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# 国际刑法评论

*China Review of International Criminal Law*

◎主 编 赵秉志 卢建平  
◎执行主编 王秀梅

第3卷



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国际刑法学协会中国分会

# 国际刑法评论

China Review of International Criminal Law

顾问 高铭暄 万鄂湘等  
主编 赵秉志 卢建平  
执行主编 王秀梅

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**赵秉志** 国际刑法学协会会员暨中国分会副主席，中国法学会刑法学研究会会长，北京师范大学刑事法律科学研究院院长暨法学院院长、教授、法学博士

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## 《国际刑法评论》导言

在经济、政治和法治日益全球化发展的当代，具有鲜明时代特色的国际刑法具有重要的意义，它体现了国际社会防范与惩治国际犯罪，进行国际刑事司法合作，开展国际刑事审判，以维护国际社会安全与和谐的现代法治诉求。然而，随着经济全球化进程的加快，国际犯罪、跨国犯罪也日益突出，严重危害国际社会和全人类的和平与安全，是建立现代法治与国际和谐社会最不和谐的因素。为有效地惩治与防范跨国犯罪尤其是国际犯罪，国际社会和世界各国愈来愈重视国际刑法的研究与适用。近年来，在国际刑法的实体法领域，国际社会暨国际刑法学界主要聚焦于国际刑事法院管辖的相关罪行、恐怖主义犯罪、有组织犯罪和腐败犯罪等方面。同时，国际刑法在程序法领域较多关注普遍管辖权、引渡、国际刑事司法协助与国际合作以及国际刑事法院中的程序性问题等方面，但无论是实体方面还是程序方面，这些问题也都是关系到国际社会共同利益的重大法治问题，需要各国共同关心和研究并取得共识。

国际刑事法院的设立是国际刑法发展史上的里程碑，为进一步研究国际刑法问题开拓了新的领域。

第二次世界大战期间惨绝人寰的大屠杀在上演历史悲剧的同时，也从另一个角度激发了国际刑法的迅猛发展。此后的纽伦堡和东京审判将国际刑法的发展推上第一个历史发展高峰，并形成了一系列国际法原则，如个人刑事责任等。事隔 50 年之后，前南斯拉夫、卢旺达、乌干达、刚果、中非共和国和苏丹达尔富尔地区发生的武装冲突再现了人类历史上灭绝种族和危害人类的悲惨画面。为了使人类不再重蹈覆辙、重历此类狞恶之浩劫，国际社会通过不同方式分别建立了前南斯拉夫和卢旺达特设法庭、东帝汶和柬埔寨特设法庭，以审判那些人类的罪人，但这些法庭终因时间和地理等诸多条件的限制而不能充分维护世界的正义与和平。建立常设国际刑事法院，让人人享有正义，让犯罪者不再逍遥法外，结束武装冲突，弥

补特设法庭的不足,威慑未来的战犯,已经成为国际刑法发展的必然趋势。

毋庸置疑,任何一个新鲜事物的产生总需要一个得到国际社会广泛认同和达成共识的过程。中国作为设立国际刑事法院《罗马规约》的非缔约国,对《罗马规约》本身存在问题的研究也逐渐升温,尤其关注的问题是从法理角度分析中国未能批准《罗马规约》的障碍,权衡中国批准《罗马规约》的利弊。近年来,北京师范大学刑事法律科学研究院国际刑事法院项目办公室的学者们数次以国际刑事法院为题举办大中型的国际学术研讨会,多次邀请国内外专家学者举办论坛,撰写和翻译出版了多部研究成果,在促进国际刑事法院全球发展方面发挥着积极的作用。为了深入了解《罗马规约》以及国际刑事法院的运作,2007年2月3日至4日,由北京师范大学刑事法律科学研究院和加拿大刑法改革与刑事政策国际中心共同主办的关注国际刑事法院的运作系列论坛在北京举行,来自国内外的专家、学者、国际刑事法院的法官近70人,围绕国际刑事法院的管辖权、检察官的地位以及中国关注的国际刑事法院问题等展开了热烈的讨论。

