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RESEARCH ARTICLE

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The establishment and characteristics of China's extradition system

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Abstract Through analyzing the 25 bilateral extradition treaties that China concluded with other countries and the background of relevant legislation and treaty conclusion, the author delineates and discusses the establishment and basic characteristics of China's extradition system. These characteristics are mainly as follows: (a) introduction of basic rules through bilateral treaties; (b) establishment of a scientific double examination to standardize and formalize extradition cooperation; (c) principle-centered, flexible and open towards extradition cooperation, and take the extradited person as a party to the extradition proceedings and give attention to the protection of his human rights.

Keywords extradition, international treaty, political offence, double examination, human rights protection

The formation of the extradition system in China began fifteen years ago. Since the first bilateral extradition treaty with Thailand on August 26, 1993, China has concluded bilateral extradition treaties with 25 countries, on average two treaties per year and being the most fruitful for treaty conclusion. On December 28, 2000, China promulgated its first *Extradition Law*, which provides for specific rules, conditions and procedures for extradition cooperation with other countries and establishes a set of

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characteristic system of judicial and administrative examination. So far, China's extradition system has made its way by leaps and bounds, serving as an important symbol and indication of its legal modernization and internationalization, plus its respect for human rights.

1 Introduction of basic rules through bilateral treaties

Before the promulgation of the *Extradition Law* in 2000, a series of widely accepted basic rules of extradition cooperation has been introduced in China through bilateral treaties. According to the *Constitution* and the *Procedural Law on Conclusion of Treaties*, the treaties and agreements relating to the judicial assistance and extradition should be ratified by the Standing Committee of the National People's Congress, and once ratified, they will acquire legal force. It is indeed a very wise policy for China to initiate and promote the establishment of its extradition system through bilateral treaties. On one hand, to carry out international extradition cooperation, it is necessary to adopt many widely used or accepted rules and systems, and this is precisely what the conclusion of treaties can realize properly. On the other hand, its domestic legal system, which is in the process of formation, can hardly accept some fragmentary, unfamiliar and sudden adaptation and modification upon itself especially when such adaptation and modification are conducted for the sake of international cooperation, affect the absolute sovereignty inherent in its existing domestic law and prevailing socio-political outlook. Domestic law indeed is not a good starting point.

Take the "rule of speciality" for example, from the aspect of international legal assistance, it is a basic and a very natural rule of international cooperation, demonstrating the mutual trust and respect among cooperating countries. However, from the aspect of domestic law, it constitutes a kind of restraint on the judicial sovereignty of the requested state. It requires that the requesting state can only prosecute or execute punishment in accordance with the offense or offense indicated in the extradition request and for which an extradition is granted by the requested state and forbids the requesting state, without the consent of the requested state, from extraditing to a third state the person being extradited. The conclusion of treaties will be an easier

way to introduce such a rule,[1] since it is binding upon both parties to the treaties, no one gets benefit or suffer losses from such restriction on judicial sovereignty and no one gets an unfair feeling.

In the course of the establishment of China's extradition system, international treaties have played a prominent role in introducing the rule of "exception of political offense". "Exception of political offense" is also a basic rule of the modern extradition system. Under such rule extradition is no longer a means of political transaction, and international legal assistance is confined in the scope of ordinary offense and thus unaffected by sensitive political issues. Thus, every country is entitled to define "political offense" in accordance with its own legal system and value so as to properly utilize this "safety valve". Yet in China, "political offense" was once taboo, its penal legislation does not adopt this concept and criminal trial strives to avoid making any sentence related to it. The direct introduction of "political offense" into domestic legislation is virtually incredible, and this mission eventually rests on the conclusion of treaties.

The *China-Poland Treaty on Civil and Criminal Judicial Assistance* concluded in 1987 courageously took a very prudent first step as regards to "exception of political offense". This Treaty, rather than using the term of "political offense" directly, used a sentence to express relevant meaning, that is, "an offense is of political nature."[2] *China-Turkey Treaty on Civil, Commercial and Criminal Judicial Assistance* concluded in 1992 achieved another break-through and for the first time adopted the typical European expression, i.e., "political offense and related offense".[3] In 1993, when concluding with Thailand its first bilateral extradition treaty, in order to

[1] *China-Thailand Extradition Treaty* concluded in 1993 for the first time introduced the "rule of speciality", and Art. 13 of the Treaty provides: "(1) A person extradited under this Treaty may not be detained, tried, or punished in the Requesting State or extradited to a third state for an offense other than the extradition offense, except for, (a) the person leaves the territory of the Requesting State after extradition and voluntarily returns to it; (b) does not leave the territory of the Requesting State within 30 days of the day on which that person is free to leave; (c) The Requested State consents to detain, try or punish or extradite the person to a third state for an offense other than the extradition offense. For the purpose of this, the Requested State may require the submission of the documentation called for in Art. 7, including the statement of offense made by the person sought. (2) This rule does not apply to any offense committed after the extradition of the person. "

[2] This expression occurred in Para. 1, Art. 24 of *China-Poland Treaty on Civil and Criminal Judicial Assistance,* and the entire text is as follows: "If the Requested State determines that an offense on which the request based on is of political nature or a military offense, it may refuse to provide judicial assistance."

