



Department of Political Science

Chair of International Law

**THE INSTITUTE OF EXTRADITION BETWEEN ITALY  
AND BRAZIL: THE CHANGES CAUSED BY ITALY'S  
MEMBERSHIP TO THE EUROPEAN UNION AND THE  
ANALYSIS OF CESARE BATTISTI'S CASE**

SUPERVISOR

Prof. Roberto Virzo

CANDIDATE

Paola Patierno

076812

**ACADEMIC YEAR 2016/2017**

*A nonno Dado,  
non sono ancora la migliore,  
ma questa è la prova  
che ce la sto mettendo tutta.*

*A nonno Aldo,  
oggi il tuo sguardo fiero  
mi manca più del solito.*

# TABLE OF CONTENTS

<b>I. EXTRADITION: GENERAL PRINCIPLES.....</b>	<b>p. 1</b>
<b>I.1 Extradition in International Law: active and passive.....</b>	<b>3</b>
<b>I.2 General principles.....</b>	<b>1-3</b>
<b>I.2.1 Double criminality and <i>ne bis in idem</i> .....</b>	<b>3-7</b>
<b>I.2.2 The doctrine of Specialty Law.....</b>	<b>7-8</b>
<b>I.2.3 Political and military crimes.....</b>	<b>9-12</b>
<b>I.2.4 the prohibition of extradition if requested to apply torture, inhuman and degrading treatment or discriminatory acts.....</b>	<b>12-15</b>
<b>II. DOMESTIC INSTRUMENTS AND COMPETENT AUTHORITIES</b>	
<b>II.1 Domestic instruments:.....</b>	<b>16</b>
<b>II.1.1 Italian Constitution:.....</b>	<b>16-19</b>
▪ art. 10, 26 and 27	
<b>II.1.2 Italian Criminal Law and Criminal Procedure:.....</b>	<b>19-25</b>
▪ art. 13 of the Criminal Code	
▪ art. 8, 9 and 10 of The Code of Criminal Procedure	
▪ Title II from art. 697 to art. 726 of The Code of Criminal Procedure(Extradition)	
▪ Title IV from art. 730 to art. 741 of The Code of Criminal Procedure (Legal effects of foreign judgements)	
<b>II.1.3 Brazilian Federal Constitution:.....</b>	<b>26-29</b>
▪ art. 22	
<b>II.1.4 Brazilian Statute of the Foreigner: Title IX from art. 75 to art. 94.....</b>	<b>30</b>
<b>II.2. Competent authorities as regards extradition:.....</b>	<b>30</b>
<b>II.2.1 Italy: the Minister of Justice and the Appeal Court: art. 697 and</b>	

701 of the Italian Code of Criminal Procedure.....	30-32
<b>II.2.2</b> Brazil: The Supreme Federal Tribunal and the President of the Republic: art. 102 Brazilian Federal Constitution.....	32-33

**III. RELEVANT INTERNATIONAL INSTRUMENTS APPLICABLE TO EXTRADITION CASES BETWEEN ITALY AND BRAZIL**

<b>III.1</b> the Treaty of extradition between the Empire of Brazil and the Reign of Italy – 1872.....	34-35
<b>III.2.</b> the Treaty of extradition between the Republic of Italy and the Federal Republic of Brazil – 1989.....	35-38
<b>III.3.</b> the European Convention of extradition – 1957.....	38-40
<b>III.4.</b> the EU Council Framework Decision 2002/584/JHA on the European Arrest Warrant – 2003.....	41-43
<b>III.4</b> the European Convention on Human Rights – 1950: the role of the Court and its decisions.....	43-48

**IV. AN EXAMPLE OF APPLICATION OF THE 1989 TREATY: CESARE BATTISTI'S CASE**

<b>IV.1.</b> Biography and first contacts with “Proletari Armati per il Comunismo”..	49-52
<b>IV.2.</b> The first extradition from France and the applied norms.....	52-55
<b>IV.3.</b> The second extradition from Brazil and the applied norms.....	55-58
<b>IV.4.</b> Final considerations and prospects.....	58-59

<b>Bibliography</b> .....	60-61
---------------------------	-------

# I. EXTRADITION AND ITS GENERAL PRINCIPLES

## I.1. Extradition in International Law: active and passive

Throughout history, extradition has been an effective and controversial instrument of cooperation among states. However, since in the international arena every state considers its sovereignty as absolute and unassailable, this instrument has been the subject of numerous disputes and, at the same time, it boosted the evolution of the doctrine and of divers international and public law principles.

The first form of this process dates back to 1280 years b. C., when Rameses II of Egypt and the Hittite prince Hattusili III signed an agreement to return a criminal who fled in the territory of the other. Even if there is proof of numerous episodes similar to the one above, international law scholars considered them ordinary cooperation among states and not as proper extradition, since it often took place in absence of a formal treaty and it concerned the surrender of political enemies and not common criminals<sup>1</sup>. “Although the surrender of common criminals may not have been quite exceptional as it has usually been thought, the effective beginnings of modern international cooperation in the suppression of crime lie in the eighteenth century”<sup>2</sup>. The scholar de Martens studied various treaties signed during the same century, including different kinds of offenders, and he concluded that the majority was signed by contiguous states, which could explain the difference between the American and European current practise and approach to extradition<sup>3</sup>. However, it was only in the following century that the control of fugitive criminals became an urgent problem, given also the industrialization, which led to better communication and transports. The word “extradition” itself was new, it came from the French term as a combination of the Latin *ex-* “fuori” and *traditio -onis* “delivery”<sup>4</sup>, and it was formally recognised only in 1870 with the Extradition Act, in England. The first treaty including extradition of modern era, indeed, was signed in

---

1 I.A. SHEARER, *Extradition in international law*, Manchester, 1971. p. 5.

2 I.A. SHEARER, *op.cit.*, p.6.

3 While the bilateral solution was preferred by European countries, at least until 1957, the American Continent is the pioneer in the multilateral ones, demonstrated by the fact that the countries of this continent signed the first multilateral treaty in 1879 in Lima, despite it never entered into force. *see* I. ZANOTTI, *Extradition in multilateral treaties and conventions*, Boston, 2006, p.1.

4 TRECCANI, Definition of “extradition”, in Treccani Enciclopedia, available *online*.

1794 between Great Britain and the United States, who committed themselves to “deliver up to justice all persons who, being charged with murder or forgery, committed within the jurisdiction of either, shall seek an asylum within any of the countries of the other, provided that this shall only be done on such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the offence had there been committed”<sup>5</sup>.

From a legal point of view, extradition is “the transfer of an individual from one state to a state that aims to place the accused on trial”<sup>6</sup>.

The entire process is usually regulated by formal bilateral and multilateral treaties or by the domestic immigration law, in the absence of an official treaty. An example of the first category is the Treaty between Italy and Brazil signed in 1989, object of this thesis, and an example of multilateral treaty could be the European Convention of Extradition of 1957.

A necessary condition for an extradition to properly work, especially in the absence of a treaty, is reciprocity, namely when “two or more States agree to extend to the other's citizens specified legal rights on the same standing as its own citizens”<sup>7</sup>. It may also be interpreted as a mutual legal assistance, in which both states commit themselves to accede to each other's request. According to the ICJ, this principle does not represent a mechanic basis, but, on the contrary, each request should be assessed singularly.<sup>8</sup>

Focusing on bilateral treaties, there are three main actors involved: the requesting state, meaning the one that requests the extradition of a person or the provisional arrest of a person with a view to extradition, commonly referred to as “active extradition”, the receiving state, the one to which a person is to be extradited from, “passive extradition”, and finally the transferring state from which a person is being extradited to a third state, the receiving state<sup>9</sup>.

The internal procedures may differ from one country to another: every single State has its own competent judicial and executive figures. In Italy, for example, the three main

---

5 I.A. SHEARER, *op.cit.*, p. 13.

6 J. KLABBERS, *International Law*, New York, 2013, p..

7 Definition of the “principle of reciprocity”, Duhaime's Law Dictionary, Available *online*.

8 International Court of Justice, report of June 4 2008, *Djibouti v. France*, par. 119.

9 Available *online*

competent agents are the Minister of Foreign Affairs, the Attorney General and the Court of Appeal, while, for Brazil, the power is in the hands of the Minister of Foreign Affairs, the Supreme Federal Court and the President of the Republic. As already mentioned above, these figures may vary according to the different forms of State and of government.

## **I.2. General principles**

Being a dual law, so not falling exclusively under the domain of International Law, but requesting also national intervention, each case of extradition has its own peculiarities and needs to be considered individually. However, there are some general principles that are common to all the countries. In 1990, the United Nations approved the Model treaty on Extradition<sup>10</sup>, in order to provide “a useful framework”, in which it is possible to find the principles cited below:

- a) The principle of double criminality, according to which the offence for which extradition is requested is punishable under the law of both the signing states by imprisonment or other deprivation of liberty<sup>11</sup>.
- b) the *ne bis in idem* principle, which forbids to take to trial, judge and convict a person more than once for the same crime.
- c) the doctrine of speciality, which asserts that the request for extradition and the subsequent prosecution need to concern the same allegations
- d) the prohibition to extradite a person if the offence for which extradition is requested is regarded by the requesting state, and also the requested state according to common law, as political offence or military crime.
- e) as *jus cogens*, the prohibition to apply torture, inhuman and degrading treatments or discriminatory acts.

---

10 U.N. Resolution A/RES/45/116, December 14, 1990.

11 European Convention, Charter of Fundamental Rights of the European Union, December 1 2009, art. 50.

### **I.2.1 Double criminality and *ne bis in idem*.**

The double criminality principle, or dual criminality, is one of the basic requirements for an international criminal procedure of extradition. It states that “the underlying act (or omission) is criminal in both the requesting state and the requested state”<sup>12</sup>. The principle derives from the principle of legality, *nulla poene sine lege*, but it is also linked to the concept of sovereignty and reciprocity. The interpretation of such principle may vary from treaty to treaty. For example, some states may require that the conduct of the individual subject to extradition must be not only criminal, but also regarded as “serious crime”<sup>13</sup>, whose seriousness is usually “determined by the minimum sentence which a person could receive if convicted of the crime”<sup>14</sup>. Other countries, on the other hand, require a demonstration that the conduct constitutes an extraditable crime, such as those listed in the same treaties. Although the requirements of this principle are not always crystal clear, in the last century, the permissive trend has taken place, also because of the increasing in the international crimes such as drug trafficking and terrorism, which added a new urgency to allow extradition whenever possible<sup>15</sup>.

Although the double criminality requirement was established primarily to protect the individual's liberty, in the absence of a positive law without a fair process and to protect the basic human rights, double criminality is often considered a major obstacle for cooperation and many scholars think that it is no longer necessary. An example may be the European Arrest Warrant, that will be analysed in detail in chapter 3, which does not require double criminality concerning various crimes, among which there are the “crimes within the jurisdiction of the International Criminal Court”, and the Nordic States, that, after a long past of judicial and political cooperation, and having similar judicial systems, did not adopt the double criminality requirement even before the

---

12 R. CRYER, *An Introduction to International Criminal Law and Procedure*, Cambridge, p. 89.

13 See art. 22, par. 2, Treaty between United States of America and the federal Republic of Germany Concerning Extradition, June 20 1978. (hereinafter “Germany International Extradition Treaty with the United States”)

14 R. CRYER, *op.cit.*, p.89.

15 J.O. HAFEN, *International Extradition: Issues Arising Under the Dual Criminality Requirement*, 1992, p. 197.



European Arrest Warrant <sup>16</sup>.

In addition, a further requirement to conform to this principle concerns time. The temporal aspect, established by the House of Lords in the Pinochet case<sup>17</sup>, concerns the obligation to meet the double criminality principle at the time of the offence and not only at the time of the extradition request<sup>18</sup>.

Another limitation to cooperation through extradition may be the application of statutory limitations, such as the European Extradition Convention of 1957<sup>19</sup>, which allows statutory limitations as grounds for refusal, such as the possibility to refuse extradition of nationals. It is possible to talk about limitations, since the Convention is binding for all the signatories, creating an obligation at the international level.

One of the fundamental principle of national and international law is the prohibition of double incrimination, commonly known as *ne bis in idem*. In particular for criminal law, this principle puts in act a strong intervention that promotes the pure concept of justice and, at the same time, it values the human being, trying to preserve its guarantees. A recognised definition of *ne bis in idem* can be found in the European Convention on Human Rights, article 4 protocol 7, signed the 22<sup>nd</sup> November 1984<sup>20</sup>, according to which “ No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.”<sup>21</sup>. The first problem of interpretation is the definition of “criminal proceeding”, to which the Strasbourg Court firstly applied the Engel criteria<sup>22</sup>: the first aspect to analyse is the qualification given by the national juridical system to the contested offence; secondly, the substantial nature of the offence, namely if the offence consists of a “violation of a norm that protects the functioning of a certain social formation” or if it is placed before the *erga omnes* protection of collective juridical goods; finally, the *a*

---

16 R.CRYER, *op.cit.*, Cambridge, p. 89

17 Decision of the House of Lords, 1998, n. 3 WLR 1456, *R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte*.

18 R.Cryer, *op.cit.*, Cambridge, p. 90.

19 European Convention on extradition, Paris, November 13 1957.

20 See art. 4, prot. 7, *European Convention on Human Rights*, November 4 1950. (hereinafter ECHR)

21 *Ibidem*.

22 Sentence of the European Court of Justice, June 8 1976, § 82, series A n. 22 (3), appeal n.18640/10; case *Grande Stevens v. Italy*.

*priori* degree of strictness of the sentence risked by the accused. In case the single criterion could not allow the court to arrive to a decision, these criteria may be used cumulatively<sup>23</sup>. In addition to the interpretation problem, the main issue concerning this principle is admissibility of two proceedings of different nature for the same offence, for example one criminal and the other administrative, partly solved by *Sergey Zolotukin vs. Russia*<sup>24</sup>. In that decision, the ECHR Grand Chamber decided that it is not necessary anymore to compare the particular case, so its criminal or administrative nature, but to refer to the historical-naturalistic fact. In *Lucky Dev v. Sweden*, 27<sup>th</sup> November 2014, the ECHR specified that the article 4 of the protocol 7 does not prohibit the contemporary opening and execution of parallel proceedings for the same fact, but the only aspect possibly subject to sanction would be the missed interruption of the other proceeding once one of them is definitive<sup>25</sup>. Furthermore, regarding the concept of “same offence”, the Court, in many different sentences, stated that “the Court took the view that Article 4 of Protocol 7 had to be understood as prohibiting the prosecution or trial of a second offence in so far as it arose from identical facts or facts which were substantially the same. It was therefore important to focus on those facts which constituted a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which had to be demonstrated in order to secure a conviction or institute criminal procedure”. This principle has two different dimensions, that sometimes clash: the internal and external dimension. The national conception and interpretation of the *ne bis in idem* principle does not always correspond to the international meaning given to it. An example, concerning Italy internal interpretation against the international dimension of the

---

23 Sentence of the European Court of Human Rights, November 23 2006, application n. 73053/01, case *Iussila v. Finland*.

24 Sentence of the European Court of Human Rights, June 7 2007, application n. 14939/03, case *Sergey Zolotukhin v. Russia*.

25 In June 2004 tax proceedings were instituted against Ms. Lucky Dev by the Swedish Tax Agency, which found that her husband and she evaded about 83,000 euros and the VTA of 41,000 euros. For these reasons she was condemned to pay a surtax of respectively 20 and 40 %. During the same year, another criminal proceeding started, that condemned Ms Lucky to 160 hours of community service for having incorrectly filled out the accounting registers and absolved her from the crime of fiscal fraud. The two trials proceeded together: the criminal one was definitive in January 2009, while the administrative in October of the same year. At the end, the Grand Chamber of the ECHR condemned Sweden for a violation of the *ne bis in idem* principle, because the administrative proceeding was not interrupted after the criminal one was concluded .

Sentence of the European Court of Human Rights, November 27 2014, appeal 7356/10, case *Lucky Dev v. Sweden*.

principle, may be found in a sentence<sup>26</sup> of the Italian Court of Cassation, in a case where the Italian juridical system had to apply the international *ne bis in idem* to a foreign citizen for crimes committed in national territory. According to the Court of Appeal, the accused could not be put on trial for crimes already judged by the court of his own country, according to the international *ne bis in idem*. The Court of Cassation, on the contrary, stated that the principle in object can be considered as a tendencial principle that inspires and guides the international system, but, having an exclusively contractual nature and not being customary, it can be applied only in a general way. Thus, the international *ne bis in idem* has limited application in the internal system, unless it is part of specific treaties. According to this interpretation, the Cassation ruled against the Court of Appeal and proceeded with the trial<sup>27</sup>.

### **I.2.2. The doctrine of specialty**

The doctrine of specialty has always been used as a protection against the misuse of extradition processes. The term comes from the French word “spécialité” and it refers to the principle according to which an individual, who has been extradited, may be prosecuted, tried or detained by the requesting state exclusively for the offences expressly included and stated in the extradition request. The already cited above United Nation Model Treaty on Extradition contains a specific clause about the doctrine of specialty : “A person extradited under the present Treaty shall not be proceeded against, sentenced, detained, re-extradited to a third State, or subjected to any other restriction of personal liberty in the territory of the requesting State for any offence committed before surrender other than:

- (a) An offence for which extradition was granted;
- (b) Any other offence in respect of which the requested State consents. Consent shall be given if the offence for which it is requested is itself subject to extradition in accordance

---

<sup>26</sup> Sentence of the Court of Cassation, July 8 2014, n. 2966/14

<sup>27</sup> M. CASTELLANETA, *Il ne bis in idem non è un principio generale di diritto*, in Marinacastellaneta.it, August 5 2014, available *online*.

with the present Treaty”<sup>28</sup>.

