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基于国际法的视角

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of the United Nations:
A Study from the Perspective of International Law

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内容提要

反对恐怖主义离不开国际社会的有效合作，而反恐国际合作的基础是国际法，尤其是国际反恐法。近半个世纪以来，作为国际反恐法重要组成部分的国际反恐立法发展迅速，但仅限于部门性反恐公约的制定方面，而备受国际社会关注和期待的最新一项国际反恐立法——《关于国际恐怖主义的全面公约》（以下简称联合国全面反恐公约或全面公约）的拟订工作却进展缓慢。该公约是一项全面禁止恐怖主义并适用于所有情况的普遍性反恐公约，它历经9年的谈判协商至今仍未能完全定稿。本书以国际法为视角，对该公约草案进行全面系统的分析评述，并着重研究公约中涉及的重点和难点问题，进而提出中国学者的见解和建议。

目前，各国代表团在全面公约谈判中争论最大的问题有三：一是关于国际恐怖主义的定义，二是关于全面公约的适用范围，三是关于全面公约与现存的部门性反恐公约的关系。其中，关于定义问题和公约范围问题的争论最为激烈，而全面公约与部门公约的关

系问题的最后确定取决于前两个问题的解决。

公约草案含有一个相对宽泛的国际恐怖主义定义:根据行为的性质或背景,如果行为的目的是恐吓某一人口或迫使某国政府或某国际组织实施或不实施某一行为的话,那么针对人的严重犯罪或致使公共或私人财产受到严重损害的行为,就构成国际恐怖主义犯罪。虽然此定义不能令人满意,但制定恐怖主义定义是十分必要的。我们认为,公约应尽可能定出一个内涵和外延相对明确的概念性定义,以便充分说明恐怖主义的构成要素,从而有利于划清合法的政治行动和非法的斗争手段的界限以及恐怖主义和非恐怖主义的界限。

公约的适用范围问题是全面公约能否获得通过的关键问题。目前,规定公约适用范围的第18条存在两个悬而未决的问题,即民族解放运动问题和武装部队问题(实质为国家恐怖主义问题)。有关适用范围的分歧在于,一些国家主张把武装部队的活动排除在公约适用范围之外,另一些国家则主张应排除反对外国占领的民族解放运动,并主张应将国家恐怖主义包括在恐怖主义定义中。关于公约的适用范围是否应排除民族解放运动这一问题,学术界长期争论不休。我们认为,在全面公约中澄清民族解放运动问题十分必要,民族解放运动所从事的包括武力斗争在内的行为不应被视为恐怖主义罪行,但此种行动也应遵守国际人道法。

作为全面公约适用范围中的武装部队问题表现为两个方面:一是公约如何处理武装部队在武装冲突中的行动。对此,代表西方国家集团观点的全面公约协调员的案文规定,武装冲突中武装部队的活动排除在全面公约的适用范围之外;而伊斯兰会议组织提出的案文规定,包括民族解放部队在内的武装冲突的各当事方的活动都不受全面公约的管辖。两者分歧的实质是如何区分国际人道法管辖的活动和全面公约涵盖的活动。在此问题上的一项原则是,全面公约不影响国际人道法

和该公约不寻求限制国际人道法的发展。二是对于一国军队在和平时期的行为(即执行公务行为)如何规范。对此,公约协调员的案文规定此种行为不受全面公约管辖,而伊斯兰会议组织的提案认为,一国军队的公务行为如果违反国际法,无权豁免全面公约的管辖。我们认为,一国军队在和平时期实施的恐怖主义行为亦即国家恐怖主义行为,在理论上应被纳入全面公约的管辖范畴,但在当下的国际现实中要惩处国家本身的恐怖主义行为困难重重。为使全面公约尽早得以通过,可明确规定国家武装部队在武装冲突中和执行公务中的活动以及民族解放部队的活动免受全面公约的管辖,因为即使不适用全面公约来约束武装部队的行为,国际人道法和国际刑法等其他相关国际法规则也可对此种行为进行管制。

