CONSEJO GENERAL DEL PODER JUDICIAL
ESCUELA JUDICIAL

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Red Europea de Formación Judicial (REFJ)
European Judicial Training Network (EJTN)
Réseau Européen de Formation Judiciaire (REFJ)

CURSO VIRTUAL
COOPERACIÓN JUDICIAL PENAL EN
EUROPA
EDICIÓN 2010

MODULE II

UNIT V

The European Convention on Extradition

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LEVEL I: TOPIC

The European Convention on Extradition

General considerations

1. Of all the institutions of international judicial cooperation, extradition is without a doubt the one that has the greatest effect on the rights of the person in question.
By means of this process, one state asks another to surrender a person in order to subject them to criminal proceedings or in order to enforce a sentence or a detention order in its own territory.
This is a process that is accessory to the criminal proceedings brought by the requesting state and one that is derived from the requirement of ensuring the presence of the accused person at the trial[1] and of enforcing the sentence already imposed.
The extradition process constitutes a form of judicial cooperation between states in criminal matters because, evidently, the judicial and police bodies of the requesting state cannot exercise coercive measures in relation to persons who are in the sovereign territory of the requested state.

Any person in the territory of a state, whether a national of the state or otherwise, is entitled to have the legal rules of the same applied to him or her.
This is a kind of "trust"[2] in the sovereignty of the state of residence and the protection is granted in accordance with the principle of legal security.
When resolving to extradite a person situated in its territory, the requested state puts a limit on said trust.

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[1] As is well known, many legal systems do not allow trials *in absentia*, i.e., without the physical presence of the accused person before the judge.
For this reason, it may be necessary to detain the accused person and oblige him/her to appear in court, unless he/she can provide sufficient guarantees to be able to elude the hearing.
If the accused person is outside the national territory of the competent judge, it will be necessary to carry out an extradition procedure.
Trials *in absentia*, their admissibility and their limits are the object of a very recent Framework Decision from the Council of the European Union 2009/299/JHA: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:081:0024:0036:EN:PDF

[2] On the concept of "trust" in the legal system of the host state, specifically in relation to an extradition process (application of the European Arrest Warrant), see the judgment of 18 July 2005 from the German Federal Constitutional Court (*Bundesverfassungsgericht*) (2 BvR 2236/04) in http://www.bundesverfassungsgericht.de/entscheidungen/2005/7/18.

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We can see from the above that the reasons which lead the requested state, in general or in particular, to grant or refuse extradition, are related to the sphere of its own sovereignty and the relations with other states, in particular the requesting state.
International cooperation is always based on considerations of a "political" nature, and the judicial field is no exception.

As for the limits of the trust that an individual can have in the protection that the legal system of the requested state will guarantee, the institution of extradition, indicating the cases and the limits of application, should be contemplated in rules that have the same formal rank and substantial value as those that guarantee such protection.
The process, however, tends to be regulated by rules that are lower down in the hierarchy of sources.
Therefore, the general and preventive agreement between two states in relation to the reciprocal granting of extradition of accused or sentenced persons, to the extent that it affects their corresponding spheres of sovereignty, has the same value as a top-level rule.
In formal constitution-based legal systems, its ranking is that of a constitutional rule[3].

2. The institution of extradition has been the subject of many bilateral conventions since the 19th century.
The main characteristics of said conventions are the following:

- A listing of the crimes for which extradition is permitted and the need for dual criminality;
- The prohibition of the extradition of the citizen of the requested state;
- The prohibition of extradition for political crimes or crimes that have lapsed;
- The principle of speciality;
- The need to attach the instrument that justifies the arrest to the request, together with "evidence that, in accordance with the law of the place where the fugitive is located, would justify his arrest if the crime had been committed there" (Article 9 of the bilateral convention between Italy and Great Britain of 5 February 1873);
- The transmission of the request via diplomatic channels, the questioning of the captured person by a magistrate, the establishment of a peremptory term for a decision on the extradition request.

[3] Articles 10 and 26 of the Constitution of the Italian Republic, approved by a decision of the Constituent Assembly of 22 December 1947, envisage the institution of extradition, both for foreigners and Italian citizens respectively, and regulate its limits to a significant degree.
Article 10, considered one of the "basic principles", states in the first two sections that "The legal system of Italy conforms to the generally recognised principles of international law. Legal regulation of the status of foreigners conforms to international rules and treaties", as well as containing a reference to the international conventions on extradition.
The following sections set limits to extradition, which consist, on the one hand, of the right of asylum granted to foreigners "who, in their own country, are denied the actual exercise of those democratic freedoms guaranteed by the Italian constitution" and, on the other, of the prohibition of extradition of a foreigner for political reasons.
Article 26 allows the extradition of a citizen "in the cases expressly envisaged in international conventions" and expressly prohibits extradition on political grounds.

Other conventions envisage extradition for any crime punished by a custodial sentence in excess of a certain minimum, excluding political and military crimes and those envisaged exclusively by laws in relation to the press and with the prohibition of the extradition of nationals of the respective countries.
Bilateral extradition agreements in relation to a specific person are not unheard-of in international law.

The system of bilateral conventions has introduced rules that are often partially different and it is influenced not only by the differences between the legal systems that come into contact, but also by the different moments in time in which the states enter into the agreement.
For the interpreter, the advantage of flexibility is offset by the lack of a unified framework containing common rules for all cases.

The European Convention on Extradition

3. On 5 May 1949, ten European states gave birth to the Council of Europe, an international organisation whose objective is to guarantee that the ideals of political and civil freedom are safeguarded by the law and economic and social development[4].
By joining the Council of Europe, the states undertake to "accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms"[5].
The first and indeed main document drawn up by the Council of Europe was the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950[6], and its subsequent Additional Protocols.
The Convention, in addition to setting out the rights and freedoms that the High Contracting Parties secure to anyone subject to their jurisdiction (Article 1), establishes the European Court of Human Rights, with the power to decide on appeals by the states or individuals that denounce a violation of the rights acknowledged by the Convention and its additional protocols (Article 19 *et seq*).
Among the rights that the Convention grants to everyone is that of not being deprived of one's freedom, a right that may be limited "in accordance with the procedure prescribed by law" and only in a specific list of cases.
These include the case of "the lawful arrest or detention of a person (…) against whom action is being taken with a view to deportation or extradition" (Article 5.1 f).

[4] According to Article 1 of the Statute of the Council of Europe "The aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress".
[5] This is set out in Article 3 of the Statute of the Council of Europe. At present forty-seven states are members of the Council of Europe.
[6] The Convention for the Protection of Human Rights and Fundamental Freedoms entered into force on 3 September 1953; in Italy it was ratified by law on 4 August 1955.

Therefore, the main regulatory source of the Council of Europe envisages the institution of extradition, regulated by rules with the force of law as one of the admissible limits to the right to individual freedom.

4. In the context of its own activities, the Council of Europe adopted the European Convention on Extradition, signed in Paris on 13 December 1957 and in force since 18 April 1960[7].
Today, this Convention has been ratified by forty-seven European states as well as by Israel and South Africa[8].

On 8 December 1951 [9] the Consultative Assembly of the Council of Europe submitted Recommendation no. 16 on "the preparatory measures to be taken to achieve the conclusion of a European Convention on Extradition" to the Committee of Ministers.
In turn, the Committee of Ministers, in Resolution no. 4, recommended to the Secretariat General that it set up a committee of governmental experts to examine the recommendation from the Consultative Assembly and, in particular, "the possibility of establishing certain extradition principles acceptable to all Members of the Council, the question as to whether these principles should be implemented by the establishment of a multilateral convention on extradition or whether they should simply serve as a basis for bilateral conventions 'being reserved'."
During its meetings, held in Strasbourg between 5 and 9 October 1953, the committee of experts managed to reach an agreement on a considerable number of principles related to extradition and suggested including them in an appropriate instrument.
After examining a new recommendation from the Consultative Assembly, the Committee of Ministers, in Resolution no. 24, charged the committee of experts with drafting a model multilateral extradition convention and a model bilateral convention for those states who did not want to accede to the multilateral instrument.
The work of the committee of experts, with the support of a representation from the Consultative Assembly, took place in two sessions, between January 1955 and February 1956.
Finally, in September 1957 the Committee of Ministers decided to open the multilateral text of the European Convention on Extradition for signing.

