GIURISPRUDENZA PENALE

Uncharted waters: navigating through extradition proceedings in the face of the coronavirus pandemic.

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1. Introduction.

Within the span of a few weeks, the novel coronavirus (Covid-19) has had a profound impact on nearly all aspects of daily life, leading to the imposition of severe limitations upon movement and personal freedoms aimed at curbing the pandemic.

Persons deprived of their liberty comprise a particularly vulnerable group, owing to the nature of the restrictions that are already placed upon them, their limited capacity to take precautionary measures and pre-existing medical conditions. Prisons and other correctional facilities, many of which are often highly overcrowded and insanitary, are an ideal breeding ground for the virus.

The outbreak of the coronavirus has been framed as an emergency that can be addressed through the adoption of extraordinary measures. Albeit there typically being safeguard clauses meant to address the practical problems caused by exceptional situations in extradition and EAW proceedings, their activation may result in largely disproportionate adverse effects for requested persons, particularly in the field of pre-surrender detention.

The short-circuits discussed in this article reveal that the applicable legislation is largely ill-equipped to address emergencies, such as a pandemic, at the expense of fundamental rights.

2. The most dangerous lockdown: an overview of the situation in Italian penitentiaries.

Levels of exposure to the coronavirus outbreak vary greatly from one country to another due to great disparities in prison systems and in the performance of national health systems. Still, prisons are, by definition, amplifiers of the

risk of infection. All the concerns about the virus's spread in packed social environments apply as much, if not more, to correctional facilities.
At the time of writing, Italy accounts for many of the cases and the deaths around the world, with the numbers surging higher by the hour. The outbreak put the network of hospitals under colossal strain, some of them having soon reached full capacity (particularly in the Northern regions of Italy, where the infection spread first).
On 8 and 9 March 2020, violent riots broke out in two-dozen Italian prisons. These riots were sparked by the emergency restrictions imposed amid the coronavirus outbreak, including limitations on visits from the outside[1]. While the authorities managed to bring the situation under control, the riots exposed serious health-care concerns related to the risk of an outbreak of coronavirus in prison, which are further boosted by the issues of overcrowding, lack of hygiene and insufficient health care which notoriously affect Italian prison establishments.
Unlike other countries that have freed large amounts of inmates in an effort to contain the infection[2], Italy has been extremely soft in its response. In essence, the only measure adopted by the Government has been to allow the possibility of home confinement for inmates with fewer than 18 months left on their sentences[3].

[1] While briefing the Italian Parliament, the Minister of Justice said the unrest involved some 6.000 prisoners at facilities around the country and resulted in the death of 13 inmates and the injuring of 40 correctional officers. See transcript of the statements made by the Minister of Justice to Parliament at session no. 317 held on 11 March 2020.

[2] A detailed overview of the measures adopted across Europe made be found at http://www.prisonobservatory.org/upload/17042020European_prisons_during_covid19%233.pdf#page=13. Measures of release of low-risk and vulnerable inmates have been adopted, among others, in the United States https://www.foxnews.com/us/here-is-how-many-prisoners-have-been-released-covid-19), Colombia (https://colombiareports.com/colombia-orders-mass-release-of-inmates-after-coronavirus-deaths-trigger-prison-protests/), Iran (https://news.sky.com/story/coronavirus-iran-frees-85-000-prisoners-to-combat-spread-of-covid-19-11958783), Albania (https://exit.al/en/2020/03/24/albanian-government-to-temporarily-release-inmates-to-curb-coronavirus-risk/), Ethiopia (https://edition.cnn.com/2020/03/26/africa/ethiopia-pardons-4000-prisoners-over-coronavirus/index.html) and Turkey (https://www.aljazeera.com/news/2020/04/turkey-free-thousands-prisoners-due-coronavirus-pandemic-200414005036259.html).

[3] Article 123 of Law-Decree no. 18 dated 17 March 2020. In addition to placement in home confinement, Law-Decree no. 18/2020 envisaged the possibility of extending special leave permits until 30 June 2020 for prisoners already on conditional release (*semiliberta*). However, the impact of this measure on prison population is almost insignificant, considering that, as of 15 February 2020, there were only 1.039 inmates on conditional release. For a commentary on these measures, see V. MANCA, *Ostatività, emergenza sanitaria e Covid-19: le prime applicazioni pratiche*, in *Giur. Pen. Web*, 2020, 4; G. MURONE, *Osservazioni a prima lettura in tema di decreto "cura Italia" e nuova detenzione domiciliare*, in *Giur. Pen. Web*, 2020, 3; E. DOLCINI – G.L. GATTA, *Carcere, coronavirus, decreto 'cura Italia': a mali estremi, timidi rimedi*, in *Sist. Pen.*, 20 March 2020.

Stripped bare of the surrounding politics, this piece of legislation is no more than a reiteration – albeit with a slight easing of eligibility conditions – of a measure that already existed in the Italian system[4]. The failure to significantly broaden its scope of application (the upper sentence cap has remained unchanged), coupled with the systemic shortage of electronic tags (monitoring is a precondition for inmates with more than 6 months still to be served), leave the lingering impression of a naïve, ineffective measure[5].

Against this background, it can easily be argued that Italy chose to fight the battle against the pandemic exclusively from within prison walls through *ad-hoc* health regulations.

At the beginning, the Government established, in very broad terms, that measures needed to be taken in order to contain the spread of Covid-19 in prison by ensuring that Individual Protection Devices ("IPDs") were made available and that new detainees were to be checked upon entry[6].

The Department for the Administration of Prisons ("DAP") then issued a variety of regulations with a view of curtailing the risk of outbreak in correctional facilities. Initially, these measures were limited to denying or restricting access to anyone coming from the so-called "red zone" (which at the time was an area in the North of Italy) and to halting transfers of detainees to and from centres located in the above zone[7]. Shortly thereafter, the Government prescribed the suspension of social visits to inmates, which shall now take place in remote through electronic means where available[8].

With further regulations, the DAP focused on equipping prison officers (not inmates) with IPDs, such as masks and gloves, increasing the shifts of

[4] Article 1 of Law no. 199 dated 26 November 2010. See, among others, S. TURCHETTI, *Legge 'svuotacarceri' e esecuzione della pena presso il domicilio: ancora una variazione sul tema della detenzione domiciliare?*, in *Riv. it. dir. e proc pen.*, 2010, 4, p. 1787 ff.; F. DELLA CASA, *Approvata la legge c.d. svuota-carceri: un altro pannicello caldo per l'ingravescente piaga del sovraffollamento carcerario*, in *Dir. pen. e proc.*, 2011, 1, p. 5 ff.

