An exploration of selective justice in the International Criminal Court

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Abstract: With the development of history, human society has experienced the development stage from disorder to law, from domestic law to international law. International law came into being and developed in the context of increasing exchanges between states. International criminal law has emerged and developed in modern times on the basis of the continuous development of international law. The International Criminal Court is also a form of international legal system that has emerged when human society has developed to a certain stage. To punish international criminal criminals more effectively through the trial of the International Criminal Court, to stop, prevent or deter the occurrence of international criminal crimes and potential international criminal criminals is an inevitable historical product of the development of human society to a certain stage, and it is a milestone progress. The International Criminal Court has played a positive role in the protection of human rights in all countries, especially in developing countries. Based on the principle of complementary jurisdiction, the jurisdiction of the International Criminal Court encompasses a set of jurisdictional principles, conditions and procedures to ensure the legality and impartiality of its exercise. These principles, conditions and procedures of jurisdiction have certain particularity. Since the establishment of the International Criminal Court, there has been a problem of selective justice, so this paper tries to discuss the meaning of selective justice in the International Criminal Court, the development of selective justice in the International Criminal Court and the influencing factors of selective justice in the International Criminal Court.

1. INTRODUCTION

The entry into force of the Rome Statute of the International Criminal Court (hereinafter referred to as the Statute) and the establishment of the International Criminal Court are important symbols of the improvement and development of the international criminal law system. But in the first decade of the ICC’s existence in 2002, one of the main controversies that emerged was the issue of selective justice, as the court did not investigate or prosecute outside Africa. The international community has criticized the "selective justice" of the International Criminal Court, especially African countries, which have expressed strong dissatisfaction. Therefore, the international community has been highly concerned about the judicial selectivity of the International Criminal Court, and domestic and foreign scholars have conducted in-depth discussions on its connotation from both broad and narrow perspectives, providing a solid theoretical basis for the study of this issue. Due to a combination of factors, the International Criminal Court often adopts a selective approach to justice in practice, which may jeopardize national sovereignty, call into question national judicial systems and have a negative impact on non-States parties.

2. THE CONCEPT OF SELECTIVE JUSTICE IN THE INTERNATIONAL CRIMINAL COURT

In recent years selective justice has been directed at African leaders, so enforcement of international criminal law has been more selective than enforcement by domestic courts. Due to the higher selectivity of international criminal law enforcement, international criminal law is more likely to be accused of injustice, and this selectivity controversy is triggered by the choice of international criminal law and its institutions. Selective justice refers to a system in which when a crime is committed in a country or region, the judicial authorities will make different treatment according to its specific circumstances. To the extent that judicial selectivity exists, limitations are necessary but acceptable. Under the current legal framework, selective justice should be appropriately restricted. Given the realities of the time constraints and limited resources that prosecutors face in their work, a comprehensive assessment of the information and evidence available, as well as the environment in which investigations and prosecutions are
According to Chinese and foreign scholars, the selective justice of the International Criminal Court covers a series of selective acts, including but not limited to treaty making, discretion, the UN Security Council and state contracting, etc., which have a certain impact on the operation of the International Criminal Court system; it refers to a set of rules and mechanisms based on "jurisdiction" in the field of international law. In the International Criminal Court, the discretion of judges and prosecutors leads to selective judicial actions.

3. THE INTERNATIONAL CRIMINAL COURT CHOOSES THE DEVELOPMENT OF JUSTICE

Before the birth of the International Criminal Court, the establishment of some international criminal tribunals or international military tribunals to punish international crimes marked the progress of the international criminal system, but the emergence of the statute proved the codification of international criminal law. But with that comes selective justice.

3.1 Embryonic stage

After the end of World War II, the establishment of the Nuremberg, Tokyo and ICTY Tribunals, as well as the Rwanda Tribunals, injected targeted judicial shoots into the field of international criminal justice. With the development of the practice of selective justice, various countries have enacted or revised relevant laws to restrict selective justice. Prior to the Rome Statute and the subsequent establishment of the International Criminal Court, advocates of international criminal justice were increasingly concerned about the judicial selectivity involved in the arbitrary creation of single conflict tribunals. With the gradual maturity of the selective justice system, selective justice has become a special legal department independent of traditional litigation. Since these international criminal judicial bodies were established in the context of selective justice, selective justice was seen in its infancy as a criticism, whether well-intentioned or ill-intentioned, and has been a difficult problem for the ICC from its inception to the present day. The main feature of the sprout of selective justice is that it does not conform to the principle of neutrality and non-discrimination, which has become the biggest obstacle to its development. The credibility of the International Criminal Court has suffered direct damage in the embryonic stage of selective justice, which is one of the most typical negative acts.

