

Extradition procedures in force in Chile

I. INTRODUCTION

In our legal system, there are provisionally two models of criminal justice:

- A **new accusation-based model**, according to which the Ministerio Público [Public Prosecutor's Office] directs the investigation, and which is in force today in all regions of the country, with the exception of the Metropolitan Area of Santiago. On June 16, 2005, this model will enter into force in that area as well, which will complete the process of reform of the criminal justice system in Chile.
- In the meantime, the old investigation-based model continues in effect in the Metropolitan Area, in which judges direct the investigation.

Prior to June 16, 2005 (the date on which the new system and the Code of Criminal Procedure take effect in the Metropolitan Region of Chile, according to transitional regulations), **passive extradition requests will be processed in accordance with the system under the former Code of Criminal Procedure.**

The complete texts of the former Code of Criminal Procedure and the new Code of Criminal Procedure can be found in the section on Fundamental Texts of our legal system. In this section the specific regulations governing extradition processes are addressed.

II. EXTRADITION PURSUANT TO THE FORMER CODE OF CRIMINAL PROCEDURE (Governing passive extradition requests prior to June 16, 2005)

Passive extradition

Articles 644 to 656 of the former Code of Criminal Procedure

DIPLOMATIC STAGE

An extradition request must be presented in a diplomatic letter, and the following documents, duly authenticated and translated into Spanish, if necessary, must be included, as a minimum:

- a) Records of the proceeding that verify the existence of the punishable act and provide proof, or at least reasonable evidence of the guilty participation of the accused, or in other words, those pieces that would serve as grounds for the decision that is submitted to the proceeding or for the order for preventive detention of the requested person;
- b) An authorized copy of the order of detention;
- c) A reliable copy of the legal provisions that define and punish the crime;
- d) A reliable copy of the provisions on the statute of limitation of the criminal proceeding and the sentence;

e) The filiation of the demanded individual and personal data that permit his identification.

The judicial stage begins with the transmittal of the request and the background documents by the Ministry of Foreign Affairs to the Supreme Court.

JUDICIAL STAGE

A judge of the Supreme Court hears the extradition request in the initial proceeding.

This stage is essentially made up of two sessions or phases, called “investigation” and “debate.” If the supporting documents provided by the requesting government appear to give proof of the body of the crime and there are well-founded suspicions of the participation of the accused, the authorities will proceed to order the arrest of the individual.

During the debate phase, it is necessary to determine whether or not there is a responsible agent of the requesting government to process the extradition:

a) If there is no agent of the requesting government: once the investigation is concluded, the public prosecutor is heard; once the public prosecutor has completed the proceeding, the accused is transferred; once the procedure for the response by the accused has been completed, a date is set for the decision.

b) If there is a responsible agent of the requesting government: once the investigation is completed, first the agent is heard, then the accused, and finally the Public Prosecutor's Office (prosecutor); then a date is set for the decision.

- Initial decision by the trial court: This must be issued within five days. Then the appeal procedure begins. If there are no appeals, the case goes to the higher court, for a legal opinion.

- Higher court: The case is heard in a chamber of the Supreme Court, which summons the accused, the prosecutor, and the agent in charge of executing the extradition in order to apply any appropriate writs. This is followed by presentation of the facts and arguments.

- Higher court judgment: no appeals are allowed against this ruling.

If there is no applicable treaty on the subject, the Supreme Court of Chile applies the general principles of international law on extradition. This high court has upheld in previous decisions that these principles should be understood as those contained in the Bustamante Code (Convention on Private International Law, adopted in Havana on February 20, 1928), in the Convention on Extradition signed in Montevideo on December 26, 1933, and in bilateral treaties on the subject signed by Chile.

The basic principles emanating from these international instruments are the following:

1. Principle of double incrimination: the act must be characterized as a crime in the legislation of both the requesting and the requested country, and must be so defined prior to being committed;

2. Principle of minimum severity: the crime must be punishable by a minimum of one year in prison;
3. The crime must be prosecutable at the time, namely, there must be an arrest warrant or a prison sentence pending;
4. Principle of non applicability of a statute of limitations pertaining to the sentence and the legal proceeding. The requested state is not required to grant extradition if a statute of limitation prescribes criminal action or sentencing, pursuant to the laws of the requesting or requested state.
5. Principle of exclusion of certain crimes: political crimes and other related crimes and strictly military crimes are excluded from extradition.
6. The requesting state must have jurisdiction to prosecute the crime;
7. Principle of specialty: the person surrendered may not be tried, convicted, or subject to any restriction of his personal liberty for previous offenses different from the ones for which extradition is requested.

