Mexico-United States Extradition and Alternatives: From Fugitive Slaves to Drug Traffickers - 150 Years and Beyond the Rio Grande's Winding Courses

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1. Intention to Present a Formal Petition to Request Extradition .......................... 541
2. A Formal Extradition Request ................................................................. 542
3. Extradition Hearing ..................................................................................... 544
4. Fugitive’s Relief .......................................................................................... 546
   a. Bail ......................................................................................................... 546
   b. Amparo ................................................................................................. 546
5. Final Administrative Procedures ............................................................... 548
   a. Surrender and Delivery of the Fugitive .................................................. 549
   b. “Delayed” or “Deferred” Extradition ...................................................... 549
   c. Waiver .................................................................................................... 550
   d. Costs ....................................................................................................... 550
IV. United States Law and Requirements ....................................................... 550
   A. Procedures for Requesting Extradition from Mexico to the United States .... 551
      1. Determining Whether Extradition Is Possible ....................................... 551
      2. Jurisdiction .......................................................................................... 552
      3. Provisional Arrest ............................................................................... 555
      4. Documents Required for Extradition ................................................... 555
      5. Prosecutor’s Affidavits ....................................................................... 556
      6. Indictment and Warrant ...................................................................... 557
      7. Evidence Establishing the Case ............................................................ 557
      8. Transmission of the Completed Documents to Washington ................ 558
      9. Presentation of the Extradition Request .............................................. 559
     10. Arrangements for Taking Custody After Extradition ............................ 559
     11. Alternatives To Extradition .................................................................. 560
   B. Extradition from the United States to Mexico .......................................... 561
      1. Procedure Before the Extradition Magistrate ....................................... 561
         a. Representation of the Mexican Government ...................................... 561
         b. Complaint .......................................................................................... 562
         c. The Provisional Arrest ..................................................................... 562
         d. Formal Extradition Request ............................................................. 564
      2. Arrest Warrant ...................................................................................... 564
         a. Execution of Warrant ...................................................................... 564
         b. Notification of the Mexican Government ........................................ 565
         c. Initial Appearance ............................................................................ 565
         d. Reason for Arrest ............................................................................ 565
         e. Possibility of Waiver or Simplified Extradition ................................. 565
         f. Appointment of Counsel .................................................................. 566
         g. Date for Bail Hearing ...................................................................... 566
         h. Timing of Extradition Hearing .......................................................... 566
         i. Bail .................................................................................................... 567
         j. Discovery ............................................................................................ 568
         k. Extradition Request and Support Documents .................................... 568
         l. Extradition Proceedings ................................................................... 570
         m. Available Defenses .......................................................................... 572
         n. Procedure at the Extradition Hearing ............................................. 575
I. INTRODUCTION

International extradition is the process by which a person found in one country is surrendered to another country for trial or punishment. The process is formal, regulated by treaty, and conducted between the federal government of the United States and the government of a foreign country, in this case, Mexico.
The Rio Grande border has represented the point across which a variety of domestic law enforcement activities have become internationalized: the recovery of fugitive criminals and escaped slaves; the suppression of outlaw gangs and Indian marauders; the hunting of cattle rustlers and train robbers; the maintenance of order in border towns; and in modern times the suppression and prosecution of narcotics traffickers, alien smugglers, and money launderers. The border also signals the dividing line between two sovereign jurisdictions with distinct economic regulations, cultures, law enforcement systems, political interests, constituencies, upheavals, and moral values.

While criminals sometimes cross the border with indifference to its jurisdictional consequences, they often regarded the easily crossed border as providing them advantages that offer lucrative profits to smugglers, safe havens to bandits, fugitives, and freebooters, and economic opportunities to illegal migrants. By contrast, law enforcement officials typically have regarded the border as a serious impediment to their tasks. The border often has presented the limits of their police powers, a line across which they have no control and are typically dependent on authorities of the other country or state.¹

This discussion chronicles United States-Mexico extradition to show historical patterns and continuity in many current extradition issues. The extradition requirements and practices of the United States and Mexico are then highlighted. Extradition requirements and practices in both Mexico and the United States under the existing (e.g., 1978) extradition treaty are considered. The contemporary extradition issues, such as drug trafficking and the Alvarez-Machain, Garcia Abrego, and Ruiz Massieu cases are discussed. The more informal and sometimes more cooperative approaches of the border states are contrasted with the more formal extradition. The policy debate during the ratification of the North American Free Trade Agreement ("NAFTA") and the special procedures developed in Mexico to prosecute nationals who commit serious crimes are outlined.

This article discusses the problems with current extradition mechanisms between the United States and Mexico. Potential solutions to these problems including a renegotiated extradition treaty and some alternative substantive provisions are highlighted. Extradition issues and prospects for handling them are considered in the context of other United States-Mexico policies and relations, as well as in the context of criminal cooperation and criminal justice in the region.

II. HISTORY OF EXTRADITION

An understanding of the evolution of the current extradition practice and policy between the United States and Mexico requires a review of its history. While the specific cases, judges, political leaders, and prosecutors change, many jurisprudential trends and themes continue. One of the continuing trends has been the use of treaty provisions to refuse either to extradite or prosecute some individuals,

resulting in impunity for such individuals. Similarly, the use of kidnapping and/or irregular rendition are employed simultaneously or alternatively to extradition. Another continuing theme is the emphasis by the United States or Mexico, in response to domestic political needs, of extradition for crimes *de jure*: fugitive slaves and smugglers of alcohol and cattle followed by the enactment and enforcement of neutrality laws; and in the 20th century the smuggling of drugs and aliens, transborder abductions, and the early practice of extradition of nationals.

A. PROBLEMS OVER UNITED STATES FUGITIVE SLAVE TRADE

The predominant power of the United States has always directed extradition relations. In the 19th century the most important extradition issue derived from fugitive slaves from the United States. The institution of slavery depended on the capacity of slave owners in the United States to deter their slaves from escaping and to recover and punish them when they did escape.2

In Mexico the fugitive slave issue resulted in: frequent diplomatic overtures, as well as efforts to negotiate extradition treaties; private and state-sponsored expeditions across the border to recover runaway slaves; efforts by foreign citizens and officials to lure slaves across the border; refusal by the Mexican Government to return escaped slaves; discreet complicity by foreign officials near the border in United States initiatives to recover slaves; differences of opinion within Mexico regarding the desirability of inviting thousands of fugitive slaves into Mexican territory; and discussions of the issue of fugitive slaves and annexationist plots, filibustering expeditions, and the variety of transnational criminal activities engaged in by free whites from the United States.3

Mexico's independence in 1810, her prohibition of the slave trade in 1824, and her abolition of slavery in 1829 turned the flight of slaves from the United States to Mexico into a source of great tension. Many Mexicans perceived the prohibition of slavery not just as a humanitarian imperative, but also as a mechanism that could be used to repel the growing influence of North Americans in Texas, many of whom arrived with their slaves.4

In 1825, the United States initiated in the conclusion of a Treaty of Amity, Commerce, and Navigation with Mexico a provision for the "regular apprehension and surrender . . . of any fugitive slaves."5 Opposition to the inclusion of the clause by the Mexican Chamber of Deputies delayed the ratification of the treaty until 1832 and resulted in the removal of the provision from the treaty.6

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2. *Id.* at 33-45.
4. NADELMANN, *supra* note 1, at 42 (citing Alleine Howren, *Causes and Origin of the Decree of April 6, 1830*, 16 SW. HIST. Q. 387-90 (1913)).
During the Texas republic's period of independence between 1836 and 1845, the number of fugitive slaves seeking refuge in Mexico rose considerably. Slave owners advertised in newspapers for the return of their slaves, offering lucrative rewards, and employed agents to collect their escapees in Mexico. Mexican officials arrested and then released two Texas Rangers sent to Matamoros to apprehend runaway slaves. While slave owners' pleas to the United States to negotiate an extradition treaty or otherwise obtain assistance from Mexico to cooperate in the problem of apprehending fugitive slaves resulted in diplomatic activity, the Mexican Government adamantly refused. In 1857 Mexico enacted a law protecting fugitive Negro slaves from extradition and included the law in the new Mexican constitution.\footnote{NADELMANN, supra note 1, at 42-43.}

In 1857, the state of Texas enacted an "Act to Encourage the Reclamation of Slaves, Escaping Beyond the Limits of the Slave Territories of the United States." It provided for the state treasury to reward those returning runaway slaves to their owners.

In the 1850s, Texas slave owners frequently contacted Mexican military officials in the Mexican states of Nuevo León and Coahuila to seek their assistance in slowing the flight of slaves across the border. Many Texan slave owners supported the unsuccessful efforts of José Carvajal, a Mexican promising assistance to Texas slave owners in recovering their fugitives. Carvajal also sought to transform the northeastern Mexican state of Tamaulipas into the Sierra Madre Republic.\footnote{Id. at 44.}

In 1861, Mexico and the United States concluded an extradition treaty prohibiting the return of fugitive slaves. It went into effect the following year.\footnote{Moor, supra note 6, at 1118-21.} In the early 1860s, a secret agreement between Texas slave owners and Albino López, the governor of Tamaulipas, provided for the exchange of fugitive slaves for Mexican peons fleeing north. The provision in the Mexican Constitution protecting fugitive slaves and then the end of the Civil War finally ceased efforts to conclude a formal agreement with Mexico or its states and relieved the tension over the return of fugitive slaves.

While the Mexican Government resisted the efforts of United States law enforcement to enter Mexico to capture and reclaim fugitive slaves, it responded on nationalistic and moralistic grounds rather than resorting to legalistic technicalities as Canada and Britain had, in rejecting United States requests for the return of fugitive slaves. The United States efforts, however, were especially aggressive in Mexico, partly because Mexico bordered on a slave state. The different norms south of the border to capture and return persons continued to shape United States actions in modern times.\footnote{NADELMANN, supra note 1, at 45.}

In 1861 the United States and Mexico concluded the first extradition treaty. It contains eight articles. Article III provides for extradition for twelve listed extra-
ditable crimes. Article VI of the treaty provides that neither signatory is bound to deliver up its own citizens or subjects. A United States District Court in Texas interpreted these provisions to mean that the United States could not surrender a United States citizen. The provisions of Article VI do not apply to political offenses or the return of fugitive slaves or persons who were slaves when their extradition offense was committed. Article VI also does not apply to crimes committed before the date of the exchange of the treaty's ratifications.