3.2 Formation stage

In 1994, the draft Rome Statute of the International Criminal Court was introduced; in 1995, the United Nations established the Preparatory Committee for the International Criminal Court; on July 1, 2002, 60 countries ratified the Rome Statute, making the International Criminal Court the world's first permanent international criminal institution responsible for enforcing jurisdiction over international crimes in accordance with the Rome Statute. The establishment of the International Criminal Court is a wise move, but it cannot ignore the fact that while reducing selectivity towards the accused, it also adopts a selective stance towards the law. Throughout the process of compiling the Rome Statute, legislators and compilers constantly compromised and screened to ensure the quality and accuracy of the final version. From the cautious consideration in the initial formulation of the Convention to hasty accession and modification later, and finally to becoming a fully effective text, there have been multiple iterations, ultimately forming the current massive code.

In the process of compiling the provisions of the Rome Statute, the power of judges and prosecutors has caused the greatest controversy. Therefore, the compilers of the Rome Statute aim to limit the discretion of law enforcers to the maximum extent possible, which also gives the International Criminal Court more ability to transcend boundaries than the former Yugoslavia Tribunal. It is undeniable that the compilation of the Rome Statute provides selective judicial guarantees for legal practitioners, which is beyond doubt. In the relevant provisions of the Rome Statute, judges and prosecutors of the International Criminal Court enjoy extensive discretionary power, and the legalization of these discretionary powers is a symbol of the selective judiciary formation of the International Criminal Court.

3.3 Practical stage

On January 27, 2016, the Pre-Trial Chamber, at the request of the Prosecutor, authorized it to investigate the situation in Georgia. However, as the situations investigated by the Prosecutor were all African countries, there were voices criticizing the Prosecutor for selectively administering justice to African countries. Although this claim was supported, it also raised some doubts. The disappointment of the African Union with the Court and the United Nations Security Council mainly stems from its belief in the politicization of international criminal justice. As a result, the United Nations Security Council was authorized by the Rome Statute to submit cases of suspected international crimes within the jurisdiction of the International Criminal Court to the Court, while the transfer of the Security Council extended the Court's jurisdiction to non-contracting parties, including referring the situations in Darfur, Sudan, and Libya to the Court. African countries account for the vast majority of investigations and prosecutions by the International Criminal Court, regardless of the contracting situation. During this period, the United States launched wars in Afghanistan and Iraq, and the crimes committed by them were widespread within the jurisdiction of the International Criminal Court. Until 2020, Judge Hofmansky authorized prosecutors to conduct a comprehensive investigation into the alleged war crimes and crimes against humanity committed by

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3.4 Regulatory Stage

In the selective jurisdiction of the International Criminal Court, the discretion of prosecutors has caused the greatest controversy. When the Pre-Trial Chamber authorizes the Prosecutor to investigate a particular situation, or when the State Party or the Security Council submits the situation to the Prosecutor, and the Prosecutor's Office begins a formal investigation of the specific situation, some people believe that once the jurisdiction of the court is triggered, the Prosecutor will have considerable discretion to choose cases in a specific situation. This viewpoint is not entirely in line with the actual situation, as prosecutors' judgments on different situations are often influenced by the judge's personal stance and other factors, and in the actual operation process, prosecutors may also make appropriate adjustments as needed. The principle of fairness is the primary principle for regulating judicial selectivity. The prosecutor's office screens and analyzes potential criminal offenders involved in multiple objects to ensure that they are not subject to partisan bias.

4. FACTORS INFLUENCING THE SELECTION OF JUSTICE BY THE INTERNATIONAL CRIMINAL COURT

The biggest problem facing the establishment of the International Criminal Court is the existence of different legal systems and different criminal trial systems, that is, the court must be able to adapt to civil law countries that adopt interrogative trial methods, but also be satisfied with common law countries that adopt procedures that focus on discovery and presentation of evidence. States must also reach agreement on all relevant judicial issues. This different legal system directly affects the judicial selectivity of the International Court of Criminal Law. The selective justice of the International Criminal Court has active selective justice, which mainly includes the choice of legislation, the choice of law enforcement and the choice of the state.