The European Convention on Extradition of 1957, prohibits states to process an extradited individual “for any offence committed prior to his surrender other than that for which he was extradited, unless the sending state consent”<sup>29</sup>, or, as the Inter-American Convention on Extradition<sup>30</sup> likewise states an individual extradited under the Convention shall not be tried “for an offence, committed prior to the date of the request for extradition, other than that for which the extradition has been granted”<sup>31</sup>, at least without the consent of the requested state.

M.Cherif Bassiouni explained the reasoning behind this doctrine in some points:

- The requested State could have refused extradition, if it knew that the individual would be prosecuted or punished for an offence other than the one for which it granted extradition.
- The requesting State did not have *in personam* jurisdiction over the extradited, if not for the requested State’s surrender of the latter.
- The requesting State could not have prosecuted the offender, other than *in absentia*, nor could it punish him or her without securing that person’s surrender from the requested State.
- The requested State would be using its processes in reliance upon the representations made by the requesting State.<sup>32</sup>.

The exceptions may be in case the accused himself agrees and gives his consent to stand trial for the additional or subsequent accuses or the requested state gives consent to a formal request by the requesting state. The refusal by the Surrendering state may impair other principles discussed above, such as the principle of double criminality, and it may indicate an abuse of power. So, since there are limited coded safeguards concerning both the subsequent charge of an extradited individual and the refusal by the requested state, the specialty doctrine works as both as a legal protection for the accused and for the treaties signed among states and as a powerful political tool in the hands of

---

28 See art. 14, U.N. Resolution A/RES/45/116, December 14 1990.

29 See art. 14, European Convention on Extradition , 359 U.N.T.S. 273, December 13 1957.

30 Inter-American Convention on extradition, 1752 U.N.T.S. 191, February 25 1981.

31 See art. 13, Inter-American Convention on Extradition, Feb. 25, 1981, 1752 U.N.T.S. 191;

32 M.C. BASSIOUNI, International Extradition and World Public Order, Chicago, 1974, p. 353-354.

the surrendering states.

### **I.2.3 Political and military crimes**

A further international law principle fundamental for extradition is the political offence exception, according to which the requesting state may refuse to extradite an individual if it believes that he will be prosecuted for an offence that it regards as political, or for offence connected to political motives. The principle is stated in many international treaties, such as the United Nations Model Treaty for Extradition, the 1957 European Convention of Extradition or the 1981 Inter-American Convention. As explained in the first part of the chapter, the first cases of extradition concerned political refugees around Europe, so, until the nineteenth century the political nature of crimes did not constitute an exception, but a regular practice. In the nineteenth century, however, the European countries allowed citizens to rebel and protest against their governments, granting asylum to those whose rebellion failed. Belgium was the first country to put in act the refusal to extradite political offenders in 1833 and France followed one year after. Furthermore, Belgium was one of the first to define the concept of “political offence”. During the 20<sup>th</sup> century, the scope of the principle narrowed its range, influenced by communism and fascism and, after the two World Wars, by the great number of extradition and asylum requests by individuals politically persecuted. The European Convention on the Suppression of terrorism<sup>33</sup>, designed to facilitate the extradition process for those individuals accused of act of terrorism, was the most successful one. In its first article, there are the offences that could not be considered as “political offences”, such as:

- c) a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents;
- e) an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons;
- f) an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence.

---

<sup>33</sup> European Convention on the Suppression of Terrorism, Council of Europe, E.T.S. n. 90, January 27 1977.

But also new offences, such as:

- d) an offence involving kidnapping, the taking of a hostage or serious unlawful detention;

Article 13, however, leaves the right to make reservations concerning Article 1 to the contracting states.

The implementation of the European Arrest Warrant<sup>34</sup> excluded the exception of the political offence for the European countries.<sup>35</sup>

Due to the current debate on terrorism and the changes in the political arena, the concepts of political crime underwent divers influences, there is not a unique definition of “political offence”, but there is a distinction<sup>36</sup>:

a) Pure political offence

b) Relative political offence

The first refers to the basic definition of “political offence” as an act directed against the security of the state<sup>37</sup>. It does not include ordinary crimes, but espionage, sedition and treason and, since its main target is the government, so the heart of the State itself. These crimes are considered purely political. The second typology could be considered an extension of the pure political offence, when the crime includes an ordinary crime, some of its aspect or when the individual carries them out supported by political ideology.

The combination of pure political offence and ordinary crimes and the degree of involvement of each element is hard to interpret and it is often left to the single state. L.F.L. Oppenheim perfectly defined the problem stating “where as many writers consider a crime, Political, if committed from a political motive other call ‘Political’ any crime committed for a political purpose; again others recognize such a crime only as

---

34 Decision 2002/584/JHA of the Council, June 13 2002, on the European Arrest Warrant and the surrender procedures between Member States.

35 M. FORDE, K. KELLY, *Extradition Law and Transnational Criminal Procedure*. 4<sup>th</sup> edition, 2011, p. 18.

36 M.R. GARCIA-MORA, The nature of political offences: a knotty problem of extradition law, Virginia, November 1962, p. 1226-1257.

37 M.R. GARCIA-MORA, op. Cit., citing U. GROTIUS, *De Jure Belli ac Pacis Libris Tres*, 1<sup>st</sup> edition, 1625.

political as was committed both from a political motive and at the same time for political purpose; and thirdly some writers confine the term 'Political Crime' to certain offences against state only such as high treason etc. Up to present day all attempts to formulate a satisfactory conception of the term have failed". So today, International Law leaves up to the States deciding according to their own municipal laws and practice whether an offence to which extradition has to be requested is a political crime or not."

38 .

There are, on the other hand, various exception to political offence, such as terrorism, anarchistic offences, war crimes and international crimes.

Terrorism poses a serious question about the interpretation of such offences, since terroristic attacks are usually motivated by a political purpose. To solve this conceptual problem, many treaties regarding terrorism have been instituted. Modern treaties exclude terrorism from the political offences, facilitating the extradition in such cases, for example the International Convention for the Suppression of Terrorist Bombing<sup>39</sup> and the International Convention for the Suppression of the Financing of Terrorism<sup>40</sup>.

Anarchistic offences have been recognised as different from political offence for many years, so they could be used as a motive to request and concede extradition. A proper definition of these offences is given by the Treaty between Brazil and Bolivia 1938, which states that "Criminal Acts which constitute an open manifestation of anarchy or are designed to overthrow the bases of all social organisations shall not be considered as Political offence". The main difference between political criminals and anarchists is that the first move against a government lacking democratic and constitutional aspects and basic rights, while the latter do not pay attention to the type of government or its issues, but their aim is to overthrow it no matter what.

After Second World War, one of the main goals of the international community was to define war crimes and sentence the major war criminals. A 1946 resolution of the

---

38 K. K. PANDA, *A Text Book of International Law*, Delhi, 1998.

39 Resolution A/RES/52/164 of the General Assembly of the United Nations, May 23 2001, International Convention for the Suppression of Terrorist Bombing.

40 Resolution A/RES/54/109 of the General Assembly of the United Nations, December 9 1999, International Convention for the Suppression of the Financing of Terrorism.

United Nations, all States were urged to arrest war criminals and to “cause them to be sent back” to the countries in which the abominable deeds were done, in order that they may be judged and punished according to the laws of those countries<sup>41</sup>. For example, the Genocide Convention of 1948 prohibits the states to qualify genocide and related crimes as political offences for the purpose of extradition, urging States to concede extradition.

In addition, Article 8 of the 1998 Rome Statute of International Criminal Court lists the crimes considered “war crimes”, as acts against the persons or property, biological experiments, extensive destruction and appropriation of property, deprivation for a prisoner of war of the rights of fair and regular trial, unlawful deportation or transfer or unlawful confinement, taking of hostages, etc.

Another category of offences, that are committed during war time in violation of humanitarian laws, was excluded by the political offence category: the war crimes. They includes genocide, piracy, hijacking, counterfeiting, slavery, international traffic, discrimination etc. Unfortunately, as the other political offences and their exceptions, even this category is hard to define, due to a lack of codification in the international criminal law.

Summarizing and having evaluated various exceptions to the political offence concept, it is possible to exclude their aspects, in order to obtain some characteristics that help to identify political crimes, as the desire to challenge the State, and its action is proportional to the aim.

#### **I.2.4 The prohibition of extradition in case of torture, inhuman and degrading treatments or discriminatory acts.**

In the aftermath of World War II, human rights became fundamental in the development of international law. Not all human rights are considered as an obstacle for extradition,

---

<sup>41</sup> See chap. 13, United Nations Year Book n. 66, 1946-47.



but some of them, like torture, represent an “absolute bar”<sup>42</sup>. The latter is intended as a protection for individuals against severe physical and psychological distress and suffering, by governments’ agents aimed at obtaining information or inflicting punishment.

The prohibition on torture is considered as *jus cogens* and as a general principle of international law, binding *erga omnes*, so for all the states of the international scene, not just for those which signed specific treaties regarding this matter. On the other hand, cruel, inhuman or degrading treatments are prohibited under international norms that deal with torture, but involve a lower level of suffering.

In 1948, the Universal Declaration of Human Rights<sup>43</sup> adopted by the General Assembly condemned torture and other cruel, inhuman or degrading treatments, then further codified in the 1975 Declaration on the protection of All persons from Being Subjected to Torture and Other Cruel, inhuman or degrading Treatments or punishment<sup>44</sup>. Its implementation is controlled by an *ad hoc* commission, namely the Committee Against Torture. The declaration itself recognises torture in article 1 as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Minimum Standard Rules for the Treatment of Prisoners” and, furthermore, “Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.”. Article 3 states that countries could not invoke the threat of war, internal political instability or other public emergencies to justify the use of torture and other cruel, inhuman and degrading treatments and punishments.

In 1984, the United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatments or Punishments<sup>45</sup>, commonly known as CAT, defined torture from a legal point of view: “any act by which severe pain or suffering, whether physical

---

42 V. STEFANOVSKA, Human Rights Exception To Extradition Regarding The Risk Of Torture, in Cambridge International Law Journal, January 18, 2017, available *online*.

43 U.N. General Assembly Resolution A/217, December 10 1948

44 U.N. General Assembly Resolution 3452/30, December 9 1975.

45 U.N. General Assembly Resolution 39/46, December 10 1984.

or mental, is intentionally inflicted on a person for such purposes as obtaining from him, or a third person, information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in, or incidental to, lawful sanctions”<sup>46</sup>.

Taking this definition as a reference, it is possible to underline three main aspects that constitute torture:

1. the intentionality in inflicting severe pain or suffering
2. the specific purpose, such obtaining information, unimposing or to discriminate
3. the instigation of or the consent of State authorities <sup>47</sup>.

When an individual denounces the use of torture, he must document and report the abuse. In the absence of compliance with one of the criteria above, the victim has the possibility to show the presence of cruel, inhuman and degrading treatments, which is easier, since they do not require a specific rationale behind them, but only a minimum level of severity<sup>48</sup>.

It is possible to find references to torture also in the Rome Statute of the International Criminal Court, 1998, where this act is considered a “crime against humanity” or “war crime”<sup>49</sup>, and the cases concerning it fall under the International Criminal Courts jurisdiction.

---

46 U.N.H.R. Resolution 39/46, December 1, 1984, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1. (hereinafter CAT).

47 J.M. BERNSTEIN, Torture, in Politicalconcept.org, available *online*.

48 Decision of the European Court of Human Rights, application n. 5320/71, 1978, *Ireland v. The United Kingdom*.

In *Ireland v. The United Kingdom*, the European Court of Human Rights listed **factors to be taken into account in determining the severity** of treatment, including the age, sex, and state of health of the victim. The Court also examined certain methods of interrogation, none of which were found to cause acute physical injury, finding that forcing detainees to remain in stress positions for periods of time, subjecting them to noise and depriving them of food, drink and sleep amounted to ill-treatment, but refusing to find that the treatment amounted to torture. The case stresses the applicability of the prohibition, even **in cases involving terrorism and public danger**.

49 See respectively art. 7, letter (f), art. 8, letter (a) and (f), *Rome Statute of the International Criminal Court*, 17 July 1998. (hereinafter: “Rome Statute”)

Regarding extradition and its connection to torture and cruel, inhuman and degrading treatments and punishments, there are numerous cases in which torture and the other treatments had been used as a reason to refuse extradition for many years. One of the most influential one is the case of *Soering v. the United Kingdom*<sup>50</sup>. The case represents a milestone for the following cases and, in general, for international law, since, for the first time, the ECtHR, referring to Article 3<sup>51</sup> of the 1950 ECHR, recognised the responsibility of a State for having extradited a person subjected to serious risks of the mistreatments in question.

In some cases, the breach of Article 3 takes place at the moment of the request of extradition, so before the acceptance by the requested state, and, in others, after the formal acceptance of such request. One of the most known, cases concerning the second scenario, is the *Amekrane* case, in which a Moroccan officer, fled from Morocco to Gibraltar after a failed coup, was returned to Morocco by the British authorities. The officer was tortured and executed, even if the British government received guarantees about his treatments.

---

<sup>50</sup> Resolution of the European Court of Human Rights n. 14038/88, 1989, *Soering v. United Kingdom*.

Jens Soering is a German national, who at the time of the alleged offence was a student at the University of Virginia. He and his girlfriend were wanted in Bedford County, Virginia, USA for the murder of his girlfriend's parents. The couple disappeared from Virginia in October 1985, and were later arrested in England in April 1968 in connection with cheque fraud. Soering was interviewed by Bedford County police in the UK, which led to his indictment on charges of capital murder and non-capital murder. The USA commenced extradition proceedings with the UK under the terms of the Extradition Treaty of 1972, between the USA and UK. Mr Soering applied to the European Court on Human Rights (ECtHRs) alleging the breach of Article 3, Article 6 and Article 13 ECHR.

<sup>51</sup> See art. 3, section 1, *European Convention on Human Rights*, November 4 1950.

“Prohibition of torture : No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”.

## **II. Domestic instruments and competent authorities**

### **II.1. Domestic instruments**

After the analysis of the main international law principles in the first chapter, the present one will scrutinize the legislation that guides and supports Italy and Brazil in the extradition process. Both countries have a constitution that regulates the status of the foreign citizen and specific laws and statutes that codify their rights and duties, under the domestic juridical system, namely the Italian Criminal Law and Procedure and the Brazilian Statute of the foreigner.

#### **II. 1. 1 Italian Constitution**

In addition to international law principles, Italian law on extradition is regulated by the Italian Constitution, in particular in article 10 of the fundamental principles and article 26 and 27 of Title I, Part 1, among the rights and duties of the citizens.

Article 10 states:

“The Italian legal system conforms to the generally recognised principles of international law. The legal status of foreigners is regulated by law in conformity with international provisions and treaties.

A foreigner who, in his home country, is denied the actual exercise of the democratic freedoms guaranteed by the Italian constitution shall be entitled to the right of asylum under the conditions established by law.

A foreigner may not be extradited for a political offence”<sup>52</sup>.

In the first paragraph, the founding fathers referred to those international norms with a general range of effectiveness, that have an automatic recognition and application in the Italian juridical system. Furthermore, Italy commits to applying these norms, not to adopting international laws in contrast with these principles and to ratifying international treaties that respect them.

The legal status of foreigners in Italy, subject of the second paragraph, is regulated by the so-called Turco-Napolitano law<sup>53</sup>, law n. 40/1998, then integrated in the legislative decree n. 268/1998<sup>54</sup>, in which Italy codifies duties and rights of the foreign citizens. The law regulates

---

<sup>52</sup> See art. 10, part 1, Italian Constitution, January 1 1948.

<sup>53</sup> See L. March 6 1998, n. 40.

<sup>54</sup> D. lgs. , July 25 1998, n. 268, Testo unico sull'immigrazione.

the immigration flow and the its management, the conditions and the rights of immigrants. Before 1998, the two aspects were parted into two different laws and they were usually motivated by emergencies. However, the most effective aspect of the law is its general applicability throughout a wide spare of time, since it is in compliance with international law general principles. As Celina Frondizi said, “These two qualities, the coherence in the phenomenon legal framework and the non circumstantial configuration of the normative structure, allow to affirm that law n.40 ratifies the polyvalent structure and ordinariness of the immigration phenomenon in our country too”<sup>55</sup>.

As specified in article 1, the law may be applied exclusively to extra-European immigrants and stateless people, since European citizens are contemplated in the Schengen Agreement<sup>56</sup>. The above cited law postponed the regulation of the entrance and eventual expulsion of illegal immigrants to a future law, that would be conceived four years later. In 2002, the Bossi-Fini<sup>57</sup> law provided for the expulsion, by the provincial prefect, of illegal immigrants. The latter, found without any valid documents at the border, are transferred to temporary permanence centres, instituted by the 1998 law, cited above, in order to be identified. The residency permit is granted to those immigrants who demonstrate to have a permanent and stable job or a sufficient income for their economic nourishment<sup>58</sup>. To this general rule, it is possible to add special residency permits and those applicable to the asylum right. The norm acknowledges the eventual refusals of the origin State in extraterritorial waters, accordingly to bilateral treaties among Italy and contiguous states, that commit the Police services of those countries to cooperating to prevent illegal immigration<sup>59</sup>.

The last paragraph states that Italy does not contemplate extradition for political crimes. It refuses to extradite, so to send a citizen back to his origin country, if he is requested for political crimes committed in opposition to anti-democratic regimes, that apply persecutory politics against human rights. Genocide and terrorism are excluded from the category of political crimes, in whose case extradition is admitted for both foreigners and citizens.<sup>60</sup>

Article 26, included in the Title I, Part 1, states:

“Extradition of a citizen may be granted only if it is expressly envisaged by international

---

55 C. FRONDIZI, *Nuovi diritti di cittadinanza Immigrati*, Roma 2000, p. 9.

56 Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, June 14 1985. (hereinafter: Schengen Agreement)

57 L.Cost., July 30 2002, n. 189.

58 BROCARDI, *Disposizioni Articolo 10 Costituzione*, in Brocardi.it, par. 1 and 2, available *online*.

59 *Ibidem*.

