

京师国际刑事法文库31

加拿大刑法改革与刑事政策  
国际中心资助项目

# 《联合国打击 跨国有组织犯罪公约》 与中国的贯彻研究

LIANHEGUO DAJI



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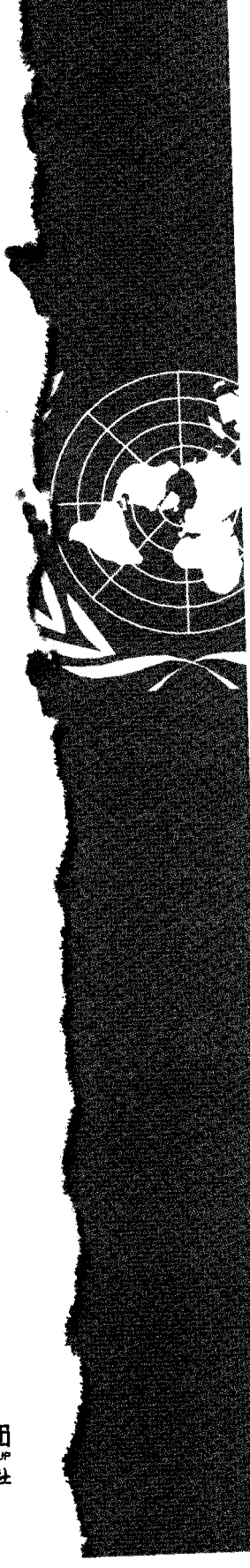
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# 总序

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基本国策的同时，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、国际型法学研究，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研究的中国刑事法学领域首家且目前唯一的独立性、实体性、综合性新型学术研究机构 and 研究生培养单位。研究院立足我国国情，在大力发展中国刑事法学研究的同时，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。国际刑法研究所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。国际刑法研究所力图通过课题研究、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。“京师国际刑事法文库”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、资料书等都具有重要的参考价值。

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

2009年6月

# 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 fo-

cusing 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 topics or general topics in a rather profound academic level, or introduction or translations 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 the society.

Prof. Zhao Bingzhi

Dean of College for Criminal Law Science

Beijing Normal University

In August of 2009



# · 前 言 ·

经济全球化是当前国际社会最为显著的特征之一。20 世纪中期以来，科学技术发展日新月异，世界经济发展突飞猛进，全球化进程日渐加快。经济全球化在加速全球贸易自由流动、增加人类财富的同时，也带来了日益猖獗的跨国有组织犯罪。各种犯罪组织利用便利的交通设施和相对开放的进出境政策，大肆跨国、跨地区作案，威胁着国际社会经济的发展和稳定。面对日益严峻的跨国有组织犯罪威胁，国际社会越来越认识到，只有加强国际合作，才能有效地遏制跨国有组织犯罪的蔓延。

自 20 世纪 70 年代，联合国就开始对有组织犯罪予以关注并进行了专门讨论，但是，囿于当时的国际环境，那时各国对这一问题的认识并不一致，国际社会打击跨国有组织犯罪的合作并未取得实质性进展。制定《联合国打击跨国有组织犯罪公约》（全书简称为《公约》）的构想是 20 世纪 90 年代中期正式提出的。1994 年 10 月，联合国在意大利那不勒斯组织召开了打击跨国有组织犯罪世界部长级会议，会议通过了《关于有组织跨国犯罪的那不勒斯政治宣言和打击有组织跨国犯罪的全球行动计划》，该宣言和计划第一次提出了关于拟订一项打击跨国有组织犯罪的国际法律文书的设想。那不勒斯会议之后，1995 年 11 月在布宜诺斯艾利斯进行了关于落实《那不勒斯政治宣言和打击有组织跨国犯罪的全球行动计划》的区域部长级讲习班，通过了《关于预防和控制跨国有组织犯罪的布宜诺斯艾利斯宣言》。1996 年 12 月，波兰总统在第 51 届联合国大会上发言，倡议联合国拟订一项打击跨国有组织犯罪的公约，并向联大提交了“公约”草案，该倡议得到了广泛支持。1997 年 5 月，第 6 届联合国预防犯罪和刑事司法委员会通过决议，并经同年 12 月召开的第 52 届联合国大会核可，决定拟订一项关