B. 1865-1914

From the 1860s to the 1880s, the principal United States law enforcement concerns were smuggling and cattle rustling, both of which evolved into significant organized criminal activities. Legal objections to the extradition of nationals prevented cooperation in extraditing fugitives. Both Mexican and United States law enforcement officials regularly complained about the lack of cooperation from counterparts across the border and periodically accused one another of complicity in cross-border criminality. To facilitate capturing a notorious gang known as "the Cowboys" that raided both American and Mexican towns and homes near Tombstone, Arizona, United States President Chester Arthur issued a proclamation against "the Cowboys." President Arthur declared the area in a state of rebellion, and circumvented the prohibitions on military involvement in civilian law enforcement imposed by the 1877 Posse Comitatus Act.

From 1836-76, the routine response of United States law enforcers, whether they were cavalry, posses organized by United States Marshals, or Texas Rangers, to transnational criminality was to pursue bandits into Mexico. As a rule permission was requested for such crossings. Normally, however, Mexican public opinion would not allow the Mexican Government to consent. Crossings, hence, were carried out without permission, generally confined to the Indian country along the upper Rio Grande, the Arizona and New Mexico boundaries.

As the number and severity of both Indian and non-Indian raids from Mexico increased in 1877, United States border, political and military officials sought both to regularize and to extend past practices. On June 1, 1877, Secretary of War McCravy issued an order to General Sherman officially sanctioning the border crossings instigated by the military commander along the Texas border, causing a

13. Id.
14. NADELMANN, supra note 1, at 64 (citing ROBERT D. GREGG, THE INFLUENCE OF BORDER TROUBLES ON RELATIONS BETWEEN THE UNITED STATES AND MEXICO, 1876-1910, 12-13 (1937)).
15. Id. at 65 (citing LARRY D. BALL, THE UNITED STATES MARSHALS OF NEW MEXICO AND ARIZONA TERRITORIES 1846-1912, 126 (1978)).
fierce nationalist backlash against the order in Mexico City.\textsuperscript{16}

In 1882, the United States and Mexico concluded an agreement, after years of tense negotiations, authorizing the troops of either state to cross the border, albeit only in desert or unpopulated regions "when they are in close pursuit of a band of savage Indians."\textsuperscript{17}

With the violence occurring during Mexico's political unrest and civil war, battles began across the border. Eventually, the Mexican revolution spawned a series of raids into United States territory by Mexicans and Mexican-Americans under the Plan of San Diego. This campaign resulted from a document prepared in the small southern Texas town of San Diego. It called for a Mexican-American rebellion, the killing of all Anglo males over the age of sixteen, and the creation of an independent republic in the southwest.\textsuperscript{18}

On February 22, 1899, following the decision by the United States District Court in the case of Ex parte McCabe,\textsuperscript{19} the United States and Mexico concluded another extradition treaty.\textsuperscript{20} Article IV provided, as in the earlier treaty, that neither party "shall be bound to deliver up its own citizens," but a new provision stated that "the executive authority of each shall have the power to deliver them up, if, in its discretion, it be deemed proper to do so."\textsuperscript{21}

Among the provisions of the 1899 treaty was Article IX, which provided in part as follows:

In the case of crimes or offenses committed or charged to have been committed in the frontier states or territories of the two contracting parties, requisitions may be made either, through their respective diplomatic or consular agents as aforesaid, or through the chief civil authority of the respective state or territory, or through such chief civil or judicial authority of the districts or countries bordering on the frontier as may for this purpose be duly authorized by the said chief civil authority of the said frontier states or territories, or when, from any cause, the civil authority of such state or territory shall be suspended, through the chief military officer in command and of such state or territory, and such respective competent authority shall thereupon cause the apprehension of the fugitive, in order that he may be brought before the proper judicial authority.

The provisions of the Mexico-United States 1899 treaty were, for some time, interpreted such that once the judicial authority determined a fugitive extraditable,

\textsuperscript{16} Id. at 66-67.
\textsuperscript{17} Id. (quoting GREGG, supra note 13, at 152).
\textsuperscript{19} 46 Fed. 363 (1891).
\textsuperscript{21} Id. at 1822, reprinted in HACKWORTH, supra note 12, at 59-60.
the decision of extraditability was forwarded to the executive of the state (e.g., governor of Texas) for surrender. 22

A difficulty under the earlier Mexico-United States extradition treaties was the need for extradition requests to be directed to the United States Department of State and the Mexican Department of Foreign Affairs before transmission to the Ministries of Justice/Attorneys General. 23

In 1916, President Wilson ordered General John “Black Jack” Pershing to lead a “punitive expedition” into Mexico in pursuit of Pancho Villa and his forces following numerous raids and the killing of Americans in New Mexico. General Pershing failed to capture Villa, but secretly commissioned two Japanese-Mexican agents to assassinate Villa with poison tablets. In 1917, with Villa’s forces still at large in Mexico, but no longer operational near the border, Pershing’s units were withdrawn from Mexico. 24

C. ENFORCEMENT OF NEUTRALITY LAWS

Although United States neutrality laws were initially enacted in 1794, actual enforcement of the laws varied substantially, depending on popular attitudes, the relations between the United States and the targeted nation, and varied motives of the Administration occupying the White House.

After 1905, increased opposition to the Porfirio Diaz regime in Mexico resulted in the first significant neutrality law enforcement. In March 1907, Mexican ambassador to the United States Enrique Creel, complaining of the machinations of the Mexican Liberal Party and its leader, Ricardo Flores Magón, within the United States, requested that the United States Government enforce its neutrality laws. Secretary of State Elihu Root, at the request of the Mexican ambassador, asked Attorney General Charles Bonapart to take the appropriate actions.

The United States Government thereafter developed a network of agents from multiple law enforcement agencies to supervise neutrality work, including lending a top Secret Service agent, Joe Priest, to the State Department and then placing him under Justice Department supervision. Similarly, Texas law enforcement of-


23. For instance in 1907, a wire from the District Attorney of El Centro, California to the Mexican Department of Foreign Affairs requested the detention at Mexicali of Praxedis Moreno, charged with the murder of his wife at Calexico. The Mexican Department responded that the orders were issued to keep the fugitive under surveillance, but his detention could not be ordered because, according to the treaty, the request should come through the diplomatic channels. HACKWORTH, supra note 12, at 9 (citing the Mexican Minister of Foreign Affairs (Mariscal) to the American Ambassador (Thompson), Dec. 30, 1907, Ms. Dep’t St., file 11142).

24. NADELMANN, supra note 1, at 75-76. For an account of the demise of Pancho Villa, see CLARENCE C. CLENDENEN, THE UNITED STATES AND PANCHO VILLA: A STUDY IN UNCONVENTIONAL DIPLOMACY 305-13 (1961).
Officials occasionally helped enforce federal neutrality work. The Mexican Government sent its own agents and hired employees of the United States private detective agencies to assist in tracking down and even arresting rebels and plotters. On United States territory the "subversives" were followed, harassed, and arrested by agents of both governments; prosecuted in United States courts; deported or extradited to Mexico; and occasionally kidnapped in the United States and taken across the border to Mexico.²⁵

The prosecution for violation of United States neutrality laws arose out of the inability to extradite Mexican "revoltosos," or political rebels successfully under the 1899 extradition treaty, as supplemented by the agreement of June 25, 1902.

Two provisions of the treaty were especially important. Article III(2) excluded individuals from extradition "when the crime or offense charged shall be of a purely political character." While the term "political" was not defined, all extraditable crimes, with the exception of an attempt against the life of a head of state, could legally be declared political offenses (depending on the temperament and "politics" of the magistrate, the motivation of the defendant, and the circumstances of the crime). If and when this occurred, the accused could avoid extradition.²⁶

A method sometimes used in lieu of extradition was to lure Mexicans back into Mexico where they would be arrested. On October 24, 1906, the Díaz Administration sought from the Texas Governor the provisional arrest of Juan José Arrendondo and sixty-five others for their roles in the Villa Jiménez uprising of September 26 and 27, 1906. They were charged with robbery, assault, and murder in connection with the disturbances at Villa Jiménez.

In spite of having a former judge and other high-powered counsel, the Mexican Government was unable to obtain the fugitives' extradition. After extradition proceedings in San Antonio at the end of December 1906 until January 5, 1907, the court held that the acts complained of were of a "purely political character" and excluded under Article III of the extradition treaty. The defendants were then discharged. Arrendondo was, however, immediately served with a warrant by an immigration inspector and taken into custody as an alien in the United States entering without inspection.²⁷ Although the board of inquiry recommended Arrendondo's deportation, it was denied on appeal. Arrendondo and sixty-five others were eventually withdrawn.²⁸

Eventually, Mexican Ambassador Creel induced Elihu Root to request from the Secretary of War the stationing of troops at Del Rio and Eagle Pass and the assignment of a special military investigator for the frontier. Meanwhile, Arrendondo was lured into Mexico on the promise of immunity. Arrendondo was ar-

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²⁶. Id. at 125.
²⁷. Id. at 130 (citing articles from the San Antonio Daily Gazette and Daily Light).
²⁸. Id.
rested and taken to Belem, where later he "conveniently" died.\footnote{29} 

At the insistence of the Mexican Government, Captain William S. Scott, a cavalry officer was assigned to special army intelligence duty to investigate the operations of Mexican emigrados on the United States side of the boundary. Increasingly a binational espionage structure was established and United States prosecutors started prosecuting Mexican nationals for neutrality law violations.\footnote{32}

**D. ENFORCING UNITED STATES PROHIBITION AND DRUG LAWS IN THE 1920S AND 1930S**

During the 1920s, the efforts of the Commissioner of Prohibition, Harry J. Anslinger, to enforce the United States prohibition laws, especially smuggling liquor into the United States, led to his appointment as head of the Prohibition Bureau's Narcotics Division. His efforts further led to the awareness of the international dimension of narcotics traffic with the end of prohibition in the 1930s.\footnote{31}

Throughout the 1930s, drug enforcement agents, Treasury agents, customs officials from border stations, and United States consular officials engaged in covert law enforcement work in Mexico, primarily collected information and conducted investigations on the smuggling of drugs across the border. While negotiations occurred between the United States and Mexico over the role of these agents, the United States rejected a formal accord, believing it might curtail their freedom to operate.\footnote{32}

The United States law enforcement officials encountered numerous problems enforcing prohibition and drug laws. The range of problems included: high and low-level corruption, economic incentives to undertake drug production and trafficking, the impossibility of adequately policing the border, the special role played by law enforcement agents based along the border, and the sensitivity of both governments and the United States Embassy concerning the operations of freewheeling United States drug enforcement agents south of the border. These problems remain much the same sixty or seventy years later.\footnote{33} The problems and trends colored the ways in which both governments and especially law enforcement agents deal with problems of arresting and gaining custody of fugitives and transgressors of the law.