恐怖主义犯罪及其惩治防范是当代国际刑法领域的另一个备受关注的议题。

恐怖主义的形成和发展与宗教、民族纷争、领土争端等有着千丝万缕的联系。恐怖主义不断地制造出人类历史上的悲剧,接踵而至的美国“9·11”恐怖主义袭击事件(2001)、西班牙马德里“3·11”连环恐怖爆炸事件(2004)、英国首都伦敦的“7·7”地铁站和公共汽车多起恐怖爆炸事件(2005)等,给一些国家和人民带来挥之不去的恐怖阴影。这些事件不仅剥夺了大批无辜者的生存权利,引发金融动荡、社会混乱,进而对国家的政局稳定、经济发展等造成巨大负面影响,还进一步恶化地区乃至世界环境。如何认清恐怖主义对全人类的现实的和潜在的危害性,如何针对恐怖犯罪这一全球“公害”“对症下药”,日益成为国际社会迫切需要解决的棘手问题。

北京师范大学刑事法律科学研究院通过举办研讨会、讲坛、撰写和翻译有关国家立法及学术研究成果,以及向国家有关部门提交研究咨询报告等方式积极建言献策,与世界人民共同致力于全球反恐怖斗争。

腐败犯罪及其惩治防范是国际社会的另一个关注的新视点。

腐败真可谓当前国际社会的“政治之癌”，更是一个无形的杀手，它的泛滥正在危及社会的稳定和治安，破坏民主和道德的价值观，危害社会、经济和政治发展。2005年10月27日，中国十届全国人大常委会第十八次会议审议并批准了第一项全球性的反腐败法律文件《联合国反腐败公约》。该公约设立了针对腐败犯罪的预防机制、刑事定罪和执法机制、国际合作机制、资产追回机制和履约监督机制，不仅为各国打击腐败犯罪提供了一个统一标准，也为中国开展国际合作、引渡外逃腐败犯罪人员、追缴被非法转移的腐败资产提供了有益的法治经验，有利于中国建立健全教育、制度、监督并重的腐败预防和惩治体系。专家学者们应当对反腐败议题作出理论与实践相结合的研究和思考的贡献。

通过国际刑事审判案例与学理分析，实证解析国际刑法理论。

对于国际刑事审判中具有代表性的案例的分析和解读，是将国际刑法理论与具体的审判实践相结合的学习过程，本书特设“判例精选”专题，通过对各国际法庭审理的典型案件的选取，针对国际刑事审判过程中的新特点、新问题，结合国际刑法理论深入加以分析、研究。这些问题不仅涵盖了国际刑法领域争论的焦点问题，而且突出实证解析国际刑法理论的缺失，并提出相应理论探索和理论研究方案。

关注国际刑法领域最新动态，深入做好前沿研究。

在本书中，我们还设立了动态与信息专题，在该专题下就最新的国际刑法领域的动态信息进行了整理和归纳，从而密切关注国际刑法发展的新动态，为深入做好国际刑法相关的前沿学术研究作出一些努力。

最后，在这本颇具时代特色的文集出版之际，我们要向热情支持本书出版的中国人民公安大学出版社的领导和责任编辑，表示我们诚挚的谢忱。

《国际刑法评论》编辑委员会

2007年12月30日



## **Preface to China Review of International Criminal Law**

With the globalization of the economy, politics and law in the modern society, international criminal law, for its typical era feature, is of great importance. It reflects the desirability of the international society to prevent and punish the international crimes, carry out the international criminal judicature cooperation and hold the international trial. However, with the rapid speed of the globalization, the problems of the international crimes and multinational crimes which badly destroy the peace and security of the world, are increasingly serious. These problems have been the most disharmonious elements for building the modern and harmony international society. In order to prevent and punish the multinational crimes, especially the international crimes more effectively, international society have paid great attention to the research and application of the international criminal law. In recent years, in the substantive research field of the international criminal law, the international society mainly focus on the issues of crimes that under the jurisdiction of the ICC, the crime of terrorism, the crime of organization and the crime of corruption and so on. Simultaneously, in the research field of procedure, issues of universal jurisdiction, extradition, assistance and cooperation in international criminal judicature are paid more attention by the experts in international criminal law. However, no matter substantive issues or procedural issues, all of these issues are important legal matters which are related to the common interest of the international society. So it needs a corporate effort and research in this field to achieve a common knowledge.

The establishment of the ICC is a milestone in the history of international criminal law. It has exploited a new area of modern international criminal law.

While the human tragedy of extremely cruel massacres was staging during

the World War II, it inspired, consequently, the fast development of international criminal law. Nuremberg Trial and Tokyo Trial have pushed the development of international criminal law to a historic peak and developed a series of international principles such as personal criminal liability etc. A half century later, the disastrous crimes of genocide and crimes against humanity reoccurred in the armed conflicts in former Yugoslavia, Rwanda, Uganda, Congo, Central Africa and Sudan as well. In order to prevent the human being from re-suffering such tremendous catastrophe, the international society has established respectively the International Tribunals for the Former Yugoslavia and Rwanda and the Special Courts for East Timer and Cambodia to trial those criminals, although such tribunals and courts cannot fully maintain the justice and peace of the world due to their temporal and geographic limitations. It has become an inevitable trend in the development of international criminal law to establish a permanent international criminal court so as to have everyone enjoy the justice and every criminal controlled under law, to end armed conflicts, make up the deficiency of special tribunals and deter the potential war criminals.