60 *Estradizione per i delitti di genocidio*, l. cost. n.1, June 21 1967.

conventions. In any case, extradition may not be permitted for political offences”.

The first comma was approved by the Assembly, after Camillo Corsanego, member of the Constituent Assembly and of the first legislation with Christian Democracy, underlined these motives to prohibit extradition: the right of protection for citizens internal and external to national borders, the high chance of discrimination of an Italian citizen from the judicial authority of a foreign country and the existence of legislations opposite to the Constitution of the Italian Republic's principles, such as the death penalty in many foreign countries<sup>61</sup>. After the insistence of Giuseppe Bettiol, Giovanni Leone and Lodovico Benvenuti, all members of Christian Democracy, the Assembly approved also the second paragraph of the article, which expressively prohibits the extradition for political offences. Bettiol later explained “Who is the most natural judge, if not the national judge? (...) Our judge has a different sensibility then the one of a judge living in another season, another social and political situation”<sup>62</sup>.

The article refers exclusively to passive extradition and not to the active form. It safeguards Italian citizens with the institute of constitutional guarantee, which prohibits extradition for political offences, envisages extradition just in those cases in which the Italian State signed an agreement with another State, in order to guarantee the reciprocity of treatment requested by other states. Furthermore, extradition can't be granted for those countries whose set of rules includes punishments that cannot be inflicted in Italy, especially in case of death penalty, as article 27 states<sup>63</sup>.

Article 27, in Title I, Part 1, claims:

“Criminal responsibility is personal.

A defendant shall be considered not guilty until a final sentence has been passed.

Punishments may not be inhuman and shall aim at re-educating the convicted.

Death penalty is prohibited”.

The first paragraph was approved since all the founding fathers had in mind the reprisals put in act by the fascist regime against innocent people and their goods, or the persecution of alleged political criminals' relatives, namely everyone who opposed to the regime. In the second paragraph, the Assembly wanted to restore all the guarantees annulled by the regime with the 1930 Criminal Code. Regarding the third paragraph, its meaning was illustrated by the *On. Umberto Tupini*: “(...) the society must not give up to every effort, mean, in order that who fell in the tangles of justice, that has to be judged, that has to be condemned, after the sentence can

---

61 BROCARDI, *Disposizioni Articolo 26 Costituzione*, in Brocardi.it, par. 1 and 2, available *online*.

62 F. CALZARETTI, *Nascita Costituzione*, art. 26, available *online*.

63 See art. 27, par. 4, Italian Constitution, January 1 1948.

offer the the possibility to re-education”<sup>64</sup>. The last comma was approved with unanimity to permanently exclude death penalty from the Italian judicial system.

## II. 1.2 Italian Criminal Law and Criminal Procedure

The 1930 Italian Criminal Code<sup>65</sup>, which takes its name from Alfredo Rocco, the Minister of Justice under Mussolini's regime, is one of the main sources of criminal law, in addition to the Italian Constitution and special laws. In the aftermath of the World War I, Italy felt the need to codify specific laws to control and fight common crimes, such as juvenile crimes, so Rocco presented a draft law, together with a commission of numerous lawyers, judges and professors, among who there was Arturo Rocco, Alfredo's brother and criminal law professor at University of Sassari. According to him, criminal law must exhaust itself in the “criminal juridical relation”, which means in the study of “ the subjective right and duty that derives from the juridical discipline of that fact called crime and of that social and political fact called penalty”.<sup>66</sup>

Article 13 of the Italian Criminal Code states:

“Extradition is regulated by Italian Criminal law (...), by conventions and international customs.

Extradition is not admitted, if the fact object of the extradition request is not considered a crime by Italian law and foreign law.

Extradition could be conceded or offered, even for crimes not envisaged in international conventions, as long as they are not expressively prohibited by them.

Extradition of the citizen is not granted, unless it is explicitly consented in the international conventions”<sup>67</sup>.

The first comma refers to the Italian Criminal law of procedure, in which Title IV regulates extradition concerning Italy, both passive and active. The second paragraph concerns the principle of double criminality, explained in the previous chapter, according to which the crime for which the extradition request is made must be illegal and considered a crime in both the Requesting state and the Requested state. To satisfy this principle, it is not necessary that the crime in one state finds the exact correspondent in the other, without the equivalence of the title

---

64 Mondadori, *Articolo 27*, in Mondadorieducation.it , available *online*.

65 Royal d. October 19 1930, n. 1398.

66 A. Rocco, *Il problema e il metodo della scienza del diritto penale*, in *Rivista di diritto e Procedura Penale* p. 596.

67 D.P.R. September 22 1988, n. 447, art. 13.

of the crime of the difference in the final sanction <sup>68</sup>.

The two final paragraphs deal with the limits that prevent extradition from be conceded, such as the individual in question, the type of crime for which extradition is requested and the type of sanction that could be applied in the Requesting or Requested state. For the first limit, it is recognised in the Italian constitution in article 26, which prohibits the extradition if the subject of the extradition is an Italian citizen. The other limits refer to article 10 and 26 of the Italian constitution, which state the prohibition to extradite a foreigner and a citizen for political crimes, as well as the case of death penalty, that is excluded from the Italian juridical system with article 27 of the Italian Constitution.

Italian Code of Criminal Procedure<sup>69</sup>, hereinafter CCP, can be considered the main source of regulation concerning extradition in the Italian law system. It deals primarily with general territorial competences, in article 8, and in particular with extradition Title II and Title IV, Book XI.

Article 8 of the CCP declaims:

“The territorial competence is determined by the place where the crime is committed. If the fact caused the death of one person or more, the competent judge is the one from the place where the crime or the omission is committed. If the crime is permanent, the competent judge is the one from the location where the consummation started, even if the fact caused the death of one person or more. If it is the case of an attempted crime, the competent judge is the one from the place where the last action aimed at committing the crime is committed”<sup>70</sup>.

The article prescribes the general rules regarding the territorial competences and, in particular, it identifies the competent judge that, *ratione loci*, is qualified for the committed crime. The main principle stated in the article is the one according to which the territorial competence is determined by the place in which the crime is committed, namely the *locus commissi delicti* principle<sup>71</sup>. In fact, in the place where the crime is committed is easier to gather proves, especially in case of death of the victim. On the other hand, in case of attempted crime, the competent judge is the one belonging to the territory in which the last action directed to commit

68 “Ai fini della concedibilità dell'extradizione per l'estero, non assume rilievo l'eventuale difformità del trattamento sanzionatorio previsto nello Stato richiedente, potendo l'aspetto sanzionatorio rientrare tra le condizioni ostative alla pronuncia favorevole alla estradizione solo qualora sia del tutto irragionevole e si ponga manifestamente in contrasto con il generale principio di legalità e proporzionalità delle pene”.

See dec. Court of Cassation. n. 121, July 8 2005.

69 D.P.R. September 22 1988, n. 447.

70 See art. 8, Italian Code of Criminal Procedure.

71 See art. 8, par. 1, Italian Code of Criminal Procedure.



the crime takes place<sup>72</sup>.

It is noticeable how article 9 and 10 of the CCP further describe territorial competence too. The first describes the subsidiary criteria applicable to all the cases in which it is impossible or hard to apply article 8. For example, if the place where the crime was put in act is not precise or hard to attest, the competent judge is the one of the residency, abode or domicile of the accused<sup>73</sup>. The second article claims the logic behind the attribution of the territorial competence, pointing to residency, abode and domicile of the accused and, then, to the arrest or delivery place. In case of a plurality of accused individuals for the same crime, the competent judge is the one competent for the majority of them<sup>74</sup>.

When it is not possible to establish the cases cited in the first paragraph, the competent territory is the one where the first judge has registered the notice of crime in the register provided by article 335 of the Procedural Criminal Code<sup>75</sup>.

Title II is divided into two parts: passive extradition from article 697 to article 719 of the CCP, where Italy is the Requested state, and active extradition from article 720 to article 726, Italy as the Requesting state.

At the beginning, article 696 dictates two fundamental principles for the relationship with foreign authorities: the principle of prevalence and the principle of subsidiarity. The first states the priority given to international conventions and the general international law sources, as article 10 and 117 of the Italian Constitution recognise. The second provides for a sort of plan b in case the international sources cited above were deficient or “arrange differently”<sup>76</sup>.

In Title II, the most technical part begins. Extradition is defined, according to two international law principles, the double criminality and the specialty doctrine, and it explains that for European citizens the European Arrest Warrant is in act<sup>77</sup>. The criteria that the Minister of Justice must follow, in case there are contemporary requests of extradition to establish a precedence order, are required by the single cases, but they usually concern the data of the request, the degree of seriousness of the crime, the location, the nationality and residency of the accused and a possible extradition to a third state<sup>78</sup>.

In the following article, 698 of the CCP, the code further explains the exception of political

---

72 See art. 8, par. 4, Italian Code of Criminal Procedure.

73 G. SPANGHER, *Codice di procedura penale ragionato*, II edition, 2014, pag. 9 and 10.

74 “It has been often contested since it does not take into account the real contribution of the accused in the crime” cit. in F.CORDERO, *Procedura Penale*, IX edition, 2012, p. 86.

75 G. SPANGHER, *op. cit.*, p. 11.

76 See art. 696, par. 2, Italian Code of Criminal Procedure.

77 L. April 22 2005, n. 69, .

78 See art. 698, par. 1, Italian Code of Criminal Procedure.

crimes and it focuses on the clause of non discrimination, in all those cases in which the extradited person runs the risk of being discriminated and persecuted for motives of race, religion, gender, nationality, language, political opinion, personal and social conditions, namely degrading, cruel and inhuman punishments and sanctions, that violate in any case personal fundamental rights.

The specialty doctrine is treated in article 699 of the CCP, at the end of which the code explains the double *ratio* contained in the doctrine: on the one hand, it represents a form of protection for personal freedom of the individual against possible persecutory acts, especially from State authorities; on the other hand, it constitutes a guarantee for the sovereignty of the state, in particular in criminal matters and to easily identify asylum right.<sup>79</sup>

Article 701 of the CCP is fundamental, since it states that, in order to be guaranteed, the extradition request needs to obtain the consent of the Appeal Court, so after the so-called “jurisdictional guarantee”. However, there is an exception, in case the accused gives his consent to the extradition request. The expressed consent needs to be given written or orally, in front of his advocate, the Attorney General in the Appeal Court or its President.

The following article concerns<sup>80</sup>, in case of reciprocity, the possibility for the Requesting State to intervene during the proceeding, represented by a legal advisor enabled by the Italian jurisdictional authority.

Article 705 of the CCP, first comma, regards the conditions for the final decision to be taken: in case of absence of an international convention or treaty, the Appeal Court grants extradition if there are serious guilt evidences and, if the crime in question has not been already object of a trial with final permanent sentence. On the contrary, the Court pronounce adverse sentence to the request if :

“(a) or the crime object of the extradition request, the person underwent a trial that does not respect the compliance with fundamental human rights<sup>81</sup>;

(b) the sentence for which the extradition request was submitted contains dispositions contrary to the fundamental rights of the State's juridical system;

(c) there is reason to believe that the accused will be put through the acts, sufferings and treatments stated in article 698, comma 1”.

Article 706 and 707 of the CCP respectively deal with the possibility of appeal and the renewal of the request. The first admits the possibility to appeal to the Court of Cassation, by the accused, his advocate or the Attorney General or a delegate of the Requesting State. The second

---

79 G. SPANGHER, *op. cit.*, p. 756.

80 See art. 702, Italian Code of Criminal Procedure.

81 See art. 698, par. 1, Italian Code of Criminal Procedure.

one admits the renewal of the request only in case there are new elements, concerning the precedent fact, that were not evaluated in the first sentence.

Article 708 and 709 of the CCP are the most practical ones concerning passive extradition, since they explain how the effectively delivery works: in case of positive final sentence by the Court, the Minister of Justice has forty-five days to decide, after which, in case of missed or negative decision, the accused is free <sup>82</sup>, whereas in case of positive decision by the Minister, he must communicate the effective place and time of the delivery and the eventual restrictions of personal freedom. The time of delivery is fifteen days, to which it is possible to add twenty additional days, if requested by the requesting State<sup>83</sup>. If after these days, the requesting State does not proceed with the take delivery of the accused, the latter is free <sup>84</sup>.

Article 709 of the CCP explains the suspension of extradition, in case the extradited must expiate a sentence in the Requested State, for crimes committed before or after those object of the extradition request. However, the Minister of Justice can temporarily deliver the accused to the other state, deciding about the conditions and means to make it happen. Furthermore, according to comma 2 of the same article<sup>85</sup>, the Minister can also agree that the sentence is directly expiated in the requesting State.

The extension and a new extradition request are object of article 710 and 711 of the CCP. The first conceives the possibility, for the Requested State, to extend the extradition for another accuse or penal proceeding for an anterior or different fact from the one object of the previous request, for which the procedure is the same illustrated above and in the following paragraph. The second article in question admits the re-extradition, according to which the requesting state asks for the extradition of the accused to a third state to proceed with the sentence. There are some cases in which the requested State, in this case Italy, can temporarily arrest<sup>86</sup> the accused, if the requesting State declares that there is already a restrictive proceeding for the subject, whose request must be supplied by written description of the facts, the accuse and the exact identification of the person, and if there is risk of escape<sup>87</sup>.

From article 720 to article 726, the Code of Criminal Procedure explicates active extradition, namely when Italy is the requesting State asking for the extradition of an Italian citizen from another country, in order to put him before trial, processual extradition, or to execute a sentence,

---

82 See art. 708, par. 2 and 3, Italian Code of Criminal Procedure.

83 See art. 708, par. 5, Italian Code of Criminal Procedure.

84 See art. 708, par. 6, Italian Code of Criminal Procedure.

85 See art. 709, par. 2, Italian Code of Criminal Procedure.

86 "If, after ten days, the Minister of Justice does not request the observance, the restrictive measure is revoked. The latter is also revoked if the Court of Appeal, of Cassation of the Minister of Justice decide so" See art. 716, comma 4 and article 718, Italian Code of Criminal Procedure.

87 See art. 715, comma a b and c, art. 716, Italian Code of Criminal Procedure.

executive extradition. The main role is played by the Minister of Justice, with the assistance of the Attorney General and the competent Appeal Court. Due to the political nature of such procedure and the delicacy of international relations among states, the Minister's role has a more administrative rather than juridical dimension<sup>88</sup>.

The detention order, following an extradition request, illustrated by article 722 underwent divers changes throughout time<sup>89</sup>, but in 2004 the Constitutional Court intervened to declare the original article unconstitutional in the section dealing with the maximum terms of the detention abroad, different from the ones required in case of passive extradition<sup>90</sup>. After such *dictum*, there is now a perfect congruence between the national and abroad detention due to extradition.

The following articles<sup>91</sup> of the CCP concern the so-called letters rogatory, or letters of request, conceived as a form of assistance between juridical authorities in different states, in particular aimed at communicating any procedure, notification or transmission of material. It can be both passive or active, depending on the role of the concerned country and it is regulated by the norms of international law. The practical function of these letters is clarified in article 725 of the CCP, in which the Court designates one of its component, the judge for the preliminaries investigations. In the second comma of the same article<sup>92</sup>, the Code requires the application of the norms included in the same, at least if there is not an explicit request from the foreign State, as long as in compliance with the Italian juridical system.

In the last article of this section, the Code states that, in case the Requested State asks for the writ of summons for one or more witnesses citizens or resident in the Italian territory, it is the Attorney of the Republic competent in that territory that has to notify such request<sup>93</sup>.

Before starting to analyse how extradition works in Brazil, it is worth-mentioning Title IV of the Code of Criminal Procedure, concerning the validity of penal sentences in a juridical system that is not the one that issued it.

At the moment, there is not a general international principle that deals with the values of these sentences, but, on the contrary, every single State has its own regulation, giving to relations among states a fragmentary nature. The Criminal code deals with the recognition of foreign

---

88 G. SPANGHER, *op. cit.*, p. 726

89 L. June 8 1992, n. 360.

90 Decision of the Constitutional Court n. 253, July 21 2004.

91 See from art. 723 to art. 729, Italian Code of Criminal Procedure.

92 See art. 725, par. 2, Italian Code of Criminal Procedure.

93 "In case the Requesting state does not directly notify through postal service the request to the witness, it is the Minister of Justice that notifies it to the territorial Attorney" cit. in art. 726 bis, Italian Code of Criminal Procedure.

penal sentences in article 12, according to which in comma 3<sup>94</sup>: “In order to apply the recognition, the sentence must be pronounced by the juridical authority of a State that Italy has an extradition treaty with. If it does not exist, the foreign sentence can be equally admitted and recognised from the State, if the Minister of Justice asks for it”, then recalled in article 730, 731 and 732 of the Code of Criminal Procedure, that lists the positive conditions necessary to recognition. On the contrary, article 733<sup>95</sup> formulates the negative ones: “

- a) the sentence is not irrevocable for the laws of the State that pronounced it;
- b) the sentence includes dispositions opposite to the fundamental principles of the State's juridical system:
- c) the sentence was not pronounced by an independent and impartial, when the accused is not cited before a foreign authority, when he doesn't have recognised the right to be interrogated in a language that he can easily understand and to be assisted by an advocate;
- d) there are valid reasons to believe that considerations relative to race, religion, gender, nationality, language, political opinions or personal and social conditions influenced the execution or sentence of the trial;
- e) the fact object of the sentence is not considered a crime by the Italian law;
- f) for the same fact or person the State has already pronounced an irrevocable sentence;
- g) for the same fact or person there is an active trial<sup>96</sup>,”

In article 734, the Code states that it is the Court of Appeal that has the power to recognise a foreign sentence and the same holds for a possible appeal to the Court's decision, comma 2. Article 735 is fundamental in the recognition process, since it explains how to practically execute a foreign sentence in our juridical system. The punishment must correspond in nature to the foreign one, the original duration must not exceed the correspondent in equivalent of Italian penal system and it must be not more serious than the foreign sentence. The Italian State must recognise an eventual suspension and an eventual parole under the same conditions, as stated in comma 4<sup>97</sup> of the same article. Particularly relevant for extradition cases is article 739, where the Code prohibits extradition if a foreign sentence has been recognised and applied by the Italian juridical system, with the exception in case of confiscation. The accused can't be extradited nor put before trial in the State for the same facts, even if they are considered with a “different title, degree and circumstances”.

