



京师国际刑事法文库 (1)

首届“当代刑法国际论坛”论文集

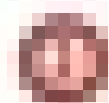
# 全球化时代的刑法变革 ——国际社会的经验及其对中国的启示

Criminal Law Reforms in the Era of Globalization  
International Community's Experience and Its Inspirations to China

主编 赵秉志



中国人民公安大学出版社



CHINA SOCIETY OF CRIMINOLOGY

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# 全球化时代的刑法变革

——国际社会的比较及对中国的影响

Comparative and International Law in the Era of Globalization  
Comparative Criminal Law and International Criminal Law

主编 张明远

中国政法大学出版社



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学术顾问 高铭暄 刘家琛

张 军 朱孝清

主 编 赵秉志

副 主 编 卢建平

主编助理 刘志伟 王雨田

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· 北 京 ·

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## 北京师范大学刑事法律科学研究院 京师国际刑事法文库

### 总 序

20 世纪 70 年代末 80 年代初以来,为顺应现代社会发展进步的历史潮流,在坚定不移地推行改革开放的基本国策之同时,中国政府尤为注重社会主义法治的建设与发展。随着立法日益健全,司法不断完善,法学欣欣向荣,国家和社会已经步入现代法治的轨道,从而有力地维护和推动了经济、政治、文化乃至整个社会全方位的发展与进步。在中国社会发展进步的历程中,社会主义法治系统必将发挥日益重要的作用。这一系统的发展完善离不开法学理论的引导和推动。因此,进一步重视法学研究,尤其是外向型、国际性法学研究,无疑具有长远的战略意义,刑法学领域亦然。

北京师范大学刑事法律科学研究院(以下简称研究院)是北京师范大学重点建设的、专门从事刑事法学的研究的、中国刑事法学领域首家且目前系唯一的具有独立性、实体性、综合性的新型学术研究机构 and 研究生培养单位。研究院立足本国国情,在大力发展中国刑事法学的同时,专设国际刑法研究所,关注国际刑法学基础理论建设,并注重对当前国际刑事法理论与实务中热点、难点问题的研究。研究院国际刑法学方面的研究力量,以本单位的教师和博士生为基本队伍,同时聘任、定向联系国内外一些著名大学和研究机构的知名刑事法及国际法专家学者、国际刑事审判机构的法官、联合国暨国际学术研究机构的知名学者。研究院的学术研究范围主要包括:国际刑法的基础理论、国际犯罪、国际刑事审判、国际刑事司法协助与合作等。研究院力图通过课题研究、学术研讨活动以及同国内外专家、学者和学术机构的学术交流与合作研究等多种渠道、多种形式,努力促进与繁荣我国外向型和国际型刑事法学研究,以适应国家在改革开放中加强刑事法制建设的需要。

“京师国际刑事法文库”,是以开拓和繁荣外向型、国际型刑事法学研究为主旨的一种学术载体形式,与研究院的“京师刑事法文库”分工不同、相辅相成。本“文库”在广义上理解国际刑事法,拟出版国内外专家学者在国际刑法、比较刑法、外国刑法等方面的科研成果,可以是专题研究、综合研究,可以是国外、境外法典、著作的译作或介述研究之作,还可以是国内外专家学者的合作研究项目。其中,研究性著作应具有较高的学术水平,译著、介述书籍和工具书、资料书等当有重要的参考价值。

## 2 全球化时代的刑法变革

古人云：“合抱之木，生于毫末；九层之台，起于垒土；千里之行，始于足下；聚沙成塔，集腋成裘。”我们希望能通过以文库形式的逐步积累，为我国国际刑法学和其他外向型刑法学的发展脚踏实地地做一点事，为法治之昌盛和社会之进步，作出应有的贡献。

是为序。

北京师范大学刑事法律科学研究院

院长 赵秉志 谨识

2006年6月

**College for Criminal Law Science of Beijing Normal University**  
***International Criminal Law Library of BNU***

## **Preface**

Since the late 1970s and early 1980s, Chinese government, to be in conformance with the trend of progressive development of modern society, has put a special emphasis on the construction and development of socialist legal system, besides firmly adhering to the principal national policy of reform and opening-up to the foreign countries. Along with the gradual perfection of legislation and judicial practice, legal science thrives and our country and society is stepping to the track of modern rule of law, which further forcefully safeguards and facilitates the development and progress of all fields such as economy, politics, culture and even the whole society. In the course of social development and progress in China, our socialist legal system will certainly play a more and more important role, which, however, is impossible without the legal theory to pilot and drive. In other words, it is of significance of long-term strategy to further reinforce legal science studies (including criminal jurisprudence studies), especially extrovert and international legal studies.