**E. EARLY PRACTICE ON EXTRADITION REQUESTS FOR NATIONALS**

Subsequent to the decision of Ex parte McCabe in 1891, the United States and Mexico concluded a new extradition treaty, in which Article IV provided, as in

\footnote{29} Id. at 131. \footnote{30} Id. \footnote{31} NADELMANN, supra note 1, at 93-94 (citing DAVID F. MUSTO, THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL 211 (1973)). \footnote{32} Id. at 95-97 (citing WILLIAM O. WALKER III, DRUG CONTROL IN THE AMERICAS 164 (1981)). \footnote{33} Id. at 97-98.
the prior extradition treaty, that neither of the signatories "shall be bound to deliver up its own citizens." A new provision, however, was added that "the executive authority shall have the power to deliver them up, if, in its discretion, it be deemed proper to do so."\(^{34}\)

The practice under the provisions of Article IV was for a United States district court to determine whether the person was otherwise extraditable, and, if so, to certify the matter to the Secretary of State for a decision on the discretion to extradite nationals.\(^{35}\)

On December 1, 1926, the United States Ambassador to Mexico confronted the Mexican Ministry of Foreign Affairs about the President of Mexico’s apparent policy to decline to surrender to the United States fugitives who are Mexican citizens, notwithstanding the power to surrender in such cases under Article IV of the 1899 treaty. This is a result of the Juan Adams and other recent cases. The Mexican Minister of Foreign Affairs, however, assured the U.S. Ambassador that the Mexican Government considered each case only after a careful study of the circumstances.\(^{36}\)

Notwithstanding the assurances of the Mexican Minister of Foreign Affairs, the de facto practice of not extraditing nationals evolved as illustrated by the case of Henry Phillips Ames, alias Enrique Tames, whose provisional arrest and detention, with a view to extradition to Mexico, was requested for robbery and embezzlement charges. On May 21, 1928, the United States Commissioner for the Southern District of California found him extraditable, noting that the relator was a United States citizen and that extradition should be denied due to his citizenship, unless it could be affirmatively shown that the accused will receive a fair trial and political considerations would not taint the proceeding. Hence, the decision was a mixture of concern about the potential unfairness of the proceedings in Mexico, notwithstanding the rule of non-inquiry, and concern for non-reciprocity. In a note dated June 4, 1928, the Secretary of State informed the Mexican ambassador that Ames would not be extradited due to Mexico’s consistent practice since 1923 in refusing to surrender Mexican citizens to the United States.\(^{37}\)

After the receipt of assurances that the Mexican Government did not have the "deliberate intention of refusing the extradition of Mexicans to the United States, simply because of their nationality," Secretary of State Kellogg informed the Chargé d’Affaires of Mexico that the State Department "in the future will be governed by the special circumstances in each case, in the same manner as your Embassy states your Government deals with the reversed situation."\(^{38}\)

\(^{34}\) 1899 Extradition Treaty, supra note 12, at 1186, 31 Stat. 1818, 1822.


\(^{36}\) HACKWORTH, supra note 12, at 60 (citing Under Secretary Olds to Ambassador Sheffield, Dec. 1, 1926, MS. Dep’t St., file 212.11Ad1/18; the Mexican Minister of Foreign Affairs (Saenz) to Mr. Sheffield, Jan. 13, 1927, file 212.11 Ad1/21).

\(^{37}\) Id. at 61.

\(^{38}\) Id. (citing Ambassador Tellez to Secretary of State Kellogg, Jan. 7, 1928, MS. Dep’t St., file 211.12Am3/1; commissioner’s certificate, May 21, 1928, MS. Dep’t of St.,
On June 27, 1939, the Department of State denied an extradition request for Severiano Riojas on the basis of the Mexican Government's practice of declining to extradite its citizens and the need for reciprocity of action under extradition treaties.\textsuperscript{39} On December 12, 1939, the State Department, granted a Mexican extradition request for Juan Delgado Ortiz, a United States national, thereby showing that the refusal to extradite nationals is not an established practice.\textsuperscript{40}

The above-mentioned cases and diplomatic notes indicate that the issue of extradition of nationals has loomed as a major controversial issue between 1861 and 1980 and indicates the environment and context in which the two governments are grappling with the issue in the modern period.

F. RECENT EXTRADITION TRENDS

Statistics indicate that extradition between the United States and Mexico has increased significantly over the last ten years.

1. Extradition from the United States to Mexico

According to Mexican sources, since 1984, Mexico submitted 416 extradition requests to the United States. This number resulted in: thirty-seven persons handed over to Mexican authorities; seven petitions denied; fourteen deportations; and eighteen persons facing extradition proceedings.\textsuperscript{41}

Between 1980 and 1992, the United States extradited twenty-one persons to Mexico. The crimes for which these persons were extradited include the following: homicide, nine; abuse of functions (ejercicio abusivo), two; kidnapping, one; purchasing arms, one; drug crimes, one; fraud, one; and abuse of confidence, one. No crimes were listed for five of the cases. In terms of the methods of delivering the fugitive, five fugitives were delivered without Mexican requests. Fourteen were delivered; one was waived; and one acquiesced and returned without undergoing the extradition process.

Since 1993, when Mexico established the General Division of International Legal Affairs, the United States delivered thirty-nine persons for the following crimes: homicide, twenty-five; violation of Article 91, Frac. II of the banking law,
one; sex offenses, one; bribery, two; tax fraud, one; improper harm to property and assault and battery, one; carrying of fire arms exclusively reserved for the Mexican Army, one; drug crimes, two; trafficking in minors and persons incapacitated, one; murder of a parent, one; and fraudulent administration, one.

In terms of the means for the extradition or alternative mode to delivery of the persons requested by Mexico, the methods are as follows: extradited, eighteen; acquiesced, six; deported, thirteen; and delayed consent, one.\(^2\)

2. Extradition from Mexico to the United States

Mexican sources report that, since 1984, the United States requested the extradition of 151 fugitives from Mexican territory. These requests resulted in: sixty-eight detentions; twenty persons surrendered; two suspects expelled; five escapees; fourteen facing extradition proceedings; five requests denied; and eight requests approved but delayed. Mexican authorities are processing the remaining requests.\(^4\)

Most recently, the Mexican government indicated that, as of July 1996, ninety-one United States extradition requests were pending in the hands of Mexican authorities. Of this number, fifty-two are drug trafficking-related.\(^3\)

Since 1988, Mexico extradited thirty-nine persons to the United States for the following crimes: drugs, seventeen (includes one case that also included conspiracy to commit drug offenses); fraud and false declarations, one; falsification of documents and false declarations, one; sexual conduct against minors, one; postal fraud and arson, one; fraud, three; arms trafficking, one; tax evasion, one; sexual offenses, two; homicide, one; assault, wounding and unlawful transportation of prohibited arms, one; and robbery, two.\(^4\)

According to Johnathan Winer, Deputy Assistant Secretary, Bureau for International Narcotics and Law Enforcement Affairs, “more than twice as many fugitives—13 in all—were extradited to the United States in 1996 as in 1995. Among the 1996 extraditees were two Mexican nationals, an unprecedented step given Mexican legal strictures on extradition of nationals.” According to Deputy Assistant Secretary Winer, the return of such criminals represents real progress, and he anticipates “additional Mexican extraditions in the near future” despite the “large backlog of pending United States extradition requests.”\(^46\) Moreover, ac-
cording to United States Ambassador James Jones, "about 200 suspects, including drug traffickers, are on Washington's extradition wish list." Of this number, about thirteen names make the United States' top priority list.47

III. MEXICAN LAW AND REQUIREMENTS

In looking at Mexico's judicial system, one must keep in mind some of the basic features that distinguish civil and common traditions. One of these features is that the legal principle of stare decisis, elevated to a position of supreme prominence in common law countries, such as the United States, carries little weight, if any, in the Mexican legal system.48 Judicial decisions in Mexico are generally made by judges interpreting and applying blackletter law (mainly developed by legal scholars) and not case law, as in the United States.

As a general rule, therefore, court decisions in Mexico have only persuasive value even though certain types of cases may be interpreted as binding.49 In the end, the judge must interpret the law and not court rulings in similar cases. In fact, the creativity enjoyed by judges and lawyers in the common law tradition—and this includes their ability to use precedent to influence court decisions—is significantly curtailed in the Mexican context.

This section summarizes Mexican domestic law within which substantive and procedural extradition law is implemented. The constitutional and legal aspects of Mexican extradition combined with its distinctive legal culture explain the differences in the implementation of the extradition treaty between the two governments.

A. SUBSTANTIVE REQUIREMENTS

Mexico's international extradition is governed by federal law and is regulated by various sources:50 the Constitución Política de los Estados Unidos Mexicanos

on Banking and Financial Services, 105th Cong. (1997) (statement of Johnathan Winer, Deputy Assistant Secretary, Dep't of State).