5. The committee of experts first debated whether a multilateral convention or a series of bilateral conventions was preferable.
Those who defended the latter option cited the greater adaptability to the different interests of the parties, based on geographical, political and legal reasons.
Others declared their preference for a multilateral convention containing, in addition to rules of a procedural nature, only principles widely accepted by the Member States, i.e., an instrument providing the general basis for agreements in the field, consequently leaving it for different bilateral conventions to regulate other aspects.
In the end, the opinion of those who preferred a multilateral convention with detailed and common rules prevailed, as it had the advantage of coordinating and, to a certain extent, standardising the

[7] The European Convention on Extradition was ratified in Italy by law on 30 January 1963 and entered into force on 6 August 1963; in Spain it was ratified on 24 July 1979 and entered into force on 7 May 1982.
[8] The current state of the ratifications can be seen on the following website http://conventions.coe.int/Treaty.
[9] Regarding the preparatory work, see the Explanatory Report to the European Convention on Extradition, which can be seen on the following website: http://conventions.coe.int/Treaty/en/Reports/Html/024.htm

rules on extradition in different countries, in line with the wording of Article 1 of the Statute of the Council of Europe.
The Convention was to be drafted in such a way that it would allow states who opted not to accede at the outset to do so at a later date.

During the preparatory work, two basic positions emerged: some said the institution's main objective was the suppression of crime and, as such, asked that extradition be made easier, while others wanted to introduce limits based on specific grounds of a humanitarian nature.
Some Scandinavian experts proposed amending the text of Article 6 with the following content: "If the arrest and delivery of the person claimed are likely to cause him consequences of an exceptional gravity and thereby cause concern on humanitarian grounds particularly by reason of his age or state of health, extradition may be refused".
The committee of experts did not accept this amendment although, in any event, it decided to cite the proposal in a note to the article in question, in order to give the states the possibility of making a reservation to it[10].

The languages in which the European Convention on Extradition is drafted are English and French, the official languages of the Council of Europe.
Two additional protocols[11] were added to the Convention subsequently that amended and partially integrated the provisions of the Convention.

6. The Preamble to the Convention explains that the signatory states considered that the adoption of uniform rules in this area would be likely to assist the work of unification and would be a useful instrument for establishing closer links between them.
By means of the Convention, the contracting states "undertake" to participate in reciprocal extradition, subject to certain rules and conditions, of "all persons against whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order [12]" (Article 1).
In the cases envisaged it is therefore an "obligation" that no state can elude.
In addition to this, as we will see shortly, there is the "power" to agree to extradite in cases in which it is not obligatory.

The preparatory work clarified that Article 1 is taken from the bilateral extradition convention between France and the Federal Republic of Germany of 23 November 1951.
It is a rule of a general nature considered as a norm for interpreting the entire text of the convention in the context of the evident intention to favour the process of extradition.

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[10] In any event, the exceptional seriousness of the consequences of extradition is dealt with in Articles 3 and 11 of the Convention and in Article 3 of the Second Additional Protocol, to which we will return later.
[11] The First Additional Protocol was signed in Strasbourg on 15 October 1975 (signed by Spain on 10 June 1983) and entered into force on 20 August 1979 (for Spain, on 9 June 1985). It has been ratified by thirty-seven states to date, although Italy is not one of them.
It can be obtained on the following website: http://conventions.coe.int/Treaty/en/Treaties/Word/086.doc.
The Second Additional Protocol was signed in Strasbourg on 17 March 1978 (signed by Italy on 23 April 1980 and by Spain on 10 June 1983) and entered into force on 5 June 1983 (for Italy on 23 April 1985 and for Spain on 9 June 1985). To date it has been ratified by forty states.
It can be obtained on the following website: http://conventions.coe.int/Treaty/en/Treaties/Word/098.htm.
[12] Article 25 of the Convention specifies that the expression "detention order" refers to any order involving deprivation of liberty which has been made by a criminal court in addition to or instead of a prison sentence.

The English term "*competent authorities*" corresponds to the "*autorités judiciaries*" of the French text.
These expressions cover the judiciary and the Office of the Public Prosecutor but exclude the police authorities.

7. Unlike many bilateral conventions, the 1957 convention does not contain a list of crimes that merit extradition, but rather it links application to the seriousness of the crime of which the person is accused in relation to a minimum threshold, deduced from the punishment envisaged by law or the one specifically imposed and from the circumstance that the act on the basis of which action is being taken is considered a crime by the laws of the two states in question.
Extradition will be granted (section 1 of Article 2) in the case of offences punishable by deprivation of liberty, a detention of a maximum period of at least one year, or by a more severe penalty.
In the case of extradition after conviction has taken place, it must refer to a sentence or detention order of at least four months.
In these cases, provided that the requirement of dual criminality is also fulfilled and apart from the exceptions we will mention later on, the requested state is obliged to extradite the accused or sentenced person[13].
In the event that the extradition request refers to several acts, some of which do not fulfil the requirement of the seriousness of the sentence envisaged by law or which has already been imposed, the requested state will be entitled (but not obliged) to grant extradition on the basis of the latter.
According to the report attached to the Convention, this extradition is "accessory" to the main kind, which without infringing the principle of speciality, can be granted for purely practical reasons on the basis of the appropriateness of *simultaneus processus*, considering that in many contracting states the accumulated sentence to be imposed for several inter-connected acts is often less than the simple sum of the individual sentences for each of the acts.

Article 1 of the Second Additional Protocol to the European Convention on Extradition envisages the extension of accessory extradition also in relation to the offences punishable solely with a monetary penalty.
The preparatory work underlines the existence in some criminal systems, such as the German one, of infringements against public order that are punishable by a monetary penalty imposed by an administrative authority, which can be appealed before an ordinary criminal court.
These are infringements that can cause serious social harm, such as offences in relation to environmental protection, in relation to which the possibility of accessory extradition would seem desirable.

8. Basing the extradition of an accused or sentenced person on a minimum quantitative limit of sentence instead of the *nomen juris* of the offence of which he/she is accused constitutes one of the most significant instruments of the standardisation of the institution in relation to some 19th century bilateral conventions[14].

[13] For crimes excluded from the scope of application of the Convention, the last section of Article 2 grants any of the contracting states the right to apply the reciprocity rule.
[14] See, for example, the convention between Italy and Great Britain for the reciprocal extradition of criminals, signed in Rome on 5 February 1873.

The act is considered serious exclusively due to the legally envisaged sentence or the one already imposed, which justifies the extradition.

In addition to this requirement, the act on the basis of which the surrender of the person is being requested must be considered an offence both by the law of the requesting state and that of the requested state (requirement of dual criminality).
In this regard neither the identity (*nomen juris)* of the offence in question nor the legal classification of the act, which can vary in different systems, are relevant[15].
Nevertheless, it is necessary that both legislations coincide both in the description of the deed in itself and its classification as an offence, subject, as such, to punishment of a criminal nature.
It is a matter of checking that the elements that constitute the offence coincide both from an objective point of view, which corresponds to the conduct of the perpetrator and its result, and from a subjective point of view.
For example, the condition regarding dual criminality will not be fulfilled if the rules of the requesting state consider generic misconduct[16] sufficient while (apparently) the corresponding rule in the requested state only punishes an act committed with specific misconduct[17].
In this case, the conduct of the perpetrator, solely on the basis of generic misconduct, will not be punishable in the requested state and this will prevent extradition being granted.
Dual criminality will also not exist if the law of the requesting state envisages deprivation of liberty as punishment for a particular act, while the requested state considers it merely an infringement of an administrative or civil nature.
The existence of the elements that constitute the offence does not refer to conditions of processability[18], as much as to the filing of the complaint or the existence of the authorisation to proceed required, if applicable, by the legislation of the requested state.

