



Extradition and the death penalty: Perspectives from Italy

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Introduction

This Research Paper studies the history, rationales, and contents of the 'Italian approach' to the rejection of extradition requests concerning the imposition and execution of the death penalty by analysing key decisions rendered by the Italian Constitutional Court and the Italian Supreme Court.

In the first part of the paper, attention is devoted to the shared reading of the existing Italian law. This substantially consists of the refusal of procedural extradition requests for capital crimes, regardless of the eventual granting of assurances on the non-application of the death penalty by requesting State authorities. In the second part, this form of legal reasoning is contextualised by comparing it to the one adopted by the European Court of Human Rights. The Strasbourg Court's standard in this area is lower than that of the Italian higher courts because it still relies on the mechanism of the

exchange of information among public actors as a solution to guarantee that the death penalty is not administered. The third part addresses the Italian Supreme Court position that procedural extradition requests for capital crimes ought to be rejected upfront, and, as a consequence, that no arrest nor precautionary measures can be adopted awaiting the decision on such requests, with an in-depth examination of two major rulings it issued recently. This paper argues that such a stance treats States that are abolitionist de facto (ADF) – those that keep the death penalty in their statutes, but have not enforced it for ten years or more – in the same way as those that retain and carry out capital punishment. In concluding, it is contended that this innovative reading has a two-fold significance. On the one hand, it offers a model for higher courts of other countries, as well as regional ones, to follow. And, on the other, in dealing with retentionist and ADF States in the same manner, it increases the

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pressure on the latter to abolish the death penalty from their legislation.

1. Italy's journey to non-extradition for crimes punishable by the death penalty

The progressive abolition of the death penalty¹ has been assisted by restrictions in international cooperation in criminal matters.² If extradition requests for crimes sanctionable with capital punishment are refused, it inevitably follows that criminal proceedings on the related criminal activity become more cumbersome in the requesting State. This consequently contributes to the repeal of legislation providing for the death penalty in national statutes,³ since, among other reasons, retention hinders the effectiveness of retentionist nations' efforts to restrict crime in the transnational sphere.⁴ A notable exemplification of this growing influence is the modification of case law of the Canadian Supreme Court. In the 1991 case of *Kindler v Canada (Minister of Justice)*,⁵ the Court ruled that extradition to the U.S. for a crime which was sanctionable with capital punishment, without assurances of its non-application, was in line with section 7 (right to life, liberty, and security of the person) of the Canadian Charter of Rights and Freedoms. Ten years later, in the 2001 case of *United States v Burns*,⁶ concerning a similar situation, the Canadian Supreme Court took the opposite stance, deciding that unconditional extradition was incompatible with section 7 of the Charter.

Italy has historically been at the forefront of international efforts to abolish the death penalty, notwithstanding a return to capital punishment from 1926, during the time of the Fascist dictatorship,⁷ until 1948, when the Constitution

entered into force.⁸ This orientation can be traced back at least to the eighteenth century, in particular with the publication of *Dei delitti e delle pene* by Cesare Beccaria in 1764⁹ as well as with the passing of the *Codice Leopoldino* by the Grand Duke of Tuscany in 1786, which abolished the death penalty in the Grand Duchy.¹⁰ As the law currently stands, the Italian Constitution provides that the death penalty is inadmissible under art. 27 para. 4.¹¹ Subsequently, in 2007 the text of the Constitution was amended,¹² also abolishing capital punishment for military crimes.¹³ Therefore, since the taking effect of the Constitution, the death penalty has not been administrable and the focus of the Italian higher courts (i.e. the Italian Constitutional Court and the Italian Supreme Court) in this area has turned to extradition requests concerning crimes that are punishable by death in other jurisdictions.¹⁴ From the late 1970s to date, the Italian higher courts have developed pioneering jurisprudence based upon the absolute character of the constitutional ban on capital punishment, read in conjunction with the right to life.¹⁵ This interpretation has gradually restricted the scope of collaboration that Italy is willing and able to offer to countries that require persons to be returned to stand trial, or if convicted, to serve a final sentence, for charges that could be sanctionable with death.

The Italian Constitutional Court intervened in laws regarding extradition and the death penalty in two seminal decisions handed down, respectively, in 1979 and in 1996.

In the first decision, no. 54 of 1979,¹⁶ the constitutional judges were called upon to adjudicate on the compatibility with the Constitution of the Royal Decree no. 5726 of 1870, which implemented the 1870 Convention on Extradition between Italy and France. In particular, it allowed for the transfer of defendants from Italy to France

for crimes sanctionable with capital punishment in France. The Constitutional Court, by making reference to art. 27 para. 4 of the Constitution stated that, notwithstanding the obvious difference between those that would face trial in Italy and those that would be extradited, it is not acceptable for Italian authorities to discriminate between individuals in matters of legal interests and values that are fundamental to the domestic legal order. This is so even if when cooperating with the authorities of the requesting State. Therefore, it ruled that it is in conflict with the Constitution for Italy to co-operate in the execution of penalties that could not be inflicted in the country.¹⁷ The constitutional judges further argued that art. 27 para. 4 cannot be taken in isolation, but has to be interpreted and applied in view of the whole of the Constitution. This specifically includes art. 3, which affirms the principle of non-discrimination.¹⁸ The latter provision, enshrining an inviolable right, applies with regards to the treatment of Italians as well as foreigners. It includes also the right to life, which is itself specifically protected, in terms of the criminal law, under art. 27 para. 4. Finally, the Constitutional Court declared Royal Decree no. 5726 of 1870 contrary to the Constitution, insofar as it allowed extradition for crimes punishable by the death penalty under the legal system of the requesting State.