---

94 D.P.R. September 22 1988, n. 447, art. 12, par. 3.

95 See art. 733, Italian Code of Criminal Procedure.

96 *Ibidem*.

97 See art. 735, par. 4, Italian Code of Criminal Procedure.

### II.1.3 The Brazilian Federal Constitution

In the Brazilian juridical system, extradition is treated by two different sources of law: the Constitution and the Foreigner Statute<sup>98</sup>, substituted by the new law on immigration in 2016<sup>99</sup>.

According to article 22 of the Federal Constitution, the Brazilian State has exclusive competence to legislate on “immigration, emigration, entrance, extradition and expulsion of foreigners”<sup>100</sup>. Concerning extradition, the Constitution differentiates three possible situations of passive extradition request:

1. Passive extradition of a natural born Brazilian
2. Passive extradition of a naturalized Brazilian
3. Passive extradition of a foreigner

In the first situation, it is article 5 of the Constitution to guarantee rights to Brazilian citizens and foreigners in Brazil, as it states:

“Everyone is equal before law, without distinction of any nature, guaranteeing to all the Brazilians and foreigners resident in the State the inviolable right to light, freedom, equality, security, property(...)”.

Of the same article, the subsection LI specifies:

“no Brazilian will be extradited, except the naturalized, in case of common crime, committed before the naturalization, or in case of proved involvement in connected illegal traffic of medicines and drugs, according to the law”.

It is noteworthy that there is absolutely no possibility of conceding extradition for a natural born Brazilian. In regard to this issue, it is the Supreme Federal Court to state that:

“The natural born Brazilian, no matter the circumstances and the nature of the crime, can't be extradited from Brazil, under request of a foreign country, according to the Constitution, in the provision that does not include any exception, impeding, with absolute character, the efficacy of extraditional delivery, following the criteria of the *jus soli*, of the *jus sanguinis* and primary or original Brazilian nationality. This constitutional privilege, that gives benefit, without exception, the born Brazilians<sup>101</sup>, does not misrepresents itself before the foreign State, that, according to

98 L. n. 6.815, August 19 1980.

99 L. n. 2.516, August 8 2015.

100 See article 22, subsection XV, Brazilian Federal Constitution.

101 See art 5, par. LI, Brazilian Federal Constitution.

its law, has recognised the titular condition of original nationality pertinent in the same State<sup>102</sup>”.

In the second case, for the extradition of a naturalised Brazilian, it is fundamental the above cited article 5, subsection LI, of the Federal Constitution that conceives the possibility to extradite a naturalised citizen for crimes committed before the naturalisation and in case of illegal traffic. Note that in the first hypothesis, the common crime there is a temporal requirement of the crime's practical performance, while there is not such request in the second one. As the Supreme Federal Court states, “the naturalised Brazilian may be extradited if he acquired the nationality before having committed the common crime, that is the object of the extradition”<sup>103</sup>.

Another noticeable aspect is the illegal traffic question, that underlined the importance given to the global fight against drugs, particularly acute in Latin America, by the National Constituent Assembly in 1987. Legit point, that, at the same time, arises the question about the lack of such exception for other crimes as harmful for the community as illegal traffic, such as terrorism, human trafficking and corruption.

Regarding the last case, the passive extradition of a foreigner, it is still article 5, subsection LII, that explains: “ it will not be allowed to foreigners for political or of opinion crimes”<sup>104</sup>. This prohibition, already mentioned among the general principles and in the Italian juridical system, takes into account the political pluralism, foundation and fundamental principle of the Federal Republic of Brazil. In relation to the foreigner, the rule is extraditability, with the exception of political and opinion crimes, which is established by the Supreme Federal Court. The latter decided that: “Since the Constitution did not define the political crime, the Supreme Court in the view of the conceptualization of the ordinary legislation, should state if the crimes for which extradition is requested constitute an offence of political nature or not, considering the principle of principality and preponderance”<sup>105</sup>.

The Supreme Federal Tribunal, also, already established that “the protection cause in article 5, subsection LII, of the Constitution of the Republic- that prohibits the extradition of foreigners for political or opinion crimes – does not extend, for this reason, to the authors of other crimes of terroristic nature, considered as the frontal repudiation that the constitutional Brazilian order exempts to terrorism and to terrorists”<sup>106</sup>. Furthermore, it is significant to note the additional

---

102 See art. 12, par. 4, sub. II, lett. A, Brazilian Federal Constitution.

103 Decision of the Supreme Federal Court August 4 2006, 87.219.

104 See art 5, par. LII, Brazilian Federal Constitution.

105 Judgment of the Supreme Federal Court October, 9 1994, n. 615.

106 Judgment of the Supreme Federal Court August 26 2004, n. 855.

confirmation to its decision, when the Supreme Tribunal, “once the intertwining of crime with a political or common nature has been established, it must refuse the extradition”<sup>107</sup>.

Extradition is also one of the object of the so-called Foreigner Statute <sup>108</sup>, proposed by President Figueiredo in 1980<sup>109</sup>. The law defined the jurisdictional situation of foreigners in Brazil, creating a National Council for Immigration and guiding the actualization of the immigration policy of the government, oriented towards the “reduction of the flow of foreigners to the strictly necessary and useful to Brazil's development, in order not to damage national interests with a non-discriminating immigration in Brazil”. In this way only to those who could actively participate in the labour force and economic development of the country, in the levels of qualifications that could not be met by the Brazilian citizens, could be granted the access. In addition to this, it had as goal the international cooperation with other countries, through the means of bilateral treaties.

As Mirto Fraga, one of the first commentaries, explained “ the Brazilian immigration policy is, now, selective; it is focused on the quality more than on the quantity. We do not need people that populate our soil” <sup>110</sup>.

From article 76 to article 94 of the Foreign Statute<sup>111</sup>, the Statute express the circumstances in which passive extradition may be requested and the way in which active extradition is claimed. The main points underlined in the articles are: the reciprocity requirement the *ne bis in idem* principle, the exception of political crimes and death penalty.

Concerning the matters, article 77 lists the cases in which extradition is not granted:

- if the subject is a Brazilian citizen, unless the nationality was acquired before the crime was committed
- the crime for which extradition is required is not considered as such in Brazil
- Brazil is the competent country to rule about the crime
- if for the crime a penalty of less than one year of reclusion is provided
- if the accused has already been charged for the same crime
- if the crime extinguished the prescribed period
- in case of political crime

---

107 Judgment of the Supreme Federal Court December 14 2011, n.994.

108 L. n. 6.815, August 19 1980.

109 Presidential note n. 64, National Congress, September 16 1980, p. 01.

110 M. FRAGA, *O novo estatuto do estrangeiro comentado*, Rio de Janeiro 1985. p. 8.

111 See from art. 76 to 94, L. n. 6.815, August 19 1980.



- if the crime and the accused will be judged by an *ad hoc* Tribunal

In particular regarding political crimes, the third paragraph of the same article<sup>112</sup> explains what the Brazilian juridical system considers as such:

“attacks against Heads of Government and State or any other authority, exactly as acts of anarchy, terrorism, sabotage, kidnap, or who imports propaganda of war and of violent processes with the aim to subvert the social and political order”<sup>113</sup>.

On the other hand, according to article 78<sup>114</sup>, in order to concede extradition, these conditions must be met:

- the territory where the crime was committed and the applicable laws to the accused must be those of the requesting State;
- final sentence of deprivation of freedom, or the prison was authorized but a Judge, Tribunal or competent authority of the requesting State;

If more than one state request the extradition for the same person, it is article 79<sup>115</sup> of the Foreigner Statute to declare that it has precedence the State where the crime was committed. In the second paragraph<sup>116</sup>, it acknowledges the possibility of contemporary requests from different countries, claiming that the State taken in consideration it is the one where the most serious crime, for the Brazilian law, was committed. While, if the crime is exactly the same, it is the first one to have submitted the request that is analysed or the one where the accused was born or has residency. In any case, it is the Brazilian Government that decides. If a bilateral treaty exists, the precedence is granted to the one that includes a specific article or clause concerning the matter.

After that the extradition request is accepted, it is article 91 of the Foreigner Statute<sup>117</sup> to specify the conditions for the effective delivery of the accused:

- the requesting State must not put on trial the accused for crimes committed before the one or ones indicated in the extradition request
- the requesting State must compute the time of prison that, in Brazil, was imposed by

---

112 See art. 77, L. n. 6.815, August 19 1980.

113 See art. 77, par. 3, L. n. 6.815, August 19 1980.

114 See art. 78, L. n. 6.815, August 19 1980.

115 See art. 79, L. n. 6.815, August 19 1980.

116 *Ibidem*.

117 See art 91, L. n. 6.815, August 19 1980.

virtue of extradition

- the requesting State must transform the corporal or death punishment<sup>118</sup> into a sentence of deprivation of liberty
- it must not deliver the accused to a third State
- it must not considerate any political reason, to aggravate the penalty

On the 18<sup>th</sup> April 2017, the Brazilian Senate approved the project on the Immigration Law, which revokes the Statute of the Foreigner, 1980. The text is a modified version, by the House of Deputies, of the original one presented one year before by the Senate itself<sup>119</sup>. While the Statute had as main goal the national security, the new law favours the regularization of foreigners, qualified workers and the guarantee of hospitality to refugees, that today are more than 9 millions<sup>120</sup>. The entrance into force of the law is now in the hands of the President of the Federal Republic.

## **II. 2. Competent authorities, regarding extradition.**

Brazil and Italy have two different procedures, regarding the practical phases of extradition request and delivery. Different are also the powers and responsibilities attributed to different figures of the political system: after all, for both States, extradition is an essentially political act. While there is at least one administrative phase and one jurisdictional phase, the number of the latter is not always the same.

### **II. 2. 1. Italy: the Minister of Justice and the Appeal Court: from article 697 to article 708 and article 720 of the Code of Criminal Procedure**

As anticipated above, the passive extradition procedure in Italy consists of a jurisdictional phase and an administrative one.

The request from the foreign State must be addressed to the Minister of Justice, who, unless he has solid reasons to reject immediately the request or unless the accused himself expressively

---

118 Death penalty is still legal in Brazil, but only in exceptional circumstances, such as crimes committed in times of war, as stated in article 5, par. XLVII, lett. A, Brazilian Federal Constitution.

119 Project of Law of the Brazilian Senate n. 7, July 2016.

120 R. BAPTISTA, I. VILAR, *Projeto da nova Lei de Migração segue para sanção presidencial, Senadonoticias*, April 18 2017, available online.

agrees to be extradited, has to send all the attached documents to the Attorney General of the competent Court of Appeal<sup>121</sup>, as stated in article 703, paragraph 1, activating the first stage of the jurisdictional phase. After the receiving of the relative documents, the Attorney General proceeds with the necessary verifications and he has three months to present his indictment to the Court of Appeal. The latter is filed with the records office, with notice to the accused, his defender and the eventual attorney of the requesting State, in order to let them examine the deeds and present eventual deposition within ten days, as explained in article 703, paragraph 5. At the end of this period, the president of the Court sets the hearing for the sentence, that must be notified to the parts within ten days.

After the judicial hearing, if the final decision is positive for the extradition, the Court, under request of the Minister of Justice, orders the provisional detention. If, on the contrary, the decision is negative, the Court dismisses the detention and proceeds with the eventual restitution of the belongings confiscated<sup>122</sup>. In article 706 of the CCP, the code illustrates the possible scenario of the appeal, which can be proposed through Cassation, even for the matter, by the accused, by his defender, the General Attorney or by the representative of the requesting State.

The administrative phase starts after the accused gave his consent to extradition or after the approval of the Court, in article 708 of the CCP. During this stage, the Minister of Justice discretely decides, “according to evaluations of political-administrative opportunity”, whether to accept or not the request, within forty-five days. It is noteworthy that the representative of the government may reject the request, even if the accused himself gave the consent. The final decision is communicated to the requesting State, indicating the time, place and conditions of the delivery. If, after fifteen days from the fixed date, the requesting State does not proceed with the taking delivery of the accused, the latter is free<sup>123</sup>.

Active extradition is regulated by article 720 of the Code of Criminal Procedure. It is again the Minister of Justice to be competent to request the extradition of an accused or convict to a foreign state, by his own choice or after a previous notice of the competent Attorney General of the Court, where the sentence took place<sup>124</sup>. The Minister may decide to reject the proposal of

---

121 “The competence of the Court of Appeal is assessed, in order, taking into account the residence or domicile of the accused, or the Court that requested the preventive arrest of the accused, the court whose president provided the validation of the arrest. If the competence can't be assigned according to this requirements, it is the Court of Appeal of Rome to be in charge”.

See art. 701, paragraph 4, Italian Code of Criminal Procedure.

122 See article 704, par. 4, Italian Code of Criminal Procedure.

123 *Ibidem*.

124 See art. 720, par.1 and 2, Italian Code of Criminal Procedure.

the Attorney General, or to modify parts of the request presented<sup>125</sup>. In order to proceed with the extradition, the Minister of Justice may also order the research of the accused or convict in foreign territory and ask for his temporary arrest<sup>126</sup>.

The essentially administrative nature of the active procedure is given to the political importance of such request at the international level and the eventual echo of the consequences<sup>127</sup>.

## **II. 2.2. Brazil: the Supreme Federal Court: article 102 of the Brazilian Federal Constitution.**

The extradition process in Brazil includes two administrative phases and a jurisdictional one, in an alternated order. The first stage is administrative or governmental and it starts with the receipt of the request to the Minister of Foreign Affairs. When the Brazilian government does not deny the start of the extradition procedure, the decision passes to the jurisdictional phase, in particular to the Supreme Federal Court, due to the fact that is a matter concerning the fundamental human rights: freedom, having, therefore, priority of decision together with the *habeas corpus* request. After having received the request, the president of the Supreme Court determines the arrest of the accused, as the condition for the proceeding to begin. The Federal Supreme Court examines the legality, merits and regularity of the request. The decision of the FSC is of an authorizing nature only, since it only declares the legal possibility of the act, authorizing the President of the Republic to later affect or not the delivery of the extradition. However, there is a contradiction in invoking the right to freedom, since extradition proceedings usually have a significant delay and until the final decision, a period in which the extradite is imprisoned, awaiting the decision. If the person in question is extradited and is serving a sentence, that period in which he is detained shall be deducted from his final sentence, according to the detraction institute. However, if not convicted or extradited by the executive, at the final stage, he shall unnecessarily have his right to come and go.

The second administrative phase begins with the analysis of the delivery of the extradition by the President of the Republic, which presupposes that the Federal Supreme Court granted the request for extradition . The possibility of refusing extradition after the judgment of the Supreme Court, known as the faculty of summary refusal, can only happen in cases in which

---

125 See art. 720, par.3, Italian Code of Criminal Procedure.

126 See art. 720, par. 5, Italian Code of Criminal Procedure.

127 G. SPANGHER, *op. cit.*, p. 770.

there is no treaty or promise of reciprocity, or when there is only the proposal supervening that promise, but not yet effected. However, where a treaty exists, it may provide for exceptions to the deferral of surrender, which occurs, not infrequently, in cases where there are substantial grounds for assuming that the person sought will be subjected to persecution, discrimination or have his or her fundamental rights violated in the requesting State.

In the latter case, the power of the President is not discretionary, since it will be based on a set standard, the treaty, and requires a basis for final denial, as a form of respect for diplomatic relations. It should be emphasized that the basis for refusing extradition is always advised to maintain good relations between countries, but it is only mandatory in cases where there is a treaty or promise of reciprocity.

Given the context, it can be seen that one of the reasons for the delay of the process, in a general way, is its bureaucratic rites and alternation of instances, since the judicial phase is located between two governmental phases.

Thus, there is the question of the real necessity of this passage of instances and of whether the executive could communicate his position in just once, before or after the judicial decision, as already occurs in cases of bilateral or regional treaties or in case of reciprocity, in order to speed and ensure security to the process and to give a better impression of the Brazilian justice, in the name of future credibility<sup>128</sup>.

---

128 *A Extradção segundo a Constituição Federal, Gran Cursos Online*, February 12 2016, available online.

### **III. RELEVANT INTERNATIONAL INSTRUMENTS APPLICABLE TO EXTRADITION CASES BETWEEN ITALY AND BRASIL**

#### **III.1 Treaty of extradition between the Empire of Brazil and the Reign of Italy – 1872**

As already mentioned in the first chapter, extradition has always been one of the most effective means of international cooperation. The existence of a Treaty between the Brazilian Empire and the Reign of Italy is the proof of a long lasting relationship between the two States, based on reciprocity and respect. In the present Treaty, the changes that democratization and the Republican systems brought are evident, as much as the unlimited duration of some basic principles, later transferred to the current treaty.

Contextualizing the Treaty in its year, 1872, Italy and Brazil were two very different countries, not less than today. Vittorio Emanuele II, last king of Sardinia and first king of Italy, after the unification in 1961, was considered the “Father of the Fatherland”. On the other hand, Brazil was ruled by its last Emperor, Dom Pedro II<sup>129</sup>.

