, and he does always combine philosophy with policy in his discussions. Philosophy determines policies, policies reflect philosophy, but it must be recognized that philosophy is not the same as any policy. If philosophy is recognized as equal to policies, then philosophy becomes ideas and strategies, and eventually philosophy itself suffers, while policy will continue to adapt to circumstances.

Political philosophy is also philosophy, and it is an extremely important philosophy. Regarding the proposition of political philosophy, Bassiouni's deduction from social contract theory to international contract theory is quite distinctive and worthy of attention. Bassiouni believes that there are differences between social contracts and international social contracts, but the historical clues of the two are common: social contracts have historical parallels as 3500 years ago - individuals hand over their right to personal revenge to the state in exchange for the responsibility to protect members of the state. If someone violates the agreement, he or she needs to be

punished accordingly. Whether it is based on social contract or social order control, a society with prohibitions deprives individuals of the right to unilateral retaliation or relief - criminal relief belongs to the state and civil relief belongs to individuals. The same is true of the development of the international criminal justice system: the social contract theory assumes that, under the principle of complementarity, the power of punishment is transferred to the cooperative system responsible for providing justice and ultimately securing peace [23, p. 546]. Who ceded what to whom? This is a key question. Bassiouni's answer is that individuals ceded the power to punish to a cooperative system. This cooperative system is the international community, which should also be an organized society. The key here is obviously that the power to punish is directly ceded by the individual to the international community. There is no indirect channel. However, when it comes to moral and social philosophy, Bassiouni seems to take a half step back, saying that the international criminal justice system constructs a set of international rules to establish the accountability of individuals ensuring individuals abide by the norms, in return the international community protects the civilians' security and human rights by prosecuting and punishing criminals. Thus, the international community took over the individual power to impose personal punishment and obtain private revenge. As such, the state, acting in the name of society, reserves the right to grant immunity. But what this situation caused in consequence is that the reservation by state obstructed the pursuit of international criminal justice by the international community or human beings because of the unjust pardons applied by states. Pardons are just only when the crime has been sufficiently painful and are based on humanitarian considerations. At the same time, states retain discretion to prosecute and punish specific crimes, but not all states do this; instead, they require mandatory prosecution and punishment [23, p. 603]. Mr. Bassiouni in this logic believes that there is actually no substantial society in international society, instead of states acting in the name of society, in other words, it is not international society that actually accepts this consideration, but states or state systems. At the same time, the state also retains the power of pardon and discretion. The normal logic is: only by giving up can there be reservation. So, as the retainer, what has the state also given up? According to Professor Bassiouni, no, the transferor is just an individual. In Bassiouni's view, as recipients of the power to punish, there is not much difference between the state and the international community, which has a strong flavor of positivist philosophy, and this is the crux of the problem. When discussing the elements of historical premise for punishment, Mr. Bassiouni made a concession to his theory of social contract: According to social contract theory, the power to send punishment on individuals is handed over to the collective who fulfills the contractual obligations. Therefore, there exists a set of general principles of international criminal justice: that victims have an inherent and inalienable right to expect that violators of certain rules whether he/she is national or international be tried and punished. Furthermore, the legal system should provide victims with the right to seek adequate compensation [23, p. 603-604]. Here, a cooperative system becomes a collective, and this collective is either a state or an international legal order, and positivist philosophy is vague and repetitive. When discussing international crimes of jus cogens and universal justice, Professor Bassiouni once again mentioned his social contract theory, demanding that crimes that violate *jus*

cogens must be punished. *Jus cogens* crimes have reached such a level that the international criminal justice system must provide a dual track of access to justice [23, p. 608]. The dual track is not limited to international punishment, the national punishment system is also an option.

When discussing the issues of amnesty and the international criminal justice system, Mr. Bassiouni conducted another interpretation of the social contract theory: Social contract theory is rooted in the history of law and the development of social values. The meaning of this title is that victims' rights are inalienable, so the commitment to punishment must be respected. In other words, the principles inherent in these rights cannot be undermined by a few in power. Therefore, the state has no right to pardon *jus cogens* criminals, especially those who are leaders and senior executors. According to the social contract, the international community has the right to punish criminals. But there is another question about this? Is there power to pardon in the penalty-sending power? Generally, the power of immunity is considered to be implicit in the punishment power. However, if the victims transfer their right to punish to the international community or some organizations, then the right to amnesty is retained by the victims and not be handed over to the international community. It is a matter of dispute whether the social contract international legal order rejects jus cogens immunity. In this logic, if the right to punish is origin from and in the hands of the victims, nevertheless the international legal community could only execute the right to punish in the name or on behalf of the victims, then the substitution cannot be a blanket immunity or political concession. Political negotiators have been prosecuted for political solutions in the name of major powers, often violating the rights of victims and violating the social contract of international criminal justice. A pardon can only be granted after a verdict, for a specific crime, and based on good cause [23, p. 609]. It should be acknowledged that Professor Bassiouni made a leap at the last moment: for crimes of jus cogens, neither the state nor the international community has the power to pardon, the power of pardon is reserved for the victims; neither political negotiators nor major powers can intercept, tamper with or abuse this power. In this case, it does not matter who the "recipient of the power to punish" is. In my opinion, the outstanding value of Bassiouni's international contract theory lies in: First, in terms of social contract, national society and international society are similar and not very different. In this way, the saying that "international society is a paradise for sovereign states" has no basis. Individuals are always the core subjects of contractual society, whether it is a national society or an international society. Second, related to the first point, individuals are the only subject of the "transfer" of the power to punish, and the state is currently only a "nominal" representative and cannot interpret, tamper with, or abuse this right. In this way, the state is not the subject of the transfer of international penal power, and it has no subject qualification to "retain" anything. Third, there is no question of the state ceding sovereignty or the power of sovereignty. Sovereignty is the nominal representative of public opinion. It is only an agent of individuals, not a party to the contract of the state's penal power. If it acts as a "full agent" and exercises international criminal power, it must obtain special authorization from individuals. Obviously, this is a completely different "international contract theory". Generally speaking, the so-called "international contract" is a contract in which a sovereign state

cedes or restricts its sovereignty. Although the conclusions are the same, in terms of highlighting the contractual status of individuals, Professor Bassiouni's interpretation is obviously more likely to lead to the conclusion that "international human rights protection is vitally important", but at the same time it hinders or greatly weakens the political flavor of "hostility to sovereignty" in ICL.

Bassiouni also has unique insights into human nature, national character and their transformation. The most unique insight is that after the internationalization of human nature, evil deeds will increase. He said that the only thing that is certain is that the philosophy and policy of international criminal justice will be based on individuals, which is the same as national criminal justice; individuals commit domestic and international crimes, not abstract legal persons... Since Aristotle, philosophers, behaviorists, and sociologists have acknowledged the natural tendency of human beings to do evil. The question is, does the nature of behavior change when it is transformed from individual to collective? Does the different nature of individual and collective violence depend on whether the behavior is within the territory of one country or extends to the territory of other countries? Does the creation of national borders lead to a radical change in the substantive characteristics of violence? The answer is in the negative, for the fact is that the aggregate effect of collective violence is greater than the sum of its individual acts. Human nature has an evil side, which is also driven by instinct. When social control is weakened or fails, the evil will surface and cause disastrous consequences. Experience shows that the whitewashing of human civilization is indeed urgently. States, national societies, or international organizations – such kind of abstract entities – exist in reality, because such kind of abstract entities are created and governed by individuals in essence, so they are inevitably limited by human instincts. The collective decision-making process of these abstract entities is interactive and highly complex and difficult to evaluate, but human instincts often influence the final outcome [23, p. 606-607]. Of course, as we all know individuals are the fundamental elements of the axiology system and policy of ICL, that is why even the national borders can't block or change human nature, as a result, the nature of the state is finally determined and influenced by human nature; the evil of the state transcends the evil of the individual; these are important propositions of Bassiouni's philosophy. In Bassiouni's philosophy, no topic is more distressing to him than "international criminal justice and political choice". Law is politics, but law cannot be a mere tool of politics, otherwise it will be evil politics. The closer the court is to politics, the more questionable justice becomes. In Bassiouni's view, almost every international criminal trial model is full of political questions. We know that the formats of international criminal justice - "international hybrid tribunals" - is the latest trend, while at the same time we found out more political restrictions and interference in Kosovo, especially in Sierra Leone, East Timor and Cambodia. Bassiouni believes that the establishment of international hybrid courts lacks consistency and universality and is a specific result of the Security Council's political choice. They either hinder the ICC or complement it - another way of saying "complementarity". Between 1948 and 1993, the United Nations conducted 55 peacekeeping operations, but only a handful of them involved postwar judicial construction. There was also a game of two political ideas: political realists believed that postwar retributive justice hindered peace - a

euphemism for political settlement; on the contrary, political idealists believed this slogan – no peace without justice or where there is justice, there is peace. Because of the dominant position of the former and the influence of the Cold War, the post-war judicial situation can be imagined. A majority of governments believe that the ideal of international criminal justice isn't an indivisible and integral part of the legal order in international community, because it sets limitations on the proper role of political realism, as well as hinders political amnesty. The last but not the least, it is not conducive to conflict resolution. Political realism also believes that conflicts in different countries are different, and peacekeeping and reconciliation strategies are different, so the responsibility model must also be diverse and not limited to the judicial model. It was not until the last decade of last century that the idea that international *jus cogens* crimes must be brought to justice was gradually accepted. But so far, people have not reached a consensus. The biggest drawback of the existing mixed model is that it cannot contribute to strengthening the national judicial system. Some even believe that the hybrid court is nothing more than an "apology" for the failure of major powers to prevent and intervene in crime timely. In addition, military peacekeeping and judicial justice are quite different, and the two forces are actually isolated from each other and are arguing with each other. The political will of major powers determines the capacity and final decision of the United Nations, among which funding and manpower sources are crucial. Finally, hybrid courts are essentially national courts and cannot be considered to belong to the international criminal direct enforcement model, which is also a direct reflection of the concept of "national jurisdiction first" [23, p. 545].