In the second decision, ruling no. 223 of 1996 (also known as the 'Venezia case'),¹⁹ the constitutional judges were asked to rule on whether art. 698 para. 2 of the Code of Criminal Procedure and law no. 225 of 1984, which had ratified the Extradition Treaty between Italy and the U.S. of 1983, were in line with the Constitution. In particular, the core of the question was if these two provisions met the constitutional requirement of the non-application of capital punishment. As they stood, they allowed for the granting of extradition for crimes

sanctionable with the death penalty on the condition that two criteria were met: firstly, that the requesting State issued diplomatic assurances confirming that capital punishment would not be inflicted in the specific case; and secondly, that these assurances were deemed to be sufficient both by the judicial authority in charge of the extradition proceedings and by the Minister of Justice.

In adjudicating the matter, the Constitutional Court advanced an argument related to the death penalty starting from the Report of the Commission of the Constituent Assembly on Italy's draft Constitution, dated 1947. This document affirmed that the (later adopted) provision under art. 27 para. 4 preserves a principle that "in many respects can be considered Italian and, reaffirmed in the free phases and regimes of our Country, it was removed in reactionary and violent periods."²⁰ According to the constitutional judges' interpretation, the prohibition of the death penalty in the Constitution represents a broader expression of art. 2 of the Constitution, which defends the right to life. Thus, the prohibition on capital punishment applies to every public authority and norm. This means that it implies a duty on all three branches of government to follow that principle and also covers the Code of Criminal Procedure and the laws giving effect to international treaties on extradition and judicial assistance. Drawing from the legal reasoning expressed in the previous ruling no. 54 of 1979, the Constitutional Court concluded by stating that:

In our legal system, where the prohibition of the death penalty is enshrined in the Constitution, the rule of sufficient assurances – for granting extradition for acts for which the death penalty is prescribed by the law of the foreign State – is not constitutionally permissible.

Because the prohibition contained in art. 27 para. 4 of the Constitution, and the underlying values – foremost among them the essential legal interest of life – require an absolute guarantee.²¹

In essence, the constitutional ban on the death penalty was expressed in two main steps, leading to two different sets of exclusions. The first exclusion was that of the legitimacy of extradition requests for crimes punishable by this penalty. The second exclusion was that of the judicial and political scrutiny, which was formerly to be conducted on a case-by-case basis, predicated on the reliability and effectiveness of assurances that would deny its imposition. On a closer look, it appears that the reading of art. 27 para. 4 has become ever-more absolute, shifting from one field of the law to another. In particular, it transited from international law, with regards to non-cooperation or non-acquiescence among States, to the national criminal law, in relation to non-discretion or non-flexibility in the decision-making process.

Currently, the Italian Code of Criminal Procedure of 1989, under art. 698 para. 2, specifies that extradition for crimes sanctionable with the death penalty is forbidden unless a final decision imposing a different penalty has been issued or, otherwise, the sentence inflicting it has been commuted.²² This provision was amended in 2017 to ensure its conformity with the statements made by the Constitutional Court in the ‘Venezia case’, where, as noted, the previous version of the norm was declared to be partially incompatible with the Constitution.²³ Specifically, the legislative overhaul also concerned the role of the courts and the Minister of Justice, which were no longer required to carry out the assessment on the quality of the diplomatic assurances. The prior regime of scrutiny of the assurances was itself considered inadequate

by some scholars: for instance, Mario Chiavario criticised the criteria chosen when selecting the public bodies undertaking said scrutiny and the unsatisfactory level of due process rights guaranteed by their intervention.²⁴

2. The ‘traditional alternative’: Extradition and the death penalty in the case law of the European Court of Human Rights

The European Convention on Human Rights (ECHR) differs from the relevant Italian law pertaining to extradition for crimes punishable by the death penalty. In fact, in such situations the European Court of Human Rights protects the right to life under art. 2 ECHR (and the prohibition of torture and inhuman or degrading treatment under art. 3 ECHR) by relying on the mechanism of the granting of assurances on the non-application of capital punishment.

Undoubtedly, the landmark case in the Strasbourg Court’s case law in this area is *Soering v. United Kingdom* (1989).²⁵ In that instance, the European Court of Human Rights notably stated that returning the applicant Mr. Soering to the U.S. would have exposed him to the real risk of the imposition of the death penalty and therefore to treatment contrary to art. 3 ECHR due to ‘death row phenomenon’.²⁶ This phenomenon refers to the physical and psychological hardships that a person awaiting execution faces and, specifically, the very long waiting period in extreme conditions with the “ever-present and mounting anguish”²⁷ of their looming execution. With particular reference to the granting of assurances, the Strasbourg Court clarified that those offered were insufficient to exclude the possibility that capital punishment would have been imposed by the competent

judge.²⁸ Ultimately, Mr. Soering was extradited, but only after the State of Virginia prosecutor overseeing the case provided a stronger assurance, deemed sufficient by the British authorities that were tasked to come to a final decision, namely that he would not seek the death penalty.²⁹ In fact, this was the first ruling in the ECHR domain where international cooperation in criminal matters was made dependent on capital punishment not being imposed, due to the consideration that the administration of such penalty would be contrary to the Convention.