[3] Para. 1, Art. 29 of *China-Turkey Treaty on Civil, Commercial and Criminal Judicial Assistance* provides: If "the Requested State determines that the offense on which the request is based is a political offense or related offense," it can refuse to provide criminal judicial assistance.

complete the expression of "political offense" in extradition treaties, the Ministry of Foreign Affairs, with the consent of the Supreme People's Court, the Supreme People's Procuratorates, the Ministry of Public Security and the Ministry of Justice, submitted to the State Council a file on *Solutions to Some Problems in China-Thailand Extradition Treaty*, suggesting the direct use of "political offense". This suggestion was approved and effectuated in treaty negotiation.

Above treaties has laid the basis for the establishment of the rule of "exception of political offense" in China's *Extradition Law*. As expected, during the discussion in the Standing Committee of the National People's Congress about "political offense", there occurred a hot debate. Some representatives thought it would be inappropriate for the Extradition Law to adopt the expression of "political offense", since such a concept would be inconsistent with the "no political prisoners" statement made by China, and suggested to use "political behaviors" instead.[4] The Commission of Legislative Affairs, after investigation, concluded that "political prisoner" and "political offense" are two distinct concepts, the former refers to persons detained for political or ideological reasons, and the latter refers to offense in political nature. In international criminal legal assistance such offense must first meet the requirement of double criminality, and then, the requested state, in accordance with its legal system and particulars of the case, will determine whether such offense is political in nature. On the other hand, the concept of "political offense" has been adopted by China in its conclusion of bilateral treaties and proves to have no negative impact on its fundamental legal system. Instead, competent authorities in China have acquired a kind of favorable power of deciding on their external legal assistance. The *Extradition Law*, rather than recoiling from them, should recognize this concept and relevant systems. For this reason, legislators eventually are of the opinion that it is not necessary to change the "political offense" in Paragraph (1), Article 8 of the *Extradition Law* into "political behavior".

Besides these basic rules, the original introduction of some procedural rules related to extradition cooperation is also through bilateral treaties, for instance, procedures for custody in urgent circumstances. The *Criminal Procedure Law* has provided certain conditions and time limits for the detention of suspects. However, due to the urgency of such temporary detention and the necessity of leaving necessary time for the preparation and submission of formal extradition request, such conditions and time limits can

[4] In the *Explanations for the Extradition Law of the People's Republic of China* (Draft) by Kangsheng Hu on behalf of the Commission of Legal Affairs to the 17th Session of the Standing Committee, "the request for extradition is made for a political offense" in Art. 7 for a time was changed into "the request for extradition is made for a political behavior".

be hardly applicable to such custody. At the early stage of the establishment of its extradition system, it is unlikely for legislators in China to amend existing *Criminal Procedure Law* for the sake of standardizing the custody procedures in extradition cooperation. Such being the case, the establishment of custody procedures for extradition in the meantime has to rest on bilateral treaties.

Thus, considerable legislative breakthroughs in extradition cooperation originated from the conclusion of international treaties, and even after the promulgation of *Extradition Law*, extradition legislation in China continues to introduce new rules and improve its *Extradition Law* through the treaties, properly connecting different legal systems in the field of international judicial cooperation. The *China-Spain Treaty on Extradition* concluded in Madrid on November 14, 2005 for the first time explicitly provides "no extradition for capital punishment",[5] and this is an important legislative breakthrough realized through the bilateral treaties, which paved the way for removing judicial hindrances to its extradition cooperation with western countries.

As to the relationship between international treaties and domestic laws, unlike the *Civil Procedure Law*, the *Extradition Law* does not explicitly stipulate the precedence of international treaties.[6] However, after a careful study, people may find in the *Extradition Law* the precedence of international treaties and special laws over ordinary laws. For example, Article 4, after designating the Ministry of Foreign Affairs as the "communicating authority", goes to add: "Where in an extradition treaty, there are special provisions to govern the communication authority, the provisions therein shall prevail." Similarly, Article 49 of the Extradition Law, when adjusting the procedures for the extradition request submitted to foreign countries, provides: "or where there are no such treaties or no such provisions in such treaties to go by, the provisions of Sections 2, 4 and 7 of this Chapter may be applied mutatis mutandis". Besides, Article 17 of *Criminal Procedure Law* in principle provides that international criminal judicial assistance should be conducted "in accordance with the international treaties, which the People's Republic of China has concluded or acceded to".

[5] Art. 3 of *China-Spain Treaty on Extradition* provides that extradition request will be rejected if: "When the offense for which extradition is sought is punishable by death under the laws in the Requesting State, unless the Requesting State provides an assurance that the death penalty will not be imposed or, if imposed, will not be carried out".

[6] Art. 3 of *Extradition Law* (draft) has preserved such a provision: "When there are different provisions in the extradition treaty, then the extradition treaty will apply." But, in the final review by the Standing Committee, this provision was silently deleted.

2 Establishment of a scientific double examination

For quite a long time, people and even some judicial personnel deemed extradition cooperation as foreign or police affairs. In past practices, the majority of extradition requests were examined by governmental administrative authorities (such as the Ministry of Foreign Affairs, the Ministry of Public Security), though subsequent internal documents also added the Supreme People's Court, the Supreme People's Procuratorates and the Ministry of Justice to the list of competent authorities for extradition cases.[7] However, due to the lack of definite authorizations and concrete procedural guarantees, such "countersigned" written examination, i.e., the so-called judicial examination, eventually proved to be nominal.