50. Id. A case may be interpreted as binding on lower courts if followed by five consecutive and consistent decisions from either the Supreme Court or (appellate) circuit courts. Id. These types of cases establish what is known as "jurisprudence" (case law) and have the most persuasive weight any case can have in the Mexican context. Id.

51. APPLE & DEYLING, supra note 48, at 37 (noting the different roles and responsibilities of judges and lawyers in civil and common law systems).

52. GUILLERMO COLÁN SÁNCHEZ, PROCEDIMIENTOS PARA LA EXTRADICIÓN 69 (México: Editorial Porrúa, 1993) (providing a comprehensive work on Mexico's extradition proce-
(Mexican Constitution), the Ley de Extradición Internacional (Law on International Extradition), the Código Penal Para el Distrito Federal en Material de Fuero Común y para toda la República en Materia de Fuero Federal ("C.P.D.F.," or Federal Penal Code) and the Código Federal de Procedimientos Penales ("C.F.P.P.," or Federal Code of Criminal Procedures). If there is an extradition treaty, as with the United States,^5 the treaty governs extradition procedures.54 Mexico's Law on International Extradition governs in the absence of an extradition treaty.55 The law also supplements gaps in the treaty.

International treaties must "be in accord" with the Constitution.56 Some of the articles from the Constitution most frequently invoked in international extradition procedures are:

Article 14 - guarantees the non-retroactivity of the law; protection of life, liberty, property, and the precise application of the law;

Article 15 - prohibits extradition for political offenses or when the defendant has been subject to slavery in the country where the offense has been committed;

Article 16 - limits unreasonable searches and seizures;

Article 18 - permits custody only for offenses punishable by imprisonment;

Article 19 - stipulates that no detention can exceed 72 hours, unless justified with a judicial resolution or order (sufficient evidence must show the elements of the crime and the probable cause imputed to the accused);

Article 20 - grants the accused numerous rights in a criminal process: right to bail, freedom from self-incrimination, right of information in a public hearing within 48 hours after being turned over to the judicial authorities of the name of his accuser and the nature and cause for the accusation; right to a trial, a defense and counsel;

Article 33 - entitles foreigners to the constitutional guarantees enjoyed by Mexican nationals set forth in the first 29 articles of the Constitution. It allows the Executive Branch, however, the exclusive power to compel any foreigner, whose presence may be deemed inexpedient, to abandon Mexican territory without prior trial.


54. Mexico's International Extradition Law, supra note 52, art. 3.
55. Id. arts. 1, 3.
56. MEX. CONST. art. 133 (stating that the Constitution, laws from Congress, and treaties in accordance with them combine to form the "Supreme Law of all the Union").
Article 104 - dictates that extradition matters are within the competence of federal district judges; and

Article 119 - decrees that international extradition procedures are mainly handled by the Federal Executive, with the intervention of the Judiciary, and that in international extradition cases the suspect may be detained up to two months. Reciprocity is a fundamental principle of Mexico's extradition practices. Both Mexico's Law on International Extradition makes reciprocity a condition to consider an extradition request from a foreign State. The Extradition Treaty between the United States of America and the United Mexican States (hereinafter United States-Mexico Extradition Treaty) makes reciprocity an obligation.

1. Jurisdiction and Extraterritoriality

Mexico's Federal Penal Code provides for jurisdiction over and prosecution of criminal suspects residing in Mexico and in other countries, regardless of the fact that they may or may not be subject to the sovereignty of a specific country. The Penal Code allows prosecution:

(a) For crimes initiated, prepared and committed in another country, when they produce or attempt to produce an effect in the (Mexican) Republic;

(b) For the crimes committed in Mexican consulates or against its personnel when they are not judged in the country where committed;

(c) For crimes that are committed continuously in another country, and continue to be committed later in the (Mexican) Republic. These crimes will be prosecuted under Mexican law, for both Mexican and foreign nationals;

(d) For crimes committed by a Mexican in a foreign country against a Mexican or against foreigners, or by a foreigner against a Mexican. These crimes will be punished in the (Mexican) Republic, and according to federal law, if: (i) the accused is in the Republic; (ii) the criminal has not been tried in the country where the crime was committed; and (iii) the crime must be of a type that exists in both

57. See id.; see also Telephone Interview by Julia Padiema Peralta with Miguel A. Méndez, Office of Mexican Attorney General, Mexican Embassy to the United States (Aug. 28, 1996) (noting that Article 119 the Mexican Constitution does not contradict or supersede Article 19 since a judicial order or arrest warrant must still be issued to justify the detention of the person) [hereinafter Méndez Interview of Aug. 28].

58. Mexico's International Extradition Law, supra note 52, art. 10(I).

59. U.S.-Mexico Extradition Treaty, supra note 53, art. 1(1) (requiring that "[t]he Contracting Parties agree to mutually extradite, subject to the provisions of this Treaty...").

60. C.P.D.F. (Mexico's Federal Penal Code) art.2 - 4.

61. Id. art. 2(I).

62. Id. art. 2(II).

63. Id. art. 3.

64. Id.
countries.\textsuperscript{65}

The Penal Code permits the extradition of individuals charged with a crime or whose arrest is sought to serve a sentence in the requesting State.\textsuperscript{66} The United States-Mexico Extradition Treaty re-affirms extradition of such individuals.\textsuperscript{67} It allows the extradition of persons charged with an offense, found guilty or wanted for an offense committed within the territory of the requesting State.\textsuperscript{68} When the offense has been committed outside the territory of the requesting State, extradition shall be granted if: (a) the offense is punishable by the laws of the requested State; or (b) the suspect is a national of the requesting State, which has jurisdiction to try that person.\textsuperscript{69}

Although the law allows Mexico to enjoy broad jurisdictional-prosecutorial powers over fugitives, this is not the case when it comes to the actual delivery of fugitives. The Law on International Extradition limits the delivery of Mexican nationals to a foreign state except in “exceptional circumstances” and at the discretion of the Executive.\textsuperscript{70} This principle, reaffirmed in the United States-Mexico Extradition Treaty,\textsuperscript{71} served well for Mexico to justify its historical reluctance to extradite its own nationals.

2. Extraditable Offenses

There are three basic conditions that make an offense extraditable in Mexico: 1) the criminal act or behavior must be intentional; 2) the conduct charged must be a crime in the laws of both countries, thereby meeting the double criminality standard; and 3) the crime must be punishable with imprisonment of no less than a year.\textsuperscript{72} In the case of the United States-Mexico Extradition Treaty, the offense does not necessarily have to fall within any of the clauses of the Appendix to be extraditable—as long as the three above mentioned requirements are met.\textsuperscript{73} Mexico’s Law on International Extradition is more explicit on this point, as it specifies that serious or negligent crimes (delitos culposos) can also give rise to extradition.\textsuperscript{74} Also, one would expect the type of crime not to fall within the exceptions

\textsuperscript{65} Id. art. 4.
\textsuperscript{66} Mexico’s International Extradition Law, supra note 52, art. 5.
\textsuperscript{67} U.S.-Mexico Extradition Treaty, supra note 53, art. 1.
\textsuperscript{68} Id. art. 1(1).
\textsuperscript{69} Id. art. 1(2).
\textsuperscript{70} Mexico’s International Extradition Law, supra note 52, art. 14.
\textsuperscript{71} U.S.-Mexico Extradition Treaty, supra note 53, art. 9(1) ("Neither Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it be deemed proper to do so.").
\textsuperscript{72} Mexico’s International Extradition Law, supra note 52, art. 6; U.S.-Mexico Extradition Treaty, supra note 53, art. 2 (stating the criteria required for an offense to be extraditable).
\textsuperscript{73} U.S.-Mexico Extradition Treaty, supra note 53, art. 2(3).
\textsuperscript{74} Mexico’s International Extradition Law, supra note 52, art. 6.
to extradition spelled out in statutory law and the bilateral treaty.

The United States-Mexico Extradition Treaty spells out thirty-one extraditable offenses in its Appendix, ranging from murder to accepting bribes. The Treaty covers and punishes acts of attempt, conspiracy and participation in the commission of an offense. Offenses involving the transportation of persons or property, use of mail or other means of carrying out interstate or foreign commerce are also extraditable.

Often, defense lawyers argue that their clients are improperly charged with felonies that are neither extraditable, nor part of an extradition treaty. For instance, Daniel James Fowlie, a powerful marijuana-trafficker convicted in the United States and arrested in Mexico in 1987, argued that nine out of twenty-six counts, including operating a continuing criminal enterprise and making illegal money transfers, did not have an equivalent in Mexican law. His lawyers argued that Fowlie could not face charges in the United States. Assistant United States Attorney Elana S. Artson contended, however, that Fowlie's extradition from a prison in La Paz, Baja California was for all twenty-six counts which she said were part of the United States-Mexico Extradition Treaty. Eventually, the United States district court extradited and sentenced Fowlie to thirty years in prison and fined him $1 million.

B. NON-EXTRADITION AND BARS TO PROSECUTION

This section analyzes several grounds to non-extradition and bars to prosecution in Mexican constitutional and statutory law and in the United States-Mexico extradition treaty.

1. Political or Military Crimes

Mexican law bars extradition when the offense is of a political or military nature. The Mexican Constitution prohibits the negotiation of extradition treaties regarding political crimes. Both Mexico's Law on International Extradition and the United States-Mexico Extradition Treaty bar extradition for "political offenses." Mexico's Federal Penal Code includes in this category, the crimes of

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76. Id. art. 2(4)(a).
77. Id. art. 2(4)(b).
78. See, e.g., Dan Weikel, Fowlie Lawyers Say 9 Drug-Case Charges Invalid, L.A. TIMES, Nov. 27, 1990, at 5 (relating that attorneys for Daniel James Fowlie argued that their client was extradited for Mexican charges with no equivalent in U.S. law).
79. Id.
81. MEX. CONST. art. 15.
82. Mexico's International Extradition Law, supra note 52, art. 8; U.S.-Mexico Extradition Treaty, supra note 53, art.5(1).
rebellion, sedition, mutiny, and conspiracy. The United States-Mexico Extradition Treaty excludes from this category murder and willful crimes against the life and physical integrity of heads of government, attempts to commit such offenses, and specific offenses which countries agree to prosecute by agreement.