So, what about other so-called "great", "cross-century", and "just" trials, according to Bassiouni? His overall assessment remains the same: between 1919 and 1994 there were five special international commissions of inquiry, four international criminal tribunals, and three internationally administered or authorized national proceedings. However, they rarely adhere to their professional goals - to administer justice through independent, effective and impartial methods and procedures. Although to varying degrees, sometimes overtly and sometimes covertly, they do succumb to political ends, and political decisions lead to logistical, personnel and legal difficulties that can derail the operation of the courts. Bureaucratic and fiscal wizardry is used to direct, stop, censor, and ultimately close courts for political reasons. Politicians often deliberately make time fly by so that the public interest in justice wanes and public pressure to ensure that the courts do justice evaporates. For example, the reason why the Allies did not take legal action against Turkish officials for the mass killing of Armenians in 1915 was mainly on this consideration - they feared destabilizing Turkey, defeating pro-Western ruling elites, and desired to establish a "Western camp" in Turkey to oppose the fledgling Red Soviet Union. For example, the reason why William II remained at large was that Article 227 of the Treaty of Versailles did not specify any known international crimes other than "political" crimes, which provided the Dutch government with a legal basis for refusing extradition; In addition, the Allies condemned the Netherlands, which was seen by some as a way for the Allies to avoid setting up a tribunal. As for the Lisbon Trial, it is a typical example of the evolution of international and domestic political will and the subsequent sacrifice of international

justice. This shows that the Allies care more about the future of peace in Europe than justice. Because political indulgence reinforces cynical ideas, as Hitler said proudly in 1939, “who is still talking about the destruction of the Armenians today?”, it is equivalent to openly shouting that “the rule of might overshadows the rule of law”. During World War II, The UN Commission on War Crimes, made up of representatives of 17 governments in exile, faced difficulties and eventually didn’t win the support of Britain and the US. All of Italy’s overseas war criminals also went unpunished. Britain and the US occupied Italy and decided to try the war criminals, but considering that communism was spreading across Europe and that the reformed fascism was the enemy of communism, in order to prevent domestic political backlash, they finally decided to abandon the trial and refuse to extradite the war criminals to the victim countries. The phenomenon of politics overcoming justice is not only reflected in the fact that major powers prevented the establishment of international criminal justice institutions, but also in international criminal trials. For example, during the Nuremberg trials, the political will of the four countries was freely released. For example, the US used common law judges to try war criminals, while the other three countries used military judges to try war criminals; the Soviet Union implemented summary trials and had no or few legal advisers, while the other three countries each had their own laws. The Far Eastern Tribunal is another example. The Allied Far Eastern Committee was originally composed of 11 countries, including Britain, the US, China, and the SU with the right of veto, in essence, we could say that it was not an investigative body but a political body. Under MacArthur’s exclusion, the Commission went from a free forum to euthanasia. This is also the main political reason why the Far Eastern Tribunal was not established by a treaty - the Soviet Union only entered the war a few weeks before Japan’s defeat, and the US did not want the Soviet Union to influence the Far Eastern litigation; the US and the Soviet Union had fierce competition over Japan’s acquisition of biological and chemical weapons and their technology; the US was also concerned about Japan’s post-war process. During the trail, judicial officers are representatives of governments, not individual entities, which leads to the politicization of committees and courts, affecting work order and the quality of justice. During the proceedings, the courts suffered from irregular procedures, abuse of judicial discretion, and, because the courts selected defendants based on political criteria, most trials were unfair and no Allied personnel were brought to justice. In addition, in the Far East Trials, MacArthur gave up prosecuting Hideki Tojo because preserving the image of the emperor would make it relatively easy to make peace with Japan, reduce U.S. military casualties, and be more conducive to obtaining the cooperation of postwar Japanese elites - the trial was a reflection of this personal political will. Furthermore, politics also plays an important role in special trials in other countries, the only difference being that they only try war crimes and do not involve crimes against humanity. All these indicate that justice is often subject to many constraints in real political society.

Regarding the foundation and aim of international penalty, Bassiouni puts the foundation of his international criminal philosophy on the theory of “retribution”. However, there is a clearly distinction between international society and national society on terms of “policies and goals of the criminal penalty”. The main objective of international punishment is the maintenance of world order, peace and security, while

domestic justice is concerned with the maintenance, restoration and improvement of social order as well as with the aim of rehabilitating criminals and reintegrating society. Second, these two kinds of systems also have different assumptions about overall prevention. The two systems themselves differ, and the results they predict are enough to transcend the philosophical and political foundations of international criminal punishment: domestic justice system is continuous and regular, which has established institutions, structures and personnel, so there are preventive and preventive effects and expectations; While in contrast, international justice system lacks regularity, so its threatening intent cannot be expected, then retribution and desert justice should be a more appropriate philosophical and policy basis for international punishment. In addition, the international community has various levels of political integration and social aggregation mechanisms. There are many ways to achieve the realization of goals and functions, and incompleteness is not fully expected to be judicial. In addition, international justice almost exactly expects special execution mechanisms and shame trials. The direct execution mechanism has only begun in the 1980s, and it is mainly "special". Other responsibility mechanisms have not been recognized until today [23, p. 608]. As a result, as scholar Bassiouni see it, according to the current state of international judicial development, punishment and fairness should be the real goal of international punishment.

3.1.3 Beyond the Social Contract Theory

Through the analysis of Mr. Bassiouni's international criminal value system, it can be seen that his value system takes "international contract" as the logical starting point, and then argues that international common values have the effect of transcending national positive law. However, international criminal rule of law has not yet been established, and the international community is still a political society supported by sovereign states. Therefore, it blocks the smooth development of international criminal judicial system. The very way to achieve international criminal rule of law - even if Mr. Bassiouni did not explicitly point it out - is for states to transfer the judicial power to try international crimes to the ICC. However, this study believes that Mr. Bassiouni's value system has the following flaws.

First, as for national and international contracts, Mr. Bassiouni's theory of international contract ignores the stages of the transfer of the power to punish and the power to forgive and the "retention" status of the rights after the staged transfer, and therefore does not provide strong theoretical support for the obstruction of the Court's exercise of the power to punish. In other words, when international social contract subjects transfer the power to punish and pardon on the international crimes which shocks the conscious of the international community to states and the ICC, there is a step-by-step process. It should be noted that the step-by-step transfer is followed by an analysis of the "retention" status of the rights in the context of staged transfer theory, we can more clearly and thoroughly explain the reason why the effectiveness of court enforcement is limited. The ICC exercises jurisdiction over the most serious international crimes and prosecutes individuals responsible for the most serious

international crimes, while its power to punish victims is vested in them. However, individuals cannot directly grant their power to punish to the ICC; they must do so through state action by signing and ratifying the RS. Taking into account the Court's principle of complementary jurisdiction, while the State, on behalf of the people, relinquishes the power to punish, it retains the power to exercise priority jurisdiction and grant leniency over cases under the jurisdiction of the Statute. Therefore, in the second stage of the transfer, the only entities involved in the transfer are the states and the international criminal judicial organization - the ICC, however, the original owners who have the power to punish and forgive - the victims - obviously did not play any role. Because the court has jurisdiction over the most serious criminal offenses, victim immunity applies only to minor cases, similar to amnesty under domestic criminal law, where the state's punishment for more serious crimes has long been established by law. Therefore, after the first stage of transfer, the individual's power to forgive more serious crimes is only a nominal "ownership" and is actually controlled by the state. Therefore, in the process of international criminal justice, individuals must transfer their powers to the ICC through the state, and in this process, the state is not a "middleman" but plays a role similar to that of an "individual" in domestic law.

Second, in fact, international common values do exist, which can be concluded from various social practices. But as Louis Henkin said: "Politics is selfish" [43, p. 6]. Sovereignty itself is part of politics. Therefore, from a realist perspective, international common interests and national sovereignty interests are often incompatible, especially in the context of international competition. Moreover, even if there are international common interests, culture is local. Even the concept of rule of law, which has a relatively unified connotation, has different understandings in different cultures, as Chinese scholar Su Li pointed out: "The specific rule of law that is suitable for a country is not a set of abstract, de-contextual principles and rules, but involves a knowledge system. A living and effective legal system requires a large amount of constantly changing specific knowledge" [129, p. 18]. Therefore, the ICC's understanding of justice essentialism may be difficult to be recognized by all countries.