The College for Criminal Law Science of Beijing Normal University, founded in August of 2005, is the first and, at present, the only academic research organ in China specializing in criminal jurisprudence that is independent and comprehensive entity and undertakes the mission of educating postgraduates. Basing itself upon the situation of China, The College, in addition to fully developing the studies on Chinese criminal law, specially establishes the Institute for International Criminal Jurisprudence Studies focusing on constructing the basic theory of international criminal jurisprudence and researching the theoretic and practical hot-topics and difficulties in current international criminal law. The main force of international criminal jurisprudence staffed the College is the professors and doctorate candidates thereof, besides those who are invited as fellow researchers or fellow professors such as famous scholars and specialists engaging in criminal and international law from the prestigious universities and academic organizations home and abroad, judges from the international criminal judicial agencies and famous scholars from UN and international academic research organizations. With respect to the

international criminal jurisprudence, the main academic domain of the College covers the basic theory of international criminal jurisprudence, international crimes, international criminal trial, international criminal judicial assistance and so on. The College seeks to facilitate and thrive studies on the extrovert and international criminal law through various channels and programs such as project researches, academic workshops, academic exchange and cooperation with domestic and foreign specialists, scholars and academic organs, so as to meet the requirements of strengthening criminal legal construction in the course of reform and opening up to the foreign countries.

International Criminal Law Library of BNU, undertaking different missions from Criminal Jurisprudence Library of BNU but supplementing each other, seeks to exploit and deepen and thrive the academic researches on extrovert and international criminal jurisprudence. With a broad understanding of international criminal law, the library consists of the academic achievements by domestic and foreign specialists and scholars on international criminal law, comparative criminal law and foreign criminal law, which may be of either special or general topics in a rather profound academic level, or introduction or translation of foreign literatures and codifications with much value of references, or research projects co-operated by domestic and foreign specialists.

As an ancient master said, “ A huge tree grows from a tiny seedling; A nine-storey tower begins with a pile of earth; A thousand-li journey begins with the first step . ” “Grains of sand piled up make a pagoda; The finest fragments of fox fur, sewn together, will make a robe.” Through the program of library, we seek to accumulate academic fruits and develop the international jurisprudence and other extrovert criminal jurisprudence, so as to make our contributions to the prosperity of rule of law and progress of society.

Prof. Zhao Bingzhi

Dean of College for Criminal Law Science  
Beijing Normal University

In June of 2006



## 前 言

“当代刑法国际论坛”是由中国法学会刑法学研究会会长暨国际刑法学协会中国分会常务副主席赵秉志教授和国际刑法学协会副秘书长暨中国分会秘书长卢建平教授倡议,并得到中国法学会刑法学研究会名誉会长、国际刑法学协会副主席暨中国分会主席高铭暄教授和国内诸多刑法专家学者赞同而设立的开放性、国际性的高层次刑法学术论坛。其宗旨是为了深化与各国同行的密切合作,促进学术交流,提升中国刑法学的国际影响,吸取人类先进法律文化、综合全球智力为中国社会主义法治特别是刑事法治建设事业服务。本着“开放、对话、合作、进取”的原则,论坛向国内外关心国际刑事法治变革、关心中国刑事法治建设的理论界、实务界的专家、学者、朋友们开放,计划在中国每两年举办一次,为各国同行的坦诚对话交流提供平台,推动相互之间在刑事法理论教学、研究、立法、司法等领域的全面有效合作,为促进国际刑事法治和人类和平进步事业而共同努力。为了保证论坛的广泛性和持久性,论坛设立了组委会,由高铭暄教授担任主席,赵秉志教授为常务副主席,最高人民法院副院长张军先生、最高人民法院大法官刘家琛先生和最高人民检察院副检察长朱孝清先生为副主席。论坛组委会成员有:北京师范大学刑事法律科学研究院特聘顾问教授、北京大学法学院教授储槐植先生,西南政法大学法学院院长陈忠林教授,中国社会科学院国际法研究中心主任陈泽宪教授,国际刑法学协会副秘书长暨中国分会秘书长卢建平教授,中国人民大学法学院黄京平教授,最高人民法院研究室副主任胡云腾教授,最高人民检察院检察理论研究所所长张智辉教授,北京师范大学刑事法律科学研究院国际刑法研究所所长黄风教授,中国澳门科技大学法学院副院长杨诚教授。论坛还特别聘请前国际刑法学协会主席、美国德保罗大学巴西奥尼教授,法国法兰西学院院士戴尔玛斯-马蒂教授,现任国际刑法学协会主席、西班牙巴斯克大学德拉奎斯塔教授等国际著名学者担任顾问。