These are the fundamental principles in the area of extradition adopted by the Chilean Government; however, this is not an exhaustive list, and other principles may certainly be added to it, such as the following ones: the right of the surrendered person to due legal process, or to non application of the death penalty, the principle of double jeopardy or "non bis in idem", denial of extradition when the person demanded was or will be tried by a special court, or the guarantee that the situation of the demanded person will not be aggravated by his race, religion, nationality, political opinions, or other reasons of this nature.

Active extradition
Articles 635 to 643 of the former Code of Criminal Procedure

In the event that active extradition is granted in domestic courts, the Supreme Court must address the Ministry of Foreign Affairs and request it to initiate the diplomatic procedures required to obtain extradition.

The Ministry of Foreign Affairs, after authenticating the supporting documents, must undertake the necessary procedures to comply with the Supreme Court decision. If extradition is obtained, it must conduct the person from the country in which he is located and accompany him until he is placed at the disposal of the Supreme Court.

III. EXTRADITION PURSUANT TO THE NEW CODE OF CRIMINAL PROCEDURE
(Governing passive extradition requests as of June 16, 2005)

Passive extradition
Articles 440 to 454 of the new Code of Criminal Procedure

a. Processing of the request – competent entities – representation of the requesting state:

The request is processed through the **Chilean Ministry of Foreign Affairs**, which refers the request and the supporting documents to the **Supreme Court**. When it receives the documents, the Supreme Court designates a judge of the Supreme Court as the person responsible for the initial hearing of the extradition request in lower court. The Criminal Chamber of the Supreme Court shall have jurisdiction to hear any appeals.

Representation of the requesting state: The national **ministerio público [public prosecutor's office]** represents the interests of the requesting state in passive extradition hearings, without prejudice to the principle of objectivity that governs it. In all cases the requesting state may designate another representative.

b. Procedure -- processing:

The competent judge of the Supreme Court must notify the representative of the requesting state and the accused of the request and the supporting documents, unless personal precautionary measures were requested against the latter (if such measures were requested, the accused will be notified of the petition and the accompanying documents after they have been ordered).

Pre-trial detention. Before receiving the formal extradition request, the Supreme Court judge may order detention of the accused, if that is so stipulated in the respective treaty or so requested by the foreign state, in a request that must contain the following information as a minimum:

- a) Identification of the accused;
- b) Existence of a final judgment of conviction or an order restricting or depriving the accused of his personal liberty;
- c) The characterization of the crime that has motivated the request, and the place where and date when it was committed; and
- d) The declaration that extradition will be formally requested.

Pre-trial detention may be ordered for the period of time specified in the applicable treaty or, failing that, for a maximum of two months counting from the date on which the requesting state was notified of the fact that the accused was placed in pretrial detention.

Grounds for preventive detention and other personal precautionary measures. Once the extradition request has been presented, the requesting state may request preventive detention of the individual whose extradition is requested, or other personal precautionary measures, which will be ordered if they comply with the requirements of the pertinent treaty or, in its absence, the provisions of national domestic law (Arts. 138 ff. of the new Code of Criminal Procedure).

Parole and other precautionary measures. At any stage of the proceedings, the accused may be granted parole or provisional freedom in accordance with general rules, but the Supreme Court judge may take any steps he deems necessary to prevent the flight of the accused.

Hearing on passive extradition. The hearing is public, and when it begins, the representative of the requesting state must give a brief account of the facts on which the extradition request is based.

This is followed by presentation of the evidence.

Ruling on passive extradition. The court will grant extradition if it considers the following circumstances to have been proven:

- a) The identity of the person whose extradition is requested;
- b) That the crime of which he is accused or the crime for which he was convicted is a crime for which extradition is authorized pursuant to treaties in force or, in their absence, in accordance with the principles of international law;
- c) That on the basis of the factual information presented during the hearing, it could be presumed that the accused would be charged in Chile for the acts of which he is accused.

The corresponding ruling must be handed down within five days of the hearing.

Ruling granting passive extradition. Once a ruling granting extradition has been issued, the Supreme Court judge must place the person requested at the disposal of the Ministry of Foreign Affairs, so that the person may be delivered to the country that requested him.

c. Simplified passive extradition:

If, after the person whose extradition is requested has been informed of his rights to a formal extradition proceeding and the protection it offers, including the assistance of counsel, that person informs the Supreme Court judge who heard the case that he agrees to be delivered to the requesting state, the judge shall grant extradition without any further proceedings.

Active extradition

Articles 431 to 439 of the new Code of Criminal Procedure

Processing of the decision granting the request for active extradition. The Chilean Ministry of Foreign Affairs will authenticate and translate the accompanying documents, if necessary, and will take the necessary steps to comply with the decision of the Court of Appeals that granted the active extradition within the country. If the extradition of the accused is obtained, the person will be conducted from the country where he is located until he is placed at the disposal of that court.