Finally, as the fundamental theory of international criminal rule of law, international contracts should focus on their "international" characteristics. Although the concept "international" is rarely discussed in world justice and criminal justice, it cannot be denied that international criminal justice operates and takes effect within the context of a flexible international system. So that it could be said like this, the international criminal justice could be understood in this way – neither as justice for all human beings in broad dimension, nor as criminal justice in minimal dimension, but should be understood as the justice among sovereign countries. From Bassiouni's discussion, we can see that his theory of international contract lacks consideration of the "inter-state dimension". world justice puts the grand concept of humanity above the potential interests of individuals and society, even though the RS is "to protect the well-being of mankind" and international criminal justice is based on individual initiative, it is still doubtful whether the social embeddedness of the individual, the national authorization and the responsiveness of the international structure can make the international criminal justice truly surpass the international system and national sovereignty [130, p. 13-15]. However, the potential and real dangers of international

contracts force us to face up to the specific issues of international common values raised by the inter-state dimension. This is not only a theoretical need, but also a practical need. Although the International Criminal Court is concerned with serious domestic human rights violations, its focus is on crimes between states. The 1950 Statute of the ICC was suspended because the concept of the "crime of aggression" was full of "transnational factors". Only until 2020 the specific definition of crime of aggression finally was adopted. This shows that inter-state factors have not only not been abandoned by the world, but on the contrary, may become more prominent in the future. This study emphasizes internationality and fills the gap in the legitimacy of the ICC in exercising international criminal justice. First, the transfer of sovereignty by sovereign states is the most direct explanation for the ICC's jurisdiction, but the ICC's exercise of jurisdiction over non-States Parties is controversial. Taking the referral of situations by the Security Council as an example, the UNSC may take measures pursuant to Chapter 7 of the UN Charter to establish an international criminal tribunal or refer the case to it. Non-Parties are countries that are not members of the RS but are members of the United Nations. Under the UN Charter, the UNSC has the power to refer cases which occurred in the non-parties to the RS to the ICC. The highly artificial nature of this reasoning, while logically flawed, reveals the gap between effective arguments in law and persuasive arguments in justice. Secondly, there is also tension in the relationship between the States Parties and the ICC. The parties accept the ICC's jurisdiction over them through sovereign consent, but this does not mean that sovereign states have handed the ICC a blank check so that they can be sure to accept all its decisions, especially those regarding prosecuted nationals. To point out this dilemma, Mr. Bassiouni said that "the international criminal justice system, like the national criminal justice system, is based on the existence of a hypothetical and implied social contract" [130, p. 13-15]. Although the theory of contract has been supplemented by Spinoza, Locke, Rousseau, and Kant since the beginning of Hobbes, it has its own charm and rationality. However, "contract is an act of will, and its morality lies in the voluntary character of the transaction" [130, p. 13-15], its foundation is a metaphysical thing that can neither be proved nor falsified. The practice of contract theory to give the ICC a philosophical basis for legitimacy by bypassing "internationality (national sovereignty)" is obviously unable to shorten the distance between legitimacy and the persuasiveness of justice.

Therefore, according to the research, the reason why the social contract theory proposed by Mr. Bassiouni is difficult to gain vitality in the international community is that it confuses the social contract with the international contract and assumes the premise of its own theory on the non-existent international civil society. Promoting the formation of an international community and the rationalization of international contracts are precisely the goals that international criminal rule of law needs to achieve.

3.2 Several core propositions in the international criminal value system

3.2.1 Definitions and Relations among concept the Rule of Law, Rule of International Law and Rule of International Criminal Law

The construction of a value system is often based on the definition and connection of propositions, and then forms a system. The above has analyzed Mr. Bassiouni's value system based on international contracts and pointed out the logical loopholes in his theory. The following article will use international criminal rule of law as a value guide to define several core concepts, clarify their relationships, and preliminarily establish an international criminal value system.

No matter what the meaning of "rule of law" is, there is nothing more attractive and controversial than it. Now there is an additional adjective "harmony". Any kind of "rule of law" must be in line with "harmony", and "harmony" itself is a term that is subject to different opinions, so the controversy will naturally double. At present, "rule of law", "international rule of law", "criminal rule of law", "civil rule of law", "administrative rule of law", etc. seem to live and die for "harmony". This study argues that the rule of law is primarily a substantive rather than formal harmony. We may first need a substantive harmony, whether it is the rule of law or international rule of law. However, this is only a general argument and does not solve the problem of logical transformation of many concepts. At present, this seems to be the most difficult problem, which has not only not been solved but is rarely even addressed.

International law has always been soft law, lacking sufficient enforceability and self-sufficiency; good international law is the prerequisite for international rule of law, so the first sub-topic must inevitably involve the possibility or feasibility of international rule of law. Sir Arthur Walts of the United Kingdom has made special remarks on the international rule of law [131, p. 94]. The author evaluates the extent to which the rule of law exists in international relations and its possible special connotations. He believes that the rule of law is the balancer of domestic power, in this logic the rule of international law is the balancer of independent states. Sovereignty must be curbed, which is perhaps the most valuable achievement of the 20th century. Watts's understanding is roughly similar to the explanation in the authoritative British dictionary: the rule of law includes international rule of law or world rule of law, and the key point is to limit power and resolve disputes [128, p. 990-991]. In addition, authoritative works on the philosophy of international law also mention the issue of "rule of law among nations" [43, p. 107], which refers to "international rule of law". Many famous politicians have also touched upon the construction of a "rule of law order" in the international community. What Hans Kautzler calls "universal rule of law" and "global rule of law" are substitute terms for "rule of international law" that are "obstructive or destructive" by "global power structure" in the context of "unipolar power structures" to "rule of international law" [132, p. 12]. At present, Chinese academia has paid special attention to the different meanings of "rule of law" and "international rule of law" [133, p. 196].

Just as many international legal instruments refer to how to "accept", "strengthen" and "respect" "democracy, human rights and the rule of law", such as ICL

instruments - particularly those of the ICC and the International Criminal Tribunals, often refer to promote or strengthen the rule of law. As one of the five major components summarized by the court itself, the so-called strengthening of the rule of law by the ICTY includes broad meanings such as strengthening peace, justice, judicial system reform, cultivation of judicial professionalism, civil liberties, and international judicial experience exchange. As one of the practical values of promoting peace and justice, the value of the Rwanda Tribunal in promoting the rule of law is reflected in six aspects: first, the ICTR's sentences implement in Africa; second, pursuit of ending the history of impunity; third, achieving the aim to end armed conflicts; fourth, the ICTR needs to use its professional skills to make up for the shortcomings of special tribunals; fifth, efforts on filling gaps where the Rwanda is of no capacity or doesn't want to exercise jurisdiction; sixth, prevention on future war criminals. These clearly indicate the significance of international criminal law. In fact, former UN Secretary-General Kofi Annan has already highlighted the importance of ICL when commenting on the ICC: "It's such an important and huge step towards protection of universal human rights and construction of rule of law around the world." The rule of law here is nothing else but international criminal rule of law. In addition, regarding the relationship between domestic rule of law and international rule of law, Annan pointed out: "The rule of law is in crisis in today's world," "we must start from this principle: no one is above the law, and no one should not be protected by the law. Any country that respects the rule of law at home must also respect the rule of law abroad. Similarly, all countries that uphold the rule of law abroad must also respect the rule of law at home." It is worth noting that the rule of law must also be respected abroad. This refers to international rule of law. Judging from the background of the incident, this refers to international criminal rule of law. The rule of law always rises from the ashes of despotism and international rule of law will inevitably be born in international chaos. Annan is merely a spokesperson for the times. Various signs indicate that the concept of rule of international criminal law is about to emerge. Rule of international criminal law - one of the value considerations - has both supra-legal propositions and propositions outside the law. The rule of law itself is not simply a legal issue. As Sir Watts said, on the one hand, the rule of law is a long-term quasi-constitutional framework that contains an atmosphere of legitimacy and legal order; on the other hand, the rule of law is a value orientation, and basic concepts such as democracy, human rights, justice, and freedom coexist with it [131, p. 94].

Given that the perspectives and views of different scholars varies from person to person, there is still one common point all the scholars admit: rule of international criminal law and its purpose for the international community is to restrict sovereign power of the states in order to safeguard the basic human rights. Therefore, the essence of international criminal rule of law is also to limit the state's right to war and other punitive powers. As for how to restrict it, the specific paths vary, and the difference between what is and what should be is also huge. The specific interpretation of international rule of law and international criminal rule of law cannot be explained by the concept itself. What position and opinion are taken on the following proposition is more decisive.

3.2.2 Definition and relationship between international society, international public legal order and international criminal order

Is the international community a society or not? This depends on the understanding of the concept of society. According to social monism, the conclusion must be that there is no international society; on the contrary, according to social dualism, the conclusion must be that there is international society, and the international community is different from the national society. In fact, the dispute between monism and dualism in international law has the same nature, and the real starting point of the dispute does not lie in law itself, but in the basic differences between political science and sociology. Therefore, the solution or argument to this proposition is inseparable from legal professionals' understanding, selection and adherence to various political and social theories. Therefore, what the international community should be like is bound to be a matter of opinion. This is precisely the difficulty in thinking deeply about international rule of law and even international criminal rule of law. As far as the rule of law in the West is concerned, natural law philosophy and social contract theory are its main philosophical and political doctrines, and Rousseau's theory is its concentrated embodiment. Law itself is politics, and international law is international politics. Different starting points of political philosophy will inevitably lead to different legal concepts. Here, the focus of the dispute is: should the international community develop into a "three-dimensional society"? If the answer is yes [134, p. 349-350], then the next question is: what is the relationship between this "three-dimensional society" and sovereign states? What kind of relationship do individual citizens establish with the "overall three-dimensional society" and the "partial three-dimensional society"? Of course, if the answer to the first question is negative, the remaining questions are almost unnecessary to discuss, and Professor Bassiouni's "complex creed" will naturally be correct forever. The current mainstream view is mostly empirical and technical, focusing more on what is and ignoring or disregarding what should be, while the cosmopolitanism of the new natural law always troubles sovereign states. When it comes to sovereignty and schools of thought, disputes will naturally arise. The only question this study focuses on is: how to interpret it in accordance with the process of civilization and scientific logic.