[5] To date, this measure led to the release of some 3.000 detainees. Yet, the Italian estate is still operating 120% over capacity with a prison population of 57.846 for 50.931 places. Based on the DAP's official statistics, the prison population went from 61.230 (29 February 2020) to 57.846 (31 March 2020), with a reduction of 3.384 inmates.

[6] See Decree of the President of the Council of Ministers ("DPCM") dated 25 February 2020.

[7] DAP Regulation dated 22 February 2020 ("*Raccomandazioni organizzative per la prevenzione del contagio del coronavirus*"), DAP Regulation dated 25 February 2020 ("*Ulteriori indicazioni per la prevenzione del contagio da coronavirus*") and DAP Regulation dated 26 February 2020 ("*Indicazioni specifiche per la prevenzione del contagio da coronavirus - regioni Piemonte, Liguria, Lombardia, Veneto, Friuli Venezia Giulia, Trentino Alto Adige, Emilia Romagna, Marche, Toscana e Sicilia*").

[8] Article 2, par. 9, of Law-Decree no. 11 dated 8 March 2020. See F. LAZZERI, *Il decreto-legge 11/2020 su "coronavirus", attività giudiziaria e carcere: le nuove misure a livello nazionale*, in *Sist. Pen.*, 9 March 2020.

correctional officers and regulating internal activities[9]. On 8 March 2020, the Government reiterated, among other things, that detainees who enter prison and present symptoms compatible with Covid-19 must be isolated[10].
In its most recent regulation dated 13 March 2020[11], the DAP developed contingency policies to manage cases of detainees showing symptoms of infection.
On 21 March 2020, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT") published a statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease pandemic[12]. In summary, the CPT advises the implementation of WHO guidance in all places of detention[13], reinforcement of staff, testing for prison population and employees, ensuring that any restrictions on contact with the outside world are duly compensation by alternative means of communications, and providing isolated persons with "meaningful human contact" every day.
Similarly, on 25 March 2020, the UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("SPT") issued its own set of recommendations[14].
When confronted with the above recommendations, the measures adopted by the Italian Government to prevent and control the infection in prison appear largely insufficient. In a nutshell, the only concrete strategy has been to isolate these facilities from the outside world, as if it were sufficient to just shut the doors to keep the disease from crawling and spreading inside.
In the absence of noteworthy measures to reduce the prison population, the spread of the infection is extremely difficult to contain in overcrowded facilities, such as the Italian ones. Multi-occupancy cells leave little room for social distancing or similar recommendations experts made to curb the

[9] DAP Regulation dated 4 March 2020 ("*Direttiva recante misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica attraverso l'adozione di modalità di lavoro agile*") and DAP Regulation dated 10 March 2020 ("*Linee guida sulle misure di svolgimento dell'attività lavorativa per il personale dell'Amministrazione giudiziaria al fine di attuare le Misure di contenimento del contagio da COVID-19*").
[10] DPCM dated 8 March 2020.
[11] DAP Regulation dated 13 March 2020 ("*Ulteriori indicazioni operative per la prevenzione del contagio da coronavirus negli istituti penitenziari*").
[12] CPT, *Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic*, 20 March 2020, CPT/Inf(2020)13.
[13] WHO-Europe, *Preparedness, prevention and control of COVID-19 in prisons and other places of detention*, Interim Guidance dated 15 March 2020.
[14] SPT, Advice of the Subcommittee to States parties and national preventive mechanisms relating to the coronavirus disease (COVID-19) pandemic, 25 March 2020, CAT/OP/10.

spread. In addition, many prisons deal with systemic shortage of water and dire hygienic conditions[15].
Moreover, the contingency procedures set out by the DAP to manage suspected cases of infection in themselves appear highly problematic. If a detainee shows symptoms, he shall be visited by a health practitioner in his cell, without being transferred to the infirmary. Depending on the specific circumstances of the case, the detainee might be subject to a nasopharyngeal swab and must remain in his cell until the diagnostic results come back. If the inmate tests positive to Covid-19, he shall be either placed in an isolation cell or transferred to a hospital. This means that, during the time required to process the swab, his cellmates are inevitably exposed to the risk of being infected themselves.
Not surprisingly, in just a few weeks, the number of detainees and correctional officers across the country who tested positive for coronavirus skyrocketed[16].

3. The risk of infection in prison and the prohibition of refoulement.

Much has been written on fundamental rights, non-refoulement and extradition following the judgment of the European Court of Human Rights in the leading case of *Soering*[17]. However, renewed interest is triggered by the potential impact of the novel coronavirus.
As a matter of well-established international law and subject to treaty obligations, including the European Convention on Human Rights ("ECHR"), States have the right to control the entry, residence and expulsion of aliens[18]. Nonetheless, deportation, extradition and other measures to remove an individual may give rise to an issue under Article 3 ECHR where substantial grounds have been shown for believing that the person in question would, if

[15] Overcrowding of Italian prison facilities was identified as a structural problem by the European Court of Human Rights in the pilot-judgment delivered in the case of *Torreggiani v. Italy*, 8 January 2013. The widespread shortcomings affecting the Italian prison estate are still constantly stigmatized by international bodies. See, *ex multis*, the CPT's report on the visit to Italy from 12 to 22 March 2019, 21 January 2020, CPT/Inf (2020) 2.
[16] As of 15 April 2020, the DAP officially confirmed that 94 inmates and 204 correctional officers have tested positive for coronavirus, but the situation is constantly evolving. Italian NGO *Antigone* created an interactive map updated with the situation in each prison establishment in Italy, which is available at https://www.antigone.it/news/antigone-news/3279-coronavirus-la-mappatura-di-antigone-dei-provvedimenti-assunti-nelle-carceri.
[17] European Court of Human Rights, *Soering v. the United Kingdom*, 7 July 1989. For a commentary, see, *e.g.*, F. SUDRE, *Extradition et peine de mort - arrêt Soering de la Cour européenne des droits de l'homme du 7 juillet 1989*, in *RGDIP*, 1990, 1, p. 30 ff.; M. SHEA, *Expanding Judicial Scrutiny of Human Rights in Extradition Cases After Soering*, in *YaleJIntlL*, 1992, 1, p. 86 ff.; F. DE WECK, *Non-Refoulement under the European Convention on Human Rights and the UN Convention against Torture*, Brill, 2017.
[18] See, for all, European Court of Human Rights, *De Souza Ribeiro v. France* [GC], 13 December 2012, par. 77.

removed, face a real risk of being subjected to treatment contrary to Article 3 ECHR in the receiving country[19]. In such circumstances, the principle of non-refoulement implies an obligation not to remove the individual to that country.