于打击跨国有组织犯罪的国际公约。1998年5月,第7届联合国预防犯罪和刑事司法委员会通过决议,后经同年12月召开的第53届联合国大会核可,指出有必要迅速着手拟订一项关于打击跨国有组织犯罪的公约,决定正式设立一个不限名额的特设政府间委员会(以下简称“特委会”),并从1999年1月起开始公约的起草和谈判工作。在此后不到两年的时间内,特委会连续召开11次会议,完成了《公约》以及《预防、禁止和惩治贩运人口特别是妇女和儿童行为的补充议定书》、《打击陆、海、空偷运移民的补充议定书》两个附加议定书的起草工作。2000年11月15日,《公约》及其上述两个附加议定书在第55届联大上通过。2000年12月12~15日,《公约》及其两个议定书在意大利巴勒莫召开的世界高级别政治签署会议上开放供各国签署。《公约》的第三份附加议定书——《打击非法制造、贩运枪支及其零部件、火药的补充议定书》,也于2001年2月在特委会第12次会议上完成,并于同年5月获联合国大会批准。<sup>①</sup>根据《公约》的有关规定,《联合国打击跨国有组织犯罪公约》自2003年9月29日生效。

《公约》是目前国际社会第一个针对跨国有组织犯罪的全球性公约,它确立了通过促进国际合作,更加有效地预防和打击跨国有组织犯罪的宗旨,为国际社会开展打击跨国有组织犯罪的合作提供了法律基础,对于国际社会联合打击跨国有组织犯罪具有里程碑意义。《公约》共计41条,其规定的法律对策和措施涵盖了控制跨国有组织犯罪的所有阶段,涉及国际法和国内法的多个领域<sup>②</sup>,具体包括:(1)《公约》的宗旨、适用范围、保护主权;(2)参加有组织犯罪集团行为的刑事定罪;(3)洗钱行为的刑事定罪以及打击洗钱活动的措施;(4)腐败行为的刑事定罪及反腐败措施;(5)妨害司法的刑事定罪;(6)法人的责任;(7)没收、扣押及没收事宜的国际合作、没收的犯罪所得或财产的处置;(8)管辖权、引渡以及司法协助和其他形式的司法和执法合作;(9)证人、被害人的保护;(10)跨国有组织犯罪的预防等。

改革开放以来,我国社会在享受经济发展和社会繁荣带来的福利的同时,也面临着日益严重的犯罪境况。利用国际机制与国际社会一道打击跨国有组织犯罪是我国政府的一贯立场。作为联合国常任理事国和负责任的大国,我国参与了《公约》的起草和谈判的整个过程,积极促成了《公约》的通过;在《公约》开放供签署的当天,我国政府即签署加入。2003年8月27日,我国第十届全国人民代表大会常务委员会第四次会议通过了关于

<sup>①</sup> 张毅:《〈联合国打击跨国有组织犯罪公约〉批准问题论纲》,载《中国司法》2003(10)。

<sup>②</sup> 邵沙平、丁明方:《控制跨国犯罪与现代国际法的发展》,载《法学评论》,2002(1)。

批准加入《公约》的决定，声明我国除对本《公约》第35条第2款予以保留，不受本款约束外，《公约》的其他条款均在我国适用。但是，毋庸置疑，在中国现今的刑事法律框架下，尚有诸多规定与《公约》存在差异乃至脱节之处。所以，在目前的国际国内环境下，若要全面履行该《公约》所确定的各种法律义务，有效推进中国打击跨国有组织犯罪的进行，加强与其他国家在相关领域的国际合作，就有必要促进中国刑事法治与《公约》的协调一致。可以说，这一问题直接关涉中国刑事法治的协调与完善，关涉中国社会与市场经济能否得到持续、稳定、健康的发展。

北京师范大学刑事法律科学研究院（以下简称北师大刑科院）与加拿大刑法改革和刑事政策国际中心多年来有着非常良好的学术合作关系，对中国乃至世界范围内的重大刑事法治问题都给予充分的关注和深入的学术研究。在中国签署并正式批准加入该《公约》后，我们切实感到，加强研究该《公约》与中国刑事法治之间的协调完善，对于中国履行该《公约》所确定的国际法律义务，促进中国打击跨国有组织犯罪活动的进行，有着极为重要的学术意义和实践价值。因而经过我们双方多次研究后，加拿大刑法改革与刑事政策国际中心决定资助北师大刑科院进行“《联合国打击跨国有组织犯罪公约》与中国的贯彻研究”课题的研究。本课题由北师大刑科院暨法学院院长赵秉志教授与刑法改革和刑事政策国际中心高级研究员杨诚教授共同主持，北师大刑科院院长助理暨中国刑法研究所副所长阴建峰副教授协助主持，并有北师大刑科院一批青年学术骨干参与，他们是：彭凤莲（北师大刑科院博士后研究人员，安徽大学政法学院副院长、教授、法学博士、硕士生导师，安徽省政协委员，安徽省法学会刑法学研究会副总干事）、袁彬（北师大刑科院讲师、法学博士）、何荣功（北师大刑科院博士后，武汉大学法学院副教授、法学博士、硕士生导师）、黄晓亮（北师大刑科院讲师、法学博士）、廖明（北师大刑科院讲师、法学博士）、王超（北师大刑科院讲师、法学博士）、马晓炜（北师大刑科院博士生）、徐丽敏（北师大刑科院硕士生）。加拿大国际发展署通过刑法改革和刑事政策国际中心中国项目对本项目提供了慷慨资助。项目最终成果具体撰稿分工如下（以撰写章节先后为序）：