The Mexican Government invoked the political offense exception occasionally to the detriment of criminal investigations involving the United States government. For instance, in August 1987, a Honduran citizen exploded a bomb in a Honduran restaurant wounding five United States servicemen. Alfonso Guerrero sought and received asylum in the Embassy of Mexico in Honduras. Although Mr. Guerrero was formally charged with the crime and the Government of Honduras requested that Mexico turn him over so that he could be prosecuted, the Mexican Government refused to release Guerrero to the Honduran authorities.

Furthermore, Mexico's Law on International Extradition and the United States-Mexico Extradition Treaty also preclude extradition for military crimes. The Código de Justicia Militar (Mexican Code of Military Justice) spells out the list of what are officially considered military offenses—ranging from treason to insubordination and sedition. Mexican jurisprudence defines a military crime as "one that perturbs, diminishes, or puts at risk the military service, when military duties are breached or the acts or omissions are committed during military service." Mexico's Code of Military Justice, totaling 927 articles, gives exclusive jurisdiction to Tribunales Militares (Mexican Military Tribunals) to discipline and punish military misconduct.

2. Slavery

Mexico historically denied extradition in cases of slavery. The Mexican Constitution prohibits slavery in Mexican territory and the negotiation of extradition treaties applicable to criminals subject to a state of slavery in the requesting

83. C.P.D.F. art. 144.
84. U.S.-Mexico Extradition Treaty, supra note 53, art.5(2)(a) and (b).
85. U.S. SENATE COMM. ON FOREIGN REL., MUTUAL LEGAL ASSISTANCE COOPERATION TREATY WITH MEXICO, S. Exec. REP. No. 101-9, 101st Cong. 38 (1989) (discussing instances where American law enforcement has been thwarted by terrorists and other serious criminals fleeing to Mexico where they do not face serious sanctions).
86. Id.
87. Id.
88. Id.
89. Mexico's International Extradition Law, supra note 52, art. 9; U.S.-Mexico Extradition Treaty, supra note 53, art. 5(3).
92. Id. at 173 (citing 14 S.J.F. 178).
93. MEX. CONST. art. 2.
3. Capital Punishment

Capital punishment can also bar extradition. The Mexican Constitution allows for the death penalty only for the crimes of “treason to the State during international war, parricide, homicide, arson, plagiarism, car jacking, piracy and severe military crimes.”96 The Constitution, however, explicitly prohibits capital punishment for “political crimes.”97 In cases of extradition, Mexico’s Law on International Extradition states a preference for severe incarceration rather than the death penalty, when feasible.93 The United States-Mexico Extradition Treaty, however, clearly prohibits the extradition of criminals when the fugitive awaits capital punishment in the requesting State and the laws of the requested State do not permit capital punishment for the specific offense.92 The Treaty permits extradition if the death penalty is not imposed, or, if imposed, not executed.102 Other bars to extradition include non-compliance with the following: the statute of limitations, the principle of specialty, and double criminality.

4. Statute of Limitations

Extradition is barred when the statute of limitations for the prosecution or the enforcement of the extraditable offense expires in either country.101 Articles 100 through 115 of Mexico’s Federal Penal Code delineate the provisions regarding the statute of limitations. The statute of limitations starts to run:

I. From the day of the conclusion of the crime, if this is an instantaneous one;

II. From the last day the act is committed or omitted, in the case of an attempted crime;

III. From the day of the last act, when the crime has been a continuous crime;

IV. From the last day of the criminal act, if this is a permanent crime.102

The length of the statute of limitations is generally one year for crimes punishable with a fine100 and two years when the offense is punishable by dismissal from office, suspension of a right or disqualification, unless otherwise provided by

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94. Id. art. 15.
95. Mexico’s International Extradition Law, supra note 52, art. 8.
96. Mex. Const. art. 22.
97. Id.
98. Mexico’s International Extradition Law, supra note 52, art. 10(V).
100. Id.
101. Mexico’s International Extradition Law, supra note 52, art. 7(III).
102. C.P.D.F. art. 102.
law. For crimes punishable by incarceration, the lapse of the statute equals the average time the person serves in prison, and not less than three years. Upon request from the prosecution, judges often allow the statute of limitations to toll (or expand its life span) when the individual sought is not on Mexican territory.

5. Speciality

Mexican law adheres to the principle of "speciality," whereby the requesting state cannot prosecute the relator either for crimes committed prior to extradition or those omitted or unrelated to the complaint. The principle of speciality, therefore, requires the requesting party to specify the type of crime and time of commission of the crime. Similarly, the requested state must specify with as much detail as possible in the extradition order the offenses for which the relator is being extradited. The requesting state must interpret the order if the relator raises the principle of speciality.

6. Non Bis In Idem

The Mexican Constitution prohibits double jeopardy, which is also a bar to extradition. Under the United States-Mexico Extradition Treaty, a fugitive prosecuted, tried, convicted, or acquitted for the crime for which extradition is requested in the asylum State will not be extradited. Similarly, the Law on International Extradition states that extradition will not proceed when the individual received absolution, pardon, amnesty, or served a sentence for the offense for which extradition is sought. This policy aims at avoiding the prosecution and trial of the fugitive for the same offense twice and in two different jurisdictions, which obviously could be complicated and unfair. Extradition occurs, however, if the person has been convicted or has not completed the sentence. This is known as "delayed" or "deferred" surrender.

C. PROCEDURAL LAW

The Supreme Court of Mexico characterized Mexico's extradition proceedings as a "mixed system," with various actors playing a role at three main stages: (1)
the arrest of the accused ordered by the executive; (2) the judicial determination as to whether extradition should be granted or not; and (3) the final decision of the executive on the extradition request, which may or may not follow the judicial determination. For example, in the Paul Edmond Flato case, the United States requested the provisional arrest of Paul Edmond Flato, a United States citizen charged with forgery and robbery. Mr. Flato was detained soon after the United States Embassy in Mexico City presented the formal extradition petition. The Mexican Attorney General assigned a local prosecutor to initiate proceedings and bring the case before a federal district court. The court found Flato extraditable and issued an order for his extradition. The Ministry of Foreign Affairs agreed with the court's opinion and granted the extradition request.

1. Intention to Present a Formal Petition to Request Extradition

Under the Mexican Constitution, the extradition process involves actions by both the Executive and the Judiciary. Extradition procedures can start with a requesting State's formal petition or intention to submit an extradition request. A requesting State, when expressing its intention to present an extradition request, may also request the provisional arrest of the fugitive. Such a request must be made through diplomatic channels and must be accompanied by documents supporting the detention of the person.

Under the United States-Mexico Extradition Treaty a petition for provisional arrest must include a description of the offense for which extradition is requested, a description of the person sought and his whereabouts, an undertaking to formalize the request for extradition, and a declaration of the existence of a warrant of arrest issued by a competent judicial authority, or a judgment of conviction issued against the individual. Upon receipt of a petition for provisional arrest, the requested State takes the necessary steps according to domestic law to arrest the sought person.

117. Mex. Const. art. 119. International extradition requests will be "processed by the Federal Executive with the intervention of the federal judicial authorities..." Id.
118. Mexico's International Extradition Law, supra note 52, art. 17.
119. Id. art. 3. It specifies that the petition be "processed" before the Ministry of Foreign Affairs and through the actions of the Office of the Attorney General. Article 10(1) of the U.S.-Mexico Extradition Treaty only states that the request be made through "the diplomatic channel." U.S.-Mexico Extradition Treaty, supra note 53, art. 10(1).
122. Id. art. 11(2).
If detained, pursuant to the petition for provisional arrest, the detainee remains under the supervision of the Mexican Ministry of Foreign Affairs, which notifies the requesting State of the detention. The individual is then placed in a special penitentiary for preventive detention. According to the Extradition Treaty, Mexico's Law on International Extradition, and the Mexican Constitution, provisional arrest is terminated if a formal request for extradition is not presented within a period of sixty days after the apprehension of the person. Release of the suspect after sixty days will not prevent subsequent extradition if the petition is properly presented at a later date.

2. A Formal Extradition Request

A formal extradition request must also be presented through the diplomatic channel and must be accompanied by supporting documents justifying the arrest of the fugitive and the need for an extradition hearing. The United States-Mexico Extradition Treaty requires the request to be accompanied by a statement of the facts of the case, the text of the legal provisions describing the essential elements of the offense, the text of the legal provisions describing the punishment for the offense, the text of the legal provisions relating to the time limit on the prosecution or the execution of the punishment of the offense, and the facts and personal information permitting identification of the individual sought and, when possible, information concerning the fugitive's location.

Under the United States-Mexico Extradition Treaty, if the person sought has not yet been convicted, the request must be accompanied by, a certified copy of the arrest warrant, and evidence which justifies the individual's apprehension and commitment for trial in accordance with the laws of the requested Party. If the person sought has been sentenced, a certified copy of the sentence should be included, accompanied by a statement indicating which part of the sentence remains to be served.

All documents requesting extradition must be accompanied by a translation in
the language of the requested State. The documents from the United States must be authenticated by the State Department and legalized as prescribed by Mexican law. Documents submitted by Mexico must be certified by the principal Mexican diplomatic or consular officer in the United States.

The Ministry of Foreign Affairs examines a request by the United States to determine whether it meets the requirements delineated in Mexico's Law on International Extradition or the United States-Mexico Extradition Treaty. The Office of Judicial Affairs (Dirección General de Asuntos Jurídicos) in the Ministry of Foreign Affairs handles extradition matters. If the petition is admissible, the Ministry of Foreign Affairs transmits it together with the fugitive's file to the Mexican Attorney General. The Office of International Affairs (Dirección General de Asuntos Internacionales) (OIA, PGR) in the Mexican Attorney General's Office also handles extradition matters. The OIA, PGR transmits the extradition petition to the corresponding district judge issuing an arrest warrant. The judge may also order the seizure of objects and evidence related to the crime, if petitioned by the requesting State.

