上海市学术著作出版基金

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国际和国内监督机制相结合的视角

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内容提要

酷刑和其他残忍、不人道或有辱人格的待遇或处罚的内容和禁止程度与人性的发现和张扬程度、人的价值和尊严的发现和提高程度紧密相关，如何禁止酷刑是人类社会一个恒久的命题。本书以联合国《禁止酷刑公约》为基础，论述了“酷刑”与“其他残忍、不人道或有辱人格的待遇或处罚”各概念的界定及其相互关系，阐述了缔约国承担的义务，剖析了国际反酷刑监督机制的缺陷，总结了各国的经验，考察了我国反酷刑相关制度与实践中存在的问题并提出了构建相应制度、措施的建议。

本书是国内对禁止酷刑和其他残忍、不人道或有辱人格的待遇或处罚问题所作的最全面、最深入的研究，具有较高的理论价值和现实意义。

作者简介

王光贤，男，1966年出生，湖北郧县人。2002年获武汉大学法学博士学位。瑞典隆德大学人权和人道主义法学院访问学者，挪威人权研究所访问学者。现为上海交通大学法学院副教授，人权法研究中心副主任，硕士生导师。主要研究领域为国际法基本理论、国际人权法、国际条约法、国际劳工组织与劳工标准等。参编《欧洲人权法院案例评述》、《国际经济法论》、《国际法》等教材多部，在《法学评论》、《武汉大学学报》、《国家检察官学院学报》、《中国人权年刊》（海外版）等刊物上发表学术论文多篇。

序

人权既是人类普遍的、崇高的理想和价值追求，也反映着特定历史时期人们的特殊诉求。一个社会、一个国家之内，人权保护诉求的强弱，甚至人权研究的问题具体、深入与否，实质上反映了该集合体内人性、人的价值和尊严的张扬程度以及人权保护程度的高低。由于诸多原因，“免受酷刑和其他残忍、不人道或有辱人格的待遇或处罚”权利的国际保护和国内保护机制在当今世界依然面临着许多障碍，存在着诸多问题，许多相关理论问题和制度还没有解决和建立、健全。因此，禁止酷刑在整个国际社会是一个任重而道远的目标。

联合国《禁止酷刑公约》作为国际社会所达成的一个禁止酷刑和其他残忍、不人道或有辱人格的待遇或处罚的专门性、普遍性国际人权文件，是禁止酷刑国际监督机制的重要体现，有力地推动了禁止酷刑理论研究的发展和实践的深入。因此，本书从国际和国内监督视角对有关禁止酷刑和其他残忍、不人道或有辱人格的待遇或处罚问题进行全面、深入的研究，具有重要的理论意义和现实意义。

本书将禁止酷刑的理论与实践提升到人权的高度并置于人权发展的宏观背景下进行研究，通过实证分析和比较研究的方法，全面论述和分析了国际反酷刑所涉及的重要问题，并对一些有争议的论题和迫切需要解决的问题提出了自己的观点和建议，具有理论独创性

和现实针对性。例如，作者剖析了酷刑的概念，归纳了残忍、不人道或有辱人格的待遇或处罚的概念，分析了联合国反酷刑监督机制存在的问题并提出了相应的建议以完善之，等等。既有理论分析，又有案例研究；既旁征博引，又有可读性。特别是在目前国际人权发展到重点放在如何有效地执行国际人权标准的阶段，作者在归纳、分析他国的立法、司法和行政执法实践后，结合《禁止酷刑公约》的标准，与我国的反酷刑立法相比较，分析我国行政执法和司法工作中存在的问题和原因所在，并相应地提出可行性意见，对完善中国的人权保障制度、提高人权保障水平具有重要的借鉴和参考价值。