赵秉志：前言；

杨 诚：英文导论，第一章第四节；

阴建峰、徐丽敏：第一章第一、二、三节；

赵秉志、彭凤莲：第一章第五节，第二章第八节；

袁 彬：第二章第一、二、三节，第五章第一节；

何荣功：第二章第四、五、六、七节；

·《联合国打击跨国有组织犯罪公约》与中国的贯彻研究

黄晓亮：第二章第九节，第四章第一节；

廖 明：第三章第一、三、五节，第四章第二节；

王 超：第三章第二、四节；

马晓炜：第四章第三节，第五章第二节，结论。

北京师范大学刑事法律科学研究院院长

赵秉志 教授

2009年8月

# • Introduction •

Facing the mounting threat of transnational organized crime, countries under various social and legal systems in the international community are now more than ever united to cooperate in order to effectively contain and reduce this threat. The United Nations Convention against Transnational Organized Crime (UNTOC), as a result of the international consensus, has spelt out a united commitment of nearly all member states of the United Nations and prepared a new ground for their cooperation in combating transnational organized crime. Both China and Canada have signed on and ratified the Convention. Both are preparing to improve their own domestic laws and systems. Both have started to engage each other in a constructive dialogue to explore the needs and possibilities of cooperation. This publication, *The UNTOC and Its Implementation in China*, demonstrates the results of a five-year long constructive dialogue between Chinese and Canadian legal scholars, justice officials and experts.

In the past five years, the Beijing-based Research College of Criminal Jurisprudence (the College) at Beijing Normal University in China and the Vancouver-based International Centre for Criminal Law Reform and Criminal Justice Policies (ICCLR) in Canada have been facilitating the sharing of expertise and the exploration of options regarding the implementation of the United Nations criminal justice instruments in both countries. As the Canadian Director of the Implementing International Standards in Criminal Justice Project (IISCJP), I would like to congratulate our Professor Zhao

Bingzhi, Dean of the College, and his team of experts for the completion of this difficult research initiative. I also thank Mr. Daniel Prefontaine, QC, President of ICCLR, and many other colleagues in the Canadian team for graciously sharing their knowledge and experts with our Chinese colleagues since the launch of the IISCJP in 2003. The exchange activities and conferences provided rare opportunities of mutual learning to many legal experts and senior justice officials in both countries.

It requires in depth research and great team work to explore and examine, in a systematical way, the key issues regarding the implementation of the UNTOC. This book was prepared as a research-based proposal for implementing the convention in China, with recommendations on improving the criminal law and criminal justice policies. In essence, this scholastic research product is a five-part plan of action for the government and justice departments to consider, each part offering detailed analysis of the existing problems as well as the policy-legal options. Tremendous effort was made by the College's team of young researchers to improve the chapters in this publication during the past two years. The publication was postponed from 2007 to 2008 to allow new texts being added to the book after it was sent to the printing house. And the quality of research findings has apparently improved. As a Chinese-Canadian professor in China, I was pleased to contribute a chapter to this book and recommend the inclusion of the *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* in the Appendix of this book. The Legislative Guides were a joint publication of ICCLR and the Centre for International Crime Prevention for the United Nations. It was given by ICCLR to College and other ICCLR working partner institutes in China soon after its release in 2003. The Guides are now distributed as a United Nations document by the United Nations Office on Drugs and Crime. The inclusion of the Guides is a significant input from the International Centre to this book, and the publication will in return facilitate a nationwide distribution of the Guides across China.

The English Introduction serves as an overview of the chapters in this book. For our readers outside of China, I feel obliged to introduce, and offer my own comments on, the key issues that are identified and analyzed by the authors. This will hopefully help the readers to appreciate the needs and

options in the ongoing Chinese law-and-policy reforms that are still being discussed and formulated in light of the UNTOC standards and norms as well as its three Protocols.

### 1. Reshaping the Legal-Policy Framework

Part I of the book examines the general theme and content of the UNTOC and the broader picture of its implementation. The focus of the discussion is placed on how to improve the overall Chinese legal and policy framework for effective implementation of the Convention.

This Part consists of five chapters. The first chapter offers a review of the history. It describes the trend of globalization and the evolving patterns of transnational organized crime in the world. In response to the threat of transnational organized crime, the United Nations and its member states have been working together trying to develop a universal framework that would help every state improve their own laws and practices. The authors of this chapter noted that the UNTOC was the result of the international discourse within the United Nations, which went on for some three decades, from the 1970s to end of 2000.