The problem does not lie in the acceptance of this principle but rather in the determination of its threshold of application[20].

According to the European Court, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 ECHR. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration and its physical or mental effects[21].

It is undisputed that, at least in certain countries, the outbreak of the coronavirus has put correctional establishments and the network of local hospitals under considerable strain. Prisons are, by definition, hotbeds for coronavirus. In overcrowded and insanitary facilities, there is a real risk that the disease might spread like wildfire, especially in the presence of pre-existing medical conditions.

The salient question is whether this scenario would be enough to prevent extradition and, if so, under what conditions. The answer, in my view, depends on how one looks at the problem.

Taken from a wider perspective, the European Court has been extremely reluctant to find a violation of Article 3 ECHR with reference to a general problem concerning human rights observance in a particular country, even more so in establishing that this amounts to a blanket bar to extradition towards that country[22]. An exception is to be found only in most extreme cases, where the general situation of violence in the country of destination is

[19] See, among other authorities, European Court of Human Rights, *Mamatkulov and Askarov v. Turkey* [GC], 4 February 2005, par. 67; *El-Masri v. the Former Yugoslav Republic of Macedonia* [GC], 13 December 2012, par. 212; *Čalovskis v. Latvia*, 24 July 2014, par. 131.

[20] C. VAN DEN WYNGAERT, *Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?*, in *ICLQ*, 1990, 4, p. 765. See also *Soering v. the United Kingdom*, cited, paras. 89-91.

[21] See, for example, European Court of Human Rights, *Öcalan v. Turkey* [GC], 12 May 2005, par. 180; *Shamayev and Others v. Georgia and Russia*, 12 April 2005, par. 338.

[22] See, for example, European Court of Human Rights, *Shakurov v. Russia*, 5 June 2012, par. 135; *Kamyshev v. Ukraine*, 20 May 2010, par. 44; *Turgunov v. Russia*, 22 October 2015, par. 40; *Dzhaksybergenov (Aka Jaxybergenov) v. Ukraine*, 10 February 2011, par. 37; *Perez Lizaso v. Finland* [dec.], 12 May 2015, par. 34; *T.K. and S.R. v. Russia*, 19 November 2019, par. 87; *Said Abdul Salam Mubarak v. Denmark* (dec.), 22 January 2019, par. 51; *S.H.H. v. the United Kingdom*, 29 January 2013, paras. 92-93.

of such intensity as to create a real risk that any removal to that country would necessarily violate Article 3 ECHR[23].
For example, in the seminal case of *Mamatkulov*, the Court held that general conditions of detention in Uzbekistan, although well below the minimum standards recognized at the international level, were in themselves not enough to prevent extradition[24].
Where authoritative sources describe a general situation, according to the Court, an applicant's specific allegations in a particular case require corroboration by other evidence, with reference to the individual circumstances substantiating his or her fears of ill-treatment[25]. In other words, in these cases, the Court seemingly relies on an integrated approach that combines the general situation with the individualized risk faced by the requested person[26].
Having regard to the features of the disease and the very high standards developed by the European Court, the crisis generated by the outbreak of the novel coronavirus could hardly be qualified as a general situation that is grave enough to call for a total ban of extraditions under Article 3 ECHR. This is all the more so considering that the disease is not confined to a particular country or geographical region, but is a pandemic sweeping across the world.
The answer to our question would be inevitably different where there is plausible evidence that the sought person faces an individualized risk of ill-treatment on account of his medical records or of prison conditions in the country of destination. Requested persons with pre-existing health concerns, especially of a respiratory or heart nature, would certainly have an argument that it would be oppressive to order their extradition to a State with a serious outbreak, especially if the prison estate in which they are likely to be detained has been badly hit or its medical capacity overwhelmed.
Nonetheless, the assessment of the existence of a real risk under Article 3 ECHR is still a rigorous one, which takes into account the foreseeable consequences of the individual's removal to the country of destination in the light of the general situation there and of his or her personal circumstances.

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[23] European Court of Human Rights, *N.A. v. the United Kingdom*, 17 July 2008, paras. 115-116, *Sufi and Elmi v. the United Kingdom*, 28 June 2011, par. 217.
[24] In turn, in a seemingly isolated decision, the Court held that, in view of the information about the conditions of detention, incommunicado detention and the vulnerable situation of minorities, the applicant's extradition to Turkmenistan would give rise to a breach of Article 3 ECHR. See *Ryabikin v. Russia*, 19 June 2008, paras. 115-121.
[25] European Court of Human Rights, *Mamatkulov and Askarov v. Turkey* [GC], cited, par. 73.
[26] This combined approach was the subject of a consistent stream of case-law concerning extraditions to Uzbekistan, where the Court repeatedly held that individuals whose extradition was sought by the Uzbek authorities on charges of religiously or politically motivated crimes constituted a vulnerable group facing a real risk of treatment contrary to Article 3 ECHR in the event of their removal to Uzbekistan. See, for example, *Mamazhonov v. Russia*, 23 October 2014, par. 141; *B.T. v. Russia*, 5 December 2017, par. 27.

While a pre-existing health condition would most likely not be sufficient, in itself, to bar surrender[27], its cumulative effects with poor conditions of detention or inadequate medical treatment would certainly call for a more careful scrutiny[28].

For example, in the case of *Aswat*, the Court held that the applicant's extradition to the United States, where he was being prosecuted for terrorist activities, would entail ill-treatment, in particular because the conditions of detention in the maximum security prison where he would be placed were liable to aggravate his paranoid schizophrenia. The Court held that the risk of a significant deterioration in the applicant's mental and physical health was sufficient to give rise to a breach of Article 3 ECHR[29].