The legal topic that is directly related to the international community is the "constitutional model" of "international public order". This should be the starting point of legal logic for international constitutionalists, international jurists, and ICL lawyers. In fact, this is one of the theoretical hot spots and focus of debate in the Western academic community. Asian and African scholars have not been involved much. White's so-called "international constitutional order" theory is a "continuously integrated, mutually complementary, and coexisting" international constitutional model. In this study, this is nothing more than a hodgepodge of many spontaneously generated clause models, but it is given the name of "constitution" or "constitutionalism" by constitutionalists. At present, it seems that the United Nations and its Security Council do not represent the world public order. It is only a flat order, and the international community does not have a unified flat order. We yearn for and call for international rule of law, but all the chaos in international rule of law stems

from the mixed nature of this order.

International public order is a representation of international constitutional order, and is also the political foundation and symbol of international rule of law. What kind of order should international criminal order be? At present, it is at most a two-dimensional order, and this two-dimensional order itself is chaotic and disorderly: The UN and its SC have their own mandate, and the ICC represents another international criminal order that still has some disputes with the UN or the Security Council and the sovereign states concerned. The ICLs of various countries represent another traditional order. The three types of orders do not have a unified coordination mechanism and organic development. On the contrary, competition, conflict and even sabotage are more obvious characteristics. If we examine international criminal rule of law from a realistic perspective, the conclusion will inevitably be pessimistic. However, as civilization progresses, humanity needs a political leap. In order to make progress in a world governed by sovereign states, we must delve deeper into the nature and characteristics of sovereign, state, and great power politics in the hope of finding answers.

3.2.3 Definitions and relations among the concepts of sovereignty, statehood, human rights and international criminal rule of law

In the axiology theory of ICL, no proposition is more important and sensitive than the concept sovereignty. Facing this proposition, the possible countermeasures that the academic community may take are: either stick to the “basic principles of traditional international law” [135, p. 97], avoid discussing it or only give a simple and general description, or face it squarely and elaborate on it in depth. The first two positions are “politically safe”, while the latter position is “academically risky”. The latter position is adopted here. Axiology itself cannot be without value. The main value of axiology lies in the selection of goals. Axiology debate without goals cannot be in-depth and can only be superficial. It is the easiest thing to do to talk about something else, and it is also worthless. There are four key words in this proposition, all of which need to be re-examined. It should be noted that the deduction of the relationship between ICL, human rights and sovereignty belongs to the axiology theory of ICL and has been gradually promoted by domestic science [122, p.99]. Recently, some scholars have reiterated that “respecting and protecting human rights has always been one of the basic value goals of ICL” [136, p. 4]. Chinese works on ICL also regard the principle of respecting basic human rights as one of the basic principles of ICL. Given commentators still maintain this view, it does not mean they will reject or even deny the absolutely sovereignty equality principle, nor does it mean that the principle of human rights is superior to the principle of sovereignty [135, p. 106]. The value theory of ICL takes human rights as a breakthrough point and moves forward cautiously. In recent years, some scholars have summarized the major breakthroughs of ICL in traditional international law [122, p. 64], which is remarkable, although the interpretation of the other so-called breakthrough and innovation is not in-depth [135, p. 70].

What exactly is sovereignty? We often fail to understand the meaning of words that are too familiar to us. It seems that we should first identify the meaning of the word. Here we need to examine the meaning of sovereignty in major Western languages. In French, "*souverainete*" has three meanings: such as "*autorite supreme*" or "sovereignty" as well as "national sovereignty"; in English world, "sovereignty" also has three kinds of meaning: supreme authority or sovereignty, another meaning is complete freedom and authority to act or govern, the third meaning is the quality of being an independent self-governing country. There also another meaning goes in the English-speaking academic community, it includes sovereignty, ruling power of the government, supreme power as well as royal power. It can be seen that in the common sense, the common meaning in English and French is: monarchy, ruling power. The reason is that France is not a constitutional monarchy, so it cannot point to monarchy; France can also emphasize the sovereignty of the people, so it cannot specifically emphasize ruling power. There may also be an etymological reason: sovereignty is both a direct transformation of sovereign and a direct inheritance of the meaning of sovereign. It seems that different states do have different understandings of the meaning of sovereignty, and there is more authoritative, sufficient and recent evidence of this difference in interpretation [128, p. 1054-1055]. Walker also classified sovereignty into legal and political or de facto sovereignty. In his view, who holds sovereignty varies from country to country. He also believed that sovereignty is always limited and will never be absolute, and the limited areas and classes are also extensive and profound. In short, the common meaning of sovereignty in Spanish is: the supreme power of a country. And according to Walker's explanation, who actually holds this power varies from person to person. Similarly, who should hold this power also varies from person to person. However, whether it is true or not, sovereignty is not absolute; on the contrary, it is or should be subject to restrictions, which is beyond doubt. The current international law has finally recognized that the principle of sovereignty does not mean that sovereignty is absolute, and that mutual respect for sovereignty and international law and treaty obligations are all subject to certain constraints and restrictions on the exercise of sovereignty [137, p. 31]. What is slightly questionable is that the object of restriction here does not seem to be sovereignty itself, but the exercise of sovereignty. Another question is: this kind of restriction is only certain, not strict and serious. The most questionable one is: does this kind of restriction and limitation only exist internationally or between countries? Is sovereignty not restricted and limited internally? If you think about it carefully, the three questions can actually be reduced to one question: Should sovereignty itself and its exercise be subject to comprehensive and strict restrictions and limitations? Now that we want the rule of law, we want democracy, and we respect human rights, then under these theoretical assumptions, what interpretation of sovereignty should be considered fundamentally reasonable?

The concept of sovereignty has been debated in the academic community for centuries, and no unified view has been formed yet. The concept of state sovereignty can be traced back to the earliest combination of sovereignty and royal power. As modern legal professionals explored the combination of royal power with feudal sovereignty and the "power to rule" in Roman law in practice, the status of sovereignty in the modern legal system was established [138, p. 14-20]. The sovereignty system

remains an important cornerstone on which the international system relies. The mainstream academic community generally affirms the importance of the sovereignty system, and therefore sovereignty theory has developed relatively clear internal provisions. The traditional concept of sovereignty generally refers to "the exclusive power of a state to deal with all affairs within its territory, which is recognized by internal and external actors". The core elements of sovereignty include empirical indicators such as "recognition", "the state", "authority", "coercion", and "territory" [139, p. 220]. However, the theory of sovereignty is also historical and constantly evolving. Up to now, many theoretical schools have been formed. Among them, the two most influential theoretical schools are "absolute sovereignty theory" and "sovereignty is outdated theory".

The theory of "absolute sovereignty" can be traced back to the views of Jean Bodin, a French political thinker and jurist, and Bodin's sovereignty has the attributes of royal power [16, p. 98]. Bodin developed a theory of monarchical sovereignty that advocates absolutism, which actually strengthened the inherent characteristics of state sovereignty, namely, its supremacy, absoluteness, inalienability and indivisibility [140, p. 144]. Bodin's absolutely sovereignty theory played a key role and as the foundations for the construction of the modern international law theory system by Grotius, a 17th-century Dutch international jurist and the father of international law renowned in Europe. Grotius believed that "the power which does not subject its actions to the legal control of others, and which cannot be invalidated by the exercise of the will of others, is called sovereignty" [141, p. 28-39]. The common subject of sovereignty is the state, while the specific subject is one or more persons. In short, Grotius, based on his theory of absolute sovereignty, argues that sovereignty is a kind of "property right" of ownership, similar to an individual's control over his or her possessions. His theory also focuses on the issue of a country's external sovereignty from the perspective of international relations. The Westphalia peace treaty signed in 1648 which ended the Thirty Years' War among Western European countries and promoted the theory of absolute sovereignty. The Westphalia treaty which further reaffirmed the principal of sovereignty and principal of equal rights of Protestants and Catholics then developed well into the first modern system of international relations in recording history, what we called "Westphalia System". Therefore, the "absolute sovereignty theory" is often referred to as the "Westphalian Sovereignty". According to Thomas J. Biersteker, in the "Westphalian ideal" of sovereignty, the state advocates absolute and final authority over a range of issues, national identity is largely unproblematic, and control over territory is paramount, with borders being clear and unambiguous [142, p. 157]. In summary, the theory of absolute sovereignty holds that sovereignty has a high degree of independence both at home and abroad, and is inalienable, indivisible, and cannot be shared. It is absolute and not subject to any restrictions.

The "sovereignty is outdated theory" is closely related to the "neo-interventionism" and "neo-colonialism" policies that some Western powers are promoting on the occasion of globalization. Its purpose is to whitewash the behavior of Western powers holding high the banner of "international intervention" and implementing the "big stick policy" around the world. After World War II, international law scholars represented by Philip C. Jessup of the US and W. Jenks of the United

Kingdom advocated “actively weakening state sovereignty, establishing a new international society based on individuals, and actively expanding the scope of international law”. Such views can be seen as the early sprouts of the “sovereignty obsolescence theory” [143, p. 284]. The representative task of truly advocating the “sovereign obsolescence theory” is the authoritative American public lawyer and human rights jurist Louis Henkin. He elaborated his theory in a series of papers published in the 1980s and 1990s. He believed that the concept of sovereignty was formed in an era of “national” and “kingdom” systems rather than “state systems”. The law at that time was nothing more than “a plaything in the hands of the monarch”. Therefore, sovereignty was an “internal concept drawn from the relationship between the monarch and the subjects” and was “not a necessary or appropriate abstract state of the state that we praise”. It was “unnecessary or inappropriate” to use it to express the external nature of the state [43, p. 7]. Given that sovereignty is widely used in the international system and is called a basic axiom of the international community, and has evolved into an obstacle to the progress of international governance, the development of international law and the realization of basic human values, Louis Henkin strongly criticized this, believing that doing so is in fact a “mistake within an error” [144, p. 31]. The sovereignty nihilism created by this “sovereignty is outdated theory” is harmful to maintaining the stability of the international order and safeguarding the interests of developing countries, and can easily lead to a situation in which the big bully the small and the strong bully the weak in the international community. The behavior of Western developed countries, which often interferes in the internal affairs of developing countries under the banner of “human rights are above sovereignty” in order to promote their own human rights concepts, affects the autonomous management of domestic affairs of developing countries and the effective protection of people’s interests. It is far from the sovereignty theory based on consensus, fairness and justice.