首届“当代刑法国际论坛”于2005年8月25日至26日在北京隆重举行。论坛的主题为“全球化时代的刑法变革——国际社会的经验及其对中国的启示”。确定这样一个主题是基于以下的考虑:我们已经进入了一个全球化的时代,当今世界风云际会。多极化世界政治格局的形成,经济发展的全球化趋势,人权保护运动的日益高涨,地区范围内的政治经济一体化努力,愈演愈烈的各种武装冲突以及人类为了和平正义事业而进行的不懈斗争,给世纪之交的国际法律秩序带来了众多的挑战,也带来了无限

## 2 全球化时代的刑法变革

的发展机遇,变革成为全球化时代的主旋律。在刑法领域也不例外,创新、变革、发展的时代潮流,既体现在国际或全球层次(以《罗马规约》和国际刑事法院的诞生为主要标志),也体现在区域和地区层次(以欧盟的欧洲刑事司法组织为典型),还体现在各个国家的层次上(如前苏联东欧国家的刑法变革)。国际社会刑法变革的实践,对于正处于世界瞩目的改革开放核心的中国法治建设意义重大。在改革开放的进程中,中国的刑事法治也在经历着深刻的变革。中国于1979年颁布了刑法、刑事诉讼法,又于1996年、1997年对两部法典进行了全面修订;现在又在着手对刑事诉讼法进行修订,刑事实体法领域也在酝酿多项改革。为了真切地了解域外已经发生或者正在发生着的刑事法律变革,全面地评判这些变革本身的得失及其对世界刑事法治走向的影响,尤其是深入地探讨这些变革对于中国刑事法治建设的启示和借鉴,我们邀请国内外关心中国刑事法治建设的朋友们共聚一堂,为中国刑事法治的改革、发展、完善出谋划策。

首届论坛荣幸地邀请到了来自联合国犯罪预防委员会、国际刑事法院、国际刑法学协会等国际组织,美国、法国、德国、英国、加拿大、日本、韩国、俄罗斯等国家的著名刑事法专家学者,中国全国人大常委会法工委、最高人民法院、最高人民检察院、公安部等中央政法机关,北京师范大学刑事法律科学研究院、北京大学、清华大学、中国人民大学、中国政法大学、中国社会科学院法学研究所、武汉大学法学院、西南政法大学、中南财经政法大学、西北政法学院等著名高等政法院校和科研机构,以及我国香港特别行政区、澳门特别行政区的著名专家学者共150余人,围绕“全球化时代的刑法变革”这一主题,发表演讲,介绍经验,交流体会,从中探寻对中国刑事法治的健全完善有益的启示,为中国的刑事法治建设献计献策。因此,本次论坛取得了圆满成功。本书即是本次论坛研讨成果的集中体现。

本书分为“国际刑法的变革”、“外国刑法的变革”和“中国刑法的变革”三编,收录的29篇文章对有关国际刑法、外国刑法、中国刑法及其理论的诸多重要变革问题进行了比较深入的分析和研讨。在本书的统稿与编辑出版过程中,北师大刑事法律科学研究院中国刑法研究所副所长刘志伟教授和博士后研究人员王雨田博士作为主编助理,协助我作了部分统稿工作,一贯鼎力支持北师大刑事法律科学研究院学术事业的中国人民公安大学出版社又为本书的编辑出版付出了辛勤而卓有成效的劳动,在此一并表示衷心的感谢!