Actually, since extradition relates to both the screening and protecting the legal status and litigation rights of the person sought and the applicability of many norms of international cooperation and domestic laws, modern countries usually require judicial authorities and administrative competent authorities to jointly participate in relevant examination and decision making, and regulating the process through clearly-defined authorizations and procedures. The *Extradition Law of 2000*, after long discussion and repeated revisions, finally adopted a typical double examination, i.e., the examination of the request made by a foreign state will be divided among competent authorities—judicial organs are to take charge of judicial examination and administrative organs will be responsible for administrative examination—both enjoy the veto right, and the decision for granting an extradition can only be made after its passing these two examinations. Such a double examination is characterized as follows:

2.1 Judicial examination plays a leading role and administrative examination checks on both ends

The double examination of extradition cases is realized through different modes, and the most common and typical modes are as follows:

The first mode is administrative examination–judicial examination–administrative examination. Administrative authorities will first examine an extradition request, if they determine that there are no obvious circumstances interfering in extradition cooperation, they will submit it for judicial examination. Judicial authorities, after deciding on the permissibility of the

[7] Art. 3 of the *Provisions for Several problems of Dealing with Extradition Cases*, issued by the Ministry of Foreign Affairs, the Supreme People's Court, the Supreme People's Procuratorates, the Ministry of Public Security and the Ministry of Justice, April 23, 1992.

request, will send the case back to the administrative authorities (for example, France and Japan).

The second mode is administrative examination–judicial examination. Administrative authorities, after deciding on the formal legitimacy of an extradition request, will forward the case to judicial authorities for examination, and the latter will determine whether to grant an extradition (for example, Portugal and Brazil).

The third mode is judicial examination–administrative examination. Judicial authorities will have a comprehensive examination of an extradition request made by a foreign state, and administrative authorities will hold the pass and decide whether to grant an extradition (for example, Britain and the US).

The double examination adopted by China is the typical mode of "administrative examination–judicial examination–administrative examination". The *Extradition Law* has installed administrative examination at the start and the end of the entire examination process. According to Article 16 of the *Extradition Law*, upon receiving the request for extradition from the requesting state, the Ministry of Foreign Affairs (the communicating authority designated by the extradition treaty) shall examine the formal conditions of the request and prepare the initiation of judicial examination. In accordance with Article 29, the extradition request, after passing judicial examination, will re-enter into administrative examination, and the State Council will decide whether to grant extradition. If in the process of judicial examination, the request does not meet the conditions for extradition, the people's court will render a decision that no extradition shall be granted, and the process of the entire extradition case terminates herein.

As to the functions of administrative examination and judicial examination, Article 4 of the *Extradition Law* designates the Ministry of Foreign Affairs as the communicating authority for extradition. The Ministry of Foreign Affairs is responsible for receiving and having a preliminary administrative examination of the extradition request made by a foreign state, and it only examines whether the letter of request for extradition and the accompanying documents and material is conformed with the provisions of Section 2 in Chapter II of the *Extradition Law* and the provisions of extradition treaties. By comparison, the *Extradition Law* vests the judicial examination with rather comprehensive functions: "examine whether the request for extradition made by the Requesting State conforms to the provisions of this Law and of extradition treaties regarding conditions for extradition and render a decision on it", [8] and such judicial examination is indeed

[8] Para. 2, Art. 16 of *Extradition Law*.

sufficiently empowered. All relevant legal matters are within the scope of judicial examination. Though subsequent administrative examination is executed in the name of the State Council, it decides on behalf of the state whether to grant an extradition. On one hand, it is based on the results of judicial examination, and on the other hand, it serves to hold the final pass.[9]

In my opinion, the double examination adopted by the *Extradition Law*, capable of greatly increasing the authoritativeness of judicial examination and ensuring the "check on" authority of administrative examination, is the best choice for China.

2.2 The people's court is vested with the power of judicial examination

During the drafting of the *Extradition Law*, China has for long been undecided about which organ shall take charge of judicial examination. I once suggested setting up a double examination for extradition request, for "such examination in essence differs from the trial and at most is something like a preliminary trial. Therefore, it will be improper to be carried out by official trial organs. In comparison, as the legal supervision authority, the people's procuratorates will be more proper for such examination as to its nature and characteristics".[10] At that time, in my view, such a suggestion would be quite advanced, after all, it was a call for the participation of judicial organs in the extradition process. I never imagined a set of independent extradition litigation system for the people's court. However, some years later, such a system was quickly set up, and such resolute decision is really amazing. The judicial examination presided over by trial organs is purer and more thorough; conclusions reached by such judicial examination will be more authoritative, guaranteed by relevant special legal systems and the Constitution.

Legislators in China, when deciding for such a judicial examination, are guided by a definite principle: Extradition proceedings are entirely independent and different from ordinary criminal proceedings, and some principles and procedures are stipulated in the Criminal Procedure Law. For

[9] In the course of drafting and discussing the *Extradition Law*, in order to uplift the authoritativeness of judicial examination, people for a time have designed an "administrative examination - judicial examination" mode, investing organs of judicial examination with the final power over the extradition request made by a foreign state, and while conferring on administrative organs the power to utter their opinions to organs of judicial examination. This mode was not adopted, since, to a certain extent, it will restrict administrative power, and the "hold the pass" by administrative examination will be very critical and indispensable for its political system, international cooperation and social awareness.