关于全面公约与部门性反恐公约之间的关系,一种观点认为,全面公约是后订条约,根据后法优于前法的规则,全面公约应优先适用于部门公约。另一种观点认为,相对于全面公约而言,部门公约是特别法,根据特别法优于一般法的原则,部门公约的规定应优先适用。两者关系问题的解决之道取决于如何对全面公约进行定位,即它是一项总括性的公约还是一项补充性的公约。实际上,如果关于公约适用范围的第18条的谈判结果满足了各国在恐怖主义问题上的关切,那么全面公约与部门性公约最终孰先孰后的问题便可迎刃而解。

国际反恐的有效合作机制主要关涉管辖权、引渡与庇护、国际合作等问题。在管辖权方面,公约实际上肯定了缔约国的司法主权不因参加公约而受限制,排除了对完全在一国境内实施的恐怖主义犯罪的刑事管辖权。公约确立了国内管辖权与公约管辖权重叠适用的方法,这使公约管辖权的行使更加全面。在引渡制度方面,公约确认了在"相同原则"下的"或引渡或起诉原则",同时以"非辩解理由"条款重申了恐怖主义是排除在政治犯罪之外的罪行。但公约对政治犯罪的界定、对

引渡恐怖分子与国内引渡法及既存条约中有关拒绝引渡情形之间的关系等问题的规定不够明确,有待于进一步完善。在庇护方面,最新的公约草案规定了对难民地位和身份给予的限制,但有关难民的定义在实践中可能存在操作上的差异或双重标准。在国际合作事项方面,公约对各缔约国除了规定在司法调查和刑事诉讼上的协助义务外,还规定了在反恐信息交流和预防恐怖主义犯罪方面的义务,且这种预防与合作义务是针对所有类型的恐怖主义行为,这是全面公约比现有的部门性公约的优越之处。

公约草案没有提及恐怖主义产生的根源。但在每年的公约制定会议上都有一些国家的代表团提到必须在公约中解决或处理根源问题。恐怖主义产生的根源非常复杂,涉及社会、政治、经济、文化等诸多因素。针对诸如绝望、屈辱、贫穷、政治压迫、极端主义和侵犯人权现象的恐怖主义的根源,全面公约有必要制定一套反恐的措施和规则,以使反恐收到标本兼治的效果。

Abstract

The effective international cooperation is indispensable to fight against terrorism, whose basis is international law, particularly the law of terrorism. Since recent half a century, international legislation against terrorism as an important part of international anti-terrorism law has developed rapidly, however, which is only limited to making sectoral conventions against terrorism. The Comprehensive Convention on International Terrorism(hereinafter the Convention), as an latest international legislation against terrorism, has progressed slowly, which is drafted by the United Nations General Assembly and has been concerned and expected by international community. The Convention is a universal convention against terrorism to comprehensively prohibit terrorism and apply to all circumstances addressing terrorism, which is not yet completed after negotiating for nine years. This book, from the perspective of international law, makes a

systematic and overall study of the Draft Convention and focuses on the main issues and outstanding issues in the Draft Convention, and then puts forward the views and suggestions of Chinese scholars.

At present, there are three most controversial issues in negotiating the Convention as follows: the one is the definition of international terrorism, the second is the scope of the Convention's application, the third is the relationship between the Convention and the sectoral anti-terrorism conventions. In the above key issues, the ones of the definition and the scope are most heated arguments, while resolution to the issue of the relationship depends on having resolved the issues of the definition and the scope.

The Draft Convention contains a relatively broad definition of international terrorism. Under the Convention, any person commits an offence of international terrorism if that person causes death or serious bodily injury to any person or serious damage to public or private property when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act. Although this definition is not satisfactory, it is really necessary for the Convention to work out a definition of terrorism. In our opinion, the negotiating parties should try their best to work out a conceptual definition of terrorism with a relatively clear intension and extension in order to sufficiently explain the elements of terrorism, which will help distinguish lawful political acts from unlawful means of struggles and make the precise delimitation between terrorism and non – terrorism.