Interestingly, the authors indicate that even though China started to participate in the United Nations' work on crime prevention and criminal justice in a relatively late stage, it was among the first member states to join the Convention. On December 23, 2003, China signed the Convention. Only one month later, it ratified it. The pace of China joining this Convention and making it effective was surprisingly fast. In contrast China's signing of the International Covenant of Civil and Political Rights in 1998 has not yet led to ratification after ten years. To me, it was very disappointing that the ICCPR was not ratified when the new Chinese leadership entered into their second term in the office, and it was not ratified prior to the Beijing Olympics. China is vigorously seeking a truly global cooperation to combat transnational organized crime. However, in practice, when it involves the western democracies, there is often a hesitation to cooperate with China because of the controversies on human rights. In my view, ratifying the ICCPR will help China to develop a more effective cooperation with the western countries. Further delay in ratifying the universal human rights standards will remain to be a main obstacle to international cooperation.

Chapter Two is a highlighted legal review of the Convention. It gives

high remarks to the new concepts and principles of substantive and procedural criminal laws in this instrument. It also notices the provisions of technical assistance and the obligation of member states. The authors conclude that the UNTOC is a landmark instrument of international criminal law and has provided “guarantees for international cooperation”. This conclusion, in my view, appears to be too optimistic when we observe the reality. Potentially, the Convention has opened the doors to more effective cooperation. It can facilitate cooperation, but not to guarantee it. My observation of the difficulties, if not deterioration, in the Sino-Canadian cooperation in criminal justice over the last twenty years has convinced me that the magic effect of the UNTOC is still something to be seen, and a truly global cooperation is still a remote possibility. Indeed, in the past five years, apparently, I have not seen a single case whereby the UNTOC was used as a legal ground for international cooperation in extradition or mutual legal assistance. In practice, the Convention has basically been an instrument for discussions on cooperation, but we have not seen much actions of using it to facilitate the cooperative handling of transnational organized crime cases.

The next Chapter in Part I analyses the scope of application; that is, the types of criminal offences that the Convention applies to and the territorial jurisdiction. The authors hold that protection of sovereignty is recognized as a high principle by the Convention. In the meantime, they also try to address issues of conflicting sovereignties in determining the jurisdiction when a case involves transnational factors. It is suggested that disputes relating to conflicts in jurisdiction should be submitted to an “international court” for a decision. It is worth noting that the Research College of Criminal Jurisprudence has been a driving force in China to promote the recognition of the International Criminal Court. In the past three years, the College has worked with ICCLR in several ICC focused workshops. Experts at the College also translated the ICCLR Manual on the Rome Statute and published the translation in China. In my view, however, the level of commitment from the government remains the key issue to be resolved. Recognizing the jurisdiction of a “foreign criminal court” upon cases involving Chinese citizens still appears to be a questionable idea. In this respect, China and the United States probably have something in common.

I wrote Chapter Four to examine the Convention from a criminal policy



perspective. The first part of the chapter tries to conceptualize “criminal policies” by comparing the various definitions used in western and Chinese scholastic literatures. It is suggested that, given that China is “to build a harmonious society” “under the rule of the law”, criminal policies in China could be defined as official decisions for actions to prevent and combat crime, and that these decisions must reflect the universal and fundamental values of democracy and the rule of the law. These policies should also be based on rationales that are testable scientifically.

The second part of the chapter explores criminal policy issues in China. The UNTOC provides a wide range of criminal policies, which could be divided into four categories: legislative policies, justice and law enforcement policies, crime prevention policies and international cooperation policies. To meet the most pressing needs of China, the chapter suggests that priorities should be given to implement three of them: criminalization, as required by the Convention, mandatory jurisdiction and vigorous law enforcement, and promotion of effective international cooperation. With respect to criminalization, I recommend that the Chinese Criminal Law needs to have a much broader definition of “an organized criminal group”, which is different from the definition of “crime clique” or “secret society” in the current Law. I also recommend that participation in a organized criminal group should be written into the Criminal Law as an independent offence; that the offence of money laundering in the Law needs to be redefined in light of the requirements in the Convention, especially regarding the predicate offences; that the Chinese Criminal Law should expand the definition of a “bribe” to include any kind of undue advantage, rather than monetary asset only; and that a special provision is required to specifically target corruption in the judicial process, considering the deterioration of the problem in China.

The chapter also recommends that the next phase of the Chinese reform will address four practical issues of policy development: tackling the problem of rampant enterprise crime that involves organized criminal groups; expanding community based corrections to members of criminal groups; publicizing government statistics on activities of organized crime in China; and blocking the enormous flow of dirty money from mainland China to Macao, which has become the world gambling capital.