Rather tellingly, the issue whether the coronavirus could qualify as a condition for refusal of extradition is currently being reviewed by the European Court in the case of *Hafeez v. the United Kingdom*[30]. The applicant – a sixty-year-old man with multiple health concerns, which include diabetes and asthma – is facing extradition towards the United States on drug charges. In its communication of the application, the Court asked the respondent Government whether, having regard to the ongoing Covid-19 pandemic, the applicant is under threat of a breach of Article 3 ECHR on account of the detention conditions he would face if extradited.

The concern is rather legitimate, considering the applicant's pre-existing medical condition (which makes him particularly vulnerable) and the region of arrival (he is facing trial in New York, which has been officially classified as the hotbed of the coronavirus in the United States).

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[27] The Court has constantly held that the fact that an applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be expelled or extradited is not sufficient in itself to give rise to breach of Article 3 ECHR. The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3 ECHR only in very exceptional circumstances, where there are compelling humanitarian grounds. See, for example, *Paposhvili v. Belgium* [GC], 13 December 2016, paras. 180-183; *D.H. v. the United Kingdom*, 2 May 1997, paras. 46-54; *Savran v. Denmark*, 1 October 2019, paras. 50-67.

[28] According to the Court, even though an applicant's poor state of health cannot in itself be regarded as a ground warranting a stay in his extradition, a breach of Article 3 ECHR could in principle arise if the receiving State does not guarantee appropriate medical treatment. See, for all, *Oshlakov v. Russia*, 3 April 2014, par. 88. In Italy, for example, the newly amended Article 705, par. 2, *c-bis*, prevents extradition if "*health or age concerns give rise to the risk of consequences of exceptional gravity for the requested person*". On the application of this new ground of refusal see, for all, Court of Cassation, Section VI, 11 January 2019 (hearing 27 November 2018), no. 1354.

[29] European Court of Human Rights, *Aswat v. the United Kingdom*, 16 April 2013. See, *a contrario*, *Babar Ahmad and Others v. the United Kingdom*, 10 April 2012.

[30] European Court of Human Rights, *Hafeez v. the United Kingdom*, application no. 14198/20, communicated on 24 March 2020.

The outcome of this specific case will most likely depend on the length of the proceedings. As with domestic cases, the risk of ill-treatment in proceedings before the European Court is determined in light of the present-day situation, meaning that the Court may take into account also developments which occurred after the final domestic decision[31]. Since the situation in a given country of destination may change greatly in the course of time (especially with the rapidly evolving epidemiology of an infectious disease), an overall improvement of the health situation at the time of the final decision may lead to the conclusion that a risk of ill-treatment no longer exists so as to bar extradition under Article 3 ECHR.

Nevertheless, irrespective on what the outcome of the *Hafeez* case will be, *rebus sic stantibus*, depending on the individual circumstances of each case, there may be room to argue that the requested person faces a real risk of ill-treatment if extradited to a country with a serious outbreak of Covid-19.

At the same time, it would be open to the requesting State to counter this argument by submitting diplomatic assurances to the effect that the sought person will be provided adequate medical treatment and suitable accommodation and that the prison administration will implement plans to prevent and control the spread of the infection[32]. Determining whether such assurances would in fact be sufficient, in their practical application, to eliminate or mitigate the risk of infection and the ensuing ill-treatment carries a high degree of complexity in the current situation.

Assuming that a real risk of ill-treatment in the receiving country has been established, the question that arises is what the outcome of the extradition proceedings should be.

A first (rights-oriented) option would be to simply refuse the surrender.

However, one cannot avoid wondering whether turning down flat extradition requests is the proper course of action, one that fairly balances the requirements of the protection of the individual's fundamental rights and the demands of justice in bringing offenders to justice. Albeit currently widespread across the globe, it is reasonable to believe that the coronavirus is a transitory infection that will be eradicated or, at least, significantly contained in the near future.

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[31] European Court of Human Rights, *Maslov v. Austria* [GC], 23 June 2008, paras. 91-92; *Saadi v. Italy* [GC], 28 February 2008, par. 133; *Sufi and Elmi v. the United Kingdom*, cited, par. 215.

[32] In relation to the contents and features of diplomatic assurances in extradition cases, see, for all, *Othman (Abu Qatada) v. the United Kingdom*, 17 January 2012; *T.K. and S.R. v. Russia*, cited, paras. 99-101. In literature, see M. GIUFFRÉ, *An Appraisal of Diplomatic Assurances One Year after Othman (Abu Qatada) v United Kingdom*, in *IntHumRtsLRev*, 2012, 2, p. 266 ff.; C. MICHAELSON, *The Renaissance of Non-Refoulement - The Othman (Abu Qatada) Decision of the European Court of Human Rights*, in *ICLQ*, 2012, p. 750 ff.; S. SCHLICKEWEI, *The Revision of the General Comment No. 1 on the Implementation of Art. 3 UNCAT's Non-Refoulement Obligation in Light of the Use of Diplomatic Assurances*, in *MaxPlanckUNYB*, 2018, 1, p. 167 ff.

Concerns stemming from this option could be dispelled, at least, in relation to those jurisdictions that would allow the requesting State to re-send the extradition request once the health situation has been brought under control. Whether this would be a viable option in Italy is debatable. Without prejudice to specific treaty provisions, Italian law allows for the re-submission of an extradition request in relation to a same set of facts only if the new request is based on elements that had not been previously considered[33] or if the prior proceedings had been discontinued on procedural grounds[34]. Strictly speaking, thus, Italian law would not permit a fresh review of a request already found defective. Nonetheless, the Supreme Court has recently opened to this possibility if the ground for refusal is subject to changes (*i.e.* improvements) over time. Conditions of detention and health crises certainly fit the description[35].

A second (State-oriented) option would be to grant extradition (provided no other grounds for refusal exist) but defer surrender until the pandemic is over.

This solution, however, would raise a wide array of problems: *i*) the premise on which it is predicated (the temporary nature of the pandemic) is yet to be definitively established; *ii*) most extradition treaties do not envisage the possibility to postpone surrender for humanitarian reasons; *iii*) an improvement of the situation requires careful evaluations which cannot be confined to the execution stage of the proceedings, let alone left to political authorities; *iv*) this solution would leave the requested person in a limbo for an indefinite period of time.

A third (intermediate) option would be to halt the proceeding until the pandemic is over.