中国法学会刑法学研究会会长  
国际刑法学协会中国分会常务副主席  
北京师范大学刑事法律科学研究院暨法学院院长  
赵秉志 教授 谨识  
2006年10月

## Preface

As a high-level, open and international academic tribune on criminal law, International Forum on Contemporary Criminal Law is established upon the proposition of Professor Zhao Bingzhi (President of Criminal Law Research Committee of China Law Society, Deputy Chairman of AIDP China Branch) and Professor Lu Jianping (Deputy Secretary-General of AIDP and Secretary-general of AIDP China Branch) with agreement of many domestic criminal law experts including Professor Gao Mingxuan (Emeritus President of Criminal Law Research Committee of China Law Society, Deputy Chairman of AIDP and Chairman of AIDP China Branch), and aims at consolidating the close cooperation with internal colleagues, accelerating academic exchange, promoting the international influence of Chinese criminal jurisprudence, assimilating the advanced legal civilization in the world, serving for the construction of rule of law in socialist China, especially for the construction of rule of law in criminal matters. Complying with the principle of “openness, dialogue, cooperation and progress”, this forum is open to all experts, scholars and friends who care for the development of international rule of law in criminal matters and the construction of rule of law in criminal matters in China from theory circle and judicial practice circle home and abroad. The forum is planned to be held biennially in China so as to provide a stage for frank dialogue and communication among colleagues from different countries, promote full and effective cooperation in such fields as the theoretical education, research, legislation and justice of criminal law, and facilitate the cause of international rule of law and human peace and progress. In order to ensure an extensive and successive forum, an organizing committee of the forum is set up with Prof. Gao Mingxuan as chairman, Prof. Zhao Bingzhi as executive chairman, deputy president Zhang Jun from the Supreme People’s Court, grand judge Liu Jiachen from the Supreme People’s Court and deputy president Zhu Xiaoqing from the Supreme People’s Procuratorate as deputy chairmen. Members of the organizing committee of this forum include Prof. Chu Huaizhi (specially invited consultant professor of College for Criminal Law Science of BNU, professor of Peking University law school), Prof. Chen Zhonglin (dean of Southwest University of Politics and Law, School of Law), Prof. Chen Zexian (director of Study Center for International Law of Social Science Academy of China), Prof. Lu Jianping (Deputy Secretary-General of AIDP and Sec-

retary-general of AIDP China Branch), Prof. HUANG Jingping (Renmin University of China), Prof. Hu Yunteng (deputy director of Research Department of The Supreme People's Court), Prof. Zhang Zhihui (director of the Procuratorate Theory Institute of the Supreme People's Procuratorate), Prof. Huang Feng (director of Institute of International Law of College for Criminal Law Science, BNU) and Prof. Yang Cheng (deputy dean of Law School, Macau University of Science and Technology). In addition, some international famous scholars are specially invited as consultants of the forum such as Prof. M. Cherif Bassiouni (emeritus president AIDP, De Paul University of USA), Prof. Mireille Delmas Marty (Academician of College de France) and Prof. Luis De La Cuesta (Chairman of AIDP, dean of College for Criminology of University of the Basque, Spain) as well.

The 1st session of International Forum on Contemporary Criminal Law was held in Beijing in August 25th – 26th of 2005, the theme of this conference is named as “The Change of Criminal Law at an Age of Globalization: International Experience and its Enlightenment to China” based on the following consideration: We are living in an age of globalization with dramatic changes in the world. A multi-polar pattern of political powers is emerging, the development of economy is on a trend of globalization, activities for protection of human right are on the upsurge, regional unification of economies and politics is on their way, various armed conflicts upswing and the people are struggling for the cause of peace and justice, all of these have brought both challenges for international legal order in new century and unlimited evolution opportunity simultaneously. Change has become the key rhythm in an age of globalization, so is the criminal law, the epoch feature of innovation, reform and development is not only reflected in the international or global level (The emerging of Roman Statute and International Criminal Court is the main symbol), but also in the regional level (European Organization of Criminal Justice is the representative), and in the level of individual country (for example, the reform of criminal law in the countries of former Soviet Union and east Europe). The experiences of criminal law reform of international community are of great significance to building rule of law in China, where is carrying out a policy of open and reform with startling achievement. The rule of law in criminal law matters in China has experienced profound alteration. The Code of Criminal Law and the Code of Criminal Procedure Law inaugurated in 1979 were revised respectively in 1997 and 1996, another revision of the Code of Criminal Procedure Law is on the way and many reform measures of the Code of Criminal Law are in embryo. In order to clearly understand the changes of criminal law abroad and thoroughly judge the advantages and disadvantages of such alterations and their influence upon the trend of global rule of law in criminal law matters, especially to deeply probe into the enlightenment and significance of

such alterations to the building of rule of law in criminal matters in China, we invited friends home and abroad who care for the building of rule of law in criminal matters in China to get together and propose advices on the reform, development and modification of criminal law of China.