本书作者王光贤博士在武汉大学法学院攻读硕士和博士学位期间，我作为他的导师，见证了他的思想成熟过程。本书是在其获得专家一致好评的博士论文基础上修改而成。可以看出，作者占有大量的文献资料，了解、分析了公约缔约国的最新立法和司法的发展情况，体现了作者具有较强的收集、梳理和分析文献资料的学术研究能力，具有良好的学术素养。全书的结构完整，注释规范，文字流畅，表达清晰。

当然，禁止酷刑涉及许多国际法和国际人权法的重要理论和现实问题，某些重点问题仍然是整个国际社会需要解决的持久命题，值得继续跟踪和深入研究。因此，本书的出版将不仅以其较高的学术价值可资理论界深入研究的借鉴，而且可供立法、外交、司法和执法人员、部队官兵、国际法和国际关系学生以及所有致力于或关注禁止酷刑和其他一切形式不人道或有辱人格行为的人士作为重要参考。

值此书稿付梓之际，欣志数语，以为序。

最高人民法院、武汉大学法学院

万鄂湘

2007 年 1 月于北京

内 容 摘 要

如何在全球范围禁止酷刑和其他残忍、不人道或有辱人格的待遇或处罚，已经成为国际社会关注的一个焦点。联合国《禁止酷刑和其他残忍、不人道或有辱人格的待遇或处罚公约》（以下简称《禁止酷刑公约》）作为一个专门性公约，对于酷刑和其他残忍、不人道或有辱人格的待遇或处罚的禁止、惩治和预防作了具体规定，为国际社会反酷刑运动的开展提供了重要的法律支撑。本书以历史、理论、现实为脉络，运用逻辑归纳、比较分析、宏观审视与微观剖析相统一的研究方法，对《禁止酷刑公约》的主要法律问题以及其缔约国的相关实践进行了深入研究。

在导论部分，通过对传统人权思想和现代人权理念的回顾与阐述，说明人权在形式上表现为人类的普遍理想，在实质上却反映着特殊历史时期人们的特殊要求。酷刑的内容和禁止程度与人性的发现和张扬程度、人的价值和尊严的发现和提高程度紧密相关；人本身越受重视、人的价值越被尊重，反酷刑的要求就越高、越迫切。

第一章，界定和归纳了“酷刑”的概念和特征，并对“酷刑”与“其他残忍、不人道或有辱人格的待遇或处罚”各概念之间的相互关系作了评述。现代意义上的酷刑已经远非传统所谓的具有适法性、残酷性的刑事处罚。《禁止酷刑公约》第1条对“酷刑”所作的界定，是现

代国际法上唯一具有普遍法律意义的酷刑概念。《禁止酷刑公约》对酷刑的界定存在“法律制裁例外”和“剧烈程度”的认定标准问题。“法律制裁例外”问题的解决依赖于援引其他已经存在的国际人权标准，并有待于社会和文明的进步促成某些国家法律制裁方法的改进。对“剧烈程度”的确定主观性较强，由医生对受害者的身体或精神上遭受的伤害程度进行鉴定或评估，是解决此问题的最佳途径。“酷刑”和“其他残忍、不人道或有辱人格的待遇或处罚”之间是一种严重程度依次递减的包容关系。但是，难以对“其他残忍、不人道或有辱人格的待遇或处罚”这些概念作出界定，依赖于裁判者根据案件的具体情况进行判断。“其他残忍、不人道或有辱人格的待遇或处罚”的认定同样存在“最低严重程度”要求，而对最低程度的评估依赖于案件的综合情况，如所涉待遇或处罚的性质、实施行为的方式和方法、肉体和精神损害后果以及受害者的年龄、性别和健康状况等。“其他残忍、不人道或有辱人格的待遇或处罚”的认定标准应当宽泛，以利于对这些待遇或处罚的禁止。