Subsequent judgments³⁰ brought about a repositioning in the jurisprudence. The salient ones were those taken after the signing and ratification by most State Parties of Protocol no. 13 to the ECHR,³¹ which banned the application of the death penalty in the Council of Europe in all circumstances.³² Remarkably, the European Court of Human Rights' attitude changed and it started to consider the possibility of a violation of art. 2 ECHR³³ as well as one of art. 3 ECHR,³⁴ with a renewed understanding that extradition for crimes sanctionable with capital punishment would be directly and per se incompatible with the right to life.

The central judgment which signified this development in the case law is *Al-Saadoon and Mufdhi v. United Kingdom* (2010).³⁵ The claim made by Mr. Al-Saadoon and Mr. Mufdhi, who were both Iraqi nationals and Sunni Muslims accused of involvement in the murder of two British soldiers shortly after the invasion of Iraq in 2003, was that their transfer by the British authorities into Iraqi custody put them at real risk of execution by hanging. In the reasoning that it provided, the Strasbourg Court stressed the number of Member States that by that time had signed (all but two) and ratified (all but three) Protocol no. 13 and also the

consistency with which State practice complied with the moratorium on capital punishment. These two elements had caused an evolution in the reading of art. 2 ECHR, to the point that it was seen to prohibit the death penalty under any condition. Furthermore, the European Court of Human Rights articulated that the wording of the second sentence of art. 2 para. 1 ECHR ("No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law") does not continue to constitute a bar to the inclusion of capital punishment under the notion of inhuman or degrading treatment or punishment in art. 3 ECHR.³⁶

Crucially, despite the shift of focus from art. 3 ECHR to art. 2 ECHR, the position that sufficient diplomatic assurances can exclude the possibility of a breach of the ECHR regarding extradition for crimes sanctionable with the death penalty remains the basic rule currently in place.³⁷ As a logical consequence, the Strasbourg Court's attention is devoted to the presence and reliability of such assurances.³⁸ In particular, it focuses on their "clarity" and "unequivocability"³⁹ or, conversely, their "vagueness" and "imprecision".⁴⁰ In the matter of judicial executions, from the standpoint of the ECHR the protection of fundamental rights remains anchored to an *in concreto* assessment of the existence of a real risk of infliction of capital punishment at trial (and at a potential re-trial).⁴¹

It is clear from the above that for extradition to be granted in compliance with the ECHR, the competent courts have to carry out an appraisal of the assurances that are provided. This arrangement has two major consequences. Firstly, it implies a requirement to trust the requesting State authorities' declarations. These documents take the form of: prosecutors' affidavits or judges' orders, in

terms of the judiciary,⁴² and executive officials' letters, insofar as the government is concerned.⁴³ They are delivered by means of diplomatic notes or equivalent. Secondly, it presumes, based on established criteria, the country's good faith in upholding public international law. The test comprises two parts, having: a "history of respect for democracy, human rights and the rule of law"; and "longstanding extradition arrangements with Contracting States."⁴⁴

3. The rejection of procedural extradition requests regarding capital punishment by the Italian Supreme Court and the implications for abolitionist de facto States

In the recent decades, the Italian Supreme Court has developed an interpretation of the Code of Criminal Procedure and the laws ratifying and giving execution to extradition treaties in light of the Constitution and especially of the Italian Constitutional Court's reading of the latter. This has implied an increasingly tightened appreciation of the legal principles regarding international cooperation in criminal matters, where the death penalty is at issue.

At the outset, it should be pointed out that this line of Supreme Court jurisprudence appears to be coherent with the wording of art. 698 of the Code of Criminal Procedure. If the extradition request is executive in nature, that is to say a penalty has already been decided and the requesting State is seeking the person in order to punish them after the trial phase has ended, then collaboration can be granted on the condition that there was no death penalty imposed or the death sentence was commuted to another sentence. From this position, so long as the end result of the criminal proceedings

totally excludes the existence of a threat to life, then cooperation between Italy and foreign authorities for crimes that are in principle punished with the death penalty is foreseeable.

This state of affairs changes when the Supreme Court decides on requests that are procedural, in the sense that they concern precautionary measures or committal to trial but not sentences that are final and binding. Here it considers the wording of art. 698 of the Code of Criminal Procedure to imply that no collaboration is feasible if capital punishment is a possible outcome, even if remote, of the trial conducted by the judicial authority in charge of the case in the foreign country. Notably, at first glance no explicit imposition of the refusal arrangement as described can be found in the relevant wording of the Code of Criminal Procedure, as it mentions executive requests only. This seems to suggest that this provision is read on account of the aforementioned constitutional principles of the right to life and the ban on the death penalty under art. 2 and art. 27 para. 4 of the Constitution respectively.