The contemporary international governance system has endowed the sovereignty theory with new connotations, which should be interpreted in a new way - The ideas and principles of the Charter… (here refers to all of the norms in international law fields, such as international humanitarian law or international human rights law) shall be applied in full [145, p. 6] The new connotation of the sovereignty theory is firstly the “moral irrelevance” and “legal irrelevance” mentioned by Professor He Zhipeng, a Chinese international law scholar. The so-called moral irrelevance of sovereignty means that morality is only an external support for sovereignty, not an internal provision of sovereignty. Specifically, “sovereignty has no direct relationship with compliance with international law norms, so sovereignty is only an uncontrolled internal command and external representation. Sovereignty accompanied by morality will be more stable and longer-lasting, but sovereignty is still sovereignty without morality. Therefore, morality is not a component of the concept of sovereignty”. The legal independence of sovereignty means that “the actual essence of sovereignty does not include the issue of legitimacy, but rather a question of self-sufficient and effective rule, a power held by the government that rules by strength” [29, p. 215]. Some scholars may criticize this by taking humanitarian intervention as an example, arguing that sovereignty is precisely something that involves morality and law. In this regard, this

study believes that: First, humanitarian intervention itself is as controversial as sovereignty. It is an inhumane state behavior that interferes with other countries based on the protection of basic human rights. However, countless practices have proved that most humanitarian interventions are usually justified by the "sovereignty is outdated theory". Secondly, the views of critics coincide with the "new interventionism" concept advocated by the "sovereignty is outdated theory". The "new interventionism" is precisely the consideration that gives sovereignty the morality and legitimacy, which makes a country's sovereignty interfered in the name of so-called "immorality" and "illegality". The new sovereignty theory advocated by this study neither supports the theory of absolute sovereignty nor opposes the theory of "sovereignty being outdated". Instead, it emphasizes its moral and legal irrelevance. Only in this way can we truly promote the epochal transformation of the modern concept of sovereignty and face the new connotation of the new sovereignty theory, namely, the necessity of the transfer of sovereign power. The transfer of state sovereignty is necessary in the contemporary international rule of law framework, as shown in the following aspects: (1) the connotation of sovereignty itself is dynamically developing, and its development process includes the need and practice of transfer. Christopher Rudolph, a famous international relations scholar, believes that the essence of sovereignty is an institution after all. It is a set of norms and rules that include relevant authority and internationally recognized normative status, and is usually regarded as the "stable and unchanging cornerstone" of the world order. Second, sovereignty is and has always been a changing institution, although the exact types of sovereignty bargains have varied over time as individual states have engaged in them. In the contemporary era, state action marks two types of sovereignty bargains.

One is in the economic sphere, where interdependent sovereignties willingly make concessions in order to shore up Westphalian sovereignty and domestic sovereignty; Second, in the social sphere, Westphalian sovereignty has been increasingly ceded in order to consolidate interdependent sovereignty, domestic sovereignty, and social sovereignty [146, p. 16]. (2) The exercise of sovereignty must be centered on international legislation, and the transfer of sovereignty is a practical need for international legislation. Oppenheim's International Law believes that "people are increasingly aware that the progress of international law, the maintenance of international peace, and the subsequent maintenance of independent nation-states, in the long run, are conditional on the surrender of some sovereignty by various countries, so that it is possible to carry out international legislation within a limited scope and to achieve the rule of law determined by international courts with compulsory jurisdiction within a necessarily unlimited scope"[147, p. 101]. (3) Only when the sovereign power of a country is transferred can space be created for the development of international law. Lorraine Elliott used the international environmental issue as an example to illustrate the necessity of transferring sovereignty. She believed that environmental degradation and ecological interdependence meant that the principle of sovereignty itself was incomplete and insufficient, and that countries were unable to cope with the global or transboundary environmental challenges they faced. Therefore, it was necessary for countries to limit their own behavior through cooperation and agreement. This is called "late modern sovereignty theory" by Sorensen, whose main feature is

“close cooperation between sovereign states” [148, p. 202]. This is also the sovereignty theory that this study agrees with and advocates.

What is the relationship between sovereignty and human rights? The essence of a harmonious world lies in protecting human rights, especially basic human rights. The substantial purpose of the ideal of rule of law aims at protecting human rights, at the same time the essence of criminal rule of law also lies mainly in protecting human rights. So, what about international criminal rule of law? Antonio Cassese believes that compared to other branches of international law, ICL is unique in that it derives from and continuously draws on human rights law and domestic criminal law. Human rights law mainly includes relevant international treaties and conventions, as well as case law of international organizations such as the European Court of Human Rights, which have greatly promoted the development of criminal law in many aspects. By prohibiting violations of human dignity and protecting life and limb integrity to the greatest extent possible, human rights law has expanded or strengthened the values it intends to protect, at the same time has also made people more sensitive to the value issues of human rights protection. Furthermore, human rights law also provides basic rights for suspects, defendants, victims and witnesses, as well as basic guarantees of a fair trial. In short, as an important branch of law, human rights law is becoming increasingly important and has permeated the entire field of ICL[90, p.18]. There is only prescriptive and normative power in international human rights law, so, without deterrent power it can’t safeguard itself. The ICL, in particular the RS, is its guarantee. In this logic, we could conclude that the purpose or essence of the rule of international law is the protection and safeguarding of international human rights. Taking as an example the process of creation of the RS, the protection of sovereignty is an integral part of the RS, given that sovereignty is a fundamental institution in the international legal system. Incorporating the exercise of sovereign acts into the framework of the rule of law and making them responsible for their actions will enable ICL, which contains the content of international human rights law, to better regulate the sovereign acts of states, thereby fundamentally safeguarding human rights. Of course, we should take all of these elements into consideration, such as the prominent status of defendants, the inefficiency of arrest, the strong opposition, political bias of the defendants, long lasting period of victims’ public opinion, and the procedures and evidence rules are mostly the result of political compromise and legal system integration. Therefore, the value position of international criminal rule of law cannot be based on protecting the human rights of the defendants. Instead, protecting the human rights of victims should be the primary focus, and protecting the human rights of victims should be secondary, or at most, they should be treated equally. Therefore, concepts such as the relationship between crime and punishment, retribution and prevention, and fairness and efficiency should also be examined in particular. Basic human rights are universal, but their specific contents vary according to the culture of sovereign states. Therefore, the relationship between human rights and power has become a core concept. Human rights culture has put an end to the death penalty. The death penalty has disappeared in Europe, mainly due to the promotion of European human rights culture and regional international law [149, p. 128]. The issue of the death penalty for international crimes highlights the impact of human rights law on

international punishment. In ICL, the death penalty cannot be used as a means of protecting victims, nor as a guarantee of the defendant's right to life. Human rights culture can no longer be used as a means to protect victims, but also as a guarantee of the defendant's right to life. Human rights culture requires that people's life, freedom, dignity and property shall not be arbitrarily deprived. Victims and defendants are the same – both of them are humans. Rule of international criminal law fully implements these purposes. Therefore, the ICL is a guarantee of international human rights law. Without the ideal accepted universally of human rights, there will be no international criminal rule of law. Without the concept of international criminal rule of law, the concept of universal human rights is just a castle in the air.

The debate about the good and evil nature of the state is no less than the debate about the good and evil nature of human beings. As for the evil side, the bad nature of the state is often seen in famous Western works. The traditional view is that only the state can represent sovereignty. Based on this inference, the reason why we say that sovereignty is supreme is actually to say that the state is supreme. The state enjoys the right to rule, so the right to rule is naturally supreme. However, apart from God, there is nothing perfect in the secular world. Regarding national spirit, Chinese cultural scholars have made important discoveries: The national spirit is like a river. When it is broad and flat, it is peaceful and elegant; when it is narrow and turbulent, it is noisy and violent. In fact, international political scientists describe the actual state of sovereign states in this way: States are like Schopenhaur's hedgehogs, huddled together in the cold, yet defending each other's thorns [150, p. 529]. This study argues that they may need a big cage with no small cells in it. The big cage is the international legal order, and the small cells are specific legal boundaries. The philosopher of international law said: "The theory of state action reminds us that behind every state are specific interests and narrow institutions" [43, p. 109]. "I want to emphasize that the self-centeredness and selfishness of states are the hallmarks of the international state system; selfishness - acting in the national interest - may sometimes have to compromise with the competing interests of other countries, but it will not easily sacrifice its national interests for the sake of some common interests." The state's occasional references to humans are merely rhetorical and have no significant normative implications. There is little society in the international system, and certainly no community, nor any support for any form of utilitarianism - the greatest good for the greatest number. There is no respect for democracy or the will of the majority in this system [43, p. 156-158]. Needless to say, this sounds very frustrating. Coincidentally, ICL researchers also believe that this selfishness is on full display in the common ground of states and their courts in prosecuting and punishing international crimes – such as the principal of territorial jurisdiction, which could give a way for the criminals who conducted international crimes to go unpunished, the principle of positive personal jurisdiction is equivalent to declaring amnesty for crimes committed by other countries, the principle of negative personal jurisdiction is equivalent to ignoring the human rights of victims of other countries, and the principle of universal jurisdiction has long been met with a cold reception from cooperation. Short-term interests dominate everything, and the so-called realization of the common interests of the international community is just a dream. In addition, the actual impact

of international law on national courts is also very limited: customary international law is generally not the legal resources which the ICC may refer to in cases, the obligation on strictly implementation of international treaties provoked by *nullum crimen sine lege* is often overlooked, so there are many ways for the prosecuted to escape from international responsibility. What is more serious is that amnesty, statute of limitations, prohibition of double jeopardy, special pardons, etc. are still obstacles to trials that the state often sets up [90, p.277].