In the first session of this forum, we are honored to have host over 150 famous criminal law experts and scholars from international organizations such as UN Crime Prevention Committee, ICC and AIDP etc. , other countries such as USA, France, German, UK, Canada, Japan, South Korea, Russia and so on, central organs of politics and law such as law working commission of the Standing Committee of National People's Congress, the Supreme People's Court, The Supreme People's Procuratorate and Ministry of Public Security etc. , famous domestic universities such as College for Criminal Law Science of BNU, Peking University, Tsinghua University, Renmin University of China, Chinese University of Politics and Law, the Law Institute of CSSA, Wuhan University Law School, Southwest University of Politics and Law, Zhongnan University of Finance, Economics, Politics and Law and Northwest University of Politics and Law etc. , and Hong Kong SAR and Macau SAR. The participants deliver speeches, introduce experiences, exchange viewpoints and propose advices and suggestions for building rule of law in criminal matters in China, so, great achievements have been made in this forum, and this book is just the production of it.

The contents of this book are divided into three parts as "the changes of international criminal law," "the changes of foreign criminal law" and "the changes of Chinese criminal law", 29 articles included have made comparatively deep analysis and expounding on many important issues of alteration pertinent to international criminal law, foreign criminal law and Chinese criminal law. In the course of collecting and editing this book, as editor-in-chief assistants, Prof. LIU Zhiwei, deputy director of Institute of Chinese Criminal Law of College for Criminal Law Science and Dr. Wang Yutian have gave me a hand in collecting articles, the staff of Publishing House of CPPSU, a persistent supporter of College for Criminal Law Science of BNU, have done a very good job, let me now express my heartfelt appreciation to them!

Professor Zhao Bingzhi

President, Criminal Law Research Committee of China Law Society

Deputy Chairman, AIDP China Branch

Dean, College for Criminal Law Science and Law School, BNU

October of 2006

# 目 录

## 第一编 国际刑法的变革

### Section One: Change and Reform of International Criminal Law

- 当代国际刑法的新发展 ..... 高铭暄 王秀梅 (3)
- New Developments of Contemporary International Criminal Law  
..... by Gao Mingxuan, Wang Xiumei (19)
- 欧盟刑法的一体化进展 ..... [西班牙]胡塞·路易斯·德拉奎斯塔 (20)
- Unification Development of EU Criminal Law  
..... by Jose Luis De La Cuesta/ Spain (30)
- 论国际刑事法院的某些主要特点 ..... [加]彼得·伯恩斯 著 郭 健 译 (31)
- Several Main Features of the International Criminal Court  
..... by Peter Burns, Q. C/ Canada (36)
- 关于国际刑事法院对非缔约国行使管辖权问题的研析 ..... 赵秉志 王秀梅 (42)
- Study on the Jurisdiction of International Criminal Court  
Applying to Non-state Parties ..... by Zhao Bingzhi, Wang Xiumei (56)
- 卢旺达国际法庭的实践 ..... 凌 岩 (57)
- Practice in International Criminal Tribunal for Rwanda ..... by Ling Yan (64)

## 第二编 外国刑法的变革

### Section Two: Change and Reform of Foreign Criminal Law

- 走近英美刑法  
——英美法系国家刑法变革的经验 ..... 储槐植 (75)
- Approaching the Anglo-American Criminal Law: The Experience of Criminal Law  
Reform in the Countries of Anglo-American legal system ..... by Chu Huaizhi (81)
- 美国刑事法发展动态 ..... [美]虞 平 (83)

