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〔法学·刑法学〕

国际刑法中的危害人类罪

GUOJIXINGFA ZHONG DE WEIHAIRENLEIZUI

杜启新 著

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内容提要

本书全景式地描述危害人类罪（反人道罪）在条约国际法、习惯国际法和判例法中的发展历程，结合有关判例，详细深入地分析、阐释危害人类罪的犯罪对象、行为要件、行为人和心理要件，逐个分析危害人类罪的各种具体罪行的犯罪要件，最后逐项对比恐怖主义行为的各项特征与危害人类罪的犯罪要件，从而得出结论：恐怖主义行为符合危害人类罪的特征。

本书可供法学学习者、研究者参考使用。

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意识到各国人民唇齿相依，休戚与共，他们的文化拼合组成人类共同财产，但是担心这种并不牢固的拼合随时可能分裂瓦解，注意到在本世纪内，难以想像的暴行残害了无数儿童、妇女和男子的生命，使全人类的良知深受震动，认识到这种严重犯罪危及世界的和平、安全与福祉，申明对于整个国际社会关注的最严重犯罪，绝不能听之任之不予处罚，……决心使上述犯罪的罪犯不再逍遥法外，从而有助于预防这种犯罪，忆及各国有义务对犯有国际罪行的人行使刑事管辖权，……决心保证永远尊重国际正义的执行……

——《国际刑事法院罗马规约》序言

摘　要

《国际刑事法院罗马规约》（以下简称《罗马规约》）已于2002年7月1日起生效，这意味着人类社会第一个常设国际刑事审判机构从观念变成现实，在选举出首届法官和检察官之后，国际刑事法院也开始运转。危害人类罪是《罗马规约》规定的国际刑事法院管辖的4种罪名之一。而且，由于该罪既可以在战时也可以在平时犯下，所以可以预见它将是国际刑事法院审理最多的一类罪行。因而，研究危害人类罪具有重要意义：对危害人类罪的系统研究，可以深化对国际刑事法院的研究；危害人类罪与人权保护密切相关，研究危害人类罪可以丰富我国关于人权问题的研究，从而为我国参与人权领域的国际合作与斗争提供理论支持；另外，研究危害人类罪，还可以促进我国刑法的现代化、国际化。

本书的主体部分分为四章：第一章为“危害人类罪的历史演变”，全景式地描述危害人类罪在条约国际法、习惯国际法和判例法中的发展历程；第二章为“危害人类罪的总体要件”，结合有关判例，详细、深入地分析、阐释危害人类罪的犯罪对象、行为要件、行为人和心理要件；第三章为“危害人类罪的具体行为”，逐个分析危害人类罪的各种具体罪行的犯罪要件；第四章为“余论：恐怖主义行为是否符合危害人类罪”，通过将恐怖主义行为、尤其是“9·11事件”的各项特征与危害人类罪的犯罪要件进行逐项对比，得出恐怖主义行为符合危害人类罪的结论。其中，第二章和第四章是全书的核心内容。

第一章。在全面梳理危害人类罪发展历程的同时，笔者重点分析三个阶段，即《纽伦堡宪章》及纽伦堡审判、《前南国际法

庭宪章》、《卢旺达国际法庭宪章》和危害人类罪的最新发展——《罗马规约》。本章重点讨论了以下问题。

（1）关于危害人类罪的起源。虽然作为一种国际条约明文规定的国际罪行名称，“危害人类罪”最早见于《纽伦堡宪章》，但有关危害人类罪的观念和精神实质则可以追溯到1907年《海牙第四公约》，尤其是该公约中的“马顿斯条款”。

（2）关于审判的主旨（指向）。在纽伦堡审判中，危害人类罪更多的被看作是对战争中人道主义法范围的扩展，而不是一个在战时和平时都能保障个人权利的独立的法律来源。换言之，纽伦堡国际法庭主要关注的是发动和实施侵略战争的行为，而不是对人权的侵犯。

（3）关于纽伦堡审判的公正性。因为《纽伦堡宪章》和纽伦堡审判仅仅追究轴心国的行为而完全忽略同盟国的行为，纽伦堡审判被有人指责为“胜利者的审判”，即不公正的审判。但笔者认为，第二次世界大战从整体上讲毕竟是正义战争和非正义战争的较量，并最终以正义一方即反法西斯一方的胜利而告终，因此战后的纽伦堡审判仅仅关注发动战争的轴心国的行为也是合乎逻辑的。否则，如果对战争双方不问正义与否加以同样的审查，就可能冲淡世人关于正义战争和侵略战争的区分，扰乱人们关于正义与邪恶的道德感觉。而且，退一步讲，即使纽伦堡审判在这一点上存在缺陷，但瑕不掩瑜，并不足以因此否认其整体上的公正性。