Indeed, for humans, the earth is not too small, but perhaps too big to be managed in a unified way. Distance leads to unfamiliarity and differences, so race, ethnicity and country are the real masters. Selfishness and short-sightedness are most likely one of the natures of a country. The earth belongs to all mankind, which is more like a slogan. The indirect execution model focuses on national interests, while the direct execution model focuses on international interests. At present, national interests are supreme, and international common interests can only be taken into account by the state. Although the direct enforcement model combats the most serious international crimes, Bassiouni's research concludes that the indirect enforcement model of ICL and the cooperation model between states are developing faster than any other model of ICL [23, p. 385]. Therefore, there is a natural tension and opposition between national interests and the common human interest of combating international crime. While integrating contractual society, nation-states are also dismembering the earth. While the nation-state is integrating contractual society, it is also dismembering the earth. Airplanes make international ad hoc military and criminal trials possible, airplanes and the Internet make the ICC possible, and over time, nothing is impossible. The earth will only get smaller. Because of this, globalization and ICL has become one of the core issues of ICL. Mr. Bassiouni had already drafted the International Criminal Code for the world, but it is obvious that the RS is far from Mr. Bassiouni's original idea.

For the sake of dialectics, we may also need to listen to different voices. In recent years, Western scholars have reviewed several Western works on ICL [151, p. 988]. And concluded: ICL scholars often regard (abuse of) sovereign power as the enemy of ICL, although they often fail to delve into the nature and plasticity of sovereignty. Although ICL does contain elements that challenge sovereignty, it also requires and, in some sense, strengthens sovereignty. The works reviewed in this study focus more on the mechanistic aspects of ICL but less researched on the substantive sphere of the ICL. This is unfortunate, because it is at this level that interesting resonances between ICL and sovereignty emerge. This study responds to how these works define the international legal order in a broad sense, and the lack of relevant constructivist scholarship is regrettable, but it should be noted that: There will be no quick consensus on the answer to the question of the precise relationship between ICL and sovereignty. According to his analysis, the relationship between ICL and sovereignty is both a hot topic in theory and controversial. On this issue, Western scholars have shown a variety of positions: radical optimism, cautious pragmatism, and negative pessimism. This study takes the first position, but as legal professionals, we must listen to different voices for identification and discussion. Bassiouni believes that the ICC isn't a supranational organization, rather than an international entity similar to existing entities... Under existing international law, the ICC has not done much more than

sovereign countries... Under existing international law legislations, the establishment of ICC expands the scope of domestic criminal jurisdiction... Therefore, the ICC does not in essence infringe on the sovereignty of states. Of course, this is just his understanding of the RS. The fact is that the international criminal justice has its own philosophy: "The international criminal value system is a reflection of the particular values embedded in the historical experience of national criminal justice systems. This philosophy is complex from the outset, but can be relatively simple in practice... In short, it is a pragmatic, humane, utilitarian and procedural philosophy - one that seeks to modestly reflect particular values widely shared by national collective organizations and international civil society... In its current state, it is complex because it reflects several philosophical propositions that have developed in different periods and cultures" [23, p. 89] Robert Cryer is a cautious optimist. On the one hand, he admits that ICL does affect national sovereignty, but he also insists that without sovereignty, the prevention of international crimes is impossible; without sovereignty, the ICC itself cannot be established. Apart from some compromises, there are no restrictions on the sovereignty of non-member states. The purpose of the principle of complementary jurisdiction is to encourage and utilize state sovereignty. The principle of universal jurisdiction strengthens state sovereignty. Without sovereignty, there is no court. Without court, there is no prosecution. Sovereignty is not always the enemy. Sovereign equality is only a legal concept, not an empirical concept. The characteristics of the international system will not easily welcome completely consistent practices. The crime of aggression protects the sovereignty of other countries, so the ICL in essence supports state sovereignty. RS lacks much innovation and has watered down the prohibition of war crimes and raised the threshold for prosecuting crimes against humanity. The only innovation is the criminalization of child recruitment and gender discrimination. The RS itself clearly does not in any way limit or derogate from existing or developing international norms for other purposes. Sovereignty is malleable, and the concept of sovereignty should advance with the times; etc. Of course, the most pessimistic and negative person is Bruce Broomhall, who hardly dares or is unwilling to cross the line of reality. At least in areas related to ICL, the sovereignty system is not in danger of being replaced, or in other words, the importance of sovereignty will not be rapidly weakened in the foreseeable future [1, p. 2]. He even said: "The fact that the role of states in making the core decisions that affect the credibility of ICL is still a central element of the emerging international judicial system makes it difficult to reconcile the view that international rule of law is the general trend." He even said: "The fact that the role of states in making the core decisions that affect the credibility of ICL is still a central element of the emerging international judicial system makes it difficult to reconcile the view that international rule of law is the general trend" [1, p. 185]. He approaches the ICL's transformation of the concept of sovereignty with some skepticism, which is very different from the cautious optimists, not to mention the big difference with the radicals.

Obviously, when shuttling between sovereignty, human rights and international criminal rule of law, different perspectives lead to different positions and opinions. In terms of academic norms, a multi-perspective integrated review should be conducted, and in terms of academic character, a minimum degree of independence should be

appropriately demonstrated.

3.3 International criminal rule of law is both a kind of common good and protection of individual rights

Justice is the foundation of international law in morality field, and peace is the practical foundation of international law. Justice is the last line of defense to end disputes, and law itself is politics. When judicial justice and political compromise conflict, how should we choose? Thinkers have different opinions.

John Rawls, an ethicist, philosopher and international lawyer, pointed out that "justice is the primary value of social institutions, just as positive truth is the primary value of ideological systems." In Rawls' view, individual justice is inviolable and cannot be exceeded even by the overall interests of society. "Therefore, in a just society, equal civil liberties are unshakable, and the rights guaranteed by justice are never subject to political transactions or the weighing of social interests;" "Justice denies that it is justifiable to deprive some of their liberty in order to obtain a greater benefit for others" [152, P. 3-4]. Rawls opposed the utilitarian analytical paradigm and reiterated: "Justice denies that it is legitimate to deprive some people of their freedom in order to enable them to enjoy greater benefits. The way of calculating the gains and losses of different people as one person is excluded. Therefore, in a just society, basic freedoms are taken for granted. The rights protected by justice are not subject to political transactions or the weighing of social interests" [152, p. 27]. Therefore, in Rawls's view, political reconciliation must be based on the realization of truth and justice, and individual rights cannot be traded or weighed casually. If justice cannot be achieved, is there any value for human beings?[146, p.137] According to Rawls, the law of peoples is not only the law between states, it also focuses on the fundamental interests of the people, and its first step is to establish principles of justice for domestic society, limit the internal sovereignty and autonomy of the state, and limit its power to insist on doing whatever it wants with the people at home; The law of nations redefines sovereign power and denies the traditional right of states to wage war and unlimited domestic autonomy; human rights limit sovereignty, which is a major shift in international law [152, p. 25]. In this way, the country's internal and external autonomy rights must be subject to the checks and balances of justice and human rights. In Rawls's view, specific justice is hierarchical. The core tenet of Rawls' political liberalism is: "Individual freedom is superior to the common good of society."[152, p.566] In this way, justice in ICL has a special meaning: bringing international coercive crimes to justice and returning justice to the victims is a creed that takes precedence over all other political considerations and reconciliations. The reason is very simple: international coercive crimes are the most serious violations of individual freedom, and we must first insist that the guilty must be punished, even the head of state is no exception. Political stability, social harmony, etc. must give way to this.

In the finale of Kant's late thought, we find that "on the sign of a hotel in Netherland there is a grave painted on it, with the ironic words 'Towards Perpetual Peace' written on it". Will there be permanent peace in the world only when men,

politicians or philosophers go to their graves? In fact, Kant was not so desperate, because the world still has a sound principle of rights, which is: “Even if the world is destroyed, justice must be realized.” In the German-speaking world, this phrase is: “Let justice reign, even if all the villains in the world fall”. “Seek first the kingdom of pure reason and its justice, and your goal will come to you” [153, p. 52-53]. In Kant’s view, the reason why the earth can still be saved is mainly because justice still exists. Kant’s concept of international justice is rich and specific, and its core content is nothing more than: “Human rights are inviolable, no matter how much sacrifice it may cost the ruling power,” and “all politics must succumb to rights” [153, p. 56]. In this way, justice is to defend human rights, which is the logical starting point for the earth’s politics to move towards permanent peace. In this way, justice should be restored to the victims, and we should not succumb to political transactions.