Undoubtedly, the development of each fangle has to experience a certain period for the international society to recognize and accept it. Although China is not a state party of Rome Statute of the ICC, Chinese scholars are increasingly interested in the study of the existing problems of Rome Statute, particularly in analyzing the obstacle that prevent China from ratifying the Rome Statute in perspective of jurisprudence. In recent years, scholars of the Projects of ICC in China and experts from College for Criminal Law Science, Beijing Normal University have played an active part in facilitating the global development of ICC by holding international symposiums on the issues of ICC, frequently inviting hosting specialists from home and abroad to make lectures and writing and translating many research books on the issue of ICC.

In order to understand the Rome Statute and the operation of ICC more deeply and broadly, on February 3-4, 2007, College for Criminal Law Science of Beijing Normal University and the International Centre for Criminal Law Reform and Criminal Justice Policy in Canada hold the symposium on Operation of

The International Criminal Court in Beijing. About 70 experts, scholars and the judge of the ICC from home and abroad have attended this symposium. During the symposium, the participants had a discussion on the jurisdiction of ICC, the status of the prosecutor of ICC and the issues that China focus on.

The crime of terrorism and its prevention and punishment is another very important and new subject in the area of modern international criminal law.

The formation and development of terrorism is closely related with such conflicts as religion, nation and territory as well. Terrorists endlessly committed the frightening calamities in human history, the successive terrorism attack in USA on September 11, 2001, the successive terrorism explosions in Madrid of Spain on March 11, 2004, the terrorism explosions at Subway Station and in buses in London, capital of UK on July 7, 2005 and as well have brought some countries and their people with lingering emotion of dread. Such events have not only deprived the lives of a number of innocent people, abused financial turbulence and social chaos, even brought tremendous side effects upon the stability of political situation and the development of social economy, but also further deteriorated regional and world environment. How to recognize the practical and potential dangerousness of terrorism imposed upon human being and how to cope with such global crime of terrorism are becoming urgent difficulties that the international society has to resolve.

College for Criminal Law Science of Beijing Normal University, in such ways as holding symposiums, delivering lectures, writing academic research achievements and translating the legislations of foreign countries, and submitting consultant research reports to central departments as well, is committing to global cause of anti- terrorism hand in hand with the people in the world.

The crime of corruption and its prevention and punishment is also a new subject for international society.

It is said that corruption a “political cancer” and an invisible killer in modern international society. The rampancy of corruption is endangering the social stability and public security, destroying the value of democracy and morality and jeopardizing social, economical and political development. On October 27, 2005, UN Convention against Corruption, the first global legal document of

anti - corruption, was reviewed and approved at the 18th session of the 10th national people's congress. UN Convention against Corruption adopts preventive anti - corruption mechanism, criminal convention and law enforcement mechanism, international cooperation mechanism, which not only sets up an anti - corruption criterion for au countries, but also provides China with useful legal experiences in international cooperation, extradition and transfer of corruption criminals fled abroad and recovery of illegally transferred property, which is helpful for China to establish and perfect the prevention and punishment system that pays equal attention to anti - corruption education, system and supervision. The scholars and specialists have the responsibility to research the issues pertaining to anti - corruption in the way of integrating theory with practice.

Through the analyzing of the typical cases in the international trials, we will have a deeply understanding of theory of the international criminal law.

Analyzing the typical cases in the international criminal trials is a study course to combing the theory study with the practice. Here is a special section for the typical cases, in which we will choose the typical cases from all the international courts, analyze the cases in light of the new feature and new theory of international criminal law. Furthermore, we will get a conclusion from the analysis and try to solve the problems more effectively.

Focus on the latest trends and development of the international criminal law and do deeply research on the new issues.

In this book, there is a section in which we will compile and conclude the new trends and developments of the international criminal law so that we can make our efforts to solve the new problems and do some research on the new issues that arise in the judicial practice.

Finally, as this book of epoch characteristics will be published, let's express our earnest thanks to the leaders and editors of the Publishing House of People's Public Security University of China for their zealous support in this publishing work.

The editorial board

December of 2007

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