（4）关于危害人类罪在《纽伦堡宪章》中的定位。在战争罪之外规定危害人类罪，是为了弥补战争罪规定之不足——有些行为不能直接纳入战争罪进行惩处，但这些行为又是为了推行侵略战争或者与侵略战争相关联而实施且危害巨大；为了不使这些罪行的实施者逍遥法外，于是就另设一类罪行即危害人类罪来涵盖上述行为。但是，纽伦堡国际法庭在判决中将大部分战争罪同时

视为危害人类罪的做法，在一定程度上将危害人类罪置于战争罪的附庸地位。《纽伦堡宪章》和纽伦堡国际法庭均要求危害人类罪必须与战争相关联，从而将德国在1938年以前实施的、与战争没有关联性的反人道行为排除在《纽伦堡宪章》所规定的危害人类罪之外，这种做法是为了尽量满足合法性原则的要求而采取的妥协之举。当然，要求危害人类罪必须与战争相关联，是《纽伦堡宪章》的时代局限性的表现，这种要求已经被后来的国际法发展所摒弃。

（5）《纽伦堡宪章》关于危害人类罪的规定，是否符合“合法性原则”？后世有人对《纽伦堡宪章》，尤其是关于侵略罪和危害人类罪的规定，是否符合“合法性原则”提出了质疑。这里仅讨论关于有关危害人类罪是否符合“合法性原则”的问题。笔者认为，《纽伦堡宪章》关于危害人类罪的规定符合“合法性原则”。理由如下：首先，从国际法渊源方面看，有关禁止并惩处危害人类罪的观念和原则存在于《纽伦堡宪章》以前的国际法文件中。如前所述，《纽伦堡宪章》中规定的危害人类罪的观念早已有之，在1907年《海牙第四公约》的“马顿斯条款”和《塞弗勒斯条约》中已有危害人类罪的实质性表述。其次，国际法也并非一成不变、静止不动的，而是不断地调整以满足变化的世界的需要。最后，“合法性原则”的精神实质在于实现法律正义。面对“二战”前后德国法西斯实施的史无前例的、骇人听闻的暴行，如果还固守僵化的实证主义观点而否定《纽伦堡宪章》的有关规定，就违反了作为法的最基本价值的正义。

（6）禁止和惩治危害人类罪是否已成为强行法？在一定意义上可以说，危害人类罪在总体上已经完全取得了强行法的地位，但《罗马规约》中危害人类罪的各种具体行为是否都已经成为强行法的内容，则不好一概而论。其中，有关奴役、酷刑、种族隔离罪的法律规定已经取得强行法地位；但关于灭绝、驱逐出境或

强行迁移人口、强迫人员失踪、监禁或以其他方式非法拘禁、迫害等行为的规定，由于存在争议，还很难说已经确立了强行法地位；谋杀和强奸等性暴力在所有国家刑法中都被规定为犯罪，但属于国内法的规定，因而很难说它们属于强行法的内容。

第二章。笔者结合大量有关判例的见解，并采用判例法的论述模式，对危害人类罪的总体要件进行了深入、细致的分析、阐释。

（1）危害人类罪的被害人（犯罪对象）：针对“任何平民人口”。“针对”一词要求“受到攻击的平民人口必须是攻击的首要目标而非附带的、偶然的目标”。“任何”一词意在表明，危害人类罪既可以针对他国的居民犯下，也可以针对本国居民和无国籍人犯下。“平民”一词是相对于武装部队成员和战斗人员而言的，强调的是罪行发生时被害人所处的状态而不是其本来身份。因此如果满足其他先决条件，抵抗组织的成员和曾经从事过抵抗活动的个人在某些情况下可以是危害人类罪的受害人。《纽伦堡宪章》使用的“人口”一词表明，该宪章所设想的是数量较大的被害人，而针对个人实施的单一的或孤立的行为不在该宪章规定的范围之内。要求被禁止的行为必须直接针对平民“人口”，并不意味着要求某国的全部人口或领土必须都受这些行为之害才能使这些行为构成危害人类罪。“人口”的用语旨在表明是对集体的犯罪（犯罪的集体性），因此排除单个或孤立的行为。

（2）危害人类罪的行为要件。在广泛或有系统地针对任何平民人口进行的攻击中，作为攻击的一部分而实施的谋杀、灭绝、奴役、酷刑、驱逐出境或强行迁移人口、种族隔离、非法监禁、强制失踪、性暴力以及基于歧视性理由的迫害等不人道行为。本章讨论的问题是，如何理解“广泛或有系统地针对任何平民人口进行的攻击”。