In the event that there are several extradition requests pending, from different requesting states, in relation to the same person, for the same offence or for another act, the requested state will decide what request to accept, taking into account: (a) the seriousness of the offences, (b) all the circumstances related to the acts, such as the venue and date of the offences, (c) the terms, such as the date of each extradition request, (d) the circumstances inherent to the person in question such as his/her nationality and (e) the possibility of subsequent extradition to another state (Article 17).

9. The Convention imposes several limits to the general principle of extradition of those accused of an offence of certain seriousness and envisaged by the legislation of the two states in question. Such limits may be based on the legislation of the requested state (Article 2), on the nature of the offence in question –political and military offences are excluded from extradition, as were fiscal

[15] Such as the distinction between crimes and misdemeanours in the Italian legal system or the distinction between crimes, offences and misdemeanours in France.
[16] In which the premeditation and intention are limited to the conduct of the perpetrator and the result of the same (in the case of murder there is only premeditation and intention in the conduct and in the event).
[17] In which the premeditation and intention go beyond the conduct of the perpetrator and the result of the same and include an additional element (in the case of robbery, in addition to the appropriation of the item in question, there is premeditation and intention in the profit motive).
[18] In this regard, see the Gartz judgment of the Italian Supreme Court no. 1850, dated 12 April 2000.

offences initially (Articles 3 to 5)–, on qualities inherent to the perpetrator –the requested state may refuse to surrender its own nationals (Article 6)– or may be determined by the possibility of the criminal action exercised by the requesting state being parallel to an analogous action in the requested state or of the offence having lapsed (Articles 7 to 10), or by the fact that capital punishment can be applied in the requesting state, something not envisaged by the legislation of the requested state (Article 11).
A further limit may be established derived from the confirmation that in the proceedings leading to the sentence or detention order in the requesting state the "minimum rights of defence" were not satisfied (Article 3 of the Second Additional Protocol).
Nevertheless, the grounds on which the refusal of extradition may be based do not include the absence of evidence or of serious indications of guilt according to the law of the requested state unlike in the case of several 20th century bilateral conventions.
The reason for said exclusion can be found in the fact that the extradition request must be supported by an instrument that is appropriate for the requesting state (conviction or detention order), which justifies the arrest of the person in question (Article 12).

10. Section 3 of Article 2 of the Convention allows the member states to exclude from the scope of application of the Convention those offences in relation to which internal legislation does not authorise extradition, even if the general requirements related to the seriousness of the sentence envisaged by law and that of dual criminality are fulfilled.
In this case, at the time of depositing the ratification instrument of the Convention, each state must notify the Secretary General of the Council of Europe of a list of offences for which extradition is authorised or excluded.
The Member States have the same obligation in the event of subsequent modification of the list of offences in relation to which its own legislation allows or excludes extradition.
In this case, the contracting states may continue to apply the reciprocity rule in relation to the state that has excluded certain offences from the scope of application of the Convention.

11. The Convention excludes extradition in the case of political offences and related acts (section 1 of Article 3), as well as when the state has "substantial grounds" for considering that the request, based on an ordinary criminal offence, has in reality been presented with a view to prosecuting or punishing a person on account of his/her "race, religion, nationality or political opinion", or that that person's position may be prejudiced for any of these reasons (section 2)[19].
The Convention explicitly states that the taking or attempted taking of the life of a Head of State or a member of his family will not be deemed to be a political offence (section 3).

An offence may be considered political when it represents an attack on the political interests of a state or on a political right of one of its nationals or when it was carried out for political reasons[20].
The first are considered "objectively" political offences, while the latter are political offences from a subjective point of view.

[19] The call to include political offences in extradition is relatively recent. The prohibition of extradition for this kind of offence was first established in an English statute in 1815 and, subsequently, several bilateral conventions did likewise. On this point, see the historical references contained in Aloisi, Fini under "*estradizione*" in *Novissimo Digesto Italiano*, vol. VI. UTET, Turin.
[20] In this regard, see section 3 of Article 8 of the Italian criminal code.

Some examples of objectively political offences are offences against the figure of the state and any attack on the citizens' right to vote, while all ordinary offences become political if motivated by such reasons.
The reason why international conventions exclude extradition for political offences is due, on the one hand, to their special nature, which can mean that they are closely linked to the dominant ideas in a country at a particular moment in time and, on the other hand, on the generally-held belief that a political criminal is less dangerous than an ordinary one, precisely because his motives are idealistic.

The Convention specifies that the definition of the notion of political offence is determined by the requested state and, as such, is influenced by the system in place in said country.
Nevertheless, Article 1 of the First Additional Protocol to the European Convention on Extradition has ruled out considering genocide, war crimes and crimes against humanity as political offences[21].
The explanatory report of said protocol clarifies that these crimes must be considered so abominable that they cannot be granted any kind of immunity.
The exclusion of these offences from the concept of political offence is only valid in relation to the application of Article 3 of the Convention and cannot be extended to a different regulatory context[22].

The second section of Article 3 of the Convention rules out extradition in the case of requests that may appear to be an act of persecution and discrimination against the accused person.
This affects all cases in which the subject requested may, due to reasons of race, religion, nationality or political opinions, have to face circumstances in the requesting state, due to the discriminatory treatment different to that applied to the rest of the population, and which once alleged, should form part of the assessment of the requested state.

The intention of avoiding any risk of discrimination against the persons to be extradited appears in Recommendation no. 80 of the Committee of Ministers[23] regarding extradition procedures to states that are not party to the European Convention on Human rights. The Committee of Ministers recommends Member States "not to grant extradition where a request for extradition emanates from a state not party of the European Convention on Human Rights and where there are

[21] "For the application of Article 3 of the Convention, political offences shall not be considered to include the following:

a) The crimes against humanity specified in the Convention on the Prevention and Punishment of the Crime of Genocide adopted on 9 December 1948 by the General Assembly of the United Nations;

b) The violations specified in Article 50 of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; in Article 51 of the 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; in Article 130 of the 1949 Geneva Convention relative to the Treatment of Prisoners of War and in Article 147 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War;

c) Any comparable violations of the laws of war having effect at the time when this Protocol enters into force and of customs of war existing at that time, which are not already provided for in the above-mentioned provisions of the Geneva Conventions.

[22] According to paragraph 15 of the explanatory report.

[23] Adopted on 27 June 1980 by the Committee of Ministers during the 321st meeting of the Ministers' Deputies.

substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing the person concerned on account of his race, religion, nationality or political opinion, or that his position may be prejudiced for any of these reasons"
Member States are recommended to adopt all provisional measures necessary, such as requesting the suspension of the extradition procedure, for example.

For the notion of political offences and acts of a discriminatory nature in Italian case law, see part II of this report.

12. Article 4 excludes persons accused of a military offence from the scope of application of the Convention, provided it does not also constitute an offence under ordinary criminal law.
This is a standard provision common to virtually all conventions on extradition[24] and is based on similar motives to those that justify ruling out extradition in the case of a political offence.
In this regard, a military offence is considered an infringement of military criminal law committed by a member of the armed services or a person holding similar status[25].
These are criminal offences that may be defined by material elements set out exclusively by military criminal legislation, in which case reference is made to the notion of "purely military offences", or by material elements that are wholly or partially defined in ordinary criminal legislation.
In the latter case, these are offences defined not only by military criminal legislation, but also by ordinary legislation, and as such, cannot be considered as excluded from the scope of application of the Convention.

13. The original text of Article 5 of the Convention envisaged the extradition of persons accused of fiscal offences[26] only if the contracting Parties had so decided for each offence or category of offences.
The preparatory work clarified that in this area it was necessary to obtain a prior agreement of the Member States and that, in the Convention, it had been impossible to agree on a binding formula due to the considerable differences between the legislations of the different parties, highlighting, in any event, the need for dual criminality of the offence in question and the fact that the text finally adopted was inspired in the contents of Article 6 of the Convention on Extradition between France and Germany.