This would be the most cautious, and thus preferable, solution, at least for European standards. Albeit accepting the possibility of rebutting mutual trust, the Court of Justice of the European Union ("ECJ") has always been reluctant to openly encourage States to refuse EAWs. In the case of *Aranyosi and Căldăraru*, for instance, the ECJ held that evidence of deficiencies with respect to prison conditions must result in a postponement of the

[33] See Article 707 CCP.

[34] See, for example, Court of Cassation, Section VI, 23 July 2012 (hearing 18 July 2012), no. 30113; Section VI, 4 March 2011 (hearing 25 February 2011), no. 8812. Although Framework Decision 2002/584/JHA does not regulate re-submission, the Italian Supreme Court held that the principles developed in relation to extradition extend also to the EAW system. See, for example, Court of Cassation, Section VI, 2 May 2018 (hearing 26 April 2018), no. 18873; and Section VI, 15 October 2015 (hearing 14 October 2015), no. 41516.

[35] Notably, the Supreme Court held that refusal of an extradition request on account of poor detention conditions is without prejudice to a fresh examination of the case once those conditions have improved. See Court of Cassation, Section VI, 13 November 2017 (hearing 27 October 2017), no. 51657.

proceeding until the executing Member State has obtained all necessary supplementary information on the conditions the sought person is envisaged to be detained after surrender, refusal being admissible only if the risk of ill-treatment cannot be discounted within a reasonable time[36].
However, as will be discussed below, this option should be exercised with a great deal of care on account of the potential implications it carries on custodial measures (see *infra* § 4).
In any case, this is not a viable option for countries – such as Italy and the United Kingdom[37] – that have decided, where practicable, to continue hearing extradition cases.
With specific regards to Italy, amidst the health crisis, the Government adopted emergency legislation governing the administration of justice, which prescribed, *inter alia*, the adjournment of the vast majority of criminal cases and the suspension of custodial time-limits[38]. While EAW and extradition cases were initially among those that had been in principle adjourned (an option that raised more doubts than those it had set out to solve[39]), the legislation was later amended to the effect that these proceedings will go ahead as usual[40]. This means that the domestic courts shall be required to

[36] EU Court of Justice [GC], Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru*, 5 April 2016. For a commentary, see K. BOVEND'EERDT, *The Joined Cases Aranyosi and Căldăraru: A New Limit to the Mutual Trust Presumption in the Area of Freedom, Security, and Justice?*, in *UtrJIntEurL*, 2016, pp.112-121; and G. ANAGNOSTARAS, *Mutual Confidence Is Not Blind Trust: Fundamental Rights Protection and the Execution of the European Arrest Warrant: Aranyosi and Caldararu*, in *CMLRev*, 2016, 6, pp. 1675-1704.
[37] See Schedule 24, Part 2, of the Coronavirus Act 2020, which applies to the 2003 Extradition Act.
[38] See Articles 1 and 2 of Law-Decree no. 11/2020, as amended by Article 83 of Law-Decree no. 18/2020 and Article 36 of Law-Decree no. 23/2020. The legislation also envisaged that the time-limits for precautionary measures under Articles 303 and 308 CCP stop running in adjourned cases.
[39] For example, while EAW and extradition cases had been adjourned, the maximum time-limits for detention on remand of requested persons had continued running. Precautionary measures in these proceedings are subject to a peculiar regime as compared to ordinary criminal cases. Notably, they are governed for extradition proceedings by Article 714, par. 4, CCP and, for EAW proceedings, by Law no. 69 dated 22 April 2005. Based on a settled stance of the Italian Supreme Court, the general provisions under Articles 303 and 308 CCP are not applicable to extradition and EAW proceedings. See Court of Cassation, Unified Sections, 18 December 2006 (hearing 28 November 2006), no. 41540, with comment of E. APRILE, *Termini di durata della custodia cautelare nel caso di sospensione dell'estradizione per l'estero: le Sezioni Unite risolvono ogni incertezza interpretativa*, in *Cass. Pen.*, 2007, 3, p. 987 ff. Yet, the emergency legislation did not contain any specific provision governing precautionary measures applied in surrender cases. Therefore, at least initially, even though these proceedings had been adjourned, the maximum time-limits for detention on remand had kept running.
[40] Law no. 27 dated 24 April 2020, which converted Law-Decree no. 18/2020 into law, amended Article 83, par. 3, lett. *b*), to the effect that EAW and extradition proceedings are exempt from the mass adjournment of criminal cases.

take a decision and, accordingly, to assess any risk of ill-treatment in light of present-day conditions.

4. Travel curbs and (un)reasonable prospects of removal: the purgatory of requested persons.

Reasonably, the pandemic will run its course with time. How much time no one knows. Having regard to all the competing interests, for the time being, the most prudential course of action would be to adjourn all unheard extradition matters and, most importantly, to halt transfers that have already been authorized. This is all the more so considering that many countries have travel bans in place and it would, thus, be difficult, if not impossible, to actually transfer the person.

Looking at the EAW, Article 23 of the Framework Decision allows the postponement of the surrender for "*circumstances beyond the control of any of the Member States*" (par. 2) and "*serious humanitarian reasons*" (par. 3). There is hardly any doubt that the current pandemic could qualify as a case of "*force majeure*" under the terms of European and international law, also considering the travel bans in place[41]. Based on the applicable legislation, the parties would simply need to agree on a new date for surrender once the travel restrictions have been lifted, or the spread of the infection contained.

Without prejudice to isolated exceptions[42], similar clauses are typically not contained in extradition treaties, nor in the Italian legislation, for that matter. Nonetheless, at least in Italy, the absence of an express provision has not prevented the Supreme Court from affirming that serious humanitarian reasons or *force majeure* justify the temporary deferment of surrender[43].

In any event, should no effective remedy be available at the domestic level, it would certainly be open to the requested person to turn to the European Court seeking an interim measure under Rule 39 with a view to stay removal (something that, most likely, has been granted in the above case of *Hafeez*). This procedural avenue, however, is not to be taken lightly. While a postponement of removal may usually be obtained on exceptional grounds, the relevant legislation says nothing as to the custodial regime in this transitory period. As a result, the mass adjournment of cases and removals may come at a high price, that of a potential indefinite extension of detention

[41] The ECJ held that "*the concept of force majeure must be understood as referring to abnormal and unforeseeable circumstances which were outside the control of the party by whom it is pleaded and the consequences of which could not have been avoided in spite of the exercise of all due care*". See EU Court of Justice, Case C-640/15, *Tomas Vilkas*, 25 January 2017, par. 53 and the references contained therein.