In order to fully grasp what the Italian Supreme Court's current line of argument is, it is necessary to analyse two of its pivotal rulings in this matter, both handed down in 2024.

In ruling no. 17316 of 2024,⁴⁵ the Italian Supreme Court dealt with an appeal filed by the Attorney General of Trieste against the decision in which the Triestine appellate judges had deemed the conditions for the extradition of an individual to be non-existent. The person concerned was the subject of a request for procedural extradition from the Islamic Republic of Pakistan for the crime of murder, allegedly committed in Pakistan and theoretically punishable by the death penalty. During the proceedings, the Pakistani authorities sent a letter mentioning Presidential Decree No. IV

of 2019, which had amended the Pakistani Criminal Code ensuring that in the event of extradition such penalty would not be applicable. In his appeal, the Attorney General specifically argued that the Court of Appeal of Trieste had made two mistakes in the interpretation of the law. One was related to art. 705 and art. 698 para. 2 of the Code of Criminal Procedure, and the other to the documentation provided by the requesting State. In particular, although the Attorney General agreed with the tenet that extradition should not take place if capital punishment could be imposed, he submitted that the 2019 Presidential Decree excluded the application of the death penalty in the case at hand. The Attorney General focused mainly on the appreciation of the documents from Pakistan, which arrived translated into English and, in his opinion, had been misunderstood in their content and could still be subjected to an independent translation. He suggested the originals should have been obtained in the native language through an appropriate exchange of communication. Further misunderstanding concerned an incorrect mention of an existing extradition treaty between the Italian Republic and the Islamic Republic of Pakistan, which in fact did not exist. This led the Attorney General to contend that the Triestine appellate judges should have solicited additional information from the requesting country.

The Italian Supreme Court dismissed the appeal brought before it by the Attorney General of Trieste and held that the extradition request in question could not be accepted. Specifically, it introduced the legal principle that there is an absolute limit in the Italian legal system to the granting of an extradition to a foreign country for crimes punishable by capital punishment and no further investigations may be conducted (for instance, by means of diplomatic notes). With respect to the Pakistani request, it specified that

the 2019 Presidential Decree should be understood as a form of assurance; thus, it was incompatible with art. 27 para. 4 of the Constitution and exceeded the scope of art. 698 para. 2 of the Code of Criminal Procedure.

Subsequently, with ruling no. 22945 of 2024,⁴⁶ the Italian Supreme Court dealt with an appeal filed by an individual against a preventive detention order which was adopted against him in connection to an extradition request by the Islamic Republic of Pakistan. Specifically, after having been arrested by police in Italy, pending the final decision on whether to extradite him, the Court of Appeal of Bologna validated his arrest and applied the precautionary measure of custody in prison. In a similar fashion to the facts of ruling no. 17316 of 2024 just outlined, the request for procedural extradition was sent by Pakistani authorities for the crime of murder, potentially sanctionable with the death penalty. Specifically, the appellant, among other grounds, argued that the Court of Appeal of Bologna had wrongly considered that the penalty that could have been imposed in Pakistan was that of life imprisonment, omitting to cite that the alternative penalty prescribed by the Pakistani Criminal Code was capital punishment.

The Italian Supreme Court upheld the appeal with special reference to the grounds concerning the death penalty and annulled the arrest and the precautionary measure orders that had been adopted against the appellant. Importantly, the Supreme Court judges expressly resorted to the reasoning established in ruling no. 17316 of 2024. Not only did they reiterate the finding that procedural extradition requests for crimes that are sanctionable with capital punishment ought to be rejected as such, but went further. In particular, they determined that the police authority that is asked to intervene cannot proceed to arrest the

requested person and that the President of the Court of Appeal, who is competent to issue the relevant orders, can, in circumstances such as those, neither validate the arrest nor apply any kind of preventive detention. According to the Supreme Court, since the extradition proceedings may not result in the return of the requested person due to the provisions of the foreign country allowing for the death penalty being in place, then no deprivation of freedom can occur. This remains true even with regards to an arrest or a precautionary measure adopted during the early stages of extradition proceedings, when the assessment of the Court is mostly summary and formal in character.

In short, the Italian higher courts' rulings on procedural extradition requests for crimes that are punished *in abstracto* with the death penalty consist of the denial of the return of the requested person. This situation occurs without: resorting to the exchange of information with foreign public authorities; scrutinising diplomatic notes assuring the non-imposition of capital punishment *in concreto* at trial; and subjecting the individual to arrest and precautionary measures. This methodology is significant for two main reasons.

Firstly, it offers a coherent reasoning for other higher courts to adopt, both at the European and international level. Presently, cross-fertilisation of the law and its interpretation are a common phenomenon, including for extradition law. It could be foreseen that, provided that this conception of the right to life and its consequences are circulated, other judicial authorities, especially constitutional or supreme courts as well as human rights courts, could implement equivalent or similar arguments to those outlined in the rulings mentioned here. Such an outcome would bring about an innovative consideration of international cooperation in

criminal matters if the death penalty is at stake, where no chance of capital punishment being imposed in breach of diplomatic notes is taken regardless of the likelihood of this occurrence. The interpretation in question would also solve the underlying issue concerning the control on the assurances provided by the authorities of the requesting State.⁴⁷ This undertaking is inherently complex, due to the number of factors to consider, among which there is the credibility of the country's judicial and political authorities. Attempts are made at improving the appraisal at hand, such as the one, as was already explored in this paper,⁴⁸ of the European Court of Human Rights. At times, though, diplomatic notes are relied upon only to be later found inconsistent, leading in the end to the application of capital punishment.⁴⁹ This suggests that the risk of non-compliance after extradition is granted, albeit minimal, cannot be excluded. Such situation is problematic by its very nature if capital punishment is involved and it further reinforces the line of reasoning that refutes the exchange of communication in procedural extradition requests for death penalty cases.