Article 5 was amended upon the approval of the Second Additional Protocol to the Convention.
In fact, Article 2 of this instrument envisages the obligation to grant extradition in the case of offences "in connection with taxes, duties, customs and exchange" provided that the condition of dual criminality is fulfilled, even if the legislation of the requested party does not impose the same kind of taxes and duties or does not regulate the area in the same way as the legislation of the requesting party.

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[24] See the observations of Aloisi, Fini on the term «*estradizione*» in *Novissimo Digesto Italiano*, vol. VI. UTET, Turin.
[25] See, in this regard, Articles 1 and 37 of the Italian military criminal code.
See also the text «British Army Discipline and Capital Punishment 1914», available at http://www.bbc.co.uk/dna/h2g2/A944363, according to which military offences are related to the ones envisaged in ordinary criminal laws as follows: "the premise of the system in peacetime was, if it is between soldiers, it's military, if civilians are involved, it's civil. On active service, everything was military including those crimes that would have been tried by a civil court".
[26] Literally, an offence "in connection with taxes, duties, customs and exchange".

The explanatory report clarifies that the original version was a result of the paradox inherent in granting extradition for an offence committed not against an individual, but against the financial administration of another state because it was not considered that the duties of a state organisation included protecting the finances of other states.
The new wording of Article 5, defined as "more mandatory", is the result of considerable changes in the criminal policy of Member States who now place greater emphasis on offences of an economic nature due to the considerable damage they cause.
Moreover, it is an area that requires closer international cooperation because, for the purposes of extradition, the distinction between ordinary offences and fiscal offences is no longer considered justifiable.
In order to facilitate the work of the interpreter and in view of the differences that exist in this area between the legislations of the contracting States, the new text of the Convention refers to those acts "in connection with taxes, duties, customs and exchange" avoiding the more general, and also more controversial, definition of "fiscal offences", and specifies that the requirement of dual criminality will be considered satisfied if the rule of the requesting state has a corresponding rule in the legislation of the requested state envisaging "an offence of the same nature".
In this regard, the existence of the same elements constituting the two offences would seem to be decisive, even if the two legislations do not impose the same taxes or duties.

14. Article 6 of the Convention grants any contracting State the power to refuse the extradition of its own nationals, providing in this regard, by means of the corresponding declaration to be attached to the instrument of ratification or accession, its own definition of the requirement of nationality (section 2).
In this regard, it was decided that nationality would be decided at the time of the decision on the request for extradition.
In this case, on the other hand, and at the request of the requesting state, the requested state may submit the matter to its own competent authorities so that proceedings can be taken and the other part is duly informed of the results of the same (section 4).

This is a rule that has been influenced by the confrontation between traditional opinion, which prohibits the extradition of nationals due to the trust that they deposit in the protection provided by the legal system of their own country, and that of more recently formed nations, such as the United States of America, which allows the extradition of its citizens if envisaged by international conventions[27].
Therefore, in the preparatory work a compromise formula[28] was agreed on that was subsequently included in the final text of Article 6, and it was thus clarified that the extradition of a country's own

[27] See the observations of Aloisi, Fini on the term «*estradizione»* in *Novissimo Digesto Italiano*, vol. VI. UTET, Turin.
[28] According to the Italian Supreme Court (Division I, judgment of 3 November 1986, the Richter case) a citizen's status as eligible for extradition must be considered the rule and not the exception because "the modern grounds for extradition consist of international recognition of the reciprocal duty of states to hand over accused and sentenced persons in their territory to the state that has the greatest interest in punishing the guilty party, except in the case of express prohibition". Article 6 of the Convention does not envisage an express prohibition in this regard, but merely the option for the requested state to refuse extradition. This

nationals could be subjected, by any of the contracting States, to the condition of reciprocity by means of an express reservation by virtue of section 3 of Article 26.
The power to refuse the extradition of a national constitutes the object of a discretionary decision of the governing body of the requested state and, as such, is outside jurisdictional control[29].

The obligation to submit the case to the competent judicial authorities is due to the traditional *aut dedere aut judicare* principle of conventions in this field[30].
The Convention sets out that the only obligation for the requested state is to "submit" the matter to the authorities, who will decide whether to exercise the criminal action against the person in relation to whom extradition was not granted, and in what manner.

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power is the exclusive prerogative of the government and does not depend on a decision from judicial authorities.

[29] In this regard, see Italian case law in the Congiu judgment, Supreme Court, section 6, dated 21 February 2001, no. 8458.

[30] "The *aut dedere aut judicare* (either extradite or prosecute) rule, according to which the state in whose territory a person accused of a crime under international law is located has the unavoidable duty to try him/her for the crime in its territory or extradite him/her to another state that wishes to exercise its jurisdiction or transfer him/her to an international court to be tried" (Amnesty International, "The duty to respect international law obligations cannot be eluded", at http://www.amnesty.org/es/library/info/EUR41/003/2005).
For the origins of the *aut dedere aut judicare* principle, see also Amnesty International "The duty of states to enact and enforce legislation" (available at http://www.amnesty.org/en/library/info/IOR53/003/2001):
"The contemporary phrase *aut dedere aut judicare* literally means "either surrender (or deliver) or try (or judge)". However, it is usually described as an obligation to extradite or prosecute. The phrase is a modern adaptation of the phrase *aut dedere aut punire* (surrender or punish) used by Grotius in *De Jure Belli ac Pacis*, Bk. I, II, Ch. XXI, §§ IV-VI, and, before him, by Covarruvias (1512-1574). It was designed to be more consistent with the fundamental principle of criminal law of the presumption of innocence. The contemporary formulation does not fully reflect this principle, since the duty to prosecute -as opposed to the duty to investigate- arises only at the point when the prosecutors have sufficient admissible evidence. It would be better to use the phrase *aut dedere aut prosequi* (extradite or prosecute), as used by a leading commentator, although this phrase still does not capture all the nuances of the duty. See generally, Marc Henzelin, *Le Principe de l'Universalité en Droit Pénal International: Droit et Obligation pour les Etats de Poursuivre et Juger Selon le Principle de l'Universalité* (Bâle/Genève/Munich: Helbing & Lichtenhahn et Bruxelles: Bruylant 2000). The principle is more accurately reflected in the obligation (in provisions of various treaties, such as Article 7 of the Convention against Torture), by the state where the suspect is located, if it does not extradite that person, to submit the case to its competent authorities for the purpose of prosecution. If the decision not to prosecute were taken on impermissible grounds which were inconsistent with the independence of the prosecutor or if the legal proceedings were taken with the purpose of shielding the suspect from criminal responsibility, the obligation to extradite would remain. Of course, if another state had sufficient admissible evidence, and the requested state did not, the obligation to extradite would also still remain.

The above history of these phrases and their rationales is based in part on accounts in a number of sources, including: M. Cherif Bassiouni & Edward M. Wise, Aut Dedere Aut Judicare: *The Duty to Extradite or Prosecute in International Law* 3-5 (Dordrecht/Boston/London: Martinus Nijhoff Publishers 1995); M. Cherif Bassiouni, *The Sources and Content of International Criminal Law: A Theoretical Framework*, in M. Cherif Bassiouni, ed., International Criminal Law 3, 5 (Ardsley, New York: Transnational Publishers, Inc. 2nd. ed. 1999); Henri Donnedieu de Vabres, *Introduction à l'étude du droit pénal international: essai d'histoire et de critique sur la compétence criminelle dans les rapports avec l'étranger* 183 (Paris: Sirey 1922); Henzelin, supra, 98 no. 477.

The preparatory work clarifies that, in this regard, a more binding formula envisaging the obligation that the state "shall proceed" against the person in relation to whom extradition was not granted was not finally accepted.