## 2 全球化时代的刑法变革

- New Development of USA Criminal Law ..... by Daniel Yu / USA (91)  
针对公民的刑法或者针对敌人的刑法——恐怖主义的挑战和增大的警察权力  
..... [德]贝恩特·舒乃曼 著 冯 军 译 (92)  
Criminal Law against Citizens or Enemies? ——The Challenge of  
Terrorism and Police Power ..... by Bernd Schünemann/ Germany (97)  
日本刑法的发展及其启示 ..... 张明楷 (104)  
The Progress of Japanese Criminal Law and Its Illumination on China  
..... by Zhang Mingkai (119)  
韩国刑法的改革和发展 ..... [韩]许一泰 著 韩相敦 译 (121)  
The Reform and Development of Korea Criminal Law  
..... by Hoh Il-Tae / South Korea (135)  
1996 年俄罗斯联邦刑法对中国的借鉴价值 ..... 黄京平 赵 微 (136)  
The Reference Value of Russian Criminal Law for China  
..... by Huang Jingping, Zhao Wei (143)  
现代社会中刑法的机能 ..... [日]金尚均 著 冯 军 译 (144)  
The Function of Criminal Law in Modern Society ..... by Kim Sang Yun / Japan (152)  
刑法中的客观归属理论 ..... 冯 军 (153)  
Objective Culpability Theory in Criminal Law ..... by Feng Jun (166)  
韩国死刑制度的废除与绝对终身刑制的引进 ..... [韩]文採圭 著 韩相敦 译 (167)  
Abolition on Death Penalty and Introduction of Life Imprisonment  
in South Korea ..... by Moon Che-kyoo/ South Korea (171)  
韩国的恢复性司法 ..... [韩]姜东沅 著 韩相敦 译 (172)  
Restorative Justice in South Korea ..... by Kang Dong Pum/ South Korea (175)  
附随刑法的产量和对策 ..... [韩]卞钟弼 著 韩相敦 译 (176)  
Creation and Countermeasure of Subsidiary Criminal Law  
..... by Pyun Jong-Pil/ South Korea (181)  
对网络犯罪的研究 ..... [韩]吴庆植 著 韩相敦 译 (182)  
Research on Network Crime ..... by Kyung Sik/ South Korea (191)  
当前加拿大刑事司法若干改革:应对全球及国内压力示例  
..... [加]爱琳·斯根乃德 著 韩瑞丽 译 (192)  
Some Recent Criminal Justice Reforms in Canada: Examples of Responding to  
Global and Domestic Pressures ..... by Eileen Skinnider/ Canada (201)  
加拿大警力一体化与有组织犯罪的打击  
..... [加]玛丽安妮·瑞安 著 郭 健 译 (217)

Integrated Policing to Combat Organized Crime in Canada	by Marianne Ryan/ Canada	(221)
加拿大检察官的作用和职责	[加]大卫·L·温克勒 著 韩瑞丽 译	(226)
The Roles and Responsibilities of Canadian Prosecutors	by David. L. Winkler/ Canada	(229)
英格兰和威尔士警察权以及刑事调查的改革:刑法改革与 研究之间实践关系的一些教训	[英]比尔·赫伯顿 著 苗 苗 译	(233)
Reform of the Legal Powers of the Police and Criminal Investigation In England and Wales: Some Lessons in the Practical Relationship Between Criminal Law Reform and Research	by Bill Heberton/ UK	(237)
犯罪被害人保护制度	[韩]元惠郁 著 韩相敦 译	(242)
On Protection of Victim	by Won Hae-Wook/ South Korea	(246)

### 第三编 中国刑法的变革

#### Section Three: Change and Reform of Chinese Criminal Law

全球化时代中国刑法改革中的人权保障	赵秉志	(249)
Human Rights Protection in China's Criminal Law Reform Under Globalization	by Zhao Bingzhi	(265)
《公民权利和政治权利国际公约》与 我国刑法罪刑法定原则的完善	卢建平 叶希善	(266)
The International Covenant on Civil and Political Rights and Perfection of The Provisions Concerning the Principle of Legality of China	by Lu Jianping, Ye Xishan	(274)
中国传统犯罪构成理论之求索	赵国强	(276)
Probing into the Traditional Theory of Criminal Elements of China	by Zhao Guoqiang	(285)
陪审制度:为新时代带来司法公正的旧制度	江乐士	(287)
Jury System: Old System Which Brings New Era Judicial Justice	by Jiang Leshi/ Hong Kong, PRC	(293)
庭审的具体问题:普通法系的实践经验	陆贻信	(300)
On Trial Issues: The Experiences of Common Law System	by Lu Yixin/ Hong Kong, PRC	(307)
反恐时代的香港反恐刑事法律要论	汤显明	(308)



#### 4 全球化时代的刑法变革

Highlights of Anti-Terrorism Criminal Law of Hong Kong in An Age Of Counter-Terrorism .....	by Timothy H M Tong, JP/Hong Kong, PRC	(323)
澳门对实施国际法文书的刑法保护 .....	徐京辉	(344)
Protection of Implementation of International Legal Instruments through Criminal Law in Macao .....	by Xu Jinghui/ Macao, PRC	(354)