Secondly, it has a considerable influence on States that are abolitionist de facto (ADF).⁵⁰ Upon closer examination, the stance according to which no extradition is permitted if the national criminal law of the foreign country provides for capital punishment brings the following conclusion: relations with States that still actively carry out executions are dealt with in the same way as those that only maintain it in their laws but that have not administered it for at least a decade, since both ultimately retain death as a valid punishment in their codes. At the political level, this could persuade ADF countries to move towards full abolition, since for them, prosecuting crime could be gravely hampered by the lack of collaboration by judicial

authorities following the approach of the Italian higher courts. The pressure could be quite considerable precisely because of the maximum severity of capital punishment. In fact, despite the lack of a clear link between the gravity of the harm and the death penalty,⁵¹ the choice of the sanction suggests that the legal interest protected by the criminal offence is important to the State in question, otherwise it would resort, for example, to a lesser penalty such as imprisonment. Therefore, this indicates that cooperation would be less effective particularly with regards to those crimes that, according to an ADF State, are most essential to prosecute as they deserve the highest form of sanction. This argument, consequently, could supplement the abolitionist effort in such States, casting fresh doubts on the effectiveness of the retentionist strategy in the international arena.

Finally, an argument that is commonly used to oppose the 'absolutist stance' against extradition has to be addressed. It has been suggested that if States do not extradite individuals who have to face trial for crimes that are punishable by the death penalty, the end result is that potentially dangerous people are let free and the fight against criminality is weakened by creating 'safe havens' for investigated individuals and defendants.⁵² Against this assumption, the principle of *aut dedere aut iudicare*,⁵³ according to which a country that receives an extradition request can either return the person or try them itself, could be applied.⁵⁴ Indeed, in such a scenario the requested State is allowed to refuse extradition and consequently initiate criminal proceedings itself. And it can do so, if necessary, by relying on the police and judicial assistance of the very authorities of the foreign country in question (e.g., for collecting essential evidence). As a confirmation of this, the 'Venezia case' discussed above is indicative of the

practicability of this approach. After the Italian judicial authorities refused his extradition to the U.S. for the crime of murder, Mr. Venezia was prosecuted, tried, found guilty, and sentenced by Italian courts, finally serving jail time in the country's prisons and being spared capital punishment.

Conclusion

The Italian higher courts spearheaded the 'strategy of non-cooperation' to indirectly ban the death penalty by categorically denying arrest, precautionary measures, and eventually procedural extradition for crimes sanctioned *in abstracto* with capital punishment. The courts also reached the outcome of refusing to rely on the otherwise customary exchange of assurances with the authorities of the requesting State attesting to its non-imposition *in concreto*. Such a level of personal guarantees is higher than the one admitted by the European Court of Human Rights, which still deems the practice of sending diplomatic notes excluding the enforcement of the death penalty acceptable. The consequences of this reading are meaningful both for the requested person and for the requesting State. The former are not at all at risk of being executed and so they do not endure the suffering that such uncertainty implicates, however distant the prospect of the infliction of capital punishment may be. The latter has to contend with the inefficacy of the transnational prosecution of these crimes which derives from non-cooperation, even when it has abolished the death penalty *de facto*. Ultimately, if the understanding of extradition law described in this Research Paper is shared by higher courts of States other than Italy, the outcome will be momentous, marking an advancement in the protection of fundamental rights as well as a strengthening of the abolitionist cause.