[10] Feng Huang, *Extradition System*, 1st Edition, 1990, Law Press, p.187.

instance, the people's courts, the people's procuratorates and the public security organs shall divide responsibilities, coordinate their efforts and check each other, plus, detention and arrest procedures for criminal proceedings are not applicable to it. The *Extradition Law* concentrates the power to make decisions on the people's court and deletes the provision that the public security organs and the people's procuratorates in certain circumstances may decide to terminate the examination proceedings or refuse the extradition request. Under the existing *Extradition Law*, public security organs are only responsible in searching for the person sought, executing compulsory measures and surrendering the person sought and do not directly participate in judicial examination. To be noted, though the *Extradition Law* preserves certain examination responsibilities for the Supreme People's Procuratorates, such examination is confined to criminal judicial jurisdiction and instead of the power of decision-making, and it only has the right to make the suggestions. In other words, *Extradition Law* does not provide that the examination results of the Supreme People's Procuratorates are binding on the Supreme People's Court and the State Council.

Such high concentration and unity of judicial examination are also manifested in the following aspects: only the higher people's court designated by the Supreme People's Court can execute such judicial examination and decisions by the higher people's court in which the request meets the conditions for extradition or no extradition shall be granted, before entering into force, must be approved by the Supreme People's Court. Except the judicial examination of the extradition request made by a foreign state, at present, by the judicial trial systems in China, there seems to be no other judicial examination mechanisms which must obtain the approval of the Supreme People's Court before entering into force. Such high concentration and unity are consistent with the characteristics of the extradition cooperation though the amount of extradition cases is not that many. However, they all relate to great or complicated legal issues, and the solution of such issues needs not only quite a high degree of special knowledge and quality but also the mutual coordination and negotiation between the judicial and administrative organs.

2.3 Double examination and one-vote veto

In such double examination of extradition request, it is from the one-vote veto rule that we can see the mutual coordination and check between judicial examination and administrative examination. That is, judicial and

administrative examinations, upon finding unsuitable circumstances, both have the right to veto an extradition request, and such veto, no matter where it is from, is binding.

Article 24 of the *Extradition Law* provides, after examination, that the Higher People's Court may render two different decisions, that is, the decision that the request meets the conditions for extradition or the decision that no extradition shall be granted.

"The decision that the request meets the conditions for extradition" is a kind of opinion expression. The higher people's court responsible for the extradition case will use such decision to confirm on behalf of the judicial examination organs the permissibility of an extradition request made by a foreign state and such decision justly demonstrates their consenting attitudes to the extradition. The decision that the request meets the conditions for extradition is not binding on administrative examination organs, especially the final decision-making organ—the State Council, and the latter can decide not to adopt such decision, and it can even render a contrary and binding decision for non-extradition. Of various judicial decisions, the decision that the request meets the conditions for extradition may be the only one that administrative organs can overrule in accordance with legal procedures.

The decision that no extradition shall be granted is a kind of ruling, which the people's court makes in accordance with the veto right of judicial examination. Such decision, upon the approval of the Supreme People's Court, will immediately enter into force and effect. The decision that no extradition shall be granted is binding on organs of administrative examination, and the latter not only cannot change or overrule the decision but can also terminate relevant proceedings of judicial examination, that is, the State Council or administrative authorities designated by it will no longer hold the final pass and make repeated decisions. The Ministry of Foreign Affairs will directly notify the requesting state of such decision. According to Paragraph 2, Article 28 of the *Extradition Law*, if the public security has taken compulsory measures against the person sought, after the Supreme People's Court approves or makes the decision that no extradition shall be granted, the public security organ shall immediately terminate such compulsory measures.

"One-vote veto" fully manifests the legal guarantee for the double examination mechanism. With such mechanism, the decision that the request meets the conditions for extradition will all be based on the conformity of statutory requirements. Judicial examination and administrative examination will be equally authoritative, and the solution of conflicts and discrepancies between judicial examination and administrative examination will be very convenient and reasonable.

3 Principle-centered, flexible, open and firm

The purpose of the extradition system is to serve the international judicial cooperation. Its participants include all sovereign states and cases greatly vary. Therefore, the extradition system shall not only sufficiently exhibit the legal spirit but also effectively solve various problems encountered in the course of cooperation. For this purpose, that is, to be both principle-centered and flexible, one not only adheres to the fundamental national rules but also observes international courtesy and reciprocity, and to some extent go beyond the existing legal framework, and be very open and compatible. From the following examples, we can see that the extradition system in China is trying to achieve such an end.

3.1 Accept cooperation conditions without prejudice to sovereignty

Paragraph 2, Article 3 of the *Extradition Law* provides: "No cooperation in extradition may impair the sovereignty, security or public interests of the People's Republic of China". Such provision exists in all its laws and treaties relevant to international legal assistance and can be directly cited as the reason for refusing an extradition request made by a foreign state.[11] Meanwhile, the spirit of such provision also runs through the basic rules of the *Extradition Law*, for instance, the seven circumstances under which extradition request shall be refused and two circumstances under which extradition request may be rejected are all likely to relate to sovereignty, national security and social order in a direct or indirect way. For this purpose, competent authorities for extradition cases should strictly protect the legal rights defined in Paragraph 2, Article 3 of the *Extradition Law*.