①关于“攻击”。《罗马规约》将“攻击”界定为“多次实施

第一款所述行为的行为过程”。这个界定存在缺陷。“攻击”既可以是作为，也可以是不作为。因为，虽然《罗马规约》没有明文规定危害人类罪可以以不作为的形式实施，但《犯罪要件终稿案文》（以下简称《犯罪要件》）在危害人类罪的导言部分的脚注中指出：以平民人口为攻击对象的政策应由国家或组织的行动来实施。在特殊情况下，这种政策的实施方式可以是故意不采取行动，刻意以此助长这种攻击。不能仅以缺乏政府或组织的行动推断存在这种政策。这个脚注实际上认可了危害人类罪的“攻击”可以是不作为形式。而且，构成“攻击”的行为不要求是军事攻击。

②关于“广泛或有系统”。“广泛”这个用语强调的是被害人的数量，而“有系统”这个用语强调的是行为的组织性、一致性、协调性。“广泛”这个术语可以理解为针对大量被害人，集体性地实施大量的、频繁的、大规模的具有相当严重性的行为。“有系统”这个术语被卢旺达国际法庭进一步解释为：“被彻头彻尾的组织，并且基于一个涉及大量公共或私人资源的共同计划而采取一个固定的（惯常的）模式”。虽然《罗马规约》等国际法文件规定，“广泛”与“有系统”之间是选择关系，但在证明“广泛或有系统”这个要件时，证据之间可能会出现重叠的现象。攻击被“广泛”实施这个事实本身，就是表明攻击的“有系统性”的证据。实际上，在司法实践中这两个标准常常很难完全分开，因为针对大量受害人的广泛的攻击通常要依靠某种形式的计划或组织。笔者认为，《罗马规约》等国际性文件之所以将“广泛”与“有系统”之间规定为选择关系，是因为起草者意图降低在起诉时证明犯罪的难度。实际上，如果考虑到“广泛”和“有系统”之间的交叉关系，以及国际刑事法院的《犯罪要件》所称的“必须对其（第7条——笔者注）规定作严格解释，在这方面，应考虑到第7条界定的危害人类罪为整个国际社会关注的最

严重犯罪之一……”笔者更倾向于在《罗马规约》中将危害人类罪的客观要件规定为“广泛和有系统地”针对平民人口进行的攻击。

③关于“政策成分”和“广泛或有系统”之间的关系。在比较三种处理办法之后，笔者主张：如果仍然严格坚持“广泛或有系统”的规定，那么鉴于“政策成分”和“有系统”之间的重合性，干脆把“政策成分”从危害人类罪的实体要件中去掉，免得造成法律解释和司法适用上的困难。同时，又为了尽量维持《罗马规约》的规定，可以将“政策成分”作为管辖条件——如果行为的背后存在一个国家或组织的攻击平民人口的政策，这就表明该行为具有相当的严重性，从而足以使其进入国际刑事法院的管辖权范围。

④关于“武装冲突关联性”。笔者认为，习惯国际法的发展已经去除了《纽伦堡宪章》所要求的与战争的关联性；尽管危害人类罪的发生往往涉及武装冲突的情况，但实际上这类罪行也可以发生在和平时期或非战非和时期。

(3) 关于危害人类罪的行为人，《罗马规约》规定：18周岁以上、具有辨认和控制自己行为能力的人，均可成为本罪的行为人。官方身份的有无，不影响本罪的构成与否。根据《纽伦堡宪章》和有些国家的国内法，法人或组织也要对危害人类罪负刑事责任，但《罗马规约》规定国际刑事法院只对自然人具有管辖权。

(4) 危害人类罪的心理要件。结合国际刑法的规定和判例法，笔者得出如下结论：其一，对国际刑事法院管辖的全部罪行而言，其心理要件原则上均为故意和明知，除非在具体罪行的条文中有特殊规定；其二，第7条关于危害人类罪的规定提及了“明知”，并未完整地揭示该罪的心理要件，而是要和第30条的规定结合起来才能完整地说明问题。笔者认为，根据第30条的