In order to allow the exercise of the criminal action in the state where the person is located, the Convention states that the requesting state will transfer to the requested state, free of charge, "the files, information and exhibits relating to the offence", and the latter will keep the requesting state informed of the result of its request.[31]

15. The political or military means used and the status of national are also relevant in relation to the mere transit of a person due for extradition through a state other than the one that filed the request and the one in which he/she is seeking refuge.
In said case, Article 21 of the Convention imposes an exception to the general principle under which all the contracting states must allow the transit of persons involved in an extradition procedure through their territories.
These are conditions that, evidently, have to be relevant for the legislation of the transit state.
The last section of this rule also excludes transit through a territory in which the life or liberty of the extradited person could be at risk for reasons of his/her race, religion, nationality or political opinions.

16. Articles 7 to 10 of the Convention envisage that the requested state has the power to refuse extradition for reasons inherent to the overlap of its own jurisdiction with that of the requesting state.
The first case is that of an offence that, according to the legislation of the requested state, has been committed in whole or in part in its territory or in a place treated as its territory.
Each state has exact criteria to identify its own territory and the connection between it and the acts that warrant criminal punishment[32].
The exercise of jurisdiction over these acts represents a fundamental aspect of its sovereignty that justifies the power to refuse extradition.

However, there are cases in which the legislation of the requesting state also envisages the possibility of punishing acts that do not have a significant link with the national territory itself.
In this regard, the connection criteria that stand out are those based on the nationality or other personal characteristics of the criminal or the victim[33], on the need to defend the interests of the

[31] The criminal proceedings brought by the requested state (Switzerland in this case) against a citizen of said state, was considered (Treviso Court, decision of 22 July 1987, the Tomarchio case, in *Giustizia Penale* 1988, III, 124) carried out under "jurisdictional delegation" of the requesting state (Italy in this case).
"As the object of the delegation is the historical nature of the act and not any legal-criminal profile that may have been detected by the "delegating" state, this entails the disappearance, by virtue of the principle of *ne bis in idem*, of the Italian jurisdiction also in relation to those crimes that are not contemplated in the criminal code of the delegated state". In this particular case, the Swiss legal system did not include the crime of unlawful association that, due to the principle stated in the judgment, could not even be prosecuted in Italy anymore.
[32] See, by way of example, Articles 4 and 6 of the Italian criminal code.
[33] See, by way of example, Article 7, number 4, and Article 10 of the Italian criminal code.

state of origin[34], or even to prosecute one's own nationals when they are perpetrators of a serious crime committed abroad[35].
Finally there is the principle of universality, or absolute extra-territoriality, under which the state prosecutes whoever has committed a certain serious offence regardless of the venue.[36]
In these cases, the exercising of the criminal action is often subordinate to the condition of the presence of the accused person in the territory of the state that is exercising its jurisdiction[37], which can make the extradition request necessary.
The second section of Article 7 of the Convention provides that when the requesting state exercises the criminal action regarding an act that was committed outside its territory, the requested state may refuse surrender in the event that its legislation does not authorise the prosecution of a crime of the same kind committed outside its national territory.
This principle is, evidently, a mirror image of that of dual criminality, because the requirement is not fulfilled if the possibility of punishing an act committed outside the territory of the requesting state is not also envisaged by the legislation of the requested state.

17. The requested state has the power to refuse extradition when its own Judicial Authority is at that time prosecuting (Article 8), or has decided not to commence proceedings or has opted to end proceedings that are already underway (second part of section 1 of Article 9) regarding the same person and for the same act to which the extradition request refers.
This is the application of the same principle of sovereignty referred to in Article 7 of the Convention, reinforced here by the existence of pending or concluded proceedings in relation to the same act and the same person.
The explanatory report to the Convention clarifies that the idea of pending proceedings should be understood in broad terms and includes, therefore, a simple summons, arrest and all court procedures.
The second part of Article 9 envisages the hypothesis of the proceedings having reached a decision that, while not final, is liable to bring them to an end.
This is the case of decisions that conclude the preliminary investigation stage declaring that the necessary requirements to hold the hearing are not fulfilled (stay of proceedings, order to shelve the case).
These are decisions taken on the basis of the status of proceedings and which are liable to be modified in the event new evidentiary elements are obtained.
The above is also relevant for the purposes of extradition because, faced with new evidence, the requested state cannot refuse to surrender the accused person, unless it intends, in turn, to reopen the proceedings and thus make use of the power envisaged in Article 8 of the Convention.

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[34] See Article 7 (numbers 1, 2 and 3), which envisages the possibility of punishing a person that has committed serious crimes abroad against the figure of the Italian State or against its fundamental interests.
[35] See Article 9 of the Italian criminal code.
[36] "The universality principle (permitting a court in any state to try someone for a crime committed in another state not linked to the forum state by the nationality of the suspect or victim or by harm to its own national interests)" , Amnesty International, «The duty of states to enact and enforce legislation», *op. cit.*
This is the case of the statute passed in Belgium in 1993 and amended in 1999 in relation to serious violations of international humanitarian laws that punish war crimes, crimes against humanity and genocide, even if neither the perpetrators nor the victims are of Belgian nationality, the acts took place outside the territory of the Kingdom of Belgium and without the need for the accused person to be in Belgium during the trial. See a comment on this in "Belgium rules the world*: Universal Jurisdiction over Human Rights Atrocities", by Roemer Lemaître, at http://www.law.kuleuven.ac.be/jura/37n2/lemaitre.htm.
[37] See Articles 9 and 10 of the Italian criminal code.

If the hypotheses examined up to now support the simple power of the requested party to refuse extradition, the one envisaged in the first part of the first section of Article 9 expressly prohibits surrender.
This is the case in which the judicial authority of the requested state has already issued a final decision in relation to the same person and the same act as that referred to in the extradition request (*ne bis in idem* principle).
The preparatory work clarifies that final judgment is understood to refer to a court judgment against which all ordinary means of appeal have been exhausted.
Therefore, any possibility envisaged by the legal system of granting extraordinary means of appeal is irrelevant in this regard[38].

Article 2 of the First Additional Protocol to the Convention has added three sections to Article 9 in order to regulate the extradition of a person who has not been issued with a final judgment by the Court of the requested state in relation to the offence or offences to which the extradition request refers, nor by the requesting state, but by a third state that is also a party to the Convention.
In such a scenario, the state in which the person has taken refuge may refuse extradition in the following three hypotheses:
a) If the final judgment resulted in acquittal.
b) If the term of imprisonment or other measure to which s/he was sentenced was completely enforced or was wholly, or with respect to the part not enforced, the subject of a pardon or an amnesty.
c) If the court convicted the offender without imposing a sanction.
In these three hypotheses extradition may also be granted if the offence was committed to the detriment of a person or institution that has public status in the requesting state, if the person whose extradition is sought holds public office in said state or, finally, if the offence has been committed, at least partially, in the territory of the requested state.
The final section envisages that the foregoing provisions do not constitute an obstacle for the application of broader national rules on the *ne bis in idem* principle in relation to foreign judgments.

These are clearly delicate situations in which the guarantees that a person who is the subject of an extradition request should receive are compared with the limited powers at the disposal of the refuge state (C).
The latter may grant extradition to the requesting state (A), but will under no circumstances intervene in the proceedings carried out in the territory of the third contracting state (B), nor extradite the accused person to the latter state without a specific request.
There is then the possibility that a person, once removed from the territory of the state that requests extradition and from the territory in which he/she is tried, can avoid being subjected to any kind of penalty by remaining in a country that is a party to the Convention on Extradition[39].

[38] As in the case of the Italian criminal procedure system with the introduction of review, regulated in Articles 629 *et seq.* of the criminal procedure code.
[39] The greater mobility of persons and the disappearance of many borders in the sphere of the European Union make one think immediately of the need for new and more modern institutions, such as the mutual recognition of foreign judgments and the European arrest warrant.

From the report annexed to the Convention we can deduce that the principle of *ne bis in idem* operates in the legal systems of all the contracting states.