The issue of the application scope of the Convention is the key issue to

decide whether or not the Convention can be concluded. Presently, there are two outstanding issues surrounding the draft article 18 of the Convention on its scope, one is the issue of the National Liberation Movements (NLM, also called the issue of "the foreign occupation") and the other is the issue of armed forces which is in essence the issue of State terrorism. The disagreement on the application scope lies in the following opinions: some States claim that activities of armed forces should be not governed by the Convention, the others insist that the activities of national liberation forces against foreign occupation should be expressly excluded from the scope of the Convention and that State terrorism should be included within the definition of terrorism. It is a long disputed problem whether or not NLM should be excluded from the scope of the Convention. We think that it is very necessary to clarify the issue of NLM, and the activities undertaken by NLM including military struggle should not be regarded as terrorism crime, although NLM's actions also should be in conformity with international humanitarian law (IHL).

The issue of armed forces within the scope of the Convention represents the following two aspects. One aspect is how the Convention deals with the activities of armed forces during armed conflicts. With respect to this problem, the text circulated by the Coordinator of the Convention represents the view of the West countries group, which provides that this kind activities are not governed by the Convention, while the text proposed by the Organization of the Islamic Conference (OIC) provides that the activities of the parties including national liberation forces during an armed conflict are not governed by the Convention. The substance of the controversy of above two arguments is how to distinguish

activities covered by IHL and by the Convention. A principle to resolve the problem is IHL is not prejudiced by the Convention nor does the Convention seek to restrain the development of IHL. Another aspect is how to regulate the activities undertaking by the military forces of a State in the exercise of their official duties. In respect to this problem, they are not governed by the Convention according to the text circulated by the Coordinator while, on the contrary, they are governed by the Convention under the text proposed by OIC if those activities are not in conformity with international law. We hold that the terrorism acts committed by the military forces of a State in time of peace belongs to acts of State terrorism, which in theory should fall within the scope of the Convention. However, since there are a lot of difficulties to punish States themselves for their terrorism acts in the present international reality, in order to make the Convention pass as soon as possible, it may expressly provide that both activities undertaken by military forces of a State during an armed conflict and in the exercise of their official duties and the activities by national liberation forces are not governed by the Convention. In fact, beyond the Convention, it can apply other rules of international law such as IHL and international criminal law to regulate military forces' acts.

With respect to the issue of the relationship between the Convention and the sectoral anti – terrorism conventions, one argument, based on the *lex posterior* rule, thinks that the Convention prevails over sectoral conventions because the Convention is the latter treaty and the latter treaty prevails over the earlier one. Another argument, based on the principle *lex specialis derogat legi generali*, holds that the provisions of sectoral conventions should receive priority because sectoral conventions are special

laws. The solution to the issue of the relationship depends on how to locate the Convention, that is, it is an umbrella convention or just only supplement one. Actually, if the negotiating result of Article 18 on the Convention's scope satisfies the concerns of States over terrorism, it will be readily solved which is priority, the Convention or the sectoral conventions against terrorism.

The effective cooperation mechanism of combating international terrorism mainly involves jurisdiction, extradition and asylum, international cooperation, and so on. With respect to jurisdiction, the Convention actually affirms that the sovereignty of parties would not be limited because of participation in the Convention, and the Convention does not govern the terrorism crimes committed completely within the territory of a single State. The Convention establishes the way to overlap applying national jurisdiction and the Convention's jurisdiction, which makes the Convention's jurisdiction being exercised comprehensively. In terms of extradition system, the Convention affirms extradite-or-prosecute principle under the principle of double criminality, meanwhile the Convention, by non – justification clause, reaffirms that terrorism is not political offence. However, since the Convention does not clearly provide the definition of political offence and the relationship between extraditing terrorists and the circumstances refusing to extradite provided by national extradition law and existing treaties concerned, the Convention needs to improve. In respect to asylum, the latest Draft Convention provides limitation on the granting of asylum to refugees. However, the definition of refugee may lead to the possible use of a double standard in fight against terrorism and operational differences in practice. In international

cooperation in criminal matters related to terrorism, the Convention requires parties providing mutual legal assistance in judicial investigation and criminal procedure, and imposes on parties the obligation to cooperate in information exchange and prevention of terrorist acts. This kind of obligation of prevention and cooperation addresses all kinds of terrorist acts, which make the Convention have more advantages than existing sectoral conventions.