In some sense, international cooperation is based on mutual courtesy, therefore, participating states may have to change their domestic legal systems, make certain concession or compromise and even restrict or waive some of their certain powers. The purpose of such change, concession, compromise and undertaking is to realize a more important aim: safeguard greater or fundamental interests at a smaller cost and with proper flexibility. Such being the case, national sovereignty, security and public interests,

[11] Extradition legislation in some countries explicitly provides that government, after organs of judicial examination renders a decision of consenting to extradition, can cite this reason to reject the request, for example, Art. 6 of the *Passive Extradition Law of Spain* provides: "The ruling made by the court that consents to extradition request is not binding on government. The Government can choose to veto the extradition in accordance with or in consideration of the security, public order and basic interests of the Spain."

instead of being impaired, are under effective protection. According to Article 50 of the *Extradition Law*, the competent authority responsible for extradition cases, when making an extradition request to a foreign state, may accept strings attached and make assurance with regards to restriction on prosecution and measurement of penalty, so as to fulfill its own purpose. For example, the assurance that certain offense or offense will not be prosecuted, certain punishment or punishments will not be sentenced or executed (e.g., capital punishment), and measurement of penalty will be restricted, etc. Article 49 of the *Extradition Law* also allows the competent authority to "submit in accordance with the specific requirements raised by the Requested State" documents and material required for request for extradition, on the condition that the sovereignty, national interest and public interests of China are not impaired and the basic principles contained in the laws of China are not violated. Meanwhile, assurance with regard to restrictions on persecution and measurement of penalty shall be determined, provided and effectuated in accordance with legal procedures.

3.2 Adopt the principle of reciprocity

Relative to the practice that provides extradition cooperation on condition that there is a bilateral extradition treaty, the extradition cooperation based on reciprocity is more liberal. Actually, it is very difficult or impossible for a country to conclude bilateral extradition treaties with all other countries, and the former will seriously restrict the scope of extradition cooperation, not only countries adopting such a practice can provide cooperation to a limited number of partners, but also their extradition request made to a foreign state may be rejected for inconformity with the principle of reciprocity.

Article 3 of the *Extradition Law* adopts an open reciprocity, providing: "The People's Republic of China cooperates with foreign states in extradition on the basis of equality and reciprocity." So far as legal assistance is concerned, "reciprocity" means according the same treatment, that is, the requesting state shall give the same extradition cooperation when the requested state makes an extradition request on the basis of similar cases. Reciprocity can be actualized by two means: one is the already existing extradition cooperation or precedent, and the other is the assurance of future practice when there is no such extradition cooperation or precedent. Article 15 of the *Extradition Law* provides: "Where there is no extradition treaty to go by, the Requesting State shall make a reciprocity assurance." This indicates that the reciprocity defined in the *Extradition Law* is a broad-sense expression, including both the practices and the assurances and opening a

door of convenience for countries willing to cooperate with China on the basis of equality and reciprocity.

3.3 Widely-accepted "no evidence" standard

If an extradition request is made for criminal prosecution, how shall the requesting state submit its documents and materials to the requested state? As to this problem, at present, there are three standards: the first is the "prima facie evidence" standard, that is, evidences provided by the requesting state, if uncontroverted, shall provide sufficient grounds to put the person on trial by the court.[12] In some countries, such standard is also called as "rational grounds" or "major suspect".[13] The second requires stating that there are sufficient evidences, though it does not require the submission of these evidences, yet it is necessary to provide "an abstract of existing evidences and an explanation that these evidences, in accordance with laws of the requesting state, will be sufficient to prosecute the person sought".[14] The third is the "no evidence standard", which only asks the requesting state to provide the warrant of arrest and relevant case summary.[15] The first standard is quite exacting and loaded with trivial details, and it simply takes the examination of extradition request for the "preliminary trial" of criminal cases, liable to cause the waste of manpower, money and time. And due to varying evidence systems and standards, the requesting state and the requested state may fall into divergence or conflict. The second is the simplified version of the first standard and is also hard to satisfy. The third is for the examination of the formal conditions, and the requesting state need not provide supporting materials for the offense and the explanation for such supporting materials. As a result, it is very simple and convenient, indicating that the requested state puts full trust on the criminal prosecution and legal proceedings of the requesting state.

Based on my estimate, of the bilateral treaties that China concluded with 25 countries, only 2 treaties adopt the first standard. They are the bilateral treaties with Thailand and Cambodia.. Four treaties adopt the second standard: the treaties with South Africa, Pakistan, Lesotho and Namibia. While 19 treaties adopt the third standard: the treaties with Belarus, Russia, Bulgaria, Romania, Kazakhstan, Mongolia, Kyrgyzstan, Ukraine, Uzbekistan,

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[12] Para. (b), Subsection (5), Sect. 11, *Extradition Act 1988 of Australia*; Para. (d), Subsection (d), Sect. 24, *Extradition Act 1999 of New Zealand*.
[13] Para. 1, Art. 705 of *Code of Criminal Procedures of Italy*.
[14] Para. (1) (i), Art. 7 of *China-Lesotho Extradition Treaty*.
[15] Subsection. (6), Sect. 2, *Extradition Act 2003 of Britain*.

South Korea, Philippines, Peru, Tunis, Brazil, Laos, United Arab Emirates, Azerbaijan, Lithuania and Spain. Thus it can be seen that China's extradition system is especially inclined to the "no evidence" standard, which is simple, convenient and full of mutual trust.