第二章，主要阐明、剖析了《禁止酷刑公约》缔约国的主要义务。在缔约国义务的性质方面，《禁止酷刑公约》第 2 条中缔约国采取立法、行政、司法和其他实施措施的义务不仅是积极的作为义务，而且是取得合理结果的义务。对于缔约国措施有效性的判断，不能由当事国根据自己的标准进行，而应当由禁止酷刑委员会直接通过《禁止酷刑公约》国际实施监督制度进行，或者由其他缔约国对某一缔约国国内措施的有效性进行集体评判。将《禁止酷刑公约》适用于所有可能发生酷刑行为的领域以及对一切例外情形的绝对排除，是《禁止酷刑公约》的重要成就之一。在管辖权方面，《禁止酷刑公约》确立的对酷刑罪行的“多国管辖制度”，在性质上与国际法通常意义上的对诸如海盗罪的普遍管辖不同。对于在共同管辖的情况下优先管辖顺序问题，尤其是引渡请求的优先权问题，应当由罪犯所在地或发现地国

根据各请求国在惩罚犯罪中的利益、检控方的举证困难、判决在外国法院的执行等情况进行综合权衡后决定。由禁止酷刑委员会对管辖权冲突之缔约国在具体案件中的利益进行评价可能更为公平，有关缔约国也可以根据《禁止酷刑公约》第30条进行谈判解决、提交仲裁或者提交国际法院解决。缔约国的"或引渡或起诉义务"不是绝对的。在不存在引渡请求的情况下，罪犯所在地国拥有是否启动起诉程序的决定权，这受制于罪犯所在地国的意愿以及证据的搜集情况。因此，在惩治酷刑罪犯方面，罪行发生地国和罪犯所在地国等当事国之间的国际刑事司法协作极为关键。排除使用以非法手段取得的供述是国际社会通行的证据规则，其理论依据有排除虚假说、保障人权说、排除违法说和混合说。就《禁止酷刑公约》而言，排除违法说体现了在程序正义和实体正义相冲突时程序正义优先的价值选择，是正当程序理念的体现，也是现代法治的要求。

第三章，通过宏观比较分析，认为《禁止酷刑公约》国际实施监督机制更多地反映了国家主权原则和不干涉内政原则。从总体上看，联合国有关禁止酷刑的国际公约中国际实施监督机构存在权能的缺陷，国际实施监督制度效能较低，国际补救措施缺少预防性的功能。《禁止酷刑公约》的实施监督机制与其他国际人权公约相比有所进步，但没有实质性突破之前的国际人权公约中国际实施监督机制的模式。为了切实保障人们免受酷刑之权利，国际社会应当赋予国际实施监督机构成就此目的的必要权能，并应当借鉴《欧洲防止酷刑和不人道或有辱人格的待遇或处罚公约》中的理念与实践。在此意义上，《禁止酷刑和其他残忍、不人道或有辱人格的待遇或处罚公约任择议定书》是解决上述问题的一个有效途径。在现阶段，联合国的反酷刑国际实施监督机构相互间应当加强合作，积极推动国际禁止酷刑工作的开展。

第四章，总结了《禁止酷刑公约》缔约国在禁止酷刑方面的某些

有效措施以及尚存在的问题，指出禁止酷刑工作是一个综合性工程，不仅需要完善相关制度，而且需要缔约国各相关部门的重视与协作，执法人员和国内民众人权素养的提高，以及整个社会的广泛参与。

第五章，以著名的“皮诺切特引渡案”为例，对其中关涉《禁止酷刑公约》主要内容的酷刑罪、引渡、管辖权等法律问题进行评述，并分析了该案对国际法上的豁免理论、国际刑法和国际人权法的影响。

第六章，考察了我国反酷刑的相关制度与实践，重点是其中存在的问题以及相应制度、措施的构建。我国仍然面临着反酷刑和其他残忍、不人道或有辱人格的待遇或处罚的严峻形势。针对某些相关制度、措施的欠缺以及行政和司法实践中比较突出的有法不依、执法不严和违法不究问题，一方面应当明确将精神酷刑确定为犯罪，适当确立沉默权制度，制定必要的有利于禁止酷刑行为的非法证据排除规则，并建立相应的刑事证据合法性的举证责任倒置制度与合法取证的有效监督机制，另一方面，应当着力培育法律文化和法律环境，使人们养成依法行事、尊重法律的良好习惯；加强执法人员的相关教育和培训，以提高其人权意识、公正诉讼意识和职业道德理念；建立对执法行为的有效约束和监督机制，加快民主政治建设，并且重视酷刑受害者的康复工作。