Louis Henkin, an American master of philosophy of international law, pointed out: “The state is often said to be a sovereign state with axiomatic characteristics; in fact, the spread of this term is an unfortunate mistake, not only because it serves a bad national myth, but also because it is a term that replaces thinking and accuracy. Sovereignty is the plaything of monarchs, and the international system has become their club. So, at least for legal purposes, we are better off relegating the term sovereignty to the historical archives as a relic of an earlier era.”[43, p.9] Although Henkin’s concept of sovereignty is rejected by this study, his criticism of the theory of absolute sovereignty and his discussion of the historicity of sovereignty are worth learning from. Having deconstructed the myth of sovereignty, one of Henkin’s conclusions must be that once people recognize that sovereignty is a fairy tale, for that there isn’t at all full reason to for the international community to insist on the theory of state immunity in any international criminal cases, furthermore, it is even difficult for the international community to find reasons to support and insist on the principle of state immunity in international criminal cases [43, p. 393]. Sovereign immunity is the main excuse for states to pursue national values on its own, while criminal punishment for crimes is for the realization of human values. How a country treats its people has become a theme in the vast human rights law system. How a country treats its people has become a matter of international concern and the main content of international politics and law: the international human rights movement is the essence of the contemporary era [43, p. 400]. Reconciliation for peace, immunity for peace, and national values above all else have become history. Justice will no longer give in. Although Henkin also said, “Peace is the highest value goal,” “peace is not only more important than development, but also more important than justice” [154, p. 37]. But the enemy of peace is not justice, but force and war. Justice is neither force nor war. In this logic, peace plays a much more important role than justice does, and it is not a comparison between peace and justice; peace is the highest value because war is inherently unjust [154, p. 37], not because justice is inherently unjust. Simply talking about war and peace cannot show the hierarchy of justice.

Perhaps we also need to listen to different voices. Grotius doesn’t seem to think so. War is waged for peace [155, p. 17]. Grotius distinguished wars into just and unjust wars in an attempt to double the chances of peace. However, contrary to Rawls, since the best outcome of war is a reconciliation of all disputed claims through fair

adjustment and a general immunity [154, p. 133], justice must give way to political reconciliation. Nor is this position limited to Grotius. Nor is the Rawlsian creed limited to the doubts of Habermas. As far as the history and reality of international criminal justice trials are concerned, in fact, the revelations of Rawls and Bassiouni are also realistic utopias and may need to be subjected to the test of reality in the long term. However, without ideals, how can we transcend? Humans are not a herd of beasts. Without ideals and transcendence, are humans still humans? Political realism can only stabilize the existing order, and the breakthrough of the constitutional order of the earth can only rely on political idealism.

3.4 Establishing a preliminary international criminal value system

3.4.1 Human rights are the purpose value of ICL

Through the above discussion, the framework of the international criminal value system has been basically established, that is, in terms of position, this study advocates the establishment of international criminal rule of law in the international community, which also works as a theoretical guidance of the international criminal axiology system; From the perspective of theoretical basis, in the context of stage-by-stage nature of the social contract – which this paper calls as the "internationality" - the term "internationality" is rarely discussed in the theories of world justice and criminal jus tice, it is undeniable that international criminal justice operates and has effects in the context of a flexible international system [156, p. 21] of international criminal justice - the reconciliation between sovereignty and international criminal rule of law is achieved; In the order of related concepts, human rights values are meta-values and purpose values; specific judicial values such as justice, fairness, security, and order are all subordinate values and are instrumental values for realizing the meta-values of human rights.

As for the relationship between purpose value and instrumental value, this study believes that purpose value is of a higher rank than instrumental value. The argument that purpose value is of a higher rank than instrumental value has long been established. Two thousand years ago, Aristotle believed that people use tools not only to complete tasks, but more importantly to achieve their own goals. But what is "purpose"? Kant pointed out in his "Formula of End": "Your actions should always regard the humanity in yourself and in others as an end, and never as a means" [157, p. 37]. In other words, people are the purpose. The same is true for law. If the existence of human subjectivity is excluded, then the law becomes meaningless. The development of law is the expression of the reality of human development. The comprehensive and free development of human beings is the highest goal and orientation of the establishment and development of law. Whether domestic law or international law, it must accept human development as an objective value. "Purposive values" are at a higher level than "instrumental values", as Aristotle said 2000 years ago, "things that are desirable in themselves are more perfect than things that are desirable because of other things" [158, p. 18]. In other words, instrumental values not only have relative value but also

do they have intrinsic value. It is precisely due to this intrinsic characteristic of purposive values that it can serve as an extension of the scale and can be used to evaluate the value of other things, thus achieving a status that transcends instrumental value. Having established the standard of which the purpose value is higher than the instrumental value, it is now necessary to determine whether "human rights" is the purpose value of ICL.

According to Aristotle's discussion on "purpose" mentioned above, this study believes that the purpose value must have the following characteristics: First, the purpose value is ontological and intrinsic, and it is the end point to which all means (tools) point. Aristotle, in discussing the relationship between ends and means, states: "…suppose an end and consider by what means it may be attained" [158, p. 68]. From this we can see that the purpose does not need other things as a medium to show its own "goodness", and the tool is one of the many ways to achieve the purpose (good). Second, as Frankfurt said, "a life without purpose is a life without meaning" [159, p. 49]. It is generally recognized in the philosophical community that there is a close connection between purpose value and man as the measure of all things, which means that purpose value must have subjective connection. Finally, due to the ontological, intrinsic, and subject-related characteristics of purpose value, purpose value, as a mapping of the subject at the value level, has the function of evaluating instrumental value and other things. This means that whether an object or a tool has value lies in whether it can "promote or fulfill the value of the purpose" [160, p. 95]. "In this century, unimaginable barbarism has claimed the lives of countless children, women and men and has shocked the conscience of humanity," RS made clear in its preamble. Because international crimes have destroyed countless lives and such atrocities pose a serious threat to world peace, security and well-being, the international community must take action at the national level and strengthen international cooperation.

The right to life is the logical starting point of all rights, and the RS places it at the beginning of the preamble, which fully proves that human rights represented by the right to life are the core value of ICL. Because "the preamble is a common part of important international treaties. Its main function is to explain the background and purpose of the parties to the treaty and to a certain extent reflect or emphasize the important principles followed or implied in the specific text of the treaty" [72, p. 19]. The RS states in its preamble that right to life stand for human rights and explicitly states that the protection of people's right to life and ending the history of impunity is a fundamental objective of the ICC. These all indicate that human rights are the purpose value of ICL.

3.4.2 Sovereignty values are the guarantee of human rights values

The generation of international power depends on the creation of international law through treaty-making by countries on the basis of consensus. Only by signing treaties and entrusting some affairs that are originally handled unilaterally by sovereign states and common affairs that are difficult for individual countries to handle alone to a certain international organization for unified handling can the effectiveness of

international law in international governance be truly brought into play and international law can be further developed. Just imagine, if there were no Statute of the ICTR, the Convention on the Prevention and Punishment of the Crime of Genocide and the Geneva Convention system for the regulation of war crimes, which will no longer prosecute the Rwandan genocide, which will make it difficult to support international criminal justice. The transferability of sovereignty means that sovereignty is no longer regarded as absolute and unrestricted. “If states recognize each other’s sovereignty as a right, then this right is not a characteristic of individual states, but is shared by many states. The common expectation of this system is that countries should not take the lives and freedoms of the other side’s people; international law is actually part of international politics. Despite the lack of a unified law enforcement agency, countries should abide by international law. Countries are increasingly recognizing the coercive force of international law, and competition between countries is also limited by the sovereignty structure recognized by international law” [161, p. 351-352]. In other words, even though the value of sovereignty takes precedence over human rights in the international community, at least within the RS framework, judicial sovereignty works for the value of human rights. In short, the judicial part of sovereignty is also a tool for safeguarding human rights, which belongs to the category of instrumental value and is lower than human rights value.

Therefore, the international criminal value system shaped by this study is as follows:

Sovereignty includes human rights; judicial sovereignty is part of sovereignty and belongs to instrumental value, which ranks lower than human rights value but higher than other instrumental values; fairness, justice, security, order and other values are instrumental values, which rank lower than human rights value and sovereignty value (figure 1).

CONCLUSION

Through the study of "Jurisdiction of the ICC on the Prosecution of Individuals", we can achieved such conclusions as following:

(1) The establishment of the ICC is an important step and milestone for mankind towards international rule of law. The "principle of individual criminal responsibility" is essentially the specific manifestation of the "system of denial of state personality" in ICL. "Individual criminal responsibility" has promoted the development of sovereignty theory.

– The essence of the "individual criminal responsibility system" is the "system of denial of state personality". The "system of denial of state personality" refers to a system in which individuals who support or act in the name of the state or represent the country, and who have abused their sovereignty power beyond necessary limits and violated the rules of international law advocated by international community, causing damage to others or common interests or shocking the conscious of human beings and thus constituting international crimes, and ICL requires such individual actors to bear joint international criminal responsibility in order to achieve international fairness and justice. The "individual criminal responsibility system" pierces the veil of national sovereignty and effectively curbs collective and systematic international crimes.

– The purpose of establishing the "individual criminal responsibility system" is to break through the limitations of the "Westphalian sovereignty system" and thus help end the history of impunity. The "individual criminal responsibility system" has been widely recognized by the international community and has promoted the innovation of sovereignty theory. This study critically inherits the legacy of "absolute sovereignty theory" and "sovereignty is outdated theory", and combined with the development of international law theory, it believes that sovereignty is "legally irrelevant" and "morally irrelevant", but in the context of globalization, sovereignty can and needs to be partially transferred.