3.4 Wisely restrict the application scope of "exception of political offense"

When engaging in extradition cooperation, some countries are especially worried about getting involved in or occurring political issues or diplomatic policy disputes. For this reason, "exception of political offense" is or once was a very important rule of extradition. China also entertained such a concern when establishing the extradition system. Out of such concern, the examination and decision power once are mainly under the control of competent administrative authorities or authorities of foreign affairs. Looking at the bilateral extradition treaties that China concluded with other countries, we would find that "exception of political offense" is usually the No. 1 or No. 2 "reason for rejecting an extradition request."

However, along with the increased emphasis that international society puts on cracking down transnational organized crimes, terrorism, corruption and crimes that endanger mankind's basic rights and survival, the "safety valve" role rendered by "exception of political offense" has been reduced. People are more attentive to not letting this rule become an amulet for criminals. As an increasingly important major power, China also pays attention and adapts itself to such trend. In recent years, it kept on depoliticizing certain crimes possibly connected to political factors and excluding or conditionally excluding the application scope of "exception of political offense"

The restriction on "exception of political offense" first occurred in the *China–Thailand Extradition Treaty*. Its Paragraph (1) of Article 3 provides: "Political offense do not include the murder or an attempt to murder the person of a Head of State of one of the Parties, or of a member of the Head of State's family". Subsequent bilateral treaties all adopt such exclusion provision.

The *Extradition Treaty with the United Arab Emirates*, concluded in May 2002, realized a new breakthrough, and its Paragraph (2)(ii) of Article 3 stipulates: "Offense defined in international conventions into which both sides have joined, that they shall "either prosecute or extradite" shall not be deemed as political offense. This is a very broad expression and actually covers all offense defined in international conventions into which both sides join, no matter whether those offenses are depoliticized by international

conventions.[16] In the *China-Brazil Extradition Treaty* concluded in November 2004, Paragraph (1) of Article 3, through quite exact expression, defines: "For the purpose of Paragraph (1)(i), offense that are not considered to be political offense by international conventions into which both sides join under no circumstance shall be deemed as political offense". Later, these two expressions with subtle differences are adopted respectively in the *China-Spain Treaty on Extradition* concluded in November 2005 and in the *China-Namibia Treaty on Extradition* concluded in December 2005. Particularly, the *China-Spain Treaty on Extradition* has incorporated "terrorism" into "offense that are not deemed as political offense."

Besides in the course of discussing and formulating the *UN Convention against Corruption* in the Ad Hoc Committee, delegates from China and some other countries actively propose to exclude corruption from the application scope of "exception of political offense". For several years, the Ad Hoc Committee kept on debating and Chinese delegates persist with this proposal. In the final moment, countries eventually reached an agreement. This is an admirable move in regard to restricting the application of "exception of political offense".

4 Emphasis on the comprehensive and concrete human rights protection of the person sought

One of basic features of the modern extradition system is that it no longer treats the object of extradition cooperation in a snobbish and passive way and goes to grant him certain legal status and protection. China's *Extradition Law* ,primarily proclaims to "protect the lawful rights and interests of individuals and organizations". Here, "individuals" include not only Chinese citizens but also foreign residents, and not only the person impaired by an offense but also the person sought. In its bilateral extradition treaties and *Extradition Law*, China never denominates the person sought as a "fugitive" or a "criminal" but instead, it refers to him as "the person sought" or "the person extradited". This suggests that in international judicial cooperation, China also insists on the presumption of innocence established by the *Criminal Procedure Law*, and before making the final judicial judgment, no

[16] A similar expression also happened in Art. 3 of *China-Lesotho Extradition Treaty* concluded in November 2003, then, delegates from China seemed to be very uncertain whether such expression should be completely accepted, therefore, such expression is used to express the unilateral assurance made by Lesotho, and before the expression, there adds such a sentence: "As to a request made to the Kingdom of Lesotho, the following shall not constitute political offense or offense of political nature".

defendant shall be called as "criminal". Meanwhile, international criminal legal assistance only provides procedural conveniences and support to each other, so as to make up the regional restrictions of national judicial jurisdiction, unless specifically defined in relevant laws or treaties. The requested state generally does not make a substantive examination and decision with regard to the case submitted by the requesting state. Even for persons already convicted in the requesting state, similarly, the requested state will deem them as parties to extradition proceedings and ensure that they enjoy various legal rights and guarantees.

4.1 Provision against persecution or discrimination

To prevent the following two circumstances, China has incorporated such provision in its *Extradition Law* and all bilateral extradition treaties. The first circumstance is that "the person sought is one against whom penal proceedings instituted or punishment may be executed for reasons of that person's race, religion, nationality, sex, political opinion or personal status". Unlike the provision excluding political offense, this is not based on the nature of an offense, but the prosecution motive behind an extradition request. For example, though the person sought is accused of an ordinary offense yet the actual motive of the requesting state is to persecute him for his specific status or opinion. The second circumstance is "that person may, for any of those reasons, be subjected to unfair treatment in judicial proceedings". This is based on judicial justice and prevents the person sought from being discriminated in the judicial proceedings of the requesting state on the grounds of his specific status or opinion. For example, basic litigation rights of the person are deprived or restricted and he suffers abuses during the serving of the sentence, etc. At present, in extradition treaties, such discrimination is usually expressed as "his status is subjected to unfair treatment in judicial proceedings" (for example, China-Thailand Extradition Treaty).