Though the Draft Convention doesn't mention the underlying causes of terrorism, every year some delegations on negotiating the Convention emphasize the need to address the root causes of terrorism. The root causes of terrorism are very complicated, which involve social, political, economic and cultural and other elements. To address the root causes of terrorism such as despair, humiliation, poverty, political oppression, extremism and violation of human rights, the Convention needs to work out a set of measures and rules of terrorism to avoid tackling terrorism on the surface, not at the root.

代序:国际反恐法是国际反恐斗争的有效工具

一、国际反恐法的概念

国际反恐法(international law of terrorism)是"反国际恐怖主义法"的简称,它又称"调整恐怖主义的国际法"(international law governing terrorism)或"关于恐怖主义的国际法规则"(rules of international law with regard to terrorism)。国际反恐法可分为广义和狭义两种。广义的国际反恐法是指所有可适用于防止和惩治恐怖主义的国际法原则、规则和制度;狭义的国际反恐法则专指有关恐怖主义的国际造法("国际立法")。换言之,狭义的国际反恐法是指专门有关恐怖主义的国际法律文件,包括普遍性和区域性的国际反恐条约和联合国安理会有关反恐的决议;广义的国际反恐法还包括可适用于反恐的一般国际法。本书是在广义的"国际反恐法"的语境下展开论述的。

国际法是随着国际关系的发展而发展起来的,作为国际法新领域的国际反恐法,是出于国际反恐斗争

的需要而创设并随着国际反恐斗争的实践发展而发展的。为反对日益严重的恐怖主义威胁,国际反恐立法一方面将特定类型的恐怖主义行为界定为犯罪行为,同时要求缔约国通过国内立法惩罚这些犯罪并对有关罪犯采取"或引渡或起诉"原则;另一方面要求缔约国或联合国各会员国不得支持恐怖分子的活动,强调各国在防止、调查和起诉恐怖行为方面展开合作。除此之外,既存的国际法原则、规则和制度也为应对恐怖主义的挑战提供了丰富的法律资源。荷兰莱顿大学国际法律研究中心在2007年主办的有关反恐研讨会的报告中指出,"(现行)国际法各个分支的原则和规范可以适用于防止和惩治恐怖主义行为。这些分支包括国际人权法、国际人道法、国际刑法、关于和平与安全的法律,以及诸如国家责任法的一般国际法的各章节。"①

作为现代国际法组成部分的国际反恐法,其旨在防止、控制和制止恐怖主义。按照不同的分类标准可以将国际反恐法大致划分为如下几种类型:其一,从规则的来源方面看,国际反恐法可分为专门的反恐法和可适用于反恐的国际法既有规则;其二,从调整的对象上看,可将国际反恐法分为防止和惩治非国家行为者(包括恐怖分子和恐怖组织)的恐怖主义行为的法律制度和规定国家对恐怖主义行为承担责任的法律制度;其三,从规则的适用范围上看,可将国际反恐法分为普遍性与区域性的反恐法。

20世纪出现的国际反恐条约标志着国际反恐法的真正形成。目前,国际反恐法已发展成为国际法的一个新领域。21世纪出版的一些

① Nico Schrijver & Larissa van den Herik, Counter - terrorism Strategies, Human Rights and International Law: Meeting the Challenges: Final Report Poelgeest Seminar, *Netherlands International Law Review*, Issue 3, 2007, p.573.