规定，“故意”指的是行为人对其非法行为及其危害结果的心理态度，而“明知”，尤其是第7条中的“明知”，指的是行为人对非法行为及危害结果之外的某些背景、情节或者大环境的认识。因此，第7条中提及的“明知”仅仅说明了认识因素，即要求行为人对其行为所处的背景有所认识；至于对意志因素的要求，仍应当遵循第30条的一般规定。因此，危害人类罪的心理要件是故意（包括大陆法系中的直接故意和间接故意、普通法系中的“蓄意”和“明知”）。关于歧视意图，结合判例法的态度，笔者认为：只有在涉及那些明文要求歧视意图的罪行，即《罗马规约》第7条第1款第（8）项所列举的迫害行为，歧视意图才是不可或缺的法律要素；而对于危害人类罪的其他具体行为，如谋杀、灭绝、酷刑等，则无此要求。

第三章。本章逐个分析危害人类罪的具体行为，重点对谋杀、奴役、酷刑、性攻击、强迫人员失踪和种族隔离罪进行讨论。

第四章。本章讨论将恐怖主义纳入危害人类罪的可能性，并得出肯定的结论。基于反恐斗争的迫切需要，能否将恐怖主义纳入国际刑事法院的管辖权这个问题被提了出来。笔者将《罗马规约》第7条的犯罪要件和范围与国际恐怖主义的概念和特征，尤其是“9·11事件”的特征，进行了详尽的比较。通过比较，笔者得出的结论是：以故意杀人方式和出于重伤故意但实际造成他人死亡的方式实施的有组织的国际恐怖主义行为，符合《罗马规约》第7条第1款第（1）项规定的危害人类罪（谋杀），因而当然属于国际刑事法院的管辖权范围之内。所以，根本不用修改《罗马规约》，国际刑事法院就可以对这一类恐怖主义行为行使管辖权。

ABSTRACT

The Rome Statue of the International Criminal Court has been in effect since June 1, 2002, which means that the first permanent international criminal judicial institution in the human society turned into reality from the realm of concept. The International Criminal Court came into work after the first judge and procurator had been elected. "The Crimes against Humanity" is one of the four crimes that under the jurisdiction of the International Criminal Court as regulated in the Rome Statute. The Crimes against Humanity can be committed either in the wartime or in the peacetime. So it is predictable that this crime would be the most among the crimes tried by the International Criminal Court. Therefore, it is of great significance to make a study of the Crime against Humanity. The systematic study of the Crimes against Humanity would deepen the study into the International Criminal Court. Since the Crimes against Humanity is related to the protection of Human Rights closely, the study of Crimes against Humanity would enrich the study of Human Rights, which would provide theoretical support for our country to participate in the international cooperation and struggle within the field of Human Rights. Besides, the study of the Crimes against Humanity can accelerate the process of internationalization and modernization of Chinese criminal law.

The main part of this book comprises four chapters, chapter I, Evolution of The Legal Prohibition of Crimes against Humani-

ty, provides an overall description of the development of Crimes against Humanity in conventional international law, customary international law and case law. Chapter II is about general elements/requirements of crimes against humanity. With the connection to the relevant judicial precedent, it offers the detailed and thorough analysis and interpretation on the victims, the objective elements/actus reus, the authors, and the subjective elements/mens rea of Crimes against Humanity. Chapter III, Specific Offences of Crimes against Humanity, analyses the relevant elements of each specific offences (the term "specific acts" is interchangeable with the term "specific offences" in this book) of Crimes against Humanity one by one. Chapter IV is "Whether Acts of Terrorism can be Included in Crimes against Humanity". After the contrast between acts of terrorism, especially the features of "September 11", and the elements of Crimes against Humanity were made item by item, it was concluded that acts of terrorism qualify as Crime against Humanity. Among the four chapters, chapter II and chapter IV are the key parts.

While having an overall description on the development of Crime against Humanity, Chapter one emphasizes on three stages, namely, the Nuremberg charter and Nuremberg Judgment, the statues of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, the latest development of Crimes against Humanity——Rome Statue.

This chapter focuses on the following problems:

1. The origin of Crimes against Humanity. As an international crime stipulated in explicit terms in international treaty,

though "Crimes against Humanity" first appeared in the Nuremberg Charter, the concept and essence about this crime can be traced to the Fourth Hague Convention of 1907 concerning the Law and Customs of War on Land, especially Martens clause in the convention.

2. The target of judgment. In Nuremberg Judgment, the Crime against Humanity were more treated as the expansion for the scope of humanitarianism law in the war time, than the single legal source that can ensure individual rights both in war time and peace time. In other words, the Nuremberg International Tribunal concerns mainly about the acts that start and carry out war of aggression, but not the infringement upon human rights.