4.2 Provision against torture

Paragraph (7), Article 8 of the *Extradition Law* provides that "Extradition request will be rejected if the person sought has been or will probably be subjected to torture or other cruel, inhuman or humiliating treatment or punishment in the Requesting State". Such a provision is reaffirmed in the *Convention against Torture and Other Cruel, Inhuman or Degrading*

Treatment or Punishment wherein China joined on September 5, 1988. Article 3 of the *Convention* stipulates "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

Here, the "torture and other cruel, inhuman or degrading treatment or punishment" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person, including both the penalty for the offense and interrogation means adopted for the purpose of obtaining from the person's confession or other testimonies. Both the tortures are incorporated into the legal system of the requesting state and the punishment or treatment that the execution organs randomly impose in the process of judicial proceedings or penalty execution. Theoretically speaking, if the execution of capital punishment is especially cruel and unacceptable, the competent authority of China can cite this provision against "torture" as the basis for rejecting an extradition request made by such countries, even if China in itself still preserves capital punishment.

4.3 Humanitarian considerations

Also in its *Extradition Law* and all bilateral extradition treaties, China has provided that it may choose to reject an extradition, if "extradition is incompatible with humanitarian considerations in view of the age, health or other conditions of the person sought". This is a typical humanitarian consideration and a widely accepted principle in modern extradition cooperation. In their criminal laws, countries, out of humanitarian considerations, usually will restrict the prosecution, penalty and penalty execution. For example, the *Criminal Law* of China prohibits imposing capital punishment on criminals less than 18 years old or women who are pregnant. According to the *Criminal Procedure Law* and *Prison Law* of China, if a criminal is seriously ill and needs to be released on parole for medical treatment or is a pregnant woman or a woman who is breast-feeding her own baby, temporary execution outside prison or no execution shall be made. Here, humanitarian considerations are usually out of sympathy to physical debility or wants.

Paragraph (2), Article 9 of the *Extradition Law* defines the age and health and other conditions as items for humanitarian considerations, yet it does not provide concrete standards of measurement. This offers its competent authorities with quite a large discretion, enabling the competent authorities to base their decision on the comprehensive consideration of the particulars

of the case, necessity of extradition cooperation and the implication of humanitarian protection.

Actually, the above humanitarian protection clause can be used when the requested state meets all necessary conditions and does not stipulate other exclusions. It can be cited not only by organs responsible for judicial examination of the extradition case but also by government authorities of the requested state, and in practice, the latter usually will cite it at their discretion after the extradition request passes judicial examination.[17] I think, the humanitarian protection clause in Paragraph (2) of Article 9 had better be cited by the State Council, since, on one hand, the decision made in accordance with this clause usually is not a purely judicial decision and instead it is based on moral and just considerations and sometimes even related to medical examination and evaluation. On the other hand, whether the health of the person sought is suitable for extradition usually is determined at the final moment and in accordance with the most recent information.

4.4 Conviction in absentia

The Extradition Law and extradition treaties concluded by China do not accept the extradition request based on conviction in absentia. Conviction in absentia is made with the default of the defendant and it deprives or at least does not endure the right to plea of the defendant. Therefore it is not allowed in China's criminal proceedings. Its rejection of the conviction in absentia made by the foreign court is quite natural and also a widely accepted rule in international extradition cooperation.

Since the conviction in absentia is rejected for the protection of the right to plea of the person sought, if the requesting state undertakes that the person sought has the opportunity to have the case retried under conditions of his presence, the requested state may choose to accept the extradition request. However, in the latter circumstance, judicial organs of China shall examine the extradition request in accordance with relevant standards. For example, when determining whether an offense is extraditable, they should cite punishment standards provided in the *Extradition Law* or the extradition treaty, and ask the requesting state to provide particulars of the offense and the warrant of arrest of the person sought, rather than the letter of judgment and statement about sentence serving. As to this, Paragraph (3), Article 2 of

[17] For example, in the Pinochet extradition case, defending lawyers put forward a series of objecting opinions, which were all rejected by the court of Britain, and at the final moment when the extradition request acquired its legitimacy, British government rejected the request on the ground that the health of Pinochet is not suitable for extradition to Spain for trial.

the China-Bulgaria Treaty stipulates: "if the conviction is made under the default of the person sought, the extradition request will be a request for the purpose of prosecution."[18]

4.5 Minimal period of guarantee

Article 23 of the *Extradition Law* provides a prescriptive period for the person sought to submit his opinions to organs of judicial examination: within 30 days after a copy of the letter is served to the person sought. This is an important provision for guaranteeing the rights of the person sought.[19] Such time limit serves to exert a two-way restriction, first, for the person sought, within such 30-day period, he shall submit to the collegial panel opinions as to the letter of extradition request of the requesting state, especially opinions against the extradition. In such a period, he can keep on adding his opinions. Upon the expiration of this period and if he does not submit any opinion, the collegial panel can render a decision. Second, to the collegial panel responsible for the extradition case, before the expiration of the above period, it cannot make any decision as to extradition request; even if the person sought has submitted his opinions. It still shall wait for the complete expiration of this period so as to leave enough time for the person sought to submit his opinions.