The treaty begins with article 1<sup>130</sup>, in which the principle of reciprocity is considered the basis of the agreement, followed by article 2<sup>131</sup>, with the prohibition to extradite a natural born citizen or a naturalized one, if the citizenship was acquired after the alleged crime and the extradition request. Article 3<sup>132</sup> is very peculiar, and, at the same time, it fits in the historical context. It lists the crimes and situations for which extradition is granted, among which there are:

- committed or attempted homicide, parricide and infanticide
- injury and mutilation, with eventual disability, of any part of the body

---

129 See introduction, Treaty of extradition between the Brazilian Empire and the Reign of Italy, Rio de Janeiro, November 12 1872.

130 See art. 1, Treaty of extradition between the Brazilian Empire and the Reign of Italy, Rio de Janeiro, November 12 1872.

131 See art. 2, Treaty of extradition between the Brazilian Empire and the Reign of Italy, Rio de Janeiro, November 12 1872.

132 See art. 3, Treaty of extradition between the Brazilian Empire and the Reign of Italy, Rio de Janeiro, November 12 1872.

- rape and kidnapping
- voluntary fire
- embezzlement and misappropriation of public money and currency forgery, bonds and coupons

Article 3 of the Treaty represents also the possible exceptions to article 10<sup>133</sup>, which states “The individual (...) may not be prosecuted or judged for any political crime committed before the extradition, nor for any fact connected to such crime or for a different crime, unless it is included in article 3”.

Article 11<sup>134</sup> contains two important aspects: the *ne bis in idem* principle and the prescription period.

### **III. 2 The Treaty of extradition between the Italian Republic and the Federal Republic of Brazil -1989**

More than one hundred years later, the two States, now as unitary parliamentary republic in the case of Italy, and a federal republic for Brazil, signed the current Treaty that regulates the extradition between the two countries. Signed on the 17<sup>th</sup> October 1989 and entered into force in 1992 and 1993<sup>135</sup>, the treaty presents many similarities and many significant differences with its predecessor.

While the first two articles do not differ from the 1872 treaty, the third article<sup>136</sup>, containing again a lists of situations and conditions, changed completely its meaning: if before the article included the situations in which extradition was granted, the current treaty, taking into account the myriad of new crimes, due to the globalization and the technological advance, among the other reasons, now contains the crimes for which the extradition process could not be started. These cases are:

---

133 See art. 10, Treaty of extradition between the Brazilian Empire and the Reign of Italy, Rio de Janeiro, November 12 1872.

134 See art. 11, Treaty of extradition between the Brazilian Empire and the Reign of Italy, Rio de Janeiro, November 12 1872.

135 In Brazil, the Treaty was implemented by the lgs. d. n. 863, July 9 1993, while in Italy with the l. n. 41, January 7 1992.

136 See art. 3, Treaty on extradition between the Federal Republic of Brazil and the Republic of Italy, October 17 1989. (hereinafter Treaty on extradition between Brazil and Italy)

- if the person has already been charged or put on trial for the same fact, object of the extradition request.
- In case the prescription period has expired;
- if the crime has been the object of amnesty in the requested State or it is under criminal jurisdiction;
- if the accused will be prosecuted by an *ad hoc* Court in the requesting party;
- if the crime is considered political in nature;
- “if the requested Party has reasonable grounds to assume that the person sought shall be subjected to acts of persecution and discrimination based on race, religion, sex, nationality, language, political opinion, social or personal status; Or that their situation may be aggravated by one of the aforementioned elements”;
- if the fact for which it is requested to constitute, according to the law of the requested Party, an exclusively military crime<sup>137</sup>;

Article 4<sup>138</sup>, which in the previous treaty concerned the diplomatic practice of transmission of the request and the communication among the parties, completely changed. It now regards death penalty, stating that: “Nor shall extradition be granted if the offence determining the extradition request is punishable by death. The requested Party may subject the extradition to the prior guarantee given by the requesting Party and deemed sufficient by the requested State that such penalty shall not be imposed and, if it has already been, shall not be enforced”<sup>139</sup>. The following article<sup>140</sup> of the Treaty introduced the fundamental rights and defences, as it prohibits extradition if:

- “on the basis of which it is requested, the person sought has been or will be subjected to a procedure which does not ensure the minimum rights of defence. The fact that the conviction occurred in absentia does not in itself constitute grounds for refusing extradition;
- if there is reasonable grounds to suppose that the person sought shall be subject

---

137 “For the purposes of this Treaty, crimes considered and punishable by military law, which do not constitute crimes under ordinary law, are considered exclusively military”.

See art. 3, par. G, Treaty of extradition between Brazil and Italy, October 17 1989.

138 See art. 4, Treaty of extradition between Brazil and Italy, October 17 1989.

139 *Ibidem*.

140 See art. 5, Treaty of extradition between Brazil and Italy, October 17 1989.



to a penalty or treatment that in any way constitutes a violation of his or her fundamental rights”<sup>141</sup>.

Article 6<sup>142</sup> refers to article 2<sup>143</sup> of the previous treaty, since it deals with the extradition of nationals. It states that, if at the time of the request, the individual is a citizen of the requested State, the latter is not obliged to surrender the accused. Furthermore, after having denied the extradition, the requested State may, under demand of the requesting Party, submit the case to its judicial authorities, communicating every step to the other part. Always according to article 6, extradition may be denied if:

- (a) “if the fact for which it is requested has been committed, in whole or partly, in the territory of the requested State or in a place considered as such by its legislation;
- (b) if the fact for which it is sought has been committed outside the territory of the Parties, and the law of the requested State does not provide for punishment for the offense when committed outside its territory”<sup>144</sup>.

Paragraphs 4 and 5 of article 7<sup>145</sup>, which deals with eventual restrictions of personal freedom, concern the delivery of the extradite to a third state, which may not happen, unless the individual gives his consent. In case of transfer, the procedure must be formalized with an application for a new extradition and the written consent of the accused.

At the end, article 8 and 9<sup>146</sup>, that end the most general part of the treaty, after which there are other 12 article concerning the documents and actual delivery of the extradite, have as objects, respectively, the right of defence and the computation of the detention period. The first element established the right to have a defender and an interpret for the accused, while the second basically requires that the years spent in temporary detention are computed from the sentence to serve in the requesting State.

---

141 *Ibidem*.

142 See art. 6, Treaty of extradition between Brazil and Italy, October 17 1989

143 See art. 2, Treaty of extradition between the Brazilian Empire and the Reign of Italy, Rio de Janeiro, November 12 1872.

144 See art. 6, Treaty of extradition between Brazil and Italy, October 17 1989

145 See art. 7, par. 4 and 5, Treaty of extradition between Brazil and Italy, October 17 1989

146 See art. 8 and 9, Treaty of extradition between Brazil and Italy, October 17 1989

### III. 3 The European Convention on Extradition

Italy's membership in the European Union in 1957 caused a series of changes to its role in the international law arena. Concerning the object of this thesis, one of the first significant documents that offered to Italy the guiding lines of what will be the European Union is the European Convention on Extradition<sup>147</sup>, signed on the 13<sup>th</sup> December 1957 in Paris. Under the Recommendation(51) 16 of the Consultative Assembly of the Council of Europe<sup>148</sup>, and with the willingness of the Committee of Ministers of the Council of Europe, in agreement with the national governments, a Committee of Government Experts was set to examine the recommendation cited above with special reference to:

“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”<sup>149</sup>.

During the draft of the Convention, following the decision to proceed with a multilateral convention and not with a model of bilateral treaty, the Committee was ideologically divided into two currents: the first attitude saw extradition as the mean to fight crime, so the entire process needed to be facilitated; the second current claimed the priority of the humanitarian aspect, tending to restrict the extradition process. Due to the copious reservations of the different members of the European continent, the Committee opted for the freedom of single States to make reservations about the detailed articles left them the possibility to accede subsequently<sup>150</sup>.

Generally speaking, pursuant to this Convention, the contracting States are obliged to

---

<sup>147</sup> European Convention on extradition, April 18 1960. (hereinafter ECE)

<sup>148</sup> Explanatory Report to the European Convention on Extradition, Council of Europe, January 1 1985, p. 5, par. 1.

<sup>149</sup> Explanatory Report to the European Convention on Extradition, Council of Europe, January 1 1985, p. 5, par. 2.

<sup>150</sup> The article states:

- (a) Any Contracting Party may, when signing this Convention or when depositing its instrument of ratification or accession, make a reservation in respect of any provision or provisions of the Convention.
- (b) Any Contracting Party which has made a reservation shall withdraw it as soon as circumstances permit. Such withdrawal shall be made by notification to the Secretary General of the Council of Europe.
- (c) A Contracting Party which has made a reservation in respect of a provision of the Convention may not claim application of the said provision by another Party save in so far as it has itself accepted the provision.

See art. 26, par. A, B and C, ECE, April 18 1960.

extradite one another the persons wanted for a crime or sought for the execution of a penalty or a security measure by the judicial authorities of the requesting State<sup>151</sup>. Extradition may be requested for facts that the laws of the requesting and requested State punish with a penalty or a measure of private security freedom of at least one year or more severe punishments, as stated in article 2, paragraph 1<sup>152</sup>. The latter also includes the reciprocity principle for the crimes not listed in the same article, stating “Any Party may apply reciprocity in respect of any offences excluded from the application of the Convention under this article”<sup>153</sup>, at the same time, each party, whose legislation does not authorize extradition for certain offences, may, as far as it is concerned, exclude such offences<sup>154</sup> from the scope of the Convention.

As article 6 declares, each Contracting State shall have the power to refuse the extradition of its nationals<sup>155</sup>, stating at the time of the ratification the meaning that it assigns to the term “national”<sup>156</sup>. Articles 3 and 4<sup>157</sup> concern respectively the political and military particular crimes. The first case does not define what is intended with such crime, leaving freedom of interpretation to the single parties, but, in general, it prohibits extradition if the offence for which it is requested is considered by the requested State as a political offence or as a fact related to such offence. The same rule applies if the requested Party has serious reasons to believe that a request for extradition reasoned with a common law offence has been filed with the aim of prosecuting or punishing an individual for reasons of race, religion, Nationality or political opinions or that the condition of this individual may be aggravated by one or the other of these reasons<sup>158</sup>. However, the taking or attempted taking of life of Heads of State of their family members are excluded from the category of political crimes<sup>159</sup>. In the second case, military crimes, article 4 states “Extradition for offences under military law which are not offences under ordinary criminal law is excluded from the application of this

---

151 See art. 1, ECE, April 18 1960.

152 See art. 2, par. 1, ECE, April 18 1960.

153 See art. 2, par. 7, ECE, April 18 1960.

154 See art. 2, par. 3, ECE, April 18 1960.

155 See art. 6, par. 1, ECE, April 18 1960.

156 See art. 6, par. 2, ECE, April 18 1960.

157 See art. 3 and 4, ECE, April 18 1960.

158 See art. 3, par. 2, ECE, April 18 1960.

159 See art. 3, par. 3, ECE, April 18 1960.

Convention”<sup>160</sup>.

Article 11 includes another exception to the application of extradition: if the fact for which extradition is sought is punishable by capital sentence by the law of the requesting State and if the capital punishment for this offence is not provided by the law of the requested State, extradition may be permitted only provided that the requesting State ensures guarantees, which the requested State considers sufficient, that capital punishment will not be executed<sup>161</sup>.

Extradition will also not be permitted when the individual has already been sentenced or discharged, or is currently on trial, by the competent authorities of the requesting State for the facts that motivate the extradition application, as stated in article 9<sup>162</sup>, with the *ne bis in idem* principle, and in article 8<sup>163</sup> with the pending processes clause.

The present convention certainly influenced the composition of many clauses in the Treaty of Extradition between Italy and Brazil of 1989 and this is evident from the introduction of many new articles and elements respect to the previous treaty of 1872. As expected, being a multilateral convention, it could not bind the signatories States to specific and detailed requests, given the peculiarity of the single jurisdictional system, but it gave an indisputable importance to general international law principles and to the fundamental conceptual pillars of the successive European Union, such as the principle of specialty and the protection of human rights.

### **III.4 The European Arrest Warrant – 2003**

From the 13<sup>th</sup> June 2002, with the decision 2002/584/JHA of the European Union<sup>164</sup>, the European Arrest Warrant (EAW)<sup>165</sup> was created to make the cooperation among States

---

160 See art. 4, ECE, April 18 1960.

161 See art. 11, ECE, April 18 1960.

162 See art. 9, ECE, April 18 1960.

163 See art. 8, ECE, April 18 1960.

164 Council Framework Decision of on the European arrest warrant and the surrender procedures between Member States, decision n. 2002/584/JHA, June 13 2002. (hereinafter EAW)

165 *Ibidem*.

simpler, entered into force in Italy with the law n. 69/2005<sup>166</sup>. The functioning is defined in this way: “The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order”<sup>167</sup>.

The main differences comparing to the precedent European Convention<sup>168</sup> and the general extradition process regards:

(a) the temporal terms, according to which the requested State must deliver the accused within sixty days from the emission of the EAR, which is shorter if the same individual agrees to the procedure, in this case the terms is of ten days<sup>169</sup>.

(b) the double incrimination is no longer required, since second paragraph of article 2<sup>170</sup> contains the list of crimes for which the principles does not hold, among which there are terrorism, illicit trade of humans and drugs, rape and computer-related crimes. The only requisite is that the crime must be punishable with a sentence of personal freedom deprivation of at least twelve months in the country where it was committed<sup>171</sup>.

(c) The absence of intervention at the political level. As article 6 disposes, it is the judicial authority of the requesting Member State, competent to issue the EAR and the executing judicial authority, both competent to issue and execute the European arrest warrant by virtue of the law of that State<sup>172</sup>;

(d) the actual delivery of nationals and citizens. In theory, the Member States do not have the possibility to refuse the delivery of the accused, unless they commit themselves to persecute or execute the individual with the custodial sentence<sup>173</sup>.

(e) the executing State may ask for these guarantees:

- after a certain period of time, the accused may ask for a revision, in case of life sentence<sup>174</sup>;

---

166 L. n. 69, April 22 2005.

167 See art. 1, EAW, June 13 2002.

168 European Convention on extradition, April 18 1960.

169 See art. 17, par. 2, EAW, June 13 2002.

170 See art. 2, par. 2, EAW, June 13 2002.

171 See art. 2, par. 3, EAW, June 13 2002.

172 See art. 6, EAW, June 13 2002.

173 See art. 6, par. 4, EAW, June 13 2002.

174 See art. 5, par. 2, EAW, June 13 2002.

- the wanted person can spend the detention period in the State that delivers him, if he is a national or has residence there<sup>175</sup>.
- “where the European arrest warrant has been issued for the purposes of executing a sentence or a detention order imposed by a decision rendered *in absentia* and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered *in absentia*”<sup>176</sup>

(f) Peremptory motives to refuse the EAW, which are divided into mandatory and optional grounds.

In the first category, for example, there are:

- amnesty, the subject could have been persecuted in the country where he was arrested, but the crime was amnestied by the same State<sup>177</sup>;
- Minors or under aged, who “cannot be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State”<sup>178</sup>;
- the person has already been charged and judged for the same crime<sup>179</sup>;

On the other hand, examples of optional motives may be:

- the absence of double criminality for the crimes not included in the above mentioned list in article 2<sup>180</sup>;
- territorial jurisdiction<sup>181</sup>;
- criminal procedure ongoing in the executing State<sup>182</sup>

The EAW is an instrument that substitutes extradition in the European Union countries, reducing the time needed to national juridical authorities and it is applicable to all those

175 See art. 5, par. 1, EAW, June 13 2002.

176 See art. 5, par. 3, EAW, June 13 2002.

177 See art. 3, par. 1, EAW, June 13 2002.

178 See art. 3, par. 3, EAW, June 13 2002.

179 See art. 3, par. 2, EAW, June 13 2002.

180 See art. 4, par. 1, EAW, June 13 2002.

181 Where the European arrest warrant relates to offences which:

(a) are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such; or

(b) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.

See art. 4, par. 7, EAW, June 13 2002.

182 See art. 4, par. 2, EAW, June 13 2002.

crimes punished with a “detention sentence or with a security measure privative of freedom, lasting no less than one year”<sup>183</sup> or the “definitive sentence with a detention penalty or security measure privative of freedom, lasting no less than four months”<sup>184</sup>. The difference with extradition in terms of time is noteworthy, since the latter may last even more than one year and half, while the EAW not more than three months and, in particular cases, for example if the accused gives his consent, it may last just three weeks.

### III. 5 The European Convention on Human Rights -1950

The European Convention on Human Rights (ECHR), namely the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>185</sup>, is an international convention drafted in 1950 and adopted within the framework of the Council of Europe. It is considered the central text regarding fundamental human rights, because it is the only one provided with a permanent jurisdictional mechanism, that allows every individual to turn to the European Court of Human Rights (ECtHR) asking the protection of the rights granted in the above convention.

To extradite to abroad, the choice of the requesting State, from which derives the danger for the accused to be subject to a violation of the fundamental human rights and that impose to the European Court of Human Rights judges to rule against it, may consent not to put in act adequate measures to ensure the detained the necessary conditions to protect the minimum needs for the respect of human dignity<sup>186</sup>. International norms, in particular those relating to human rights, therefore, are relevant in the estrangement of an individual in the territory of that State under two different aspects.

The first category, in which international norms on human rights may represent an obstacle to the freedom of States to go on with the extradition process, concerns the

---

183 See art. 2, par. 2, EAW, June 13 2002.

184 See art. 2, par. 1, EAW, June 13 2002.

185 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), November 4 1950.

