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政治犯与死刑犯不引渡原则问题研究

Research on Principles of Non-extradition of Political
Offenders and Death-Penalty

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内 容 摘 要

包括中国在内的国际社会正面临来自恐怖主义犯罪和腐败犯罪的挑战。犯罪后逃往外国是这两类犯罪分子逃避制裁的常用手段。但是，在实践中，政治犯不引渡原则与死刑不引渡原则对于引渡这两类犯罪分子客观上构成了障碍。由于恐怖主义犯罪与政治因素之间往往存在密切而错综的联系，被请求引渡国往往以被控恐怖主义犯罪分子属于政治犯为由拒绝引渡。这就导致了制裁恐怖主义犯罪与政治犯不引渡原则之间的冲突。相应地，另一个拒绝引渡原则死刑不引渡原则也阻碍了对腐败犯罪的制裁。死刑的存在和对死刑认识上的差异成为签订引渡条约的障碍。在没有条约的情况下，请求国往往只能以承诺不判处死刑或者不执行死刑换取被请求国同意引渡，但这种承诺可能导致罪刑不相适应。并且，被请求国未必会接受上述承诺，因而引渡请求仍然可能被拒绝。虽然现实中已经发展出一些解决冲突的方法，但这些方法都存在一定的局限性、个案性、即时性。为了有效制裁恐怖主义犯罪和腐败犯罪，谋求长远解决方式是一种务实和必然的选择。本文通过设计一些程序，包括上诉、第三方仲裁和向国际法院提起诉讼，期待对政治犯罪和恐怖主义犯罪的认定更具公正性，从而有助于解决制裁恐怖主义犯罪与政治犯不引渡原则的冲突；建议转变观念、采取措施、构建某些机制，包括尽可能与外国签订双边引渡条约、扩大引渡法律依据的范围、建立承诺和保证系统以及某种监督机制等，力争解决制裁腐败犯罪与死刑犯不引渡原则之间的冲突。同时，本文也对中国相关引渡制度的完善提出了若干建议。

关键词：政治犯不引渡；死刑不引渡；恐怖主义犯罪；
腐败犯罪；冲突

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ABSTRACT

International community is facing the challenge from offences of terrorism and corruption. Offenders of these two kind offences often choose to flee away to foreign countries which may protect them from being punished. But in practice, obstacles have been objectively constituted to the extraditing of the offenders above-mentioned by principles of both non-extradition of political offenders and non-extradition of death-penalty. With the usual existence of close and complicated relation between terrorism offences and political factors, the requested state often rejects the extradition request by giving a reason that the charged terrorist suspect is believed to be a political offender, which leads to the conflict between the punishment of terrorism offences and principle of non-extradition of political offenders. Similarly, another extradition-rejecting principle, that is principle of non-extradition of death-penalty, is also an obstacle to the punishment of corruption offences. Since there is so much difference in understanding the value of death-penalty, concluding and signing a treaty on extradition becomes a rather difficult task between those countries in which this penalty still exists and others abolished. Without such a treaty, the requesting state has to give such assurance to the requested state, in order to obtain the person wanted, as he/she will not be sentenced to death-penalty, and if the sentence of death-penalty has been made, it will not be carried out. However, the assurance and its fulfilment may bring an unfair consequence that the punishment doesn't match up to one's crime. Furthermore, this kind of assurance may not accepted by the requested state, thus extradition request may at last, not be granted either. Although a few resolutions have been developed, they are obviously of some certain limitations, of significance of only individual cases, of some certain instantaneousness. With the aim of punishing offences of terrorism and corruption more effectively, it is a practical and necessary choice to seek out long-term resolutions. Some procedures have been designed in this text, including appealing, arbitration by the third party and bringing a suit in the International Court, which are expected to bring more fairness in holding whether an act is of a political offence or not, whether of a terrorism offence or not and thus help to resolve the conflict between the punishment of terrorism offences and principle of

non-extradition of political offenders; some suggestion has been proposed on transforming attitude, taking measures and establishing mechanisms, such as concluding and signing as more treaties with foreign countries as possible, extending the sphere of legal standing of extradition, establishing a system of assurance and a coordinated supervising mechanism on its fulfilment, etc. All these are aiming at resolving the conflict between the punishment of corruption offences and principle of non-extradition of death-penalty. Meanwhile, some advice has also been made on improving related extradition legislation of China in the end.