西方主流的国际法综合性著作，已用专门的章节来论述国际反恐法[①]。有的西方学者还将国际反恐法视为国际法的一个新分支从而将其与战争法和国际刑法等部门法相提并论[②]。

国际反恐法的产生表明国际法的范围日趋得以扩大，同时，国际反恐法作为国际法的一个新领域仍处在发展之中，有待于不断改进与完善。

二、国际反恐领域的"国际立法"

在国际反恐法律的制定方面，联合国系统各机构和区域性国际组织都做了许多努力。目前，联合国系统的国际反恐条约、区域性国际反恐条约以及联合国安理会通过的反恐决议构成了现有国际反恐法律体系中的专门性反恐立法。可见，有关恐怖主义的造法性国际规则存在于国际和区域两个层面，国际性（或普遍性）的国际反恐法是以联合国系统的反恐条约为主，以联合国安理会的反恐决议为辅的规范体系，而区域性的国际反恐法主要是区域反恐条约。除了上述专门的反恐条约和决议之外，尚有其他有关恐怖主义的条约法规则，譬如涉及战争或武装冲突期间反恐怖的1922年《海牙空战规则》、1949年的日内瓦四公约及其1977年两个附加议定书的有关条款、1994年《联合国人员和有关人员安全公约》及其2005年任择议定书。关于这些非专门性的反恐条

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① 例如，意大利的卡塞斯教授在其2005年所著的《国际法》（第2版）中，以"对恐怖主义的国际应对"作为其第22章的标题并对国际反恐法进行了专章论述。又如，英国的马尔科姆·肖教授在其2003年出版的第5版《国际法》中，在"国际法与各国使用武力"一章下的题为"恐怖主义与国际法"一节中集中讨论国际反恐法问题。这两本书的出处分别为：Antonio Cassese, *International Law*, second edition, Oxford University Press, 2005; Malcolm N. Shaw, *International Law*, fifth edition, Cambridge University Press, 2003.

② 哈佛大学法学院教授、美国国际法学会前任会长斯劳特女士认为，在过去的10年中，战争法、国际刑法和反恐法这三个法律类型已经发展起来并越来越相互依存。为了提供一个更加有效的与恐怖主义做斗争的方法，应将反恐法与战争法和国际刑法的有关规定结合起来。她还指出，这三个不同的法律部门应合并在平民不可侵犯原则之下，以创造一套协调一致和理论上统一的普遍适用的原则。见 Anne - Marie Slaughter and William Burke - White, An International Constitutional Moment, *Harvard International Law Journal*, vol. 43, No. 1, 2002, pp. 5 - 11.

约规定,将在下述第三部分论及。

为了论述的方便,在此不妨借用国内法上的"立法"一词来表述反恐领域的新的国际造法活动。由于在国际社会不存在一个凌驾于国家之上的专门立法机构来为世界上的所有国家立法并迫使它们遵守,因此在国际法上不存在着国内法意义上的立法。我国国际法学家李浩培先生曾指出:国际上并无真正的立法……一个条约只能为缔约国自己立法,而不能为非缔约国立法。①

为了适应国际反恐斗争发展的需要,国际反恐立法得以产生并不断发展。

(一)国际反恐条约

"恐怖主义"(terrorism)一词是18世纪法国大革命时期出现的。两百多年来,恐怖主义作为一种斗争方式一直为各种政治势力所使用。在19世纪后期,更是暗杀成风,恐怖暴力将西方国家弄得一度人心惶惶。第一次世界大战的爆发便是源于1914年奥地利斐迪南大公在南斯拉夫萨拉热窝遇刺事件。由于恐怖暴力活动日益成为国际社会的严重威胁,反对恐怖主义问题开始引起国际社会的关注,国际反恐规范的拟订工作被提了出来。作为人类历史上第一个一般性的政治性国际组织的国际联盟,于1934年出台的讨论防止和惩罚恐怖主义的公约草案,向禁止这种恶行迈出了重要的第一步,从此,恐怖主义便被列入了国际日程。《防止和惩治恐怖活动的公约》最终于1937年通过,这是国际社会首次尝试创制一项专门针对恐怖主义的国际条约。遗憾的是,由于不久爆发了第二次世界大战,该公约一直未能正式生效。

在"二战"后的国际关系史上,现代国际恐怖主义呈现出这样一种

① 李浩培:《条约法概论》,法律出版社1987年版,第35页。