On the other hand, until the amendments introduced by the Additional Protocol, this principle was not applied unquestioningly in relation to a person from another state judged for reasons related either to the state nature of the jurisdiction or the circumstance that it seemed easier to obtain evidence of the offence in the territory of the state in which said offence was committed; therefore the latter could consider it unjustified that it be linked to a decision taken on that act by the judicial authority of another country, that could have acquitted the accused person due to a lack of evidence or have imposed a sentence deemed too lenient.
Nevertheless, the European Commission for Human Rights had lamented the absence of a specific rule governing such a scenario in the Convention.
The first consequence was the introduction, in the European Convention on Extradition, of the rule contained in Article 9 of the Convention, which became section 1 after the adoption of the first Additional Protocol.
In June 1969 the Committee of experts recommended the extension of the principle of *ne bis in idem* in relation to the judgments handed down by the Courts of third-party states other than the requested or requesting states in the extradition process, a recommendation that gave rise to the amendments introduced in the first Additional Protocol.
The text adopted is coherent with other conventional instruments adopted in the scope of the Council of Europe and, specifically, with the European Convention on the International Validity of Criminal Judgments [40] and the European Convention on the Transfer of Proceedings in Criminal Matters[41].
The report attached to the Additional Protocol explains that a decision that has not been issued at the end of a hearing or that does not prevent the reopening of investigations or of the trial cannot be considered final, in the way that a decision to shelve the case based on the situation of the case can.
Only the judgments issued by the Court of one of the contracting states to the Convention are appropriate for providing grounds for the prohibition of new proceedings (*ne bis in idem*), considering the level of reciprocal confidence between the states.
Not all acquittals issued in the third-party state constitute an obstacle for extradition as it, on the one hand, can be requested if new facts that justify a review of the decision by the requesting state emerge.
The existence of new facts would mean that the object of the extradition request was different to the object of the decision adopted in the third-party state.

[40] This Convention was signed on 28 May 1970 (by Italy on 4 February 1971; by Spain on 30 May 1984) and entered into force on 26 July 1974 (Spain ratified it on 2 September 1994; Italy has not yet done so); at present it has been ratified by twenty countries while a further seven have signed it but have not yet ratified it. The text is available at the following website: http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=070&CM=8&DF=3/24/2008&CL=ENG
[41] This Convention was signed on 15 May 1972 (by Italy on 26 May 2000; by Spain on 30 May 1984) and entered into force on 30 March 1978 (Spain ratified it on 11 August 1988; Italy has yet to do so).
The text is available at the following website:
http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=073&CM=8&DF=3/27/2008&CL=ENG.

Meanwhile, an acquittal based exclusively on reasons of a procedural nature does not represent an obstacle to an extradition request.

18. The convention system excludes extradition when the offence or the sentence has expired due to lapse of time (Article 10) or amnesty.
These are clearly rules issued by *favor rei,* because in both cases the exclusion of surrender is obligatory and it is to this that the specific right of the interested party not to be extradited corresponds.

The lapse of time constitutes a cause for the expiry of the offence or the sentence and occurs when a period of time passes whose duration depends on the nature and seriousness of the offence.
Some systems exclude this cause of extradition in relation to the more serious offences or sentences[42].
The convention system prohibits extradition if the offence or the sentence has lapsed in accordance with the legislation of the requesting party or the requested party.
In order to allow the requested party to check the calculation of the time-lapse period, the extradition request will include, among other things, the rules of the legislation of the requesting state that refer specifically to the expiry of the offence in question (see in this regard the comment to Article 12).

Article 4 of the Second Additional Protocol to the Convention prohibits extradition when the offence in question has expired due to an amnesty granted in the requested state or if said country was competent to prosecute the offence under its own criminal legislation[43].
This is clearly the extension of two of the rules that already formed part of the convention system: the one that envisages the power of the requested party to refuse extradition if the act is connected to its own legal system in such a way that it enables it to uphold its jurisdiction and the one which prohibits extradition if the offence has lapsed for the requested party.
Both in the case of the lapse of time and that of amnesty, the prohibition of extradition should be considered to operate independently of the fact that the judicial authority of the requested state has already carried out an independent investigation into the offence to which the request refers, leading to a decision on the expiry of criminal liability due to one of these two reasons.
In other words, these two reasons of impediment can only exist and apply during the extradition procedure.

As we have seen, in both cases the interested party can benefit from the right not to be extradited, which derives directly from the rules of the convention.
In these cases the trust that said party has placed in the legal system of the state of refuge is protected, and as a result of the expiry of the offence, the party is protected from the punitive intentions of the requesting state.

[42] See Article 157 of the Italian criminal code, which rules out expiry due to lapse of time in relation to offences punished with life imprisonment.
[43] See also the Feil Berndt judgment, Supreme Court, section 6, of 29 September 1994, no. 3744.

19. The expiry of the offence as a cause for preventing extradition concerns substantive criminal law, like in the case of the cause envisaged in Article 11 of the Convention, which entitles a state to refuse to surrender an interested party if he/she may be facing capital punishment.
The European Convention on Extradition does not contain a prohibition on surrender, but rather the power to refuse it in favour of the requested party, whose legal system does not envisage capital punishment or does not execute it generally, unless the requesting state gives it sufficient guarantees that capital punishment will not be enforced.
Only the requested party is competent to decide on the sufficiency of this kind of guarantee.
As the explanatory report explains, these are instruments that vary according to the different legal systems involved and that, by way of example, may consist of a formal undertaking not to execute capital punishment, a recommendation sent to the head of state of the requesting state for the sentence to be commuted, a simple declaration of intent in relation to a recommendation of this kind or an undertaking to return the interested party to the requested state in the event he/she is sentenced to death.
The assessment on the existence of this kind of guarantee is jurisdictional and corresponds, generally speaking, to the judicial authority of the requested state.
In any event, as in the other cases, there is still room for political manoeuvre that depends on the authority of the government of the state itself.

This rule, central in scope yet of an accessory nature, has lost much relevance due to the progressive abolition of capital punishment in virtually all the Member States of the Council of Europe.
In fact, the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (ECHR) recognised the legitimacy of the death penalty in the cases envisaged by law and after a fair trial.
Subsequently, Article 1 of the Sixth Additional Protocol to said Convention, opened for signing in 1983,[44] abolished the death penalty in all the Member States[45].
The only exception in force refers to acts committed in time of war or in imminent threat of war (Article 2), which, on the other hand, was removed by the thirteenth protocol of the ECHR[46].

[44] This protocol was signed on 28 April 1983 (by Italy on 21 October 1983; by Spain on 28 April 1983) and entered into force on 01 March 1985 (in Italy on 1 January 1989; in Spain on 1 March 1985). The text is available at the following website: http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=114&CM=8&DF=3/24/2008&CL=ENG.
[45] The forty-seven Member States of the Council of Europe have signed this protocol. Today, only the Russian Federation has yet to ratify it. See the situation at the following website: http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=114&CM=8&DF=3/24/2008&CL=ENG.
The explanatory report highlights that "that decision marks the culmination of a long movement towards the abolition of the death penalty in the member states of the Council of Europe" and that the second sentence of Article 1 ("No-one shall be condemned to such penalty or executed") "aims to underline the fact that the right guaranteed is a subjective right of the individual".
The explanatory report is available at the following website: http://conventions.coe.int/Treaty/en/Reports/Html/114.htm.
[46] The thirteenth protocol (which can be seen at the following address http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=187&CM=8&DF=3/24/2008&CL=ENG) was opened for signing on 3 May 2002 (Italy and Spain signed in the very same day) and it entered into force on 1 July 2003.

20. Article 3 of the Second Additional Protocol to the European Convention on Extradition envisages the possibility for the requested party to refuse extradition that aims at the execution of a sentence or a detention order in the event that the conviction was handed down after judgment in absentia and if, in the opinion of the refuge state, the proceedings in the requesting state "did not satisfy the minimum rights of defence recognised as due to everyone charged with criminal offence."

This cause of impediment is linked to procedural law and, in particular, to everyone's right to a fair trial, as envisaged in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The preparatory work clarifies that judgment *in absentia* should be understood as referring to that issued after an effective trial, thus excluding *ordonnances pénales*.
In defining judgment *in absentia*, the preparatory work quotes the provisions of section 2 of Article 21 of the European Convention on the International Validity of Criminal Judgments[47]: judgments rendered after a hearing at which the sentenced person was not personally present.
In this case, the requested party should have the possibility of checking whether the minimum rights of defence were respected, as envisaged in the third section of Article 6 of the ECHR[48] in particular, supplemented by Resolution (75) 11 of the Committee of Ministers of the Council of Europe,[49] which recommends that Member States adopt the minimum rule according to which "no one may be tried without having first been effectively served with a summons in time".

To date it has been ratified by forty countries; another five have signed it but not yet ratified it (see the list of ratifications at: http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=187&CM=8&DF=3/24/2008&CL=ENG).

[47] "Article 21.

1. Unless otherwise provided in this Convention, enforcement of judgments rendered in absentia and of *ordonnances pénales* shall be subject to the same rules as enforcement of other judgments.
2. Except as provided in paragraph 3, a judgment in absentia for the purposes of this Convention means any judgment rendered by a court in a Contracting State after criminal proceedings at the hearing of which the sentenced person was not personally present.
3. Without prejudice to Articles 25, paragraph 2, 26, paragraph 2, and 29, the following shall be considered as judgments rendered after a hearing of the accused:
a. any judgment in absentia and any *ordonnance pénale* which have been confirmed or pronounced in the sentencing State after opposition by the person sentenced;
b. any judgment rendered in absentia on appeal, provided that the appeal from the judgment of the court of first instance was lodged by the person sentenced."

[48] "Everyone charged with a criminal offence has the following minimum rights: a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; b. to have adequate time and facilities for the preparation of his defence; c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

[49] It was adopted on 21 May 1975 and can be seen at: https://wcd.coe.int/ViewDoc.jsp?id=661727&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75.

If the minimum rights of defence defined in this manner are not considered sufficiently respected, the requested party may refuse extradition unless the requesting party gives it a guarantee considered sufficient according to the conditions we have just seen, of the right to hold new proceedings that respect the rights of defence in full.
This is a guarantee that must preserve not only the mere possibility but also the effectiveness of a new trial.
If the requesting state provides such a guarantee, the requested state will be obliged to grant extradition.
On this point, the interested party may accept the judgment already handed down *in absentia* in the requesting state, which will be enforced, or ask for a new trial to be held[50].

The second section of Article 3 envisages that the communication of the judgment handed down *in absentia* by the requested state to the interested party, in the context of the extradition proceedings, cannot be considered valid notification for the purposes of the criminal proceedings brought in the requesting state.
In other words, the rule keeps the two proceedings apart, i.e. the criminal proceedings in the requesting state and extradition procedure in the requested state.
The reason for this is clearly the intention of protecting the interested party from the possible expiry of terms, in particular those for presenting a challenge, that can be verified in the context of the criminal proceedings of the state of origin, while he is involved in extradition proceedings in the requested state.
Indeed, one of the main reasons for rejecting extradition in the case of proceedings held *in absentia*, consists of the lack of proof that the accused has been duly informed of the existence of criminal proceedings against him underway in the requesting state.
The latter can overcome this obstacle by supplying sufficient guarantees that the interested party will have the right to new proceedings that ensure his right to a proper defence.
Nevertheless, this right must be activated by means of a specific request (opposition) from the interested party, failing which, the requesting state, once it has obtained extradition, will enforce the judgment issued *in absentia*.
It is therefore essential that the interested party be legally informed of the judgment handed down against him *in absentia* and that he has a reasonable amount of time to decide whether to challenge it.
The legal recognition of the judgment handed down *in absentia* will be obtained by means of a notification carried out *separately* from the extradition procedure and always *after* the end of the same, so that the interested party has the actual possibility of presenting a specific challenge and requesting a new trial.

21. Once extradition has been granted and executed by means of the surrender of the person in question to the judicial authority of the requesting State, the corresponding actions are limited by the principle of speciality set out in Article 14 of the Convention.
According to this rule, in fact, a person extradited for an offence cannot be prosecuted or tried, far less detained, for an act that occurred prior to the one for which the surrender was granted and different to the one for which extradition was granted.

[50] To see a specific example, see part II, as well as Framework Decision 2009/299/JHA from the Council of the European Union.

Exceptions to the above are only allowed in specific cases.
The first of these is when a request for the extension of extradition is presented in relation to an offence for which surrender is obligatory pursuant to the Convention.
The second exception occurs when the interested party, after being given the possibility to do so, fails to leave the territory of the requesting state within a period of forty-five days or returns to said territory after having left it.
Meanwhile, the requesting party is granted the power to adopt the necessary measures, including taking recourse to proceedings *in absentia,* for a possible expulsion of the accused person from its national territory or for the interruption of the lapse of time in accordance with its legislation.

Recent Italian case law considers the principle of speciality as a condition for processability which, when absent, prevents criminal action being taken on the one hand and, on the other, allows the necessary preliminary investigation actions to be taken in order to secure the sources of evidence, as well as the adoption of restrictive measures that, nevertheless, cannot be executed[51].

As for the two exceptions to the principle of speciality, set out in Article 14, it should be remembered that, on the one hand, complementary extradition constitutes, for the requested party, an obligatory measure if the request refers to an offence for which the Convention envisages the obligation to extradite.
Meanwhile, the behaviour of the accused party in failing to leave the territory of the requesting state within forty-five days after his/her final release or his/her subsequent return to said territory must fulfil the requirements of voluntary and conclusive behaviour[52].
The explanatory report clarifies, in fact, that the expression “had the possibility” was preferred to the original “been free” because the meaning is more general and, as such, less restrictive.
The person in question not only should have had the freedom to leave the territory of the requesting state, i.e., have been “finally” discharged in relation to the offence for which extradition was granted,[53] but also must have had the specific possibility to do so, and this possibility would not exist, for example, in the case of illness or the lack of economic means.
This must be verified by the corresponding judge who is hearing the criminal proceedings for the new crime and before whom the accused party alleges that he is not eligible for prosecution derived from the complementary extradition granted.
Proof of the impossibility of leaving the territory of the requesting state may be supplied by the accused party and is not subject to any legal limit.

22. Article 15 provides a specific application of the principle of speciality for cases of re-extradition to a third state.
This is a hypothesis in which the requesting state has obtained the extradition of the party in question and, once the proceedings against him/her have concluded, intends to extradite him/her to another Member State or to a third-party state.

[51] The resolution of this matter by Italian case law is examined in part II of this report.
[52] See in this regard the Araniti judgment, Supreme Court, section 6, of 27 June 1988, no. 9609.
[53] And not, for example, having been subjected due to said offence to the interim means of the prohibition to leave the national territory, with the appropriate annotation of the corresponding measure in the identity document; see in this regard the Forcieri judgment, Supreme Court, section 1, of 12 April 2005, no. 21344.

In this case, the principle of speciality also prohibits the extradited person being subject to criminal proceedings or to the enforcement of a sentence due to an offence other than the one contemplated in the extradition request and committed prior to it.
The Italian Supreme Court has also issued decisions in this sense,[54] overturning a decision in which a sentence was imposed on an accused person extradited to Italy from Switzerland, for an offence in relation to which France –the state where the accused person was located before being extradited by Switzerland– had already refused extradition to Italy.

23. Before the extradition request is processed and in urgent cases, the requesting state may request the provisional arrest of the claimed individual (Article 16).
The request for provisional arrest and the annexed documents will be transmitted via the fastest channels, including post or telegraph and via Interpol.
By means of said request, the requesting party states its intention to make a formal extradition request, which must be received in accordance with strict terms, between eighteen and forty days after arrest.
If such terms are not respected, the person will be released, although this will not prevent the extradition request being presented subsequently, or another provisional arrest[55].
It is considered that the discharge of the person in question is always possible even before the expiry of the terms mentioned above, in the event the requested party takes all steps necessary to prevent the escape of the person sought.
The requesting state will be informed immediately of whether or not provisional arrest is granted.
The explanatory report clarifies that the requesting party is the sole judge of the urgency, while it is for the requested party to decide whether or not to grant provisional arrest in accordance with its own internal rules.

24. In accordance with Article 5 of the Second Additional Protocol, which amended Article 12 of the Convention on this point, the extradition procedure envisages the transfer of actions via the corresponding Ministries of Justice (or the corresponding governmental Department), without fully ruling out diplomatic channels.
The original text established diplomatic channels as the ordinary means of transmission, although the experience of the first years of application of the rule led to delays, which prompted the proposed modification from the committee of experts[56].
The contracting states are free, however, to agree on different channels for transferring actions.

The extradition request must be in writing. It will include the originals or authenticated copies of: (a) the conviction and sentence or detention order issued by the corresponding judicial authority and which are to be enforced; (b) a statement of the offences for which extradition is requested, the time and place of their commission, their legal nature (c) a statement of the relevant law, including

[54] See the Bertola judgment, Supreme Court, section 1, of 6 July 1995, no. 4095.
[55] The verification of the end of the arrest of the person to be extradited due to the conclusion of the term forms part of the responsibilities of the corresponding judge who must, in fact, establish if and when the documents on which the extradition is based have reached the Ministry of Justice. See the judgment of the Italian Supreme Court, Division VI, 4 September 1968, the Faiola case).
[56] See the explanatory report in this regard, paragraphs 33 and 34.

provisions regarding the time-lapse of the alleged offences and as accurate a description as possible of the person claimed, together with any other information which will help to establish his identity and nationality (Article 12)[57].
The requested party is entitled to request any supplementary information in the event the information provided by the requesting party is insufficient to enable it to adopt a decision (Article 13).
After the internal procedure has concluded (referred to in the following paragraph), the requested party will inform the requesting party of its decision via the same channels used to send the request (Article 18).
Reasons shall be given for any complete or partial rejection.
If the request is agreed to, the requesting Party shall be informed of the place and date of surrender and of the length of time for which the person claimed was detained for the purposes of extradition.
Except in cases of *force majeure*, if the requesting party fails to take over the extradited person, he/she will remain at its disposal for a period of between fifteen and thirty days, after which he/she will be released.
In this case, the requested state may refuse extradition for the same reasons.
The surrender may only be postponed if the requested state intends to subject the claimed person to criminal proceedings or have him/her serve his/her sentence for a different offence (Article 19).
Together with the claimed person and at the request of the requesting state, the property that may be used as evidence or which has been acquired as a result of the offence and which were found in the possession of the person sought at the time of arrest may also be surrendered (Article 20).

The expenses incurred in the territory of the requested party will be borne by said party; all others will be borne by the requesting party (Article 24).

25. The extradition and provisional arrest procedures are regulated exclusively by the law of the requested party (Article 22) and the documents must be drafted in the language of the same or in that of the requesting party (Article 23).
The explanatory report clarifies that the underlying agreement to the Convention refers to the fact that the language or languages used in diplomatic relations between the two parties should be used.

26. At the time the Convention is signed or the instrument of ratification or accession is deposited, any contracting state has the power to make a reservation in respect of any provision or provisions (Article 26).
This is clearly a manifestation of the sovereignty of a state that does not accept certain limits in its territory.
During the preparatory work the problem arose of whether a formula should be established to allow reservations in relation to any provision or identify specific rules that would have allowed the application of reservations by the states.

[57] The *exequatur* procedure carried out by the judge of the requested state in relation to the documents attached to the extradition request should be restricted to the existence and formal correctness of the same. The original (or authenticated) copies of the judgment on which the extradition request is based must be presented; the judgment and attached documents must be translated into the language of the requested state so that they can be examined.

The former approach prevailed, and the formula adopted concerns the power to “make a reservation in respect of any provision or provisions of the Convention”.
The committee of experts highlighted the possibility of said reservations being based exclusively on fundamental principles of the judicial system of one of the Member States.

Italy has made two reservations: the first in relation to the enforcement of measures involving a detention order stating that extradition will not be granted unless the legislation of the requesting state does not envisage such measures as the necessary consequence of the offence; the second is a general rejection of extradition for offences punished with the death penalty in the requesting state.
Spain made reservations in relation to: Article 1, excluding extradition if in the requesting state the person may be brought to trial before a special court or for the enforcement of a sentence imposed by courts of this nature; to Article 10, ruling out extradition if liability to criminal prosecution has lapsed for any cause for which provision is made in the legislation of the requesting Party or the requested Party; to Article 21.5, only allowing transit on the conditions specified for extradition in the convention, and Article 23, requiring a translation into Spanish, French or English of the request for extradition and the accompanying documents.
Spain has attached the following declarations to its ratification:
- In relation to Article 2.7 it will apply the rule of reciprocity in respect of offences excluded from the application of the convention by virtue of Article 2 thereof;
- In relation to Article 3, it states that acts of terrorism will not be deemed to be political offences;
- In relation to Article 6.1.b, it will consider as nationals the persons entitled to that quality by virtue of the provisions of Title I of Book I of the Spanish Civil Code;
- In relation to Article 9, it states that final judgment shall be deemed to have been passed on a person when the judicial decision in question is no longer subject to any ordinary appeal either because all means have been exhausted, or because the decision has been accepted, or on account of its specific nature;
- in relation to Article 11, it states that the offence for which extradition is requested is punishable by death under the law of the requesting Party, Spain will refuse extradition unless the requesting Party gives such guarantees as the requested Party considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out.

Accession to this Convention entails the abrogation of existing bilateral agreements between the contracting states.
The above notwithstanding, the contracting states will be free to enter into bilateral agreements in order to complete the provisions or facilitate the application of the principles of the European Convention (Article 28).

Finally, the possibility has been envisaged (Article 31) for the Convention to be denounced by means of a notification to the Secretary General of the Council of Europe.

Conclusions

27. The European Convention on Extradition envisages a system for the surrender of persons subject to criminal proceedings or who have already been convicted, adapted both to the demands of justice and to the respect of the basic rights of the persons sought.
These include the right to life, to integrity and to respect of the person, as well as the right to defence, as acknowledged and guaranteed by the system instituted by means of the Convention on the Protection of Human Rights and Fundamental Freedoms.
The complexity of national procedures and the need to respect the principle of dual criminality has often led to delays in the surrender of persons to be extradited, which has led the Member States of the European Union and those members of the Council of Europe who are party to the European Convention on Extradition to create new instruments based above all on the concept of mutual trust and the mutual recognition of criminal judgments, considered the basis for judicial cooperation.
After the attempts made in the two Conventions of 1995 and 1996 dealing specifically with extradition between the Member States of the European Union, but which never effectively entered into force, the European Council held in Tampere in October 1999 decided to proceed with the abolition of the traditional system of extradition and replace it with the European arrest warrant. This warrant, introduced by means of a framework decision in June 2002 and which has already been implemented by all Member States, consists of a judicial measure that establishes the arrest of a person and as such is ideal for execution in all EU Member States.
Among the special features of this new institution is the fact that the European arrest warrant can be issued exclusively for offences set out specifically in the framework decision “without verification of the dual criminality”, even if the legislation of the requested state does not envisage the same type of offence.
From a procedural point of view, the transfer of the decision takes place directly from one judicial authority to another, who decides on the surrender using simpler procedures that those envisaged in the case of extradition.

The European Convention on Extradition remains in force with regard to relations other than those between the Member States of the European Union, and said limits continue to perform their function, as can be seen from the case law decisions that refer to it even today.

Genoa, 3 July 2010

Dr. Emilio Gatti

Con el apoyo de la Unión Europea
With the support of The European Union
Avec le soutien de l’Union Européenne

NIVEL III: REFERENCE DOCUMENTS

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