If the request does not meet the above mentioned requirements, the Ministry of Foreign Affairs communicates this to the requesting State, which can proceed to cure the defects and, if necessary, submit additional evidence. Opportunity to cure the defects in a petition is not accorded to Mexico when the United States is the requested state. Mexican officials at the Attorney General's Office criticize the procedure.

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132. Mexico's International Extradition Law, supra note 52, art. 16(VI); U.S.-Mexico Extradition Treaty, supra note 53, art.10(5).
134. Id. art.10(6)(b).
135. Mexico's International Extradition Law, supra note 52, art. 19.
137. Id. art. 21.
139. Mexico's International Extradition Law, supra note 52, art. 22. According to this article, the district court where the fugitive remains has jurisdiction to hear the extradition case. When the whereabouts of the fugitive are unknown, however, the case is referred to a district judge in the federal district (Mexico's capital).
140. Id. art. 21.
141. Id. art. 20; U.S.-Mexico Extradition Treaty, supra note 53, art. 12.
142. José Ignacio Rodríguez García, La Extradición en las Relaciones Bilaterales México-Estados Unidos de América (Extradition in U.S.-Mexico Bilateral Relations) 9 (undated, but prepared in Spring 1996) The official position, however, of the U.S. Department of Justice, OIA, is that it does ensure that procedural requirements are met before it sends a request to a U.S. Attorney. OIA, CRIM. DIV., U.S. DEP'T OF JUST., REPRESENTING FOREIGN GOVERNMENTS IN EXTRADITION PROCEEDINGS BEFORE UNITED STATES COURTS: A MANUAL FOR UNITED STATES ATTORNEYS, viii (Jan. 1991) [hereinafter REPRESENTING FOREIGN GOVERNMENTS].
Extradition proceedings are conducted according to principles of domestic law. The United States-Mexico Extradition Treaty explicitly provides that "the request for extradition shall be processed in accordance with the legislation of the requested Party." The Treaty, therefore, allows the requested State to apply its domestic criminal procedures—such as evidentiary and court proceedings—to extradition proceedings.

Evidence is a critical aspect of extradition proceedings. According to the United States-Mexico Extradition Treaty, extradition is granted only when evidence is found to be sufficient according to the laws of the requested Party. Mexico's Federal Code of Criminal Procedures and corresponding provisions contained in the Code of Criminal Procedures for the Federal District establish two evidentiary prerequisites that must be met before a suspect is arrested or prosecuted. Evidence must be sufficient to demonstrate all the elements of the crime (typification) and the existence of facts showing the "probable responsibility," the equivalent of probable cause in United States extradition jurisprudence, that the suspect committed the crime charged in the extradition request. The United States-Mexico Extradition Treaty allows both States to furnish additional evidence in support of the request, if necessary.

3. Extradition Hearing

The constitutional guarantees granted to suspects in all domestic criminal proceedings also apply to suspects in extradition hearings. These guarantees include the right to be heard, the right to counsel, and the right to a defense. Mexico's Law on International Extradition also emphasizes these guarantees.

After being detained, the relator will be brought promptly before the district judge. The defendant has the following rights:

1) the right to be informed of the content of the extradition petition and accompanying documents;

2) the right to counsel of choice—generally a private lawyer or a public defender. The accused may hire a defense lawyer or choose a public defender from a list provided by the court. The judge may designate a defense lawyer, if the ac-

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143. Id. at 9-10.
145. Id. art. 3.
146. Figueroa, supra note 123, at 12.
147. Id.
149. MEX. CONST. art. 20.
150. Mexico's International Extradition Law, supra note 52, art. 24(III)-(IV).
151. Id. art. 24.
152. Id.
153. Id.
cused does not make a determination.\textsuperscript{154} However, in the absence of a defense counsel, the accused has the right to present a defense su sponte.\textsuperscript{155}

3) the right to present relevant evidence.\textsuperscript{156}

According to the Mexican Constitution\textsuperscript{157} and the Federal Code of Criminal Procedures,\textsuperscript{158} the accused will be informed of the charges in a public hearing.\textsuperscript{159} The detained can request the judge to delay the hearing until defense counsel is present and accepts the assignment.\textsuperscript{160} Once the hearing starts, the defendant will have up to three days to raise the following two types of "exceptions" to extradition: (1) that the extradition petition does not meet the requirements of the applicable treaty or law; and/or (2) that the individual is not the one sought.\textsuperscript{161}

The defendant has twenty days to prove the exceptions.\textsuperscript{162} This period can be extended at the discretion of the judge.\textsuperscript{163} If the defendant raises any of these exceptions, the judge has up to five days to deliberate and transmit the court's opinion to the Ministry of Foreign Affairs.\textsuperscript{164} If the relator does not raise either of these exceptions or consciously accepts extradition, the judge must issue an opinion within the next three days.\textsuperscript{165} In fact, the judge acts as if the defendant had presented the exceptions.\textsuperscript{166}

\begin{itemize}
\item \textsuperscript{154} \textit{Id.}\textsuperscript{155} \textit{Id.} art. 25.
\item \textsuperscript{156} \textit{MEX. CONST.} art. 20.
\item \textsuperscript{157} \textit{Id.}
\item \textsuperscript{158} \textit{C.F.P.P.} (Mexico's Federal Code of Criminal Procedures) art. 86.
\item \textsuperscript{159} Telephone conversation between Julia Padierna Peralta and Miguel A. Méndez, Office of the Mexican Attorney General, Mexican Embassy to the United States (Aug. 28, 1996). The concept of a "public hearing" in Mexico differs from the one in the United States. Court proceedings in Mexico are generally not open to the public. Court rooms tend to be very small and generally only the interested parties and the judge are present. In very important cases the media is allowed to enter. Mexican lawyers seem to interpret the word "public hearing" to mean that the judicial proceedings occur in the presence of others and not "secretly" between the judge and the accused. \textit{Id.}
\item \textsuperscript{160} Mexico's International Extradition Law, \textit{supra} note 52, art. 24.
\item \textsuperscript{161} \textit{Id.} art. 25.
\item \textsuperscript{162} \textit{Id.}
\item \textsuperscript{163} \textit{Id.}
\item \textsuperscript{164} \textit{Id.} art. 27.
\item \textsuperscript{165} Mexico's International Extradition Law, \textit{supra} note 52, art. 28.
\item \textsuperscript{166} \textit{Id.} art. 27. The two permissible exceptions are broad enough to allow the defendant to conceivably argue anything that contradicts the Constitution, Mexico's Law on International Extradition or any specific extradition treaty. The defendant could argue, for example, that: 1) the crime is not part of the Treaty; 2) the crime is of a political or military nature; 3) that s/he has already been tried or pardoned in the requesting State for the crime for which extradition is sought; 4) the statute of limitations regarding the penal action has elapsed; 5) the accompanying documents are not properly legalized; and/or 6) the evidence is not sufficient to conform to the laws of the requested State to justify apprehension and the committal for trial.
\end{itemize}
4. Fugitive’s Relief

   a. Bail

   Release on bail is a right under the Mexican Constitution, which can be re-
   quested by a defendant in any criminal proceedings.167 Constitutionally, the judge
   can grant bail only when: 1) the accused posts enough bail to guarantee the repa-
   ration of the harm and potential pecuniary damages; and 2) the alleged crime is
   not of such a serious nature as to rule out bail by law.168

   Mexico’s Law on International Extradition provides that a judge may re-
   lease the individual on bail following review of the extradition request, the
   personal circumstances of the accused, and the seriousness of the crime.169 The judge
   makes this decision based on the conditions a suspect encounters if committing
   the crime in Mexican territory.170 The United States-Mexico Extradition Treaty is
   silent on bail, which apparently is not often granted by Mexican judges in extra-
   dition cases.171

   b. Amparo

   The relator may challenge the judge’s extradition decision through an amparo
   demand.172 Amparo is an extraordinary recourse in the Mexican justice system,
   with no equivalent in the common law tradition. The word “amparo” literally
   means protection, favor, or aid.173 The amparo is designed as a summary and
   speedy remedy, though it does not have a similar preferred position on court
   dockets. Legally, the action can be used as a writ of habeas corpus, injunction, er-
   ror, declaratory, judgment, or appeal.174

   Amparo relief finds its sources in Articles 103 and 107 of the Mexican Con-
   stitution.175 The Ley de Amparo (hereinafter Amparo Law), is the regulatory law
   of Articles 103 and 107 of the Mexican Constitution and governs the application
   of amparo relief.176 Under Amparo law, a defendant obtains an entirely new

167. MEX. CONST. art. 20(I).
168. Id.
170. Id.
171. Interview by Bruce Zagaris with Miguel Angel Méndez, P.G.R. Office, Embassy
   of Mexico to the United States in Washington, D.C. (July 31, 1996).
172. Mexico’s International Extradition Law, supra note 52, art. 33.
173. KENNETH L. KARST & KEITH S. ROSEN, LAW AND DEVELOPMENT IN LATIN AMERICA
174. Id. at 130.
175. MEX. CONST. arts. 103, 107.
176. “Ley de Amparo, Reglamentaria de los Artículos 103 y 107 de la Constitución
   Política de los Estados Unidos Mexicanos (Regulatory Law of Art. 103 and 107 of the
Some of the most relevant provisions of the Amparo Law applicable to extradition proceedings are as follows:

An amparo trial aims at resolving all controversies originated by:

i. The laws or acts of authority that violate individual guarantees; \(^{177}\)

ii. By laws or acts of federal authority that violate or limit the sovereignty of the states; \(^{178}\) and

iii. By laws or acts of the states that invade the sphere of federal authority. \(^{179}\)

Amparo relief can only be initiated by the party injured by the law, an international treaty, or the rule of any other act. \(^{180}\) It can be requested sua sponte, by defense counsel or by any representative in criminal proceedings. \(^{181}\) Amparo relief must be raised within fifteen days, after the defendant is notified or gains knowledge of a specific resolution or agreement contrary to his or her interests. \(^{182}\) The fifteen day period also applies to extradition proceedings, according to Amparo Law \(^{183}\) and Mexico's Law on International Extradition. \(^{184}\)

The accused loses the right to amparo if not raised within fifteen days after the notification of extradition. \(^{185}\) The Ministry of Foreign Affairs communicates the granting of the extradition request to the requesting State in the event the accused does not raise the right to amparo or the amparo demand is rejected. \(^{186}\)

Amparo relief can either be direct or indirect. \(^{187}\) Direct amparo relief is initiated in either the Supreme Court, or the (appellate) circuit courts. \(^{188}\) Indirect amparo relief is initiated in a district court, but the decision may be appealed to a higher court. \(^{189}\) Indirect amparo is generally brought to compel or prevent actions of nonjudicial government agents, such as prosecutors, police, or public administrators, though an indirect amparo may be brought against a judge to challenge an unconstitutional or unlawful act committed apart from the trial, such as the issuance of an arrest warrant. \(^{190}\) In extradition proceedings, the defendant may seek amparo relief against final findings, judicial or administrative decisions that ar-

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177. Both the Mexican Constitution and the Amparo Law use the term "Juicio de Amparo" (Amparo Trial) to describe amparo proceedings. See MEX. CONST. art. 107(1); Amparo Law, supra note 176, art. 1.