[42] See, *e.g.*, Article 18, par. 5, of the 1957 European Convention on Extradition, which provides that, "*if circumstances beyond its control prevent a Party from surrendering or taking over the person to be extradited*", the parties shall agree a new date for surrender.

[43] See Court of Cassation, Section VI, 18 January 2019 (hearing 6 December 2018), no. 2446.

orders in place against requested persons, especially in the pre-surrender stage.

In the context of the EAW system, when surrender proves impossible for humanitarian reasons or *force majeure*, the executing and issuing authorities shall agree on a new date for surrender. However, this provision does not set a clear timeframe for the new surrender date[44], nor does it envisage an express limit to the number of fresh surrender dates that may be agreed upon between the authorities[45]. In the meantime, Article 23 offers a legal framework to justify continued pre-surrender detention pending the making and carrying out of the new arrangements. But again, this provision does not define the specific conditions for deprivation of liberty, nor does it set an upper limit to its duration[46].

In the case of *Vilkas*, the ECJ opined that the expiration of the time-limits envisaged by Article 23 does not relieve the executing member State from its obligation to execute the EAW, nor does it necessarily require to release the requested person, provided that the duration of the custody is not excessive[47]. However, this safeguard clause is excessively vague and does not prevent the potentially indefinite detention of the requested person on foot of repeated extension orders. Nor may a sufficient procedural safeguard be found in the non-binding invitation by the EU Commission to the issuing member State to consider withdrawing the EAW when the exceptional reasons prove "*indefinite or permanent*"[48]. These constraints are so minimal that they end up granting authorities an ostensibly unlimited discretion.

Similar critical considerations extend to extradition proceedings. Albeit opening to the possibility of postponing surrender in the presence of exceptional circumstances, the Italian Supreme Court failed to introduce any procedural safeguards. Truth be told, by suspending the running of maximum custodial time-limits in these kinds of situations, the Court of

[44] The Supreme Court held that the new surrender date must be scheduled when the impediment has ceased; see Court of Cassation, Section VI, 10 May 2018 (hearing 26 April 2018), no. 20849, in *Cass. Pen.*, 2018, 12, pp. 4301-4302.

[45] The ECJ said as much in the case of *Vilkas*, cited, par. 39.

[46] Article 23 of the Framework Decision has been transposed in Article 23 of Law no. 69/2005, which confers the power to suspend execution of the EAW to the Court of Appeal, leaving it to the Ministry of Justice to agree with the issuing member State the new surrender date. This provision does not map out a timeline for the procedure.

[47] EU Court of Justice, case of *Vilkas*, cited, paras. 36-38. See also EU Court of Justice [GC], Case C-237/15 PPU, *Francis Lanigan*, 16 July 2015, paras. 58-59. E. SELVAGGI, *Procedura attiva e MAE: quale valore dare al vademecum ministeriale?*, in *Cass. Pen.*, 2015, 10, pp. 3800-3803.

[48] European Commission, *Handbook on how to issue and execute a European arrest warrant*, 2017/C 335/01, 6 October 2017, par. 5.9.1.

Cassation essentially paved the way for indefinite pre-surrender confinement[49].

In light of the above, the applicable legislation reveals serious loopholes when confronted with extraordinary situations, such as a pandemic. The whole scheme of extradition and EAW is premised upon tight deadlines rather than indefinite confinement. Yet, the legislation and the courts fail to offer any guidance or procedural safeguard against arbitrariness.

According to the case-law of the European Court of Human Rights on Article 5(1)(f) ECHR, only the conduct of an extradition procedure justifies the deprivation of a freedom based on that provision and, consequently, if the procedure is not carried out with due diligence, the detention ceases to be justified[50]. In a consolidated strand of cases, the Court emphasized the importance of the lawfulness of the detention, both procedural and substantive, which requires scrupulous adherence to the rule of law[51].

Against this background, indefinite administrative confinement of requested persons awaiting transfer may give rise to serious issues under Article 5 ECHR. First and foremost, failure to establish a maximum period of detention pending removal, coupled with the lack of a system of periodic judicial review of the necessity of prolonged deprivation of liberty, would be at odds with the requirements of lawfulness and protection against arbitrariness. In addition, the repeated extension *sine die* of detention orders would hardly be deemed proportionate to the strict exigencies of the situation created by the spread of the coronavirus. According to the Court, domestic authorities have an obligation to consider whether removal is a realistic prospect, taking into account the nature of the impeding event and the duration of the procedure. When removal is not feasible or when the timeframe is too uncertain or remote, detention is no longer justified, and the individual must be released[52].

Yet, it is undisputed that the coronavirus outbreak constitutes a public emergency and calls for extraordinary measures. As with many, if not all, of the emergency provisions, teething problems are inevitable.

Having regard to the exceptional nature of the situation, it is open to Contracting States to the ECHR to activate the derogation clause envisaged

[49] Technically, the Supreme Court held that Article 304 CCP is applicable to pre-surrender detention and that, thus, maximum custodial time-limits in extradition cases under Article 714, par. 4-*bis*, CCP stop running until the impeding event ceases. See Court of Cassation, judgment no. 2446/2018, cited.

[50] See, for example, European Court of Human Rights, *Quinn v. France*, 22 March 1995, par. 48; *Gallardo Sanchez v. Italy*, 24 March 2015, par. 40.

[51] European Court of Human Rights [GC], *Buzadji v. the Republic of Moldova*, 5 July 2016, par. 84; *Medvedyev and Others v. France*, 29 March 2010, par. 117.

[52] European Court of Human Rights, *Al Husin v. Bosnia and Herzegovina (no. 2)*, 25 June 2019, par. 98; *Kim v. Russia*, 17 July 2014, par. 53; *Amie and Others v. Bulgaria*, 12 February 2013, par. 77; *Mikolenko v. Estonia*, 8 October 2009, paras. 67-68.

by Article 15 ECHR. This provision affords to the Governments, in exceptional circumstances, the possibility of derogating, in a temporary, limited and supervised manner, from their obligation to secure certain rights and freedoms under the ECHR. The right to liberty under Article 5 ECHR is among those that may be subject to derogations.