第七章，对当今国际禁止酷刑的新趋势和相关的国际法问题作了一般性思考，并对全书作了总结。

ABSTRACT

How to prohibit torture and other cruel, inhuman or degrading treatment or punishment throughout the world, has become a focus of the international attention. The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (abbreviated as *Convention against Torture* in the dissertation), as a specialized convention, contains specific stipulations on the prohibition, punishment and prevention of torture and other cruel, inhuman or degrading treatment or punishment, and provides international movement against torture with crucial legal support. The dissertation, through a vertical line of history, theory and reality, using the study approaches of logical induction, comparative analysis and unity of macro-survey and micro-anatomy, makes a deep research into the main legal problems of the Convention against Torture and its state parties' practice. Besides the introductory part, the dissertation consists of seven chapters.

In the Introduction, the retrospection and elaboration of traditional human rights thoughts and modern human rights ideas shows that human rights formally expresses human universal ideal, but substantively reflects people's special requests in particular historical era. The meaning of torture and extent of prohibition of torture are tightly connected with the extent of finding and spreading of humanity, and the extent of finding and boosting of human value and dignity. The more recognition and respect is attached to human *per*

se and human value, the more demands and eagerness against torture there are.

Chapter One defines the concepts and characteristics of "torture" and "other cruel, inhuman or degrading treatment or punishment", and comments are made on the relations between these concepts. Torture in the modern sense is far different from its traditional meaning of "afflictive punishment" with features of legitimacy and cruelty. The definition of "torture" in article 1 of the Convention against Torture is the only one with common legal sense in modern international law. However, the definition is left with problems of criterion of "exception of lawful sanctions" and "extent of severity". The solution to the problem of "exception of lawful sanctions" depends on invoking of other international human rights standards, and awaits advancement of society and civilization that will promote the improvement of lawful sanctions of certain countries. As for the problem of subjectivity in determining "severity" of pain or suffering, the best solution is to authenticate by doctors the extent of pain or suffering inflicted on victims. The severity in "torture" and "other cruel, inhuman or degrading treatment or punishment" is degressive, and these concepts are arranged in a form of hierarchy of intensity. It is, however, very hard to define the concepts of other cruel, inhuman or degrading treatment or punishment, and judgment relies on particular context of a given case. There is also requirement of "minimum severity" in ascertaining "other cruel, inhuman or degrading treatment or punishment", and the appraisal to minimum severity lies on integrative elements of a given case, such as nature of treatment or punishment concerned, ways or methods of infliction, physical and mental consequences and victim's age, gender and health, etc. The criterion in ascertaining other cruel, inhuman or degrading treatment or punishment should be low, which will benefit the prohibition of them.

In Chapter Two, studies are made on the principal obligations of the state parties of the Convention against Torture. As far as the nature of the state parties' obligation is concerned, the obligation in