– The "individual criminal responsibility system" does not conflict with sovereignty and instead highlights sovereignty. First, the "individual criminal responsibility system" pierces the veil of state sovereignty, making sovereign behavior no longer a unilateral action, but more of a multilateral interaction and cooperation; Secondly, by separating the personality of sovereign actors from that, we can achieve purification within sovereign power, separating the stigma brought about by the abuse of sovereignty from sovereignty itself. By removing the individual from the protection of sovereignty, the seeds of the international crimes, such as totalitarianism and Nazism, could be to some extent prevented, and a much more harmony world could be constructed; Third, the exercise of sovereign behavior should be incorporated into the legal framework, so that it is a further consolidation and improvement of the national responsibility system to ensure that every sovereign act is included in the responsibility system and that sovereign power is not abused due to lack of constraints; Third, the establishment of "ICR system" enables the execution of state power to be incorporated into a more stable and orderly international governance mechanism.

(2) Jurisdiction is the lifeline of the ICC and a prerequisite for the ICC to conduct individual prosecutions. The difficulty for the ICC in enforcing the jurisdiction on

prosecution of individuals to achieve. There are both theoretical and practical reasons to ineffectiveness of exercise its jurisdiction for the ICC. The root reason to these dilemmas is that the international community is still a society based on sovereign states, and the common interests of the international community cannot transcend the political preferences of sovereign states.

(3) The RS and treaty-based the ICC, both of the two were created under the influence of the world federalism movement and were designed in accordance with the domestic monistic legal system. However, the international legal system and the domestic legal system are dualistic, which leads to many difficulties for the ICC in exercising its jurisdiction.

– Federalists have learned from past experience that the previous international legal order had obvious flaws, namely, the previous international legal order was based on the "absolute sovereignty theory" and the principle of sovereign equality. The international community was unable to hold government officials who committed serious crimes such as genocide, war crimes, and crimes against humanity accountable, hiding behind sovereignty. As a result, these criminals went unpunished. Based on pursue of criminal judicial organization – prosecution of individuals hiding behind the sovereignty so as to prevent future crimes, the ICC was established at their advocacy.

– The international community on which the ICC depends is a highly politicized and competitive society, in which it is difficult to form a world government.

– ICL represented by the RS is not world law, and is political in nature. Countries interpret and apply ICL based on political interests, leading to the diversification of the interpretation and application of ICL by diverse subjects, thus resulting in the politicization of ICL.

– In practical dimension, it is clear that the relationship between domestic legislation system and international legislation system is that they absolutely belong to two different legal systems; The ICL with the RS at its core mainly reflects the legal concepts of the Western world. It lacks universality and is difficult to be accepted by the non-Western world.

(4) Due to legislative and technical defects in the RS, the judges in the ICC frequently carried out functionalism interpretation of the RS in recent years, which has aroused doubts from the international community about the legitimacy of the ICC's jurisdiction, thereby hindering judicial cooperation between the international community and the ICC.

- "Ending impunity" not only is an important purpose or policy for the international community to formulate the RS, but also works as the basic value and purpose of the RS. By adopting the purposiveness of legal interpretation, judges must take the purpose of "ending impunity" into consideration when interpreting the statute. Therefore, when faced with heinous international crimes, "ending impunity" often becomes an excuse for judges to implement their intentions, and they often achieve the criminal policy goal of "ending impunity" by expanding or narrowing the literal meaning of the norms. Under this mode of thinking, it is very easy for purposive interpretation and analogical interpretation to become integrated and develop into an extremely inflated legal expansion trend oriented towards "ending impunity".

– ICL is a mixture of different branches of law, and the court has not provided guidance on the order of objectives of each branch of law, which also makes the multiple objectives of the RS full of conflicts. Since the statutes do not clearly define the hierarchy of different purposes of different law departments, when judges face heinous and brutal crimes which shock the conscious of the human beings - no one with a conscience can remain indifferent to the heinous criminals, they are without any doubt likely to carry out substantive justice judgments due to their strong sympathy for the victims when balancing diverse values of different law departments, that is, to bring the criminals to justice.

– Since the definition and implementation of normative purposes are at the core of the process of criminal law interpretation, and the diversity of purposes of ICL makes the RS open, this also makes the purpose interpretation centered on the purpose of "ending impunity to protect the interests of victims" often become the primary interpretation approach in interpretation practice and plays the final decisive role. This also means that the relationship between purpose interpretation and other interpretation methods is no longer a parallel relationship, but a relationship of domination and being dominated, that is, purpose interpretation is in a dominant position. The approach of using purpose interpretation as the main interpretive approach provides ample space for courts to conduct functionalist interpretation.

– Language itself is flexible, which leads to ambiguity in concepts in the legal system, whether they are descriptive concepts or normative elements. The openness of the legal system makes it common for legal purposes or values to be unclear, contradictory or missing. Judicial personnel are required to clarify specific details or fill in the gaps, which in turn exacerbates the uncertainty of norms, thereby creating ample space for interpreters to conduct functionalist interpretations.

– The Court's functionalist interpretation not only violates international human rights standards, but also goes against the original intent of the legislature - it infringes upon the national sovereignty of the contracting states and puts the ICC into a crisis of legitimacy and effectiveness.

(5) The provisions of the RS don't give coercive power to the "international cooperation obligation". The main structure and obedience culture of the international community are different from those of domestic society. Therefore, the international community rarely chooses to cooperate with the ICC.

- Given that the provisions stipulated in RS provides that State Parties shall cooperate fully with the ICC in process of investigation and prosecution of international crimes or situations, other provisions are filled with exceptions and qualifications, making them only exhortations, and the RS does not provide for a strong restraining mechanism for non-cooperative party states.

(6) The provisions stipulated in RS at the same time provides numerous restrictions on the Prosecutor when she/he exercise his/her discretion, which hinders the exercise of jurisdiction of the ICC.

– The ASP limits the powers of prosecutors through election and removal procedures.

– Preliminary rulings, mutual legal assistance proceedings, and challenge proceedings all give sovereign states the right to limit prosecutorial discretion.

– The courts restrict prosecutors' discretion through pre-trial procedures, review rights, hearing rights, etc., which results in the prosecutors' right to initiate court jurisdiction on their own initiative being suppressed.

– The Security Council can constrain the prosecutor's discretion through the power to delay or suspend an investigation.

(7) Since the crimes under the jurisdiction of the ICC are highly political and its prosecutions have a significant impact on national sovereignty and national image, major powers are likely to oppose the ICC's jurisdiction, which also makes it difficult to effectively enforce the ICC's jurisdiction.

(8) Considering that the Statute does not allow trials in absentia, the execution of the arrest warrant is undoubtedly the most important of all execution issues. This is because, if the arrest warrant cannot be executed, then the court proceedings can only end with the "issuance of an arrest warrant", which objectively blocks the litigation process and hinders the ICC in exercising its jurisdiction.

– The curbs of the basic structure of the international community on the international criminal execution system. There is a difference between the international community and the domestic community. As mentioned above, the state is the basic unit of the international community and at the same time works as the main subject of international law. The subject of ICL is the individual. Therefore, the international legal system is necessarily not fully applicable to the international criminal legal system.

– The impact of the culture of obedience among countries in the international community on acceptance of jurisdiction. In the international community, the prerequisite for the law to take effect on countries is the consent of every country, in addition to mandatory law and customary international law. There is no representative system in the international community.

(9)The most direct way to overcome the theoretical and practical difficulties encountered by the ICC in exercising its jurisdiction is to amend the legislation. However, the amendment procedure of the RS is extremely cumbersome and difficult, and reconciling the conflicts of interest among the numerous States Parties is a huge project that not only requires huge amounts of legal resources but also makes it difficult to achieve a fundamental solution. This study believes that the fundamental reason that restricts the effective realization of the jurisdiction of the ICC is that "rule of law in ICL field and safeguarding international common interests" have not yet gained "universal consent" from the international community. The way to solve this fundamental problem is to establish the concept of rule of law in ICL field within the international community. Given that the premise for construction of rule of law in ICL field is the prosperity of the discipline of ICL and the universal recognition of its value, and that the academic community has not yet established a value system for ICL, the initial establishment of an international criminal value system has become the most fundamental and important task in establishing international criminal rule of law.

– The knowledge form of ICL roughly belongs to factology and normative science, and the knowledge form needs a leap.

– The current international criminal value system is based on the social contract theory, but there are the following drawbacks in applying the social contract theory to

ICL: The social contract theory in the international community is of a stage-by-stage nature; the social contract theory in the international community is of internationality.

(10) The theory of sovereignty has been updated, not only because only the transfer of state sovereignty can create space for the development of international law, but also because it is necessary for states to restrict their own behavior through cooperation and agreement in order to maintain the international order. Based on this, this study established the social contract theory that includes “internationality” and “stage-by-stage”.

(11) By exploring the definitions and connections of relevant propositions such as: the first group proposals are “rule of law”, “rule of international law”, and “rule of law in ICL field”; the second group proposals are “international community”, “international public legal order”, and “international criminal order”; the last but not the least group proposals are “sovereignty”, “nationality”, “human rights”, “common good” and “individual rights”. The last group proposals may be the most controversial one which takes a lot of courage. Then, the content of the international criminal value system has been enriched.

(12) This study preliminarily established the international criminal value system (figure 1).

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