186 S. DE FILIPPIS, *Extradition and obstructive conditions: danger for the accused to be subjected to violation of human rights*, in CriminalJurisprudence.com, January 20 2014, available *online*.

hypothesis in which the removal of the accused entails a violation of such rights, directly attributable to the requested State. A typical example are the procedures that include the removal of the accused individual, that are manifestly not respectful of the minimum criteria in the field of the exercise of administrative and jurisdictional authority<sup>187</sup>.

The second category of situations is the one in which the individual transferred by the requested State is exposed to the risk of being victim of a violation of human rights in the requesting State. In fact, a State may incur in a violation of its international obligations on human rights for the simple fact of conceding the extradition, expulsion or transfer of an individual subject to its jurisdiction to the authority of another State, whether, at the time of the extradition, there are solid ground to presume that he will be exposed to a “real and personal danger” to endure violations of his fundamental human rights in the requesting State.

This principle was ratified by the EctHR, for the first time in 1989 in the case *Soering v. United Kingdom*<sup>188</sup>. The case concerns article 3, 6 and 13 of the ECHR, that respectively state:

ARTICLE 3: Prohibition of torture. “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”<sup>189</sup>.

ARTICLE 6: Right to a fair trial.

1. “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

---

187 *Ibidem*.

188 Decision of the European Court of Human Rights July 7 1989, application 14038/88, n. 161 ser. A, *Soering v. United Kingdom*.

189 See art. 3, European Convention on Human Rights, November 4 1950.



3. 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”<sup>190</sup>.

ARTICLE 13: Right to an effective remedy.

“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”<sup>191</sup>.

The case *Soering v. UK*, already analysed in chapter one, concerned the issue of non-refoulement, explained above in the second category, concerning state responsibility in removing an individual that may be exposed to a violation of human rights in the destination State. Appealing to the article 3, Soering sustained that the decision of the secretary of state for the home department to surrender him to the US would, if implemented, give rise to a breach of article, which is linked to the treatment the applicant argued he would receive if he were to be detained on death row in Virginia for an expected six to eight years <sup>192</sup>. The ECtHR, in effect, found the UK to be in breach of this article.

Regarding article 6, Soering pointed to the lack of legal aid in Virginia and the failure of the English Court to consider his psychiatric condition, in addition to a breach of the right to a fair trial. The ECtHR had no jurisdiction to consider this matter<sup>193</sup>.

---

190 See art. 6, European Convention on Human Rights, November 4 1950.

191 See art. 13, European Convention on Human Rights, November 4 1950.

192 Decision of the European Court of Human Rights July 7 1989, application 14038/88, n. 161 ser. A, *Soering v. United Kingdom.*, at 114.

193 *Ibidem* at 115.

Finally, the UK was found not responsible in regards to article 13, since Soering had all the time to bring the judicial review proceedings, but he did it too early, when the Court was not competent yet, since the Minister hadn't taken a decision yet<sup>194</sup>. The Soering case used as precedent by the ECtHR is carefully constructed. The Court's reasoning was the “serious and irreparable nature of the alleged suffering<sup>195</sup> and it is considered as the example of support to the prisoner. Furthermore, it shows how easily a State would face a breach of the Convention, when considering or applying the extradition process.

It is correct to say that there are some fundamental rights recognised by the international community that may limit the concession of extradition from a State to another, such as the right not to be subjected to torture, inhuman and degrading punishments or treatments and, secondly, the right to have a fair trial, both cited in the decision relative to the Soering case. Taking into account the fundamental values of democratic societies, the circle of protected rights has been enlarged: the Court included the principle of non-retroactivity of criminal law and the right not to be enslaved.

Another example of human rights as obstacles to the extradition procedure is a decision of the Italian Court of Cassation, in the decision number 46212, the 15<sup>th</sup> October 2013<sup>196</sup>.

The case concerned an individual who opposed to his extradition, previously granted by Rome Court of Appeal, in Brazil for the execution of a sentence of seventeen years of prison, for the illegal traffic of drugs. The central issue was the degrading conditions that the accused would have faced in the Brazilian prisons, which are not in compliance with the standards required, exactly like Italy, already sanctioned by the EctHR for the conditions of its prisons due to the overcrowding. The accused denounced the violation of Italian Code of Criminal Procedure, in particular articles 698<sup>197</sup> and paragraph 2 (a) of article 705<sup>198</sup> regarding respectively the protection of fundamental human rights and

---

194 *Ibidem* at 122.

195 *Ibidem* at 90.

196 Judgment of the Italian Court of Cassation, n. 46212, October 15 2013.

197 See art. 698, Italian Code of Criminal Procedure.

198 See art. 705, par. 2, let. a, Italian Code of Criminal Procedure.

the conditions for the decision on extradition, paragraph b of article 5 of the Extradition Treaty between Italy and Brazil<sup>199</sup> and article 3 of the ECHR<sup>200</sup>.

Regarding the above cited norms, the Supreme Court opposed to the extradition request, not sharing the Court of Appeal's decision. Indeed, the Court reaffirmed the decision taken at the European level by the ECtHR, according to which the prohibition of positive sentence established by article 705, comma 2, of the Italian Code of Criminal Procedure operates only in the hypothesis that the choice is dictated by a normative choice of the requesting State, considering its constitutional role, and not the occasional initiatives of public agents at personal or improvised title<sup>201</sup>.

The Court, however, goes over its precedent decision, stating that it is unusual that a State has norms that consent or impose the treatments that violate the fundamental human rights, so it is obvious that it is the single situation, not occasional but repeated, consolidated, accepted and tolerated by the requesting State's institutions that must be taken as reference, in order to verify that there are the grounds to deny extradition or not. Furthermore, the Court is also helped various documents and reports issued by non-governmental organizations, such as Amnesty International and Human Rights Watch, recognised at the international level<sup>202</sup>.

In this specific case, the documents used by the Court reported the dramatic conditions of the Brazilian prisons, included those in the Espiritu Santo State, that was the destination of the accused. The prison was overcrowded, with insufficient sanitary conditions, that favour the contamination of epidemics. Furthermore, the reports denounced also the tortures and violences operated by the same prison guards, usually corrupted or organized in gangs, tolerated by the authorities. In addition, the situation was well-known by the Minister of Justice, the authorities of the Republic, the United Nations and many other non-governmental organizations and it was object of many appeals and requests of investigations. This rational choice of non-intervention was considered by the Italian Court as the main condition against the extradition. On the

199 See art. 5, par. b, Treaty of extradition between Brazil and Italy, October 17 1989.

200 See art. 3, European Convention on Human Rights, November 4 1950.

201 Sentence of the Italian Court of Cassation, n. 21985, May 24 2006.

202 Sentence of the Italian Court of Cassation, n.32685, September 3 2010.

other hand, useless was the comparison with the situations in the Italian prisons, which are not even comparable to the Brazilian ones, and that, in any case, could not influence the lack of application of international norms concerning human rights operated by Brazil<sup>203</sup>.

The decision to annul the extradition request and postpone it to the Court of Appeals make us understand how the combination of the relationships between foreign authorities, international law and the protection of human rights system impose to the States to find a compromise between, on one hand, the actual cooperation to dismantle the international criminality and ensure the national security and, on the other, the protection of fundamental human rights<sup>204</sup>.

---

203 S.DE FILIPPIS, *op. cit.*, January 20 2014, available *online*.

204 *Ibidem*.

## **IV. AN EXAMPLE OF APPLICATION OF THE 1989 TREATY: CESARE BATTISTI'S CASE**

### **IV.1. Biography and first contacts with “Armed Proletarians for Communism”**

Cesare Battisti was born on the 18<sup>th</sup> December 1954 in Cisterna di Latina, but he spent his youth in Sermoneta, a small town in the centre of Italy. His family has farmer and labourer origins, with communist traditions. He is one of six children, but one of his brothers, Giorgio, died in 1980<sup>205</sup>. As a teenager, he signed up for the Communist Party, being part of the young section of the Italian Communist Party (ICP). In 1968, Cesare started the classical high school, but he left in 1971. Since then, a particularly troubled period started: bovver and small delinquency, that signalled his presence to the authorities. In fact, he was arrested twice for robbery, the first time in Frascati and then in 1974 he was arrested again for robbery with kidnapping in Sabaudia, but he did not go to prison<sup>206</sup>.

In 1977, he went to prison in Udine, after that he assaulted an Army official, while he was in the military service. It was in this prison that he met Arrigo Cavallina, one of the main exponents of the “Armed Proletarians for Communism” (APC), that involved him in the organization, in which there was Pietro Mutti, future member of Prima Linea, in English “Front Line”, an armed organization of extreme left. Mutti will become a cooperating witness and fundamental accuser of Battisti, and on whose testimonies are based almost all the sentences ascribed to Battisti<sup>207</sup>.

In a 2014 interview, Battisti denied to be an habitual criminal and sustained to have acted always for political reasons, referring to them as proletarian dispossession. He moved to Milan, where he continued with these dispossessions with the APC, that were considered responsible for many robberies and also homicides of divers merchants and authorities, but Battisti has always declared himself unrelated to the facts and, in 2009, he stated that he has never shot to anyone. In 1978 he was not part of the APC anymore and the main reason was the homicide of Aldo Moro, kidnapped and murdered by the Red Brigades. He then joined a collective of territorial group and he continued to live in an abandoned building in Milan. He has always affirmed to have tried to discourage Mutti not to kill, considering wrong the APC's objectives,

---

205 G. TURONE, *Il caso Battisti*, July 7 2011, p. 10.

206 *Ibidem*, p. 23.

207 G. CRUCIANI, *Gli amici del terrorista. Chi protegge Cesare Battisti?*, May 25 2010.

and he declared himself innocent of the four murders for which he was condemned<sup>208</sup>.

According to the sentences, however, he stayed in the APC until 1979, when, during an important anti terroristic operation, Battisti was arrested, detained in prison in Frosinone and initially condemned to thirteen years and five months, for having planned with others the murder of the jeweller Pierluigi Torregiani, killed in February 1979, and for the other murders imputed to the APC<sup>209</sup>.

On the 4<sup>th</sup> October 1981, Battisti declared to feel unsafe in prison and escaped, succeeded in going to France. In 1985, he was condemned in contumacy, confirmed by the Court of Cassation in 1991, because he was considered responsible for four murders and other crimes. He was also condemned to life sentence by the Assize Court of Milan in 1988, made definitive by the Court of Cassation in 1993, for plural homicide, in addition to robbery, felonious assault and possession of weapons. During the years, seven trials declared him guilty<sup>210</sup>.

For about one year, Battisti lived as an illegal immigrant in Paris. At the end of 1981, he fled to Mexico, and moved to Puerto Escondido until 1990. During his Mexican stay, Italy condemned him in contumacy. In 1990 he came back to France, in Paris, where he met a community of italian fugitives, that had found refuge through the Mitterrand Doctrine. In the meanwhile, he survived doing different jobs, such as the doorman. After Italy requested his extradition for the first time, he was arrested for four months, after which the *Chambre d'accusation* of Paris declared him non-extraditable. Among the reasons, there was the above cited Mitterrand Doctrine, which guaranteed protection to the italian fugitives for political reasons. According to the French judiciary, the proofs against him were contradictory and “worth of a military jurisdiction”. Later, in France, he obtained the naturalization, withdrawn in 2004, before the official citizenship. However, he has never received the passport, which will make extradition impossible<sup>211</sup>.

The so-called “Battisti's case” exploded on the 10<sup>th</sup> February 2004, when he was arrested in Paris. The Italian judiciary asked again for the extradition, that was granted by the French authorities on the 30<sup>th</sup> June of the same year. The Council of State of the French Republic and the Court of Cassation authorized the delivery of Battisti to the Italian authorities, marking the end of the Mitterrand Doctrine. After this decision, Battisti became fugitive and with the help of some friends, he escaped to Brazil. In July 2005, Italian press denounced the existence on the

---

208 *Ibidem*.

209 G. TURONE, *Il caso Battisti*, July 7 2011, p. 35.

210 G. TURONE, *Il caso Battisti*, July 7 2011, p. 46.

211 G. TURONE, *op. cit.*, July 7 2011, p. 54.

Brazilian territory of the Department for Anti-terrorism Strategic Studies (DSSA), a parallel police created by a neo-fascist group, that, according to some wire-tapping, had the intention to kidnap Battisti and take him to Italy. In the meanwhile, a last appeal was made to the European Court of Human Rights, against his extradition to Italy and he was unanimously declared inadmissible in 2006, because evidently unfounded<sup>212</sup>.

On the 18<sup>th</sup> March 2007, he was arrested in Copacabana, Brazil, after joint investigations of French agents and Carabinieri. His brother, Vincenzo declared that during the detention he underwent to violent treatments and torture<sup>213</sup>. Two years later, Brazil conceded him the political refugee status. The Brazilian Minister of Justice at the time, Tarso Genro, motivated the decision on what he defined “a grounded fear of persecution for Battisti, due to his political ideas”<sup>214</sup>. On 18<sup>th</sup> November 2009, the highest jurisdictional authority in Brazil, the Supreme Federal Court, considered his political refugee status illegitimate. The sentence is favourable to the extradition to Italy, but the definitive decision is in the hand of the President of the Republic. One year later, Battisti was sentenced to two years of probation by the Rio de Janeiro Court for having used a false passport. At the end of the same year, President Lula announced his refusal to the extradition request to Italy<sup>215</sup>. In the meanwhile, his brother asked to Giorgio Napolitano, President of the Italian Republic, the pardon, since Battisti has always lived on the run and he has different health problems, but without success. Six months later, on June 2011, the Supreme Federal Court confirmed the decision of President Lula and voted in favour of his freedom. Even without a permanent citizenship, he lives in Brazil with the immigrant permission, with no possibility of extradition. He now lives in San Paolo, he apparently married twice, with a French woman and then with a Brazilian, not confirmed, and he has 3 children, two from the first marriage and the third from the last<sup>216</sup>.

In 2015, the sentence of the federal judge Adverci Rates Mendes de Abreu revoked his residence permit, motivating the decision saying that “Battisti is a foreign citizen with an irregular situation that, since he is condemned in his country, has no right to stay here in Brazil”, and he asked for the expulsion, declaring that he may only stay if he obtains the political refugee status, already denied. However, expulsion is not synonym of extradition: in the first

212 WIKIPEDIA, *Cesare Battisti (1954)*, in Wikipedia.it, available online.

213 PANORAMA, *Il fratello di Battisti: "Chiedo a Napolitano la grazia per Cesare"*, in Panorama.it, available online.

214 O. CIAI, *Il Brasile blocca Battisti: No al diritto di asilo, la Repubblica*, November 29 2008, available online.

215 LA REPUBBLICA, *Battisti, Napolitano scrive a Lula: "Sono stupito e rammaricato"*, in la Repubblica, January 17 2009, available online.

216 C. A. LUNGARZO, *Juízes Brasileiros Mandam Sequestrar Battisti para Exatdição Obliqua*, in *A luz Protegida*, March 28 2015, available online.

case, Brazil does not have to deliver Battisti to Italy, but he can be expelled to any other country, like France and Mexico, where he has good chances of obtaining the citizenship<sup>217</sup>.

Another obstacle to his deportation is the fact that he lives with a Brazilian citizen and he is the father of a minor. In case of effective marriage, he would become a permanent citizen.

Furthermore, an eventual obstacle is article 63 of the Foreign Statute, according to which “The accused won't be expelled, if it questions the refused extradition”. The only chance that Battisti is expelled is that in which the SFC decides to start a revision of the decision, hard due to the absence of new proofs on his behalf. According to the judge that accepted the appeal, “extradition was not admitted by Lula and eliminated by the same SFC, so the expulsion may imply an indirect extradition, contrary to Lula and SFC's decision”.

Italy did not renounce to the extradition, proposing an exchange with the Italy-Brazilian Henrique Pizzolato, extradited in Brazil, even if the two situations are not connected and an agreement seems really far. The expulsion order, still valid for France and Mexico, will be judged again by a Brazilian Tribunal. The working visa cannot be released to who got in irregularly or who has ongoing procedures, but it may be conceded in case of marriage<sup>218</sup>.

In June 2015, Battisti announced the marriage with his fiancée Joice Lima. He may obtain, in addition to the permanent permission, also the Brazilian citizenship, which, however, may be revoked for the ongoing accusations<sup>219</sup>.

In September of the same year, the Regional Federal Tribunal of San Paolo declared illegitimate the temporary arrest of Battisti, which took place in March 2015, after the withdrawal of the visa. According to his legal, with the new presidency of Michel Temer, Battisti risks the expulsion to France or Mexico<sup>220</sup>.

## **IV. 2. The norms applied to the first extradition from France.**

From 1990 to 2004, Cesare Battisti lived in France, protected by Mitterrand Doctrine, which is an official position taken by the French President François Mitterrand in 1985, concerning the political asylum to Italian fugitives, on the condition that they conducted a normal life,

---

217 QUOTIDIANO INDIPENDENTE, *Caso Battisti: solo una questione di tempo*, in *L'approfondimento quotidiano indipendente*, 2015, available online.

218 TGCOM24, *Brasile: il terrorista condannato all'ergastolo si sposa*, in *Tgcom24.it*, June 19 2015, available online.

219 *Ibidem*.

220 O. CIAI, *Brasile, i legali di Cesare Battisti: “Pressioni dall'Italia per l'estradizione”*, in *la Repubblica*, September 22 2016, available online.



renouncing to violence and terrorism. On the three official occasion in which the President sustained his view, there is a conference for the *Ligue des droits de l'homme*, where he declared “the Italian refugees, that participated to the terrorist attacks before 1981 interrupted the hellish machine in which they found themselves, they started a second and new phase of their life, integrated themselves into the French society (...) I told the Italian government that they are safe from any request of extradition”<sup>221</sup>. Not considering Italy fully democratic and able to put on trial its terrorists, basically nullified the bilateral treaty signed in 1973, that for more than a century regulated the extradition processes, then extinguished in 1986 and it was substituted, on a multilateral level, with the European Convention on Extradition of 1957<sup>222</sup>.