Actually, this prescriptive period is to guarantee that, at least within 30 days after receiving the copy of the letter of extradition request, the person sought shall not be decided to be extradited to the requesting state. Such period can be called as "minimal period of guarantee".[20] In a strict sense, the minimal period of guarantee for the person sought is longer than 30 days. According to Paragraph (2), Article 25 of the *Extradition Law*, within 10 days from the date the People's Court has read the decision to the person, the person sought can submit their opinions to the Supreme People's Court, so the minimal period of guarantee is at the least 40 days. Adding the time spent on judicial and administrative examinations, the period during which the

[18] In Bulgaria, conviction in absentia is allowed.

[19] To be noted, the 30-day period provided by Art. 23 and 10-day period provided by Art. 25 are newly added, and the draft did not make such definite provisions. The *Provisions for Several problems of Dealing with Extradition Cases* issued in 1992 also provides for a kind of "minimal period of guarantee", which is 15 days, much shorter than that provided by current *Extradition Law*.

[20] In some countries, such minimal period of guarantee is a rather old and definite provision, for example, Art. 11 of *Extradition Act 1870 of Britain* provides that "if the magistrate is to imprison the fugitive, he shall inform the fugitive that he will not be handed over before the expiration of 15 days and he will have the right to apply for habeas corpus."

person sought is free will be much longer.

Since the Extradition Law of China does not provide a simplified extradition,[21] neither does the higher people's court nor the person sought have the right to shorten or require shortening the above minimal period of guarantee.

4.6 The right of plea and appeal for the person sought

In the course of examining an extradition made by a foreign state, the person sought, like the defendant in criminal proceedings, also enjoys a series of basic rights. Here, I summarize such rights provided in the *Extradition Law* as follows:

According to Paragraph (2), Article 34, the person against whom a compulsory measure for extradition is taken, beginning from the date the compulsory measure is taken, may employ Chinese lawyers for legal assistance. Here, "legal assistance" includes answering legal problems, providing legal opinions, offering opinions of defense and submitting relevant requests, etc.

According to Paragraph (1), Article 34, the person against whom the compulsory measure for extradition is taken, has the right to require being interrogated within 24 hours after the measure is taken, so as to know the reason for his being taken into compulsory measure, explain his identity and submit preliminary opinions of plea.

According to Article 23, the higher people's court shall, within 10 days from the date it received the letter of request for extradition transmitted by the Supreme People's Court, serve a copy of the letter to the person. The person shall submit his opinions within 30 days from the date he received the copy. This is to guarantee the right to defend and know and to facilitate the person to submit a well-targeted defense.

According to Paragraph (1), Article 25, after making the decision that the request meets the conditions for extradition or the decision that no extradition shall be granted, the higher people's court shall have it read to the person sought. Where the person sought refuses to accept the decision, he may, within 10 days from the date the people's court had the decision read to the person, submit his opinions to the Supreme People's Court. This is to

[21] To be noted, Art. 13 of *China-Peru Extradition Treaty* has established a "simplified transfer" clause, stipulating that "if the person sought consents to being transferred to the requesting state, then the requested state may, within the scope allowed by its laws, transfer the person sought as soon as possible, and no subsequent procedures are required." However, in order to truly introduce the system of simplified extradition, China still needs to amend and add to its domestic legislation.

further guarantee that the person sought has the right to submit his opinions and is able to exercise such right in the process of judicial examination.[22]

According to Paragraph (2), Article 28, after making the decision of approval or modification, the Supreme People's Court shall, within seven days from the date it made its decision, serve the letter of decision on the person sought. Similarly, this is also to ensure the person sough has the right to know and to timely submit final appeal to the government authority.

4.7 Residential surveillance

In the process of examining an extradition request made by a foreign state, the *Extradition Law* has introduced the system of "residential surveillance" for the person not obtaining a guarantor pending trial in accordance with the *Criminal Procedure Law*.[23] Thus, the execution of compulsory measures, under some circumstances, will be able to adapt itself to humanitarian considerations. On one hand, Article 35 of the *Extradition Law* provides "where the person sought, who should otherwise be arrested for extradition, is seriously ill or is a woman who is pregnant or is breast-feeding her own baby, residential surveillance may be taken against him or her". On the other hand, theoretically speaking, the examination of extradition request can be extended infinitely. Thus, a measure will be necessary that can reduce the restriction on the freedom of the person sought for non-serious criminal case or to alleviate the impact of the uncertainty of detention and arrest upon the person sought. According to Article 32 of the *Extradition Law*, where the measure of arrest for extradition is not taken against the person sought, the Higher People's Court may make a residential surveillance during judicial examination.

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[22] The officially promulgated *Extradition Law* deletes the "appeal" from "submit the Supreme People's Court his appeal opinions" in the draft version, and this is a right move. Since the approval of the Supreme People's Court in Art. 25 actually constitutes the necessary condition for the efficacy of the decision rendered by the higher people's court, relevant review procedures are not initiated at the request of the person sought, and in this process, the person sought continues to enjoy the right of submitting their defense opinions and being timely informed of the decision made by the higher people's court.

[23] At the beginning, compulsory measures provided by the draft of Extradition Law are only confined to detention and arrest, and some people think that will be improper to take compulsory measures which still preserve certain degree of freedom, such as residential surveillance, against a foreign fugitive. In extradition treaties concluded by China, compulsory measures are usually referred to as "custody".