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References

- ¹ See Roger Hood and Carolyn Hoyle, 'Towards the Global Elimination of the Death Penalty: A Cruel, Inhuman and Degrading Punishment' in Pat Carlen and Leandro Ayres França (eds), *Alternative Criminologies* (Routledge 2017); Roger Hood, 'Striving to Abolish the Death Penalty: Some Personal Reflections on Oxford's Criminological Contribution to Human Rights' in Mary Bosworth, Carolyn Hoyle, and Lucia Zedner (eds), *Changing Contours of Criminal Justice* (OUP 2016); Roger Hood and Carolyn Hoyle, 'Progress Towards World-Wide Abolition of the Death Penalty' (2015) Centre for Criminology Blog, Faculty of Law, University of Oxford <<https://blogs.law.ox.ac.uk/centres-institutes/centre-criminology/blog/2015/01/progress-towards-world-wide-abolition-death>> accessed 11 June 2025; Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (OUP 2015); and William A. Schabas, *The Abolition of the Death Penalty in International Law* (CUP 2002).
- ² On extradition and the death penalty see Bharat Malkani, 'Extradition and non-refoulement' in Carol S. Steiker and Jordan M. Steiker (eds), *Comparative Capital Punishment* (Edward Elgar Publishing 2019); Bharat Malkani, 'The Obligation to Refrain from Assisting the Use of the Death Penalty' (2013) 62 *International and Comparative Law Quarterly* 523; Miguel Beltrán de Felipe and Adán Nieto Martín, 'Post 9/11 Trends in International Judicial Cooperation: Human Rights as a Constraint on Extradition in Death Penalty Cases' (2012) 10 *JICJ* 581; William A. Schabas, 'Indirect Abolition: Capital Punishment's Role in Extradition Law and Practice' (2003) 25 *LoyLAInt'l & CompLRev* 581; Sharon A. Williams, 'Extradition to a State that Imposes the Death Penalty' (1991) 28 *Canadian Yearbook of international Law/Annuaire canadien de droit international* 117.
- ³ It can be described as the 'strategy of non-cooperation'. See Roger Hood and Carolyn Hoyle, 'The Abolitionist Movement: Progress and Prospects' in Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (OUP 2015) 35.
- ⁴ This is a form of 'indirect abolition'. See Schabas 'Indirect Abolition' (n 2) 583.
- ⁵ *Kindler v Canada (Minister of Justice)* [1991] 2 S.C.R. 779 (Canada Supreme Court). See William A. Schabas, 'Note on *Kindler v Canada (Minister of Justice)*' (1993) 87 *AJIL* 128.
- ⁶ *United States v Burns* [2001] 1 S.C.R. 183 (Canada Supreme Court). See William A. Schabas, 'From *Kindler* to *Burns*: International Law is Nourishing the Constitutional Living Tree' in Gérard Cohen-Jonathan and William A. Schabas (eds), *La peine capitale et le droit international des droits de l'homme* (L.G.D.J. Diffuseur 2003) 143.
- ⁷ The Fascist dictatorship lasted from 1922 to 1943. In 1926, the death penalty for civilians was reintroduced after thirty-seven years of abolition. See Giovanni Tessoro, *Fascismo e pena di morte. Consenso e informazione* (Franco Angeli 2000).
- ⁸ On the history of capital punishment in Italy see Italo Mereu, *La morte come pena. Saggio sulla violenza legale* (Donzelli 2000).
- ⁹ On the life and the work of Cesare Beccaria see John Hostettler, *Cesare Beccaria* (Waterside Press 2011). In this Research Paper Series, see Vittorio Sassi, 'Beccaria who?: A brief look at the life and thought of Cesare Beccaria' (2024) DPRU Research Papers <<https://www.law.ox.ac.uk/sites/default/files/2024-10/2024%2010%2002%20Vittorio%20Sassi%20-%20Beccaria%20who%20FINAL.pdf>> accessed 11 June 2025, 1.
- ¹⁰ For an overview of the so-called Leopoldina Law see Mario Da Passano, *Il diritto penale toscano dai Lorena ai Borbone (1786-1807)* (Giuffrè 1988).
- ¹¹ As presently in force, art. 27 para. 4 of the Italian Constitution reads: "The death penalty is not admitted".
- ¹² With Constitutional Law no. 1 of 2007. Art. 27 para. 4 of the Italian Constitution formerly read: "The death penalty is not admitted, except in cases provided for by the military laws of war".
- ¹³ In 1994, Law no. 589 of 1994 was passed rendering the existing constitutional derogation inoperative. See Tullio Padovani, 'Commento all'art. 1 l. 13 ottobre 1994, n. 589' (1995) 3 *La legislazione penale* 369.
- ¹⁴ See Mario Chiavario and Alberto Perduca, *Cooperazione giudiziaria internazionale in materia penale* (Giappichelli 2022) 43; Paolo Passaglia, *La condanna di una pena. I percorsi verso l'abolizione della pena di morte* (Leo S. Olschki 2021) 74; Fausto Vecchio, *L'Europa e la pena di morte. Comparazione giuridica e strategie abolizioniste* (CEDAM 2017) 143; Andrea Pugiotto, 'Nessuno tocchi Caino, mai. Ragionando attorno alla legge costituzionale n. 1 del 2007' in Franco Corleone and Andrea Pugiotto (eds), *Il delitto della pena. Pena di morte ed ergastolo, vittime del reato e del carcere* (Ediesse 2012) 51; Davide Galliani, *La più politica delle pene. La pena di morte* (Cittadella Editrice 2012) 32.
- ¹⁵ The right to life is derived implicitly from art. 2 of the Italian Constitution, which reads: "The Republic recognises and guarantees the inviolable rights of man, both as an individual and in the social groupings where his personality is expressed, and requires the fulfilment of the inalienable duties of political, economic and social solidarity."

¹⁶ Const Court 21 June 1979, 54. See Guido Salvini, 'Delitti punibili con la pena di morte ed estradizione dopo la pronuncia della Corte costituzionale' (1980) 1 *Rivista italiana di diritto e procedura penale* 216.

¹⁷ It is worth quoting the relevant passage in full: "Consequently, it must be considered detrimental to the Constitution for the Italian State to concur in the execution of penalties that in no hypothesis, and for no type of offence, could be inflicted in Italy in peacetime, if not on the basis of a constitutional revision" (Const Court 21 June 1979, 54 para. 5). This is an expression of the "jurisdictional principle", that is "the legal norm that prohibits a state from subjecting persons within its jurisdiction to punishments that it is not legally permitted to impose, regardless of countervailing concerns such as the need to bring fugitives to justice, and the reluctance to impose ethical values and policy preferences on other states" (Malkani, 'Extradition and non-refoulement' (n 2) 76).