Key Words: Non-extradition of political offenders;
non-extradition of death-penalty; terrorism offences;
corruption offences; conflict

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前 言

对于犯罪最强有力的约束力量不是刑罚的严酷性，而是刑罚的必定性。^①但是，由于现代科技的进步，发达的通讯设备和便捷的交通工具，以及全球一体化趋势下对出入境手续的简化，犯罪分子往往能成功地逃离犯罪地，而国家主权的要求和管辖范围的限制使得在惩处犯罪分子方面面临着种种障碍，刑罚的鞭长莫及无疑助长了犯罪。

引渡制度作为国际刑事司法协助体系中最重要的一项制度，近年来在打击跨国犯罪方面发挥出的作用已经为国际社会所关注和肯定，它使得相当一部分犯罪分子无所遁形，最终受到法律制裁。

结合国际刑事犯罪的趋势及中国的实际情况，笔者认为，近年来在形形色色的各类犯罪中尤其应该重视两类犯罪：

一是恐怖主义犯罪。也许它们之间并无直接联系，但就整体而言，它们对世界的影响就像一组连环炸弹，今天爆一个，后天响一个，尤为可怕的是，没有人知道这组炸弹有多长。其手段残忍、造成伤亡和损失惨重、对社会秩序伤害严重等等，因此任何国家都不能予以轻视，任何国家都不能因为暂时的未被卷入而置若罔闻——谁也不能预测恐怖分子下一个目标是什么。尤其是，此类恐怖主义犯罪的组织地、实施地、犯罪嫌疑人等往往具有跨境特征，并且涉及某种政治诉求、政治因素，或者政治力量。由于引渡制度中存在公认的政治犯不引渡原则，如何惩处此类犯罪活动成为当前国际社会非常关注的问题。

二是腐败犯罪。对腐败犯罪予以打击是各国的共识。为了有效地打击犯罪，一些国家，如中国国内刑事立法中甚至针对此类犯罪设立或保留死刑。然而，国际社会的当前趋势是，越来越多的国家取消了死刑，进而在双边引渡条约中规定死刑不引渡原则，这对相关国家有效地打击腐败犯罪构成严惩的障碍。在这方面，中国面临的问题尤其严重。目前，相当数量的腐败犯罪分子在实施犯罪或案发后携带大量赃款逃往国外而未能到案，这种现状既不利于惩处犯罪，也不利于预防

^① [意]切萨雷·贝卡利亚.论犯罪与刑罚[M].黄风译，北京：中国政法大学出版社，1980.

犯罪。

正是基于对犯罪现实的这一判断，笔者选择引渡制度中的两个不引渡原则，即政治犯和死刑犯不引渡原则及其在惩处恐怖主义犯罪、腐败犯罪中的运用作为论文选题。笔者希望利用在最高人民检察院工作期间获得的相关信息，对相关问题予以讨论。

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第一章 引渡制度中两个重要的不引渡原则

第一节 引渡制度概述

一、引渡

（一）引渡的定义

国际法学家们尝试从不同角度为“引渡”设定定义。《奥本海国际法》认为：“引渡是一个被控诉或被判罪的人，由他当时所在的国家把他交给另一个认为他在其领土上犯了罪或对他判罪的国家。”^①从诉讼法学的角度出发，斯塔姆勒认为：“引渡系指应他国之请求，对违反请求国法律之刑事犯交付请求国之程序。”^②日本国际刑法学家森下忠认为：“引渡是指为了追诉逃亡犯罪人或者执行刑事制裁，而把逃亡犯罪人从现在所在国（被请求国）交接给请求国。”^③

以上对于“引渡”的各种定义，虽然侧重角度各有不同，但有一个共同的特征，即都是在“属地管辖原则”基础上进行界定的。这些定义虽然明确界定了有权请求引渡的主体范围和引渡的对象，却忽视了包括受害国在内的国家可以依据“属人管辖”、“保护管辖”的原则来引渡犯罪嫌疑人的情形，因而过于狭义，不能完全适应当前日益复杂的国际形势。在充分考虑到当代社会国际犯罪所出现的各种新因素后，笔者认为，我们可以对引渡的概念作更广义的界定，即：

引渡是一国把在该国境内被他国追诉或判刑的犯罪分子，依照一定的程序，交付拥有对该人的刑事管辖权的请求国进行起诉、审判或执行刑罚的刑事司法国际合作制度。

（二）引渡制度的起源与发展

最早的引渡活动，可以追溯到公元前 1280 年。埃及国王拉默赛斯二世与赫梯族国王哈杜西三世在结束叙利亚战争后签订了“和平条约”，其中就包括了对来自对方国家逃亡犯罪人予以引渡的条款，该引渡条款被认为是条约历史上的第一

① [英]詹宁斯·瓦茨·奥本海国际法（修订本）第 1 卷第 2 分册[M].王铁崖等译，北京：中国大百科全书出版社，1998.338.

② 曾本义，高哲翰·美国对引渡条款之实践[J].美国月刊（台北），1990，5(5)：133-137.

③ [日]森下忠·国际刑法入门[M].阮齐林译，北京：中国人民公安大学出版社，2004.130.

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