Not surprisingly, a number of States have decided to rely on their right to derogation under Article 15 ECHR in the context of the Covid-19 crisis[53], some of them also with explicit reference to Article 5 ECHR[54].

In general, recourse to this clause is the *preferable* way to fare the emergency lockdown measures adopted to tackle the pandemic, since this is the closest we shall get to that "state of emergency" paradigm for which Article 15 ECHR was conceived. Not to mention that failure to invoke the derogation clause – and, thus, the normalization of an extraordinary situation – would ultimately carry the risk of recalibrating downwards the standards of protection. Yet, with specific regards to measures impinging on Article 5 ECHR, activation of the derogation clause appears to be the *only* permissible course of action, as the exceptions to this provision have an exhaustive nature and must be narrowly construed[55].

Nevertheless, recourse to derogation does not absolve States from any and all interferences with the rights guaranteed by the Convention: the European Court is empowered to review, *ex post*, the lawfulness and proportionality of the emergency legislation and, ultimately, whether the States have gone beyond the "*extent strictly required by the exigencies*" of the crisis[56].

Albeit in a completely different scenario (threat of terrorism), in the case of *A. and Others v. the United Kingdom*, the Grand Chamber laid down some guiding principles concerning the relationship between Article 5(1)(f) and

[53] In March and April 2020, Latvia, Romania, Armenia, the Republic of Moldova, Estonia, Georgia, Albania, North Macedonia, Serbia and San Marino made derogations under Article 15 ECHR. For a commentary, see A. SACCUCCI, *La sospensione dei termini processuali da parte della Corte europea per l'emergenza Covid-19*, in *Sidi-blog*, 27 March 2020; K. DZEHTSIAROU, *COVID-19 and the European Convention on Human Rights*, in *Strasbourg Observers*, 27 March 2020; G. EPURE, *Strengthening the supervision of ECHR derogation regimes. A non-judicial avenue*, in *Strasbourg Observers*, 2 April 2020; S. MOLLY, *Covid-19 and Derogations Before the European Court of Human Rights*, on *Verfassungsblog*, 10 April 2020; P. ZGHIBARTA, *The Whos, the Whats, and the Whys of the Derogations from the ECHR amid COVID-19*, in *EJIL:Talk!*, 11 April 2020.

[54] See derogations made by Estonia and Georgia. Cf., on the specific topic of derogations to Article 5 ECHR in the context of the coronavirus crisis, A. GREENE, *States should declare a State of Emergency using Article 15 ECHR to confront the Coronavirus Pandemic*, in *Strasbourg Observers*, 1 April 2020.

[55] See, *e.g.*, European Court of Human Rights, *Austin v. the United Kingdom* [GC], 15 March 2012, par. 60.

[56] European Court of Human Rights, *Ireland v. the United Kingdom*, 18 January 1978, par. 207.

Article 15 ECHR[57]. In that case, the Court was confronted with a statutory scheme that permitted the indefinite detention pending expulsion of non-nationals suspected of involvement in terrorism even though they could not be removed to their home country as there was a real risk that they would be exposed to treatment contrary to Article 3 ECHR. Since the British Government considered that this might not have been consistent with Article 5(1) ECHR, it had preventively issued a notice of derogation under Article 15 ECHR.

The Grand Chamber reiterated that where deportation is not possible owing to the risk of ill-treatment, Article 5(1)(f) ECHR does not authorize detention, irrespective of whether the individual poses a risk to national security. Most importantly, it added that the unlawful and disproportionate burden of indefinite detention imposed upon the applicants could not be discounted by recourse to derogation, as the measure manifestly failed to rationally address the domestic threat.

If one were to cautiously transpose these principles in the context of current coronavirus pandemic, in my view, the prolonged administrative detention that could stem from an indefinite halt to extraditions – *prima facie* unlawful and disproportionate – would hardly be deemed a measure "strictly required by the exigencies of the crisis" so as to be condoned by a derogation under Article 15 ECHR.

5. Early release schemes and alternatives to extradition: rethinking proportionality.

In the current situation, it would also be possible to challenge the validity of conviction EAWs and extradition requests if they are issued by countries that have released low-risk or short-term prisoners.

Depending on the terms of release, requested persons may no longer be wanted for the purposes of executing a custodial sentence or a detention order. This assessment will vary depending on circumstances as the contents of the actual measure (unconditional release, home confinement or reporting obligations), its modalities of application (*ex officio* or discretionary assessment) and its duration (permanent or temporary).

Yet, except for cases of unconditional and permanent release, reprieve schemes will hardly lead to an automatic withdrawal or refusal of the extradition request.

This is where the concept of proportionality comes in play.

Even though proportionality is not cited as a precondition for the issuance, or as a mandatory ground for refusal, of requests for surrender in the EAW

[57] European Court of Human Rights, *A. and Others v. the United Kingdom* [GC], 19 February 2009. See D. WILSHER, *The Administrative Detention of Non-Nationals Pursuant to Immigration Control: International and Constitutional Law Perspectives*, in *ICLQ*, 2005, p. 905 ff.

Framework Decision, in extradition treaties and in most domestic legislations[58], the issue has gained significant momentum over the last years, especially given the increasing volume of requests made for minor or trivial offences[59].

Proportionality tests have been introduced in policy documents and secondary legislation. In 2017, the European Commission encouraged member States to consider a number of factors in order to determine whether issuing an EAW is justified, including the seriousness of the offence and the length of sentence[60]. Similarly, the ECJ – when assessing the concept of "judicial authority" under the terms of Article 6(1) of the Framework Decision – clarified that the domestic framework must allow prosecutors to assess the necessity and proportionality of an EAW[61].

The Italian Ministry of Justice acted on this suggestion and called on the competent authorities to carry out an *ex ante* check of proportionality before issuing an EAW[62]. Albeit denying that this recommendation amounts to a mandatory proportionality test[63], the Italian Supreme Court has not been completely insensitive to demands for a necessity scrutiny[64].

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[58] The notion of proportionality referred to herein is a strict one, which must not be confused with the implicit proportionality checks grounding certain grounds for refusal (*e.g.* minimum sentence requirements and right to private and family life). The United Kingdom is one of the very few exceptions, having amended in 2014 Section 21A of the 2003 Extradition Act to introduce a proportionality test for prosecution EAWs.