3. The justice of Nuremberg Judgment. Since the Nurnberg chapter and Nuremberg Judgment only investigate the acts of Axis Powers and wholly neglect those of the Allies, the Nuremberg Judgment has been criticized as "the judgment of winner", namely, a partial judgment. But the writer considers that, since on the whole, the Would War II was the contest between the just war and unjust war and finally ended by the victory of the just part, that is, the antifascist, it was reasonable for the Nuremberg Judgment after Would War II concerned only about the acts of the Axis Powers who started the war. Otherwise, without considering justice but applying the same investigation on both parts of the war may weaken people's sense about the distinction between just war and aggressive war, and even though the Nuremberg Judgment contained some defects on this point, since the defects cannot obscure the virtues, they are not sufficient to deny its justice on the whole.

4. Status of the Crimes against Humanity in the Nurnberg Charter. To regulate the Crimes against Humanity beyond War Crimes means to make up for the inadequacies of rules in the War Crimes——Some acts can not be penalized as war crimes directly, but they are carried out on the purpose of promoting the aggressive war, or relevant to the aggressive war and of great harmfulness. As a result, another sort of crimes, namely, the Crimes against Humanity, was established to cover the above acts, with a view to avoid the perpetrators go scot—free. However, the Nuremberg International Tribunal regarded most of the war crimes also as Crimes against Humanity in its judgment, which took the Crimes against Humanity as the attachment to the War Crimes to some extent. Both Nuremberg Chapter and Nurnberg International Tribunal required that the Crimes against Humanity must have the nexus to war, thus excluded the anti—humane acts without nexus to war that carried out by Germany before 1938 from the Crimes against Humanity regulated in Nurnberg Charter. This was the compromise taken for meeting the principle of legality. Of course, it is proceeding from the limitations of the times that Nuremberg asked for the nexus between Crimes against Humanity and war. This requirement has been abandoned by the later international law.

5. Whether the Crimes against Humanity regulated in Numberg Charter were consistent with the principles of legality? Someone in the later ages showed their doubt to Nuremberg Charter, especially to the rules in Aggression Crimes and Crimes against Humanity. They suspected whether these rules were consistent with principles of legality. Here we just discuss whether

the rules of Crimes against Humanity were consistent with principles of legality. The writer considers that the Crimes against Humanity regulated in Numberg Charter were consistent with "principles of legality". The reasons are as the follows: Firstly, in the respect of the origin of international law, we can see the concepts and principles existed in the instruments of international law before the Charter. As stated above, the concept of Crimes against Humanity regulated in the charter appeared much earlier. The Matters Clause and the Treaty of Serves in the Fourth Hague Convention of 1907 concerning the Law and Customs of War on Land had given substantive description to the Crimes against Humanity. Secondly, the international law was not immutable and frozen but had continuous adjustment in order to meet the change of the world. Thirdly, the essence of "the principles of legality" lies in the realization of legal justice. In face of the unprecedented and shocking outrage committed by German fascist prior to and post the World War II, if we still adhere to the rigid viewpoint of positivism and deny the relevant rules in the charter, we would be in violation to justice, which is the most fundamental value of law.

6. Have the prohibition and punishment on the Crimes against Humanity already become Jus Cogens? In a sense, we can say the Crimes against Humanity in general has got the position of Jus Cogens. But whether all the specific offences of Crimes against Humanity in the Rome Statute have become the content of Jus Cogens can not to be lumped together. Among them, the rules of the enslavement, the torture and the crime of apartheid have got the position of Jus Cogens, but for those

about extermination, deportation or forcible transfer of population, enforced disappearance of persons, persecution, since there are controversies existing, it is hard to say the position of the Jus Cogens has been established. As for murder and sexual violence such as rape, etc, though they are formulated as crimes in all countries' criminal law, since those are rules in domestic law, it is hard to include them into Jus Cogens.

Chapter two provides profound and detailed analysis and interpretation to the general elements of the Crimes against Humanity with connection to a number of his understanding about the relevant case, and adopts the model of case law to expound his view.

1. The victims of the Crimes against Humanity. "Directed against any civilian population". The term "directed against" requires that "the civilian population being attacked must be the primary but not the auxiliary and accidental target of the attack". The word "any" means to clarify that the Crimes against Humanity can be committed either to residents of other countries, or to home residents and the stateless. In contrary to members of armed forces and fighters, the term "civilian population" stresses the victims' condition while the crimes happened, but not their original status. Therefore, if the other prerequisites have been satisfied, the members of resisting organization or the individuals who have engaged in resisting activities for a period of time can be the victims of Crimes against Humanity under some circumstances. The word "population" used in the Nuremberg Charter indicates that the charter means to regulate the acts towards mass victims, but not those single or isolated acts towards