178. Amparo Law, supra note 176, art. 1(I).

179. Id. art. 1(II).

180. Id. art. 1(III).

181. Id. art. 4.

182. Id.

183. Id. art. 21.

184. Id. art. 22(II).

185. Mexico's International Extradition Law, supra note 52, art. 33.

186. Amparo Law, supra note 176, art. 22(II).

187. Mexico's International Extradition Law, supra note 52, art. 33.

188. KARST & ROSENN, supra note 173, at 131.

189. Id.

190. Id.

191. Id. at 133.
guably violated the proceedings, constitutional guarantees, and the language of a law or a treaty.\textsuperscript{192} Amparo cannot be sought during an extradition hearing, but only after there has been a final decision from the Ministry of Foreign Affairs regarding extradition. If amparo relief is not sought or granted, the Ministry of Foreign Affairs proceeds to surrender and order the delivery of the fugitive.\textsuperscript{193}

Amparo opinions are reported in a very summary way. Many are only one paragraph providing merely a statement of a rule of law and perhaps a sentence giving the facts of the case.\textsuperscript{194} For example, in the Chong Bing J. Domingo case, Mr. Domingo's amparo request was denied. A Chinese national, Domingo sought amparo against his arrest, detention, and expulsion from Mexico. Respondent alleged violations of Articles 15, 16, and 19 of the Constitution. The Supreme Court of Mexico denied the amparo, holding that under Article 33 of the Constitution the President has the exclusive power to expel any alien, whose stay is deemed inexpedient, from the national territory without previous judicial proceedings.\textsuperscript{195} Mixed systems conferring final dispositive determinations on extradition to the executive also exist in other Latin American nations.\textsuperscript{196}

5. Final Administrative Procedures

The Ministry of Foreign Affairs, upon receipt of the court's opinion, has twenty days to either grant or deny the extradition request.\textsuperscript{197} Its decision is generally made based upon the defendant's file, the judge's opinion, and evidentiary objects seized.\textsuperscript{198} Mexico's Ministry of Foreign Affairs is not obliged to follow the district judge's opinion. In reaching its decision, the Ministry of Foreign Affairs resolves any issues concerning the delivery of papers, money, or any other objects seized as evidence during the process.\textsuperscript{199}

If the Ministry of Foreign Affairs rejects extradition, the defendant may be released.\textsuperscript{200} If the defendant is a Mexican national and, for that reason only, extradition was denied, the Ministry of Foreign Affairs notifies the defendant and the Attorney General of its decision not to extradite.\textsuperscript{201} The Attorney General would, in turn, transmit the defendant's file to the local prosecutor, commencing the case before a competent Mexican tribunal.\textsuperscript{202}

\textsuperscript{192} Amparo Law, \textit{supra} note 176, arts. 114, 158.
\textsuperscript{193} \textsc{karst and rosen}, \textit{supra} note 173, at 132.
\textsuperscript{194} Id. at 133.
\textsuperscript{195} Henry P. de Vries, \textit{Territorial Asylum in The Americas}, 5 \textsc{inter-am. l. rev.} 61, 86 (1963) (citing "Domino, Chong J.," 16 S.J.F. 59 (1925)).
\textsuperscript{196} Id. at 83-86.
\textsuperscript{197} Mexico's International Extradition Law, \textit{supra} note 52, art. 30.
\textsuperscript{198} Sánchez, \textit{supra} note 52, at 124.
\textsuperscript{199} Mexico's International Extradition Law, \textit{supra} note 52, art. 30; U.S.-Mexico Extradition Treaty, \textit{supra} note 53, art. 19.
\textsuperscript{200} Mexico's International Extradition Law, \textit{supra} note 52, art. 31.
\textsuperscript{201} Id. art. 32.
\textsuperscript{202} Id.; U.S.-Mexico Extradition Treaty, \textit{supra} note 53, art. 9.
a. Surrender and Delivery of the Fugitive

The requested State must promptly communicate to the requesting State its final decision on the request for extradition.\(^{203}\) If the requested State decides to extradite the relator, the United States-Mexico Extradition Treaty provides that the surrender of the individual shall take place within such time as prescribed by the laws of the requested Party.\(^{204}\) The delivery must be carried out by the authorized personnel of the requesting State through the Attorney General and previous notification to the Interior Ministry.\(^{205}\)

According to Mexico's Law on International Extradition, delivery of the fugitive can take place at a border port or on board an aircraft.\(^{206}\) The bilateral Treaty simply provides for the contracting parties to agree on the date and place of the surrender of the fugitive.\(^{207}\) It is expected that the authorities of the requesting party remove the fugitive from the territory of the requested party.\(^{208}\) Upon granting extradition, the Treaty also provides for the surrender of objects and other instruments of the crime, if any, that the requested State obtained during the arrest.\(^{209}\)

Mexico's Law on International Extradition requires that the fugitive be removed from Mexico's territory no later than two months (sixty days) after the approval of the extradition request.\(^{210}\) Otherwise, as in the case of United States-Mexico extradition, the fugitive may be freed and Mexico may subsequently refuse his/her extradition for the same offense.\(^{211}\)

b. "Delayed" or "Deferred" Extradition

After granting a request for extradition, the Mexican government may postpone surrender of the person. This occurs when the person has pending charges or has been convicted in Mexico for a crime other than the one motivating the petition for extradition.\(^{212}\) If the accused is acquitted in Mexico, he or she must be extradited. If, however, the accused is convicted and sentenced, s/he could be extradited only after serving the sentence.\(^{213}\) Only recently, the Mexican government exhibited an increased propensity to grant the extradition of its own nationals (cases discussed in Section VII.D below). In March of 1996, for example, Mexico

\(^{204}\) Id. art. 14(3).
\(^{205}\) Mexico's International Extradition Law, supra note 52, art. 34.
\(^{206}\) Id.
\(^{207}\) U.S.-Mexico Extradition Treaty, supra note 53, art. 14(3).
\(^{208}\) Id. art. 14(4).
\(^{209}\) Id. art. 19.(1).
\(^{210}\) Mexico's International Extradition Law, supra note 52, art. 35.
\(^{211}\) Id.; U.S.-Mexico Extradition Treaty, supra note 53, art. 14(4).
\(^{212}\) Mexico's International Extradition Law, supra note 52, art. 11; U.S.-Mexico Extradition Treaty, supra note 53, art. 15.
\(^{213}\) U.S.-Mexico Extradition Treaty, supra note 53, art. 15.
announced the approval of the extradition request of Juan Emilio Rivera Piñón, a Mexican lieutenant of the reputed Mexican drug kingpin Juan García Abrego. Piñón was sought for drug-related crimes in the United States.\textsuperscript{214} Rivera Piñón’s extradition will be deferred, however, until his sentence in Mexico concludes—not before the year 2001.\textsuperscript{215}

c. Waiver

The United States-Mexico Extradition Treaty contemplates the possibility that the defendant may freely accept extradition, in which case extradition may be granted without further proceedings.\textsuperscript{216} The Treaty allows the requested State to take all measures permitted under its laws to expedite this process.\textsuperscript{217} A decision to forego additional proceedings must be made knowingly and voluntarily. In order for the consent to be voluntary, the defendant may be no less than 18 years old—as in the case of a confession.\textsuperscript{218} In cases of summary extradition the rule of speciality does not apply.\textsuperscript{219}

d. Costs

Mexico’s Law on International Extradition requires that expenses incurred in the extradition process be covered and eventually charged to the requesting State.\textsuperscript{220} The United States-Mexico Extradition Treaty is more specific on this point and provides that the requested State cover the costs involving internal judicial procedures (spelled out in Article 13 of the Treaty), but not expenses incurred for the translation of documents and the transportation of the fugitive.\textsuperscript{221}

IV. UNITED STATES LAW AND REQUIREMENTS

The discussion of United States law and requirements for extradition is divided into two main parts: procedures to request extradition from Mexico to the United States; and those relating to extradition from the United States to Mexico.

\textsuperscript{214} Stephen Power, More Extraditions Viewed as Unlikely; Texas Law Officials Doubt Mexico will Continue Unprecedented Help, DALLAS MORNING NEWS, Mar. 30, 1996, at 33A.
\textsuperscript{216} U.S.-Mexico Extradition Treaty, supra note 53, art. 18.
\textsuperscript{217} Id.
\textsuperscript{218} C.F.P.P. art. 207.
\textsuperscript{219} U.S.-Mexico Extradition Treaty, supra note 53, art. 18.
\textsuperscript{220} Mexico’s International Extradition Law, supra note 52, art. 37.
\textsuperscript{221} U.S.-Mexico Extradition Treaty, supra note 53, art. 21.
A. PROCEDURES FOR REQUESTING EXtradition FROM Mexico TO THE UNITED STATES

The United States Department of Justice must approve every request for international extradition. The United States Department of State must present formally such requests to the Mexican Ministry of Foreign Affairs through diplomatic channels. The Department of State, or persons authorized by it, may invoke the terms of an extradition treaty. Prosecutors, police officers, or investigators generally may communicate directly with their counterparts in Mexico for the purpose of giving or receiving information on law enforcement matters, but they may not request the arrest of a fugitive for extradition. Unauthorized requests for foreign arrests cause serious diplomatic difficulties and can subject the requesting party to heavy financial liability or other sanctions.