Article 2 is not only an active obligation of action, but also an obligation to get reasonable results. The judgment of effectiveness of the measures to prevent the prohibited conduct should not be under the discretion each state party on its own standard, and yet should be conducted by the Committee against Torture established under the Convention through the implementation supervisory systems of the Convention, or by other state parties through collective judgment. It is one of the most important achievements of the Convention that torture is prohibited in any territory and that no exceptional circumstances whatsoever may be invoked as a justification of torture. With regard to jurisdiction, the "multi-state jurisdiction system" over crime of torture is different in nature from the universal jurisdiction in normal sense of international law over such international crimes as piracy. The problem of priority in concurrent jurisdiction should be settled by state of territorial jurisdiction or state where an alleged offender is found, balancing the interest of requesting state(s) for extradition in punishment of the crime, the procurators' difficulties in bearing proofs and enforcement of judgment in foreign courts, etc. It may be a better way for state parties with concurrent jurisdiction to have the Committee against Torture evaluate their interests in a given case, and states concerned may also refer conflicting assertions of jurisdiction to the Committee against Torture, to arbitration or to International Court of Justice. State party's obligation of *Aut Dedere Aut Judicare* is not absolute. In the case of absence of request for extradition, the state where the alleged offender is present has the sovereign right to decide whether to trigger prosecution procedures, which is enslaved to the state's willingness, collection of proofs and other factors. Therefore, international cooperation of criminal justice between state where the offences are committed and state where alleged offender is found is of great significance in punishing torture crime offenders. It is a universal rule of proofs to exclude any statement made as a result of illegal means, which is based on different doctrines, such as "Exclusion of Falsity", "Protection of Human Rights", "Exclusion of

Illegality" and "Eclecticism". To the Convention against Torture, the doctrine of Exclusion of Illegality embodies the priority of due process in the conflict between procedural justice and substantive justice, namely, the idea of due process, and it is a requirement of rule by law.

In Chapter Three, through a macro-comparative analysis, the conclusion is made that the international supervisory implementation mechanisms in the Convention against Torture reflects more the principles of state sovereignty and non-intervention. From the overall point of view, the supervisory implementation organs in the UN human rights conventions have limited competence, and supervisory implementation systems have low effectiveness, international remedies lacking preventive function. Compared with other international human rights conventions, the supervisory implementation mechanisms of the Convention against Torture has some advancement, but does not substantially break through the model of supervisory mechanisms in former human rights conventions. In order to truly ensure people not to be subjected to torture, the international community should endow international supervisory implementation mechanisms with necessary competence to achieve their purposes, and learn from the idea and practice of European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. In this sense, the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment is an efficient way to solve the problems above. At present stage, the UN supervisory implementation organs against torture should reinforce cooperation with each other, and promote actively the development of international movement against torture.

The Fourth Chapter summarizes some of the state parties' effective measures in combating torture, and points out that a thorough and radical prohibition against torture is a synthetic project which not only needs perfecting relevant systems, but also needs attention and cooperation of all state's authorities concerned and participation of the whole society, especially the raising of law enforce-

ment officials' human rights attainment.

The famous Pinochet Case is taken as an example in Chapter Five to comment on the principal legal issues of torture crime, extradition and jurisdiction, etc, as is concerned in the Convention against Torture, together with an analysis of the impact of the Case on theory of immunity in international law, international criminal law and international human rights law.

In Chapter Six, a review is made of China's relevant systems and practice against torture, and focus is laid on the problems therein and construction of corresponding systems or countermeasures. China is still confronted with grave situation of prohibition against torture and other cruel, inhuman or degrading treatment or punishment. In view of the shortage or deficiency of existing systems and comparatively serious problems in administrative and judicial practice, on the one hand, it is advisable that mental torture be an offence under criminal law, that right to silence be properly established, that necessary exclusive rules of proofs as a result of illegal means be constituted, and that corresponding inversion of *onus probandi* system about legitimacy of criminal proof and effective supervisory mechanism be set up. On the other hand, great efforts should be made on fostering legal culture and legal environment to improve people to form the habit of abiding by law and respecting law, and on relevant education and training of law enforcement officials to raise their human rights consciousness, idea of fair litigation and professional ethics. Furthermore, effective disciplinary and supervisory mechanisms to law enforcement acts should be established, democratic and political construction be speeded up, and importance should be attached to the rehabilitation of torture victims.

In the last chapter, the author ponders briefly over the current trends towards international prohibition against torture and some relevant issues of international law, with the general conclusion of the whole dissertation.

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