¹⁸ Art. 3 of the Italian Constitution reads as follows: "All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions.

It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic, and social organisation of the Country".

¹⁹ Const Court 25 June 1996, 223. See Giovanni Diotallevi, 'Esclusa l'extradizione per i reati puniti con la pena di morte' (1996) 11 *Cassazione penale* 3264. On the human and political history of the case see Stefano Anastasia, *Il caso Venezia: una estradizione a rischio capitale* (Datanews 1996).

²⁰ Constitutional Assembly, Commission for the Constitution, Project of Constitution of the Italian Republic, Report to the President of the Commission, Presented to the Presidency of the Constitutional Assembly on the 6th of February 1947, 7.

²¹ Const Court 25 June 1996, 223 para. 5.

²² Presently, art. 698 para. 2 of the Code of Criminal Procedure reads: "If the act for which extradition is requested is punishable by the death penalty under the law of the foreign State, extradition may be granted only when the judicial authority establishes that an irrevocable decision imposing a penalty other than the death penalty has been taken or, if it has been imposed, it has been commuted to a different penalty, in any case in compliance with the provisions of subparagraph 1". See Serena Quattrococo, 'sub. art. 698 - Reati politici. Tutela dei diritti fondamentali della persona' in Antonella Marandola (ed), *Cooperazione giudiziaria penale* (Giuffrè 2018) 64.

²³ When the Code of Criminal Procedure was adopted, art. 698 para. 2 of the Code of Criminal Procedure read: "If, for the act for which extradition is requested, the death penalty is prescribed by the law of the foreign State, extradition may be granted only if that state gives assurances, deemed sufficient by both the judicial authority and the minister of grace and justice, that such penalty will not be imposed or, if already imposed, will not be executed".

²⁴ See Mario Chiavario, 'Cooperazione internazionale ed obiettivi di garanzia ed efficienza nella nuova disciplina dei rapporti con autorità giudiziarie straniere' (1990) 4 *La legislazione penale* 699.

²⁵ ECtHR, *Soering v. United Kingdom*, Application no. 143088/88, 7 July 1989. See Stephan Breitenmoser and Gunter E. Wilms, 'Human Rights v. Extradition: The Soering Case' (1992) 11 *MichJInt'lL* 845 and Vecchio, *L'Europa e la pena di morte. Comparazione giuridica e strategie abolizioniste* (n 14) 247.

²⁶ See William A. Schabas, 'The Death Row Phenomenon and Human Rights Law' in Rosario de Vicente Martínez, Diego Gómez Iñiesta, Teresa Martín López, Marta Muñoz de Morales Romero, and Adán Nieto Martín (eds), *Libro homenaje al profesor Luis Arroyo Zapatero: un derecho penal humanista* (Agencia Estatal Boletín Oficial del Estado 2021) 1167 and Francesco Palazzo, 'La pena di morte dinanzi alla Corte di Strasburgo' (1990) 1 *Rivista italiana di diritto e procedura penale* 374.

²⁷ *Soering v United Kingdom* (1989) Series A no 161 para. 111.

²⁸ See *Soering v United Kingdom* (1989) Series A no 161 paras. 106-110.

²⁹ See Michael Shea, 'Expanding Judicial Scrutiny of Human Rights in Extradition Cases After Soering' (1992) 17 *YaleJInt'lL* 85.

³⁰ For an overview of the case law see Jeremy McBride, *Compendium of case law of the European Court of Human Rights on the death penalty and extrajudicial execution* (Council of Europe 2022) 67.

³¹ Protocol no. 13 was opened for signature in 2002 and entered into force with 10 ratifications in 2003.

³² Previously, Art. 1 Protocol 6 ECHR had only restricted it since it admitted exceptions such as during wartime.

³³ Art. 2 para. 1 ECHR proclaims: "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law".

³⁴ Art. 3 ECHR affirms: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

³⁵ *Al-Saadoon and Mufdhi v UK* ECHR 2010-II 61. See Christiane Bourloyannis-Vrailas, 'Introductory Note to the European Court of Human Rights: Al-Saadoon & Mufdhi v. United Kingdom' 49 *ILM* 762 and Vecchio, *L'Europa e la pena di morte. Comparazione giuridica e strategie abolizioniste* (n 14) 273.

³⁶ See *Al-Saadoon and Mufdhi v UK* ECHR 2010-II 61 para. 120.

³⁷ See Chiavario and Perduca, *Cooperazione giudiziaria internazionale in materia penale* (n 14) 45.

³⁸ See Stefano Zirulia, 'Art. 2. Diritto alla vita' in Giulio Ubertis e Francesco Viganò (eds), *Corte di Strasburgo e giustizia penale* (Giappichelli 2022) 49-50. For a checklist of the relevant factors to take into consideration with reference to art. 3 ECHR see *Othman (Abu Qatada) v UK* ECHR 2012-I 159 para. 189. See Mariagiulia Giuffrè, 'An Appraisal of Diplomatic Assurances One Year after Othman (Abu Qatada) v United Kingdom (2012)' (2013) 2 *Int'lHumRtsLRev* 266.