As already mentioned in chapter 3, the Convention establishes a general obligation to extradite, except for certain occasions listed in the articles, among which there are:

- (a) article 3, paragraph one, excludes any political crime, not offering a clear definition of such crime, leaving, therefore, free interpretation<sup>223</sup>;
- (b) article 3, paragraph 2, called the “French clause” or of “non-discrimination”, directly protects the fundamental rights of the extradited, excluding extradition with persecutory aims, among which there are the accused's political ideas<sup>224</sup>.

In 1991, when the *Court d' Appel* rejected twice the extradition requests from Italy, it did it on the grounds of “procedural aspects” and not of the two exceptions of the Convention. In two different decisions<sup>225</sup>, the Court decided that the accumulation of accuses that caused the sentence against Battisti on the 16<sup>th</sup> January 1990 by the Assize Court of Milan, “obstructed the requesting party to limite its concur in the execution of the condemnations that are not prescribe, that do not sanction political and military infractions, or that do not violate the principle of *ne bis in idem*”<sup>226</sup>. In fact, dividing the single crimes imputed to Battisti, there were, according to the French juridical system, prescribed and political crimes. In the second decision, the Court stated that the only way to concede extradition was through a new request, as it actually happened.

---

221 M. LAZAR, M. MATARD-BONUCCI, *Il libro degli anni di piombo*, Milano, 2010, p. 349.

222 European Convention on extradition, April 18 1960.

223 See art. 3, par. 1, European Convention on extradition, April 18 1960.

224 See art. 3, par. 2, European Convention on extradition, April 18 1960.

225 Sentence of the Court of Appeal of Paris June 3 1991, n. 348/349.

226 M. PELISSERO, *Reato politico e flessibilità delle categorie dogmatiche*, Napoli, 2000, from p. 193 to p. 200.

Not making reference to conventional clauses and applying the Mitterrand Doctrine, France posed itself outside and above the multilateral system, rendering the missed extradition for Battisti illegitimate from the beginning<sup>227</sup>.

However, France could not apply the two above mentioned exceptions: the crimes ascribed to Battisti<sup>228</sup> cannot be considered political, since they consist of robberies and homicides, and the concern that the accused may be subjected to persecution must be well-founded, and not based on a prejudice about the entire juridical system<sup>229</sup>. Regarding this last point, it is important to remember that international treaties must be interpreted in good faith and not through political prejudices<sup>230</sup>.

In 2003, the French jurisprudence interpreted and judged the Mitterrand Doctrine as inadmissible, in the light of a renewed cooperation between Italy and France. With the sentence of the 30<sup>th</sup> June 2004<sup>231</sup>, the *Cour* accepted the appeal presented in Cassation presented by Battisti and rejected the request the 13<sup>th</sup> October 2004. Ten days later, it granted the permission for extradition. The case arrived to the *Conseil d'Etat*, that disregarded the Mitterrand Doctrine, declaring it ineffective<sup>232</sup>. The accusations in object, concerning blood crimes, were not even admissible in the Mitterrand Doctrine. Furthermore, the same judges considered the pretext held by Battisti concerning the contumacy of the Italian process, stating that Battisti himself showed "his unequivocal willingness to renounce to personally appear before the judges and be subjected to justice"<sup>233</sup>. The contumacy nature of accusation was due to the fact that he evaded from prison in Udine and that he fully exercised his defence rights in the trials<sup>234</sup>. Battisti also presented an appeal against this decision of the *Cour* to the European Court of Human Rights<sup>235</sup>, which confirmed the already taken decision, stating that he consciously decided not to present himself before the court, knowing that, after his escape, the trials in contumacy would have

---

227 M.M. WINKLER, *Il Caso Battisti e le incerte promesse del diritto internazionale*, in *Il corriere giuridico*, July 2012, p. 902.

228 The homicides ascribed to Battisti are: the murder of the jeweller Torreggiani, and the injuring of his son that it is on the wheelchair since then, the murder of the prison commander Antonio Santoro, the Digos agent Campagna and Mr. Sabbadin, during an irruption, that Battisti guided, in the offices of a party.

*Resoconto stenografico della Camera dei Deputati*, regarding sentence 462, May 5 2004, p. 54.

229 B. CONFORTI, *Diritto Internazionale*, Napoli, 2006, p. 95.

230 The rule on the interpretation of international treaties is included in the Vienna Convention of 1969 about treaty law, executive in Italy with the law n. 112 of the 12<sup>th</sup> February 1974.

Vienna Convention on the law of the treaties, 23 May 1969, art. 31, p. 340.

231 Judgment of the *Cour d'appel de Paris* February 4 2004, dec. n. 1442712.

232 Dec. of the *Conseil d'etat assembleé du contentieux* March 18 2005, n. 273714.

233 *Ibidem*.

234 A. SPATARO, *Ne valeva la pena*, 2011, cit. 154.

235 Sentence of the European Court of Human Rights 12dic 2006, appeal 28796, *Battisti v. France*.

started and sending his lawyers before the Italian court. In conclusion, the EctHR stated that there was not a violation of human rights and that the trials against him were legitimate.

#### **IV. 3. The norms applied to the second extradition from Brazil.**

The two main aspects on which Battisti based his defence and presented to the Brazilian judiciary in 2007 are: the political nature of the crimes committed by the APC and the risk of persecution that he would have faced if extradited to Italy. So, even in this case, the requested State had to analyse the legitimacy of the extradition request. As already analysed in the previous chapter, there is an *ad hoc* treaty<sup>236</sup> on extradition between Italy and Brazil, signed in the 1989 and entered into force in 1993. According to article 3<sup>237</sup> of the same Treaty, there are various exceptions to the obligation of conceding extradition stated in article 1<sup>238</sup>, among which there are the political crimes and the clause of non-discrimination. Furthermore, article 5<sup>239</sup> underlines the need to protect human rights, giving to the requested State the power to refuse extradition in case of lack of respect of those rights, but specifying that, instead, contumacy is not a proper justification for the refusal. In particular, it is noteworthy that the questions concerning this dispute are not based on a conflict between the extradition request and the protection of human rights, but the three exceptions cited above and, consequently, the mere interpretation of the existing extradition treaty between the States<sup>240</sup>. This aspect is important, since it means that the only way to attest the legitimacy of the questions raised by Battisti are included in the treaty, taking into account the above cited good faith in the interpretation of international treaties.

Regarding the political nature of the crimes imputed to Battisti, the Supreme Federal Court (SFC) stated that a crime cannot be considered political if it is committed in a context of fully democratic state of law, in absence of immediate political propositions and without legitimate connotations against an oppressive regime<sup>241</sup>. In this way, the Court opposed to the current of thought used by the Minister of Justice in the same year, according to which Italy, during the so-called Years of Lead (in Italian “Anni di Piombo, an historical period in Italy between the beginning of the 1970's and the beginning of the 1980's, during which Italy faced terrorism and

---

236 Treaty of extradition between Brazil and Italy, October 17 1989.

237 See art. 3, let.e and f, Treaty of extradition between Brazil and Italy, October 17 1989.

238 See art. 1, Treaty of extradition between Brazil and Italy, October 17 1989.

239 See art. 5, Treaty of extradition between Brazil and Italy, October 17 1989.

240 M. CASTELLANETA, *Oltraggio all'italia da Lula*, December 31 2010, available online.

241 Decision of the Supreme Federal Court, 16 dicembre 2009, par. 6.

armed fight by political extremists), became the reflex of a ferocious authoritarianism during the fight against terrorism. The same SFC analysed those years, concluding that Italy did not undergo to an antidemocratic involution, stating that any points against it were speculative<sup>242</sup>.

Concerning the second question raised by the accused, the political persecution, the Court did not find any proof on the “existence of a fact that may justify the current fear of a future missed respect of constitutional guarantees for the subject”<sup>243</sup>. The “fear of persecution, in fact, must be actual, since the concept of “escape from justice” cannot be confused with the “escape with injustice”. On this matter, it is the High Commissioner of the United Nations which stated that “a refugee is a victim of injustice, not a fugitive from justice”<sup>244</sup>. It also affirms that “persecution must be distinguished from punishment for a common law offence. Persons fleeing from persecution or punishment for such an offence are not normally refugees. It should be recalled that a refugee is a victim or a potential victim of injustice”<sup>245</sup>. The same lines are followed by the Geneva Convention of 1951<sup>246</sup> about the refugee status and the Universal Declaration of Human Rights of 1948<sup>247</sup>, which exclude *expressis verbis* that the refugee status may be applied to who committed a “serious non-political crime outside the country of refuge prior to his admission to that country as a refugee”<sup>248</sup>. Homicide, indeed, is outside the sphere of the minimum standard for the respect of human rights, and, therefore, it is considered a “serious non-political crime”. As the Convention Relating to the status of Refugees states minor crimes do not cover minor crimes nor prohibitions on the legitimate exercise of human rights. In determining whether a particular offence is sufficiently serious, international rather than local standards are relevant. The following factors should be taken into account: the nature of the act, the actual harm inflicted, the form of procedure used to prosecute the crime, the nature of the penalty, and whether most jurisdictions would consider it a serious crime. Thus. For example, murder, rape and armed robbery would undoubtedly qualify as serious offences, whereas petty theft would obviously not (...) A serious crime should be considered non-political when other motives (such as personal reasons or gain) are the predominant feature of the specific crime committed. Where no clear link exists between the crime and its alleged political objective or when the act in question is disproportionate to the alleged political objective, nonpolitical

---

242 Decision of the Supreme Federal Court, 16 dicembre 2009, par. 65.

243 Decision of the Supreme Federal Court, 16 dicembre 2009, par. 4.

244 *Convention and Protocol relating to the status of Refugees*, United Nations, Geneva, 1992, par. 56.

245 *Ibidem*.

246 *Convention relating to the Status of Refugee*, United Nations, July 28 1951.

247 *Universal Declaration of Human Rights*, United Nations General Assembly, December 10 1948.

248 See art. 1, let.f, *Convention and Protocol relating to the Status of Refugee*, (UNHCR), July 28 1951, and art. 14, par. 2 *Universal Declaration*, UNA, December 10 1948.

motives are predominant. The motivation, context, methods and proportionality of a crime to its objectives are important factors in evaluating its political nature. The fact that a particular crime is designated as non-political in an extradition treaty is of significance, but not conclusive in itself. Egregious acts of violence, such as acts those commonly considered to be of a terroristic nature, will almost certainly fail the predominance test, being wholly disproportionate to any political objective. Furthermore, for a crime to be regarded as political in nature, the political objectives should be consistent with human rights principles<sup>249</sup>. Thus, it is possible to affirm that Battisti cannot legitimately benefit from the refugee status in Brazil<sup>250</sup>.

Always concerning the political crime matter, the same bilateral treaty in article 3, letter f, states that the political clause must be interpreted in the light of the international law practice, that affirms the importance of good faith aspect and tends to exclude from political crimes are included the serious crimes against the person<sup>251</sup>. The only effective exception is the case of civil war or armed insurrection, that are far away from the context in which the APC operated during the Years of Lead in Italy.

The decision of the Brazilian Court, perfectly consistent with the French Judges' decision and the Court of Strasbourg, admitted that the objections raised by Battisti about the trials in contumacy, the nature of his crimes and the violation of human rights were mere speculations and that, consequently, extradition had to be granted without hesitation<sup>252</sup>.

As already mentioned in the second chapter, the final decision for extradition, in the Brazilian juridical system, rests with the President of the Republic. In this case, President Lula opposed to the decision taken by the Court, rejecting the extradition request. The President referred to article 3, letter f of the Bilateral Treaty, concerning persecution and discriminatory acts for, among the others, political reasons. The decision is the result of an opinion<sup>253</sup> of the Brazilian Attorney General, that underlined the political aspect of the institute of extradition, that legitimises the President of the Republic to autonomously decide on the request, given that he is the expression of State sovereignty. However, this does not take into account the fact that there is still a valid bilateral Treaty that must be respected, apart from the internal political instances. From an international law point of view, if the Treaty affirms the obligation to extradition, it is

---

249 See par. 14 and 15, Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, UNHCR, September 4 2003.

250 A. CIAMPI, *L'ipotesi dell'estradizione*, p. 184, available online.

251 Decision of the Supreme Federal Court of Brasil, December 16 2009, cit. 141. Decision of the *Cassazione Penale* January 20 1993, Sec. VI, n. 18,2.

252 M.M. WINKLER, *Il Caso Battisti e le incerte promesse del diritto internazionale*, in *Il corriere giuridico*, July 2012, p. 905.

253 Dec. AGU/AG-17, *Advocacia general do Uniao*, December 28 2010, available online.

not possible to eschew such obligation, unless one of the exceptions, of the Treaty and of international law, may apply. As Natalino Ronzitti affirmed in an article of 2011<sup>254</sup>, “the final decision about extradition is, as a rule, an executive act, namely of the Brazilian President, although in this case non-discretionary, existing an *ad hoc* treaty between the two States”<sup>255</sup>.

The only way to attest who is right is to look at the exceptions, that are based on “serious reasons” and “well-founded reasons”, as required in the Treaty. In the case of the controversy and public disdain caused by the Battisti's case in Italy, they cannot be considered as neither serious or well-founded. On the other end, the fact that Battisti was condemned to life sentence cannot constitute a sufficient proof of human rights violation.

In June 2011, the Supreme Federal Court confirmed the presidential decision, contradicting everything affirmed two years before, in which they excluded any grounds for the application of the political persecution exception. The main point of the confirmation is the fact that the presidential decision is a national sovereignty act and cannot be modified. Furthermore, neither the President of the Republic nor the government have ever explained the “serious motives” behind the decision.

#### **IV. 4. Final considerations and future perspective**

A first interpretation of the entire sequence of events may be what an Italian article said “the Brazilian behaviour undermines the essence of the criminal judicial cooperation among the two States, making Brazil a safe place for those condemned for serious crimes and attacking the credibility of the State in the fight against *crime*”<sup>256</sup>. However, the case will be subject to the Treaty on Conciliation, Judicial Settlement and Arbitration, signed in Rio de Janeiro in 1954<sup>257</sup>, since the bilateral Treaty does not include an arbitration clause. The present agreement establishes, once terminated all the means internal to the treaty<sup>258</sup>, a biphasic procedure, in which both parties may call the other before the Conciliation Commission. Whether the Conciliation,

---

254 N. RONZITTI, *Il caso Battisti e il ricorso alla Corte Internazionale di giustizia*, in *Affarinternazionali*, January 10 2011.

255 *Ibidem*.

256 M. CASTELLANETA, *Vicenda Battisti atto secondo*, *Diritti umani e diritto internazionale*, sec. 3, p. 10, 2011, available online.

257 Treaty on Conciliation, Judicial Settlement and Arbitration, November 24 1954. (hereinafter “Treaty on Conciliation”)

258 See art. 3, Treaty on Conciliation, November 24 1954.

closing with a non bounding decision, was ineffective, both parties may start a contentious procedure before the International Court of Justice, that will emanate a definitive sentence<sup>259</sup>.

The fact is that, even if the International Court decides against Brazil, it does not mean that it is obliged to deliver Battisti, but that it has to pay an “equal satisfaction” to Italy<sup>260</sup> As article 18 of the Agreement states “If the International Court of Justice should hold that a decision of a judicial or other authority of one of the Contracting Parties is wholly or in part at variance with international law, and if the constitutional law of the said Party does not make it possible, or does not make it fully possible, to remove the consequences of the decision in question by administrative action, then, in such circumstances, the injured Party shall be awarded equitable satisfaction in a different form”<sup>261</sup>.

The question is delicate and requires to take into account different aspects. In the imperfect and resilient international system, the recognition of a violation may become a precedent for future sentences in similar cases, but the verification on the responsibility of Brazil for the violation of international norms may take back the question on the legal level, leaving outside all the political controversies, the polemics and the historical debates<sup>262</sup>.

---

259 See art. 16, Treaty on Conciliation, November 24 1954.

260 See art. 18, Treaty on Conciliation, November 24 1954.

261 *Ibidem*.

262 M.M. WINKLER, *Il Caso Battisti e le incerte promesse del diritto internazionale*, in *Il corriere giuridico*, July 2012, p. 907.

## BIBLIOGRAPHY

- A. CASSESE, *Lineamenti di diritto internazionale penale*, 2005.
- A. CERRI, *Istituzioni di diritto pubblico, nel contesto europeo*, 2015.
- A. LIBERTATI, *European integration. International judicial cooperation and reform of national law. The judicial system in Romania*, 2008.
- A. ROCCO, *Il problema e il metodo della scienza del diritto penale*, *Rivista di diritto e Procedura Penale*, 1910.
- B. CONFORTI, *Diritto Internazionale*, Napoli, 2006.
- C. FRONDIZI, *Nuovi diritti di cittadinanza Immigrati*, Roma 2000.
- E. GORAIEB, *A extradição no direito brasileiro*, 1999.
- E. MARIOTTI, *Guiding principles of european and italian law for spatial development and for territorial governance*, 2010.
- F. CORDERO, *Procedura Penale*, 2012, IX ed.
- F. MENDES, *13 Anos de Arrastão*, Porto Alegre, 2016.
- G. CONSO, V. GREVI. M. BARGIS, *Compendio di Procedura Penale*, 2016.
- G. CRUCIANI, *Gli amici del terrorista. Chi protegge Cesare Battisti?*, May 25 2010.
- G. FIANDACA, E. MUSCO, *Diritto Penale Parte Generale*, 2014, VII ed.
- G. NOVELLI, *Compendio di diritto privato e processuale*, 2016.
- G. RUSSOMANO, *A extradição no direito internacional e no direito brasileiro*, 1973.
- G. SPANGHER, *Codice di procedura penale ragionato*, 2014, II ed.
- G. TURONE, *Il caso Battisti*, July 7 2011.
- H. SATZGER, *International and European Criminal Law*, Munich, 2012.
- I.A. SHEARER, *Extradition in international law*, Manchester, 1971.
- I. CARACCILO, U. LEANZA, *Il diritto internazionale, diritto per gli Stati e diritto per gli individui*, 2010.
- J.E. NUNEZ, *Sovereignty Conflicts and International Law and Politics: A Distributive Justice Issue*, 2017.
- J. KLABBERS, *International Law*, New York, 2013.
- J.O. HAFEN, *International Extradition: Issues Arising Under the Dual Criminality Requirement*, 1992.