4.1 The choice of legislation

The establishment of the International Criminal Court is based on the Rome Statute, which is a universally adopted form of international treaty-style legislation of international law, among which the most important legislative principle is the "principle of legality of crime", which for the first time explicitly stipulates the principle of legality of crime in the form of international criminal legal documents.[27] In addition, the Statute also selectively identifies four types of crimes, the selection of which is closely related to the specific historical background, the scale of the crime, armed conflict and other factors, so that the most serious types of crimes in the international community are diverse and need to be investigated by the International Criminal Court. Given the dual nature of the ICC as a treaty-based international organization and a court for the trial of criminals, it must apply the basic legal principles of criminal law in accordance with the rules of treaty interpretation in international law. Therefore, the complexity and prominence of the problem of judicial selectivity are more significant.

The main body is the International Criminal Court itself, composed of judges and prosecutors; There is also passive selective justice, including political selectivity, the selectivity of States parties, including the UN Security Council and relevant countries. The characteristics of these two types of selective justice have inherent theoretical and logical relations. The subject of selective justice is not only the dominant player but also the participant, influencing and penetrating each other.

4.2 The choice of law enforcement

In the statute, the ICC has adopted a unique organizational structure that organically combines judges and prosecutors to form a unified law enforcement system, making the relationship between judges and prosecutors both independent and interrelated.[9] The judge's discretion is a relatively independent judicial power. The discretion of the International Criminal Court is a dual structure composed of two different levels of discretion of the judge and the prosecutor, which is characterized by the interweaving of the discretion of the judge and the prosecutor, forming a unique legal system. Many States were inclined to accept an independent international criminal prosecutor to enable preliminary investigations into allegations of core international crimes, but this did not meet their expectations because the Prosecutor's investigative powers were too strong. As a result, many States have decided to authorize the Pre-Trial Chamber to act as the authority for the Prosecutor to initiate investigations, in order to represent the inherent constitutional constraints on the Prosecutor, while some States require the Pre-Trial Chamber to accept the autonomous authority to initiate investigations. Although the Pre-Trial Chamber has the dual functions of prosecution and trial, it has not been as effective as it should be, mainly because it lacks a self-regulating mechanism, that is, internal checks and balances.[9] Although the Statute is intended to impose constraints on the Prosecutor through the Pre-Trial Tribunal, there are still doubts about the trust in the impartiality of the judge's supervision due to the delicate cooperation and game relationship between the judge and the prosecutor, as well as the lack of detachment in their status. At the same time, the procurator's power is too concentrated and its own lack of effective checks and balances makes it difficult to play a role.
4.3 Choice of country

The political choice to accede to the Statute is different from the political choice of the Security Council, because the Council influences the selective justice of the International Criminal Court through legal means, while States can only rely on diplomatic means, which is the selectivity of national interests based on national sovereignty, and thus affects the selective justice of the International Criminal Court.[10] Due to different national conditions, the scope and degree of application of international law are also different. It punishes criminals in large countries and produces selective justice compared to countries with less political 'influence'. The influence of powerful countries in the international criminal law system is needless to say, and how should weak countries choose, especially weak African countries. But the ICC, which was set up with the support of African countries, now wants to "break the hearts of our African brothers". At a time when African countries have little influence in some important international institutions, they are pushing for the creation of another body in the global governance system, independent of the UN Security Council. They want the ICC to be an institution that transcends the old centers of diplomatic and economic power, which they fear will turn the court into a political organ of powerful countries and suffer injustice. Since its inception, the ICC has touted its "principle of complementary jurisdiction" to ensure the integrity of its jurisdiction. It can not only safeguard its own sovereignty by interpreting international law, but also provide protection and assistance to other States by exercising jurisdiction. However, the jurisdiction principle of the International Criminal Court, as a sovereign state, is constantly disputed, and this dispute constantly touches the bottom line of national sovereignty.

Since its inception, the International Criminal Court has been controversial, but it is undeniable that its judicial activities have played a certain role in maintaining international peace and security. Selective justice has existed in the International Criminal Court since its establishment, and has gone through four stages: germination, formation, practice and regulation, and has shown different characteristics of selective justice. The International Criminal Court is mainly affected by the factors of legislation, law enforcement, politics, state contracting, etc., resulting in two aspects of active and passive selective justice theory. As a result of these factors, selective justice in the International Criminal Court has often led in practice to situations that undermine State sovereignty, question national judicial systems and target non-States parties. Therefore, it is necessary to deal with it from the aspects of foreign policy, national criminal law system, international judicial assistance, etc., which can not only protect national interests, but also effectively combat international crimes and maintain their justice.

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