1. Determining Whether Extradition Is Possible

A prosecutor or investigator, in a federal or state agency, interested in arranging a suspect for extradition from Mexico should first contact the Office of International Affairs ("OIA"), Criminal Division, Department of Justice, in Washington, D.C. Attorneys specializing in extradition in OIA determine whether the extradition request may succeed, taking into account the facts of the particular case, the language of the applicable treaties, and the law of the foreign country involved. For OIA to assess the request, the inquirer should provide the following information: (a) the country in which the fugitive is believed to be located (e.g., Mexico if the request is to Mexico), his address or location there, and his or her status (i.e., at large, incarcerated for offense, etc.); (b) the citizenship of the fugitive; (c) the precise crime for which the fugitive has been charged or convicted, including citation to the specific statute involved, the full title of the court in which criminal proceedings are pending, the name of the judge, the date on which the indictment or conviction was obtained, and the docket number of the proceedings; (e) a brief description of the specific acts committed in connection with the offense, i.e., who did what to whom, when, where, and why; and (f) a brief description of how the prosecutor intends to prove the violation (e.g., witness testimony, documentary evidence, undercover agents, codefendants who agreed to cooperate with the government).

On the basis of this information, OIA determines whether an extradition request may be made, taking into account the following factors: whether there is an extradition treaty in force with the country in which the fugitive is located (the

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223. Cf. Sami v. United States, 617 F.2d 755 (D.C. Cir. 1979) (discussing plaintiff's claims of false arrest, false imprisonment, defamation, and several constitutional claims arising from plaintiff's wrongful detention by German officials as a result of communications with the United States National Control Bureau).
United States and Mexico have a 1978 Extradition Treaty; whether the treaty provides extradition for the crime in question;\(^2\) whether the offense in question is punishable under the laws of the requested country; whether there exists sufficient evidence to justify extradition in accordance with the terms of the treaty; whether the fugitive is a national of the requested country, especially since Mexico does not extradite its own citizens; and whether extradition is in the interests of justice in light of all the circumstances.\(^2\)

The main responsibility to coordinate the Department of State’s role in extradition matters lies with the Office of Legal Adviser, who in turn delegates the main operational tasks for extradition matters to the Assistant Legal Adviser for Law Enforcement and Intelligence ("L/LEI"). The latter coordinates the Department of State’s position on potential extradition requests to foreign countries, including Mexico, with OIA and the Department of State’s political desk for the affected country. If a disagreement occurs between Justice and State on whether the United States should make a particular extradition request, L/LEI is responsible for obtaining the views of the respective governmental entities and for making an initial recommendation to resolve the disagreement.\(^2\)

2. Jurisdiction

An issue that must be considered before the United States makes an extradition request is whether it has jurisdiction over the crime. The United States asserts extraterritorial jurisdiction in criminal law on five traditional bases of jurisdiction: territorial, protective, nationality, universal, and passive personality.\(^2\) A sixth theory of jurisdiction, sometimes called the floating territorial principle, recognizes the “flagship” state as having jurisdiction over any offense committed on one of its craft or vessels.\(^2\)

\(^2\) In reviewing an inquiry from State of Utah authorities as to the possibility of extraditing from Mexico the former husband and former mother-in-law of a woman in Utah taking the woman’s infant son to Mexico in violation of a court decree awarding custody of the child to the woman, the Department of State responded that the only offense listed in the extradition treaty that might fit the facts of the case would be the offense of kidnapping and that the offense of contempt of court, such as acting in violation of a court decree awarding custody of the child to one parent, is not, as such, an extraditable offense. 6 Dig. Int’l L. 784-85 (M. Whiteman ed., 1968) [hereinafter Whiteman].


\(^2\) See generally Lauritzen v. Larsen, 345 U.S. 571 (1953) (holding that the law of the flag governed liability in suit brought by Danish seaman against Danish owner of Danish vessel for injuries suffered aboard ship in Havana harbor); see also Bruce Barenblat, Note, Jurisdiction, 15 Tex. Int’l L. J. 379, 404 n.3 (1980); Paul D. Empson, The Application of Criminal Law to Acts Committed Outside the Jurisdiction, 6 Am. Crim. L. 32, 36-37 (1967); B.J. George, Jr., Extraterritorial Application of Penal Legislation, 64 Mich. L. Rev.
The principal basis of jurisdiction over crime in the United States is the territorial principle, permitting a state in control of a territory to prescribe, adjudicate, and enforce its laws in that territory. A crime is deemed committed wholly within a state's territory when every essential constituent element is consummated within the territory. A crime is committed partly within a state's territory when any essential constituent element is consummated there. The United States also recognizes and utilizes subjective territoriality when a constituent element of the crime occurs within the United States. Additionally, United States jurisprudence sanctions the assertion of jurisdiction over offenses when the conduct giving rise to the offense occurs extraterritorially, provided the harmful effects or results occurred within United States territory. In recent years, the objective territorial principle received an expansive interpretation in the United States. Assertion of jurisdiction will be enforced as proper in either state and extradition will be approved pursuant to either state's theory of jurisdiction, so long as the offense itself, its result or effects, or any of its constituent or material elements actually occur within the sovereign territory of the requesting party. Difficulties ensue, however, when a claim of jurisdiction is asserted on some theory other than territoriality, or when the claimed "territorial basis" is strained beyond that believed proper by the other state.

The protective theory of jurisdiction provides a basis for jurisdiction over an extraterritorial offense when that offense has an adverse effect on, or is a danger to, a state's security, integrity, sovereignty, or governmental function. The focus of the jurisdictional principle is the nature of the interest that may be injured, rather than the place of the harm, the place of the conduct causing the harm, or the nationality of the perpetrator. This conduct includes lying to a consular officer. Even though the conduct happens abroad, it may be considered as constituting a danger to the sovereignty of the United States and as having a deleterious impact on valid governmental interests.

Jurisdiction based on the nationality of the perpetrator is a generally accepted

L. Rev. 609, 613 (1966).
230. Harvard Research, supra note 227, at 495.
231. Id.
233. Id. at 285.
235. Id.
236. See, e.g., United States v. Pizzarusso, 388 F.2d 8 (2d Cir. 1968) (regarding an alien convicted of knowingly making false statements under oath in a visa application to a U.S. consular officer in Canada). The court noted that the violation of 18 U.S.C. § 1546 occurred entirely in Canada. Id. at 9-10. The accused's entry into the United States was not an element of the offense. Id. See Blakesley, supra note 229, at 1136, for additional discussion and authority.
principle of international law. Under international law, nationals of a state remain under the state's sovereignty and owe their allegiance to it, even though traveling or residing outside its territory. The state has the right, based on this allegiance, to assert criminal jurisdiction over actions of one of its nationals deemed criminal by that state's laws. The United States Congress never drafted a general rule relating to extraterritorial jurisdiction. The application of any law to extraterritorial offenses is an exception to the territorial principle and must be done on a case-by-case basis. United States case law approved jurisdiction over nationals committing crimes abroad even though the appropriate statute did not expressly provide that it applied extraterritorially.

United States law generally does not favor the passive personality theory of jurisdiction. The Restatement (Third) of Foreign Relations Law of the United States provides that a state does not have jurisdiction to prescribe a rule of law attaching a legal consequence to conduct of an alien outside its territory merely on the basis that the conduct affects one of its nationals. The United States protested the assertion of this jurisdiction by Mexico and other countries and major incidents occurred as the result of cases in which United States nationals have been arrested and prosecuted on the basis of the passive personality theory.

Under universal jurisdiction international law allows any of the "community" of nationals to prosecute a perpetrator allegedly committing a universally condemned heinous offense. Universal jurisdiction recognizes piracy, slave trade, war crimes, hijacking, and sabotage in civil aircraft, and genocide as heinous offenses. A trend exists to include terrorism and trafficking of narcotic drugs.

238. See Blackmer v. United States, 284 U.S. 421 (1932) (holding that U.S. citizens abroad are subject to punishment in the United States when their conduct abroad violates U.S. laws).
239. See, e.g., Steel v. Bulova Watch Co., 344 U.S. 280 (1952) (applying U.S. antitrust laws extraterritorially to activities of U.S. nationals); Ramirez & Feraud Chile Co. v. Las Palmas Food Co., 146 F. Supp. 594 (S.D. Cal. 1958) (holding that comity would not preclude U.S. district court from applying injunction under the Lanham Trade-Mark Act to company outside its territorial jurisdiction), aff'd per curiam, 245 F.2d 874 (9th Cir. 1957), cert. denied, 355 U.S. 927 (1958); cf. Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633 (2d Cir. 1956) (holding that the Lanham Act did not apply to a Canadian corporation although harm occurred in the U.S. as a result of offenses committed by that corporation).
241. See Restatement (Third) Foreign Relations Law Of The United States § 402 (1981) (establishing the basis for universal jurisdiction and recognizing the state's interest in protecting its territory and nationals) [hereinafter FOREIGN RELATIONS RESTATEMENT].
242. See id. § 404 (recognizing a state's jurisdiction in certain offenses and defining universally recognized crimes).
3. Provisional Arrest

If OIA believes that extradition is required, the immediate arrest of the fugitive can be arranged in many cases in order to prevent further flight while the procedure of "provisional arrest" to secure documents and evidence in support of a formal request for extradition is prepared. Provisional arrest should only be considered in emergency circumstances, as opposed to the ordinary method of initiating extradition, where there exists a real danger of the fugitive fleeing before the extradition documents can be completed. All requests for provisional arrest should be made to OIA and should be