[59] L. MANCANO, *Mutual recognition in criminal matters, deprivation of liberty and the principle of proportionality*, in *MJECL*, 2019, 6, p. 718 ff.; V. MITSILEGAS, *EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Europe*, Bloomsbury, 2016, pp. 142-151; G. DE AMICIS, *La prassi del mandato d'arresto europeo fra Italia e Germania: la prospettiva italiana*, in *Dir. Pen. Cont.*, 2019, pp. 17-18; E. XANTHOPOULOU, *The Quest for Proportionality for the European Arrest Warrant: Fundamental Rights Protection in a Mutual Recognition Environment*, in *NewJEurCrimL*, 2015, 1, pp. 32-52; J. OUWERKERK, *Balancing Mutual Trust and Fundamental Rights Protection in the Context of the European Arrest Warrant. What Role for the Gravity of the Underlying Offence in CJEU Case Law?*, in *EurJCrimeCrLCrJ*, 2018, pp. 103-109.

[60] European Commission, *Handbook on how to issue and execute a European Arrest Warrant*, C(2017) 6389 final, 28 September 2017.

[61] EU Court of Justice [GC], Joined Cases C-508/18 and C-82/19 PPU, *O.G. and P.I.*, 27 May 2019, par. 51; Case C-625/19 PPU, *XD*, 12 December 2019, par. 40; Case C-627/19, *Openbaar Ministerie v ZB*, 12 December 2019, par. 31; Joined Cases C-566/19 PPU and C-626/19 PPU, *YR and YC*, 12 December 2019, par. 52.

[62] Italian Ministry of Justice, *Vademecum per l'emissione del mandato d'arresto europeo*, pp. 3-4.

[63] According to the Supreme Court, the principle of proportionality cannot prevent, *a priori*, the issuance or the execution of an EAW. See Court of Cassation, Section VI, 29 February 2016 (hearing 12 January 2016), no. 8209.

[64] Court of Cassation, Section VI, 22 May 2013 (hearing 15 April 2013), no. 21988, in relation an EAW issued by Romania for theft of chickens. In another strand of case-law, the Supreme Court retained competence to exceptionally refuse surrender if the applicable sentence is wholly unreasonable and contrary to the principle of proportionality; see, among others, Court of Cassation, Section VI, 6 March 2020 (hearing 3 March 2020), no. 9203; Section VI, 16 January

The current health crisis should serve as a catalyst for member States to reevaluate the importance of alternative instruments of mutual legal assistance[65]. At the European level, there are less disruptive tools to investigate alleged offence and prosecute, such as the European Supervision Order ("ESO")[66] and the European Investigation Order ("EIO")[67], and to ensure the final sentence is executed, such as the transfer of detainees[68], the transfer of probation decisions and alternative sanctions[69] and the enforcement of financial penalties[70].

The availability of a wide array of cooperation alternatives should be a decisive factor in reviewing EAW requests in these difficult times. Exceptional circumstances call for exceptional measures. Taking into account the disruptive, burdensome and costly implications that surrender proceedings have on both the requested person and the justice system, especially amidst a situation of crisis, proportionality should be central in the decision-making process, with the consequence that surrender should be granted only where no alternative means truly exist.

2019 (hearing 5 December 2018), no. 2037; Section VI, 19 February 2016 (3 February 2016), no. 6769, with comment of G. Stampanoni Bassi, *Estradizione e trattamento sanzionatorio: la Cassazione nega la consegna dell'estradando per violazione del principio di legalità*, in *Cass. Pen.*, 2016, 10, pp. 3685 ff.

[65] For a commentary, see C.E. GATTO, *Il principio di proporzionalità nell'ordine europeo di indagine penale*, in *Dir. Pen. Cont.*, 2019, 2, p. 69 ff; N. CANESTRINI, *Il tormentato cammino del diritto penale comunitario italiano tra procedure di infrazione, pre-alerts della commissione e leggi delega*, in *Cass. pen.*, 2015, 11, p. 4201 ff.; S. MONTALDO, *A caccia di… prove. L'ordine europeo di indagine penale tra complesse stratificazioni normative e recepimento nell'ordinamento italiano*, in *Giur. Pen.*, 2017, 11, p. 1 ff.

[66] Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention. The Framework Decision was transposed in the Italian legal system by Legislative Decree no. 36 dated 15 February 2016.

[67] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters. The Directive was transposed in the Italian legal system by Legislative Decree no. 108 dated 21 June 2017.

[68] Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union. The Framework Decision was transposed in the Italian legal system by Legislative Decree no. 161 dated 7 September 2010.

[69] Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition of judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions. The Framework Decision was transposed in the Italian legal system by Legislative Decree no. 38 dated 15 February 2016.

[70] Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties. The Framework Decision was transposed in the Italian legal system by Legislative Decree no. 37 dated 15 February 2016.

6. Concluding remarks.

The outbreak of the novel coronavirus revealed fissures and weaknesses in nearly all kinds of systems, including in the field of extradition.

First and foremost, conditions of detention are a matter of concern. As the infection began to spread, prisoners found themselves in sudden peril, stuck in often overcrowded environments where access to health care is limited and social distancing is impossible. Many countries, including Italy, were caught unprepared to deal with the risk of a spread of the pandemic behind correctional settings.

The risk of infection in prison establishments, albeit hardly grave enough to call, in itself, for a blanket ban on extraditions, might constitute a ground for refusal of surrender when taken in conjunction with an individualized risk. Requested persons with pre-existing health concerns certainly have an argument that it would be oppressive to order their extradition to a State with a severe outbreak, especially if the prison estate in which they are likely to be detained has been badly affected.

In the current situation – one that raises unprecedented challenges for fundamental rights – the most prudential course of action would be to adjourn unheard extradition matters and to halt transfers that have already been authorized. Yet, this procedural course of action requires the exercise of great care. As discussed above, this option carries the risk of adverse effects for requested persons, especially in the context of pre-surrender custodial regime.

Given the potential scale of problems and also the disruptive impact it carries on private and family life, extradition should truly be a measure of last resort, one on which to rely only when there are no viable alternatives. At the European level, there are many alternative, less severe and less ponderous measures that may achieve the same prosecution and post-conviction aims as physical cross-border surrender.

As we venture through the deep and uncharted waters generated by the coronavirus, the principle of proportionality should act as a compass in extradition and EAW cases to ensure that fundamental rights are not eclipsed by the coronavirus pandemic.