³⁹ *Harkins and Edwards v UK* App nos 9146/07 and 32650/07 (ECtHR, 17 January 2012) paras. 86 and 91.

⁴⁰ *Bader and Kanbor v Sweden* ECHR 2005–XI 75 para. 45.

⁴¹ If an extraditing State knowingly puts the person concerned at such high risk of losing their life as for the outcome to be near certainty, such an extradition may be regarded as intentional deprivation of life prohibited by art. 2 ECHR. See *Kaboulov v Ukraine* App no 41015/04 (ECtHR, 19 November 2009) para. 99.

⁴² See *Harkins and Edwards v UK* App nos 9146/07 and 32650/07 (ECtHR, 17 January 2012) para. 86.

⁴³ See *Salem v Portugal* App no 26844/04 (ECtHR, 9 May 2006).

⁴⁴ *Harkins and Edwards v UK* App nos 9146/07 and 32650/07 (ECtHR, 17 January 2012) para. 85.

⁴⁵ Cass pen 11 April 2024, 17316. See Gianmarco Bondi, 'Divieto assoluto di pena di morte ed estradizione' (2024) 10 Cassazione penale 3098.

⁴⁶ Cass pen 15 May 2024, 22945. See Elvira Nadia La Rocca, 'Sulla legittimità dell'arresto per l'estradizione verso lo Stato che prevede la pena capitale' (2024) *Quotidiano Giuridico* <<https://www.altalex.com/documents/2024/06/26/legittimita-arresto-estradizione-stato-prevede-pena-capitale>> accessed 11 June 2025.

⁴⁷ See Yves Haeck and Salvatore Fabio Nicolosi, 'Diplomatic Assurances' (2018) *Max Planck Encyclopedias of International Law* <<https://opil.ouplaw.com/display/10.1093/law-epil/9780199231690/law-9780199231690-e2174>> accessed 11 June 2025.

⁴⁸ See *supra* para. 2.

⁴⁹ For a Chinese extradition case where assurances on the non-execution of the death penalty were breached see Malkani, 'Extradition and non-refoulement' (n 2) 87 and John Dugard and Christine Van den Wyngaert, 'Reconciling Extradition with Human Rights' (1988) 92 AJIL 208.

⁵⁰ The term ADF was introduced in the United Nations' Capital punishment: report of the Secretary-General of 1985. Presently, it means that nobody has been reported executed in the country for 10 years or more or, alternatively, if this has occurred in the meantime, the State has announced an official moratorium or has ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights. On the issues stemming from the definition and the counting in this category see Roger Hood, 'The enigma of de facto abolition of the capital punishment' in Rosario de Vicente Martínez, Diego Gómez Iniesta, Teresa Martín López, Marta Muñoz de Morales Romero, and Adán Nieto Martín (eds), *Libro homenaje al profesor Luis Arroyo Zapatero: un derecho penal humanista* (Agencia Estatal Boletín Oficial del Estado 2021) 927.

⁵¹ For instance, in some retentionist countries there are incoherencies in the sentencing regimes of these crimes and also non-violent offences are classified as capital ones. In the Republic of Kenya, robbery is a mandatory capital crime, while murder is only a discretionary one. See Chris Kerkering, 'DPRU Q&As: Chris Kerkering, Katiba Institute, Kenya' (2024) *Death Penalty Research Unit Blog*, Faculty of Law, University of Oxford <<https://blogs.law.ox.ac.uk/death-penalty-research-unit-blog/blog-post/2024/04/dpru-qas-chris-kerkering-katiba-institute-kenya>> accessed 11 June 2025. In the Islamic Republic of Iran, drug-related offences, adultery, same sex sexual acts, political offences, and religious offences are sanctioned with the death penalty. See Mai Sato, 'Statement on alarming increase of executions in Iran' (2024) *Special Rapporteur on the situation of human rights in the Islamic Republic of Iran*, Human Rights Council, United Nations <<https://www.ohchr.org/en/special-procedures/sr-iran>> accessed 11 June 2025.

⁵² This is a frequent yet controversial point. Among others, it was raised in the Canadian Supreme Court case law that was mentioned in the Introduction of this Research Paper, in *Kindler v Canada (Minister of Justice)* of 1991 and in *United States v Burns* of 2001. See also Malkani, 'Extradition and non-refoulement' (n 2) 86–87.

⁵³ On the principle of *aut dedere aut iudicare* see M. Cherif Bassiouni and Edward M. Wise, *Aut dedere aut iudicare: The Duty to Extradite or Prosecute in International Law* (Brill 1995).

⁵⁴ For a critique see Michael J. Kelly, 'Cheating Justice by Cheating Death: The Doctrinal Collision for Prosecuting Foreign Terrorists – Passage of Aut Dedere Aut Iudicare into Customary Law & Refusal to Extradite Based on the Death Penalty' (2003) 20 *ArizJInt'l & CompL* 508–513 and Dugard and Van den Wyngaert, 'Reconciling Extradition with Human Rights' (n 49) 209–210.