- K. K. PANDA, *A Text Book of International Law*, Delhi, 1998.
- L. KLIMEK, *European Arrest Warrant*, Bratislava, 2015.
- M.C. BASSIOUNI, *International Extradition and World Public Order*, Chicago, 1974.
- M. DIXON, *Textbook on International Law*, 2013, VII ed.
- M. FORDE, K. KELLY, *Extradition Law and Transnational Criminal Procedure*, 2011, VII ed.
- M. FRAGA, *O novo estatuto do estrangeiro comentado*, Rio de Janeiro 1985.
- M. LAZAR, M. MATARD-BONUCCI, *Il libro degli anni di piombo*, Milano, 2010.
- M. PELISSERO, *Reato politico e flessibilità delle categorie dogmatiche*, Napoli, 2000.
- M.R. GARCIA-MORA, *The nature of political offences: a knotty problem of extradition law*, Virginia, November 1962.
- N. RONZITTI, *Introduzione al diritto Internazionale*, 2016, V ed.
- P. BILANCIA, *The dynamics of the eu integration and the impact on the national constitutional law. The European Union after the Lisbon treaties*, 2012.
- P. CORSO, L. ALIBRANDI, *Codice di Procedura Penale e leggi complementari*, 2017.
- R. CRYER, *An Introduction to International Criminal Law and Procedure*, Cambridge, 2014.
- R. LUZZATTO, F. POCAR, *Codice di diritto internazionale pubblico*, 2016, V ed.
- R. PEZZANO, *Compendio di diritto penale, Parte generale e speciale*, 2014, XVIII ed.
- T. MARTINES, *Diritto Costituzionale*, 2013, XIII ed.
- U. VILLANI, *Istituzioni di dell'Unione Europea*, 2016, IV ed.

## SOMMARIO

Il presente elaborato, seppur nei limiti di una tesi triennale, si prefigge lo scopo di analizzare l'istituto dell'extradizione, alla luce delle normative e dei rapporti nazionali ed internazionali ad esso connessi. Il filo conduttore seguito è quello di inquadrare, all'interno della normativa, i rapporti di forza tra i vari stati nazionali e le esigenze repressive degli illeciti di tipo criminale. L'istituto forza i confini statali e tende ad allargare la giurisdizione e la competenza repressiva degli illeciti criminali da parte dei soggetti esercenti la sovranità su un dato territorio. Pertanto, si è di fronte ad un istituto che stressa la competenza *ratione loci*, per privilegiare l'esigenza repressiva delle autorità nazionali, le quali, in tal modo, riescono ad aggirare il limite posto dal principio di territorialità e dai crimini derivanti dalla frammentazione dei singoli stati nazionali.

Il metodo seguito ha condotto alla strutturazione dell'elaborato secondo macro aree, inquadrando, in ciascuna di esse l'istituto, secondo la normativa, di volta in volta, presa in considerazione. Il punto di partenza consiste nell'analisi dei principi alla base del diritto internazionale, i quali guidano non solo i singoli casi di estradizione, bensì anche i Trattati bilaterali e multilaterali che ne dettano la prassi. Tali accordi tengono in considerazione le varie forme di Stato e di governo dei singoli paesi, lasciando loro una certa libertà nell'applicazione della normativa e delle procedure interne. Come si evince nel secondo capitolo, l'entrata dell'Italia nell'Unione Europea ha sicuramente influenzato la concezione dell'istituto sia per il Brasile, che per l'Italia stessa. Nonostante, i numerosi accordi, i protagonisti dell'arena internazionale si riservano, comunque, potere decisionale, il quale trova la sua fonte di legittimazione nella sovranità nazionale, rendendo l'applicazione dei trattati discrezionale e relativo al singolo caso. Tale situazione emerge con chiarezza dal caso Battisti, al quale è dedicata una compiuta analisi all'interno del quarto capitolo.

Dal punto di vista legale, l'extradizione consiste nel trasferimento da uno stato di un

individuo imputato al di fuori dei confini statali, che dev'essere sottoposto a giudizio o che deve scontare una pena definitiva, allo stato che lo richiede. Di conseguenza, è possibile, solitamente, individuare due attori principali: lo Stato richiedente (requesting State), ovvero il soggetto giuridico che richiede la consegna dell'individuo in questione, e lo Stato richiesto (requested State), nel cui territorio si trova tale individuo, e che ha la possibilità di accettare o rifiutare la richiesta, secondo accordi e principi internazionali. Nel primo caso, si parla di estradizione attiva, mentre nel secondo di estradizione passiva.

Come già sottolineato, in quanto strumento di cooperazione internazionale, l'extradizione necessita del rispetto di alcuni principi fondamentali del diritto internazionale, tra cui il principio di “doppia criminalità” e il concetto di *ne bis in idem*, il principio di specialità, l'eccezione dei crimini politici e militari, nonché il divieto di estradare in caso di tortura e trattamenti inumani e degradanti o atti discriminatori.

Il principio di “doppia criminalità” richiede che il crimine per cui si domanda l'extradizione sia qualificato quale reato e sia punibile con l'arresto o altre forme di restrizione di libertà personale, in entrambi i sistemi giuridici degli Stati coinvolti. Tale principio è un diretto crollario del principio di legalità, secondo cui ogni atto dei poteri pubblici dello stato dev'essere regolato da una legge. Il concetto viene espresso in maniera chiara dal detto latino “*nulla poena sine lege*”. La “double criminality”, rappresenta una garanzia per gli individui e, allo stesso tempo, un ostacolo alla cooperazione. Proprio le inefficenze collegate a tale principio sono oggi oggetto di ripensamento, rendendolo, agli occhi di molti, obsoleto.

Il secondo principio imprescindibile è il cosiddetto “*ne bis in idem*”. Tale principio richiede che nessun individuo debba essere giudicato e/o incriminato più di una volta per lo stesso fatto criminoso. La generalità di questo principio causa numerosi problemi di interpretazione, soprattutto in riferimento all'ammissibilità di due procedimenti per lo stesso reato o alla definizione di “stesso fatto criminoso”. A tali situazioni, solitamente, si applica l'articolo 4, del protocollo 7 della CEDU.

Il terzo aspetto da considerare è il principio di “specialità”, secondo il quale un

individuo può essere sottoposto a processo e/o arrestato dallo stato richiedente esclusivamente per i crimini espressamente inclusi nella richiesta di estradizione e che sono stati approvati dal “*requested state*”. Come nel caso del principio di “doppia criminalità”, anche quello di specialità ha due facce contrapposte: da una parte, agisce a protezione dell'individuo, dall'altra potrebbe essere usato come strumento politico nelle mani del “*requested state*”.

Infine, l'attenzione dell'elaborato, rispetto ai principi generali, si focalizza sulle principali eccezioni, a cui lo stato richiesto può appellarsi per rifiutare una richiesta di estradizione. La prima eccezione riguarda i crimini politici, a cui lo stato richiesto può appellarsi per rifiutare la domanda nel caso in cui abbia solide basi per credere che l'individuo, una volta fatto ritorno nello Stato richiedente, possa essere incriminato e/o sottoposto a processo per crimini di natura politica o collegati a motivi di tale natura. Influenzato dal contesto storico dopo le due guerre mondiali e dall'incertezza politica della seconda metà del XX secolo, il diritto internazionale e il diritto pattizio hanno codificato questa eccezione, lasciando, però, liberi i singoli Stati di interpretare arbitrariamente la natura politica dei crimini.

Anche il crimine politico include, a sua volta, alcune eccezioni per cui l'extradizione viene concessa: tra i casi, a titolo esemplificativo e non esclusivo, rinveniamo gli atti di terrorismo, i crimini anarchici, i crimini di guerra e i crimini internazionali, come il genocidio. Data la natura prettamente politica delle motivazioni alla base di tali crimini, negli anni sono stati istituiti numerosi trattati specifici, come la Convenzione Internazionale per la Repressione del Finanziamento del Terrorismo del 1999, la Convenzione sul Genocidio del 1948 e lo Statuto di Roma della Corte Penale Internazionale del 1998.

L'ultima eccezione analizzata, riguarda la tortura e tutti quegli atti e trattamenti che infliggono sofferenza fisica e psicologica all'individuo. La tortura, in particolare, è considerata *jus cogens*, ovvero obbligatoria per tutti gli stati appartenenti all'arena internazionale, nonostante sia ancora oggetto di numerose controversie.

Nonostante la presenza di questi principi, i quali fungono da linee guida nella determinazione in merito alla politica comune sull'extradizione, ogni Stato segue una

peculiare procedura interna, solitamente suddivisa in almeno una fase di natura amministrativa ed una giurisdizionale, la quale mostra compiute differenze a seconda che si tratti di estradizione attiva o passiva.

Nel caso dell'Italia, quando è lo stesso Stato a chiedere l'extradizione di un individuo ad un altro Stato, la competenza è del Procuratore Generale, presso la Corte d'Appello, competente territorialmente. Il Procuratore presenta una richiesta ufficiale al Ministro degli Affari Esteri, il quale, dopo un'attenta analisi della documentazione fornita, procede con l'ufficializzazione della richiesta da notificare alle autorità dello Stato da cui la richiesta viene accolta. Per quanto riguarda l'extradizione passiva, il Ministro degli Affari Esteri è competente a ricevere la richiesta ufficiale dello Stato richiedente e ha pieno potere per rifiutare o decidere di inoltrarla al Procuratore Generale, presso il distretto della Corte d'Appello competente. Una volta identificato e interrogato il soggetto in questione, la Corte fissa un'udienza in camera di consiglio, in cui verrà accettata o rifiutata la richiesta, proveniente dallo Stato richiedente.

Nell'ordinamento giuridico Brasiliano, invece, il Ministro degli Esteri riceve la richiesta, la quale, se non rifiutata, viene trasmessa al Supremo Tribunale Federale, il quale interrogherà l'imputato e esaminerà la domanda e le eventuali prove a suo sostegno. Il ruolo della Corte sopracitata consiste prettamente nell'autorizzare l'invio della richiesta, al fine di procedere con l'ultima fase di natura amministrativa: la decisione finale spetta comunque al Presidente della Repubblica.

Solitamente e per prassi, il Presidente si pone sulla stessa linea della decisione precedente del Supremo Tribunale Federale, salvo nelle situazioni in cui non esista alcun trattato specifico fra i due Stati, ma ciò non significa che non possa pronunciarsi contrariamente anche in presenza di un trattato, come nel caso di Cesare Battisti, analizzato nell'ultimo capitolo.

Il processo di estradizione attiva, invece, inizia con la trasmissione della domanda da parte del Ministro della Giustizia e dei negoziati interni al Ministro degli Affari Esteri, al quale spetta il compito di autorizzare l'invio della richiesta alle Autorità straniere. In casi particolarmente delicati, la richiesta può essere sottoposta a giudizio del Supremo

Tribunale Federale, il quale ne analizza i vari elementi e apporta eventuali modifiche al testo della domanda.

La presenza di un trattato bilaterale o multilaterale rende il processo meno ostico, ma, comunque, non garantisce l'accoglimento, o meno, della domanda di estradizione. Il Brasile e l'Italia, in merito, hanno codificato gli accordi riguardanti l'extradizione sin dal 1872, con il primo Trattato di estradizione tra il Regno d'Italia e l'Impero brasiliano, sostituito dal più recente trattato di estradizione del 1989, il quale contiene alcune modifiche al testo corrente. In generale, si possono evidenziare alcuni tratti comuni a gran parte dei trattati con il medesimo oggetto: il principio di *ne bis in idem*, la prescrizione, la natura politica e militare dei crimini, il rispetto dei diritti umani e la doppia criminalità.

Il cambiamento più significativo, è stato apportato dalla Convenzione Europea dei diritti dell'uomo del 1950, precedente alla formazione dell'odierna Unione Europea. La Convenzione, nell'applicazione delle norme sulla protezione dei diritti fondamentali, spesso costituisce un ostacolo per i singoli Stati: per esempio, il *requested state*, accettando la domanda di estradizione verso uno Stato che viola manifestamente tali diritti, incorre lui stesso nella medesima violazione.

L'entrata nell'Unione Europea ha in parte mutato la concezione che l'Italia ha dell'istituto in questione. Sul punto, il Mandato d'Arresto Europeo ha ridotto notevolmente i tempi di estradizione, eliminando il principio di “doppia criminalità”, per tutte le richieste provenienti e dirette ai paesi firmatari.

Nell'arena internazionale, ogni singolo Stato considera la sua sovranità assoluta e incontestabile. Per questo motivo, l'esistenza di numerosi principi riconosciuti a livello internazionale e dei trattati diretti al riconoscimento di accordi bilaterali e multilaterali non sempre garantisce il rispetto di tali norme e collaborazioni. Un esempio evidente, riguardante il rapporto tra lo Stato italiano e quello brasiliano, è il caso di estradizione di Cesare Battisti.

Battisti viene arrestato, per la prima volta, nel carcere di Udine, dove conosce alcuni esponenti dei “Proletari Armati per il comunismo”, una formazione di estrema sinistra, ai cui vennero attribuiti numerosi omicidi e rapine, durante gli Anni di Piombo. In particolare, a Battisti, che si è sempre dichiarato estraneo ai fatti, vengono imputati quattro omicidi: quello di Angelo Torreggiani, Antonio Santoro, l'agente della Digos Campagna e Lino Sabbadin.

Evaso dal carcere di Udine, Battisti fugge in Francia, dove trova protezione grazie alla Dottrina *Mitterrand*, istituita dal Presidente francese a cui deve il nome, che offrì asilo politico ai fuggitivi italiani, a condizione che conducessero una vita normale, rinunciando definitivamente alla violenza.

Nel 1991, la Corte d'Appello di Parigi rifiuta per ben due volte la richiesta di estradizione presentata dallo Stato italiano, motivando tale decisione con la presenza di crimini politici e prescrizione, senza alcun riferimento alla Convenzione Europea sull'extradizione del 1957, rendendo, quindi, la mancata estradizione di Battisti illegittima fin dall'inizio. Nel 2003, dopo aver dichiarato la Dottrina *Mitterrand* inammissibile, lo Stato francese dichiarò del tutto lecita la richiesta di estradizione di Battisti, rigettando sia il suo pretesto basato sulla contumacia, che la possibile natura politica dei suoi crimini.

Quest'ultimo motivo fu la base della difesa di Battisti che, una volta fuggito in Brasile, aggiunse a quelli precedenti anche il rischio di persecuzione politica, che avrebbe subito una volta tornato in patria, se il Brasile avesse accettato la richiesta di estradizione. Nel trattato del 1989 che regola l'istituto tra Italia e Brasile, l'articolo 3 elenca una serie di casi in cui l'extradizione non può essere concessa, tra cui i crimini politici e la clausola di non-discriminazione. Quest'ultimo è un elemento fondamentale del caso, in quanto sottolinea che l'unico modo per attestare in modo efficace tali eccezioni è quello di far riferimento al trattato. Il Supremo Tribunale Federale brasiliano ha analizzato le due eccezioni sovraccitate, constatandone la non-applicabilità al caso di Battisti per mancanza di prove non meramente speculative. Pertanto, lo stesso Supremo Tribunale, in accordo con le passate decisioni dei giudici francesi, ha confermato l'ammissibilità della richiesta di estradizione.

La decisione finale, essendo atto esecutivo, come citato precedentemente, spetta al

Presidente della Repubblica, al tempo Luiz Inácio Lula. Inaspettatamente e non tenendo conto dell'opinione del Supremo Tribunale Federale, ma basandosi sulle conclusioni del Procuratore Generale del Brasile, il Presidente Lula rifiutò la richiesta di estradizione, motivandola con “*ragioni serie*” e “*motivi ben fondati*”, mai propriamente illustrati allo Stato italiano.

Nel 2011, il Tribunale Supremo ha confermato la decisione Presidenziale, contraddicendo così il lavoro di analisi effettuato due anni prima, e motivando tale scelta con il fatto che la decisione del Presidente rappresenta un atto di sovranità nazionale, immodificabile.

Dal momento in cui il trattato bilaterale tra l'Italia e il Brasile non include una specifica clausola riguardo l'arbitrariato internazionale, il caso verrà sottoposto ad analisi attraverso la Convenzione di conciliazione e regolamento giudiziario, firmata a Rio de Janeiro nel 1954. Quest'ultima, anche concordando con l'Italia e giudicando la rifiutata estradizione come non-conforme al trattato bilaterale tra i due Stati, non avrebbe, in ogni caso, come risultato, l'estradizione definitiva di Battisti in Italia, ma solo un risarcimento pecuniario da parte del Brasile.

La questione è delicata e richiede un'attenta valutazione di ogni singolo aspetto. Nel sistema internazionale, il riconoscimento di tale violazione potrebbe costituire un precedente per le future decisioni, ma la verifica delle responsabilità del Brasile per la violazione di norme internazionali dovrebbe essere analizzata a livello giurisdizionale, lasciando al di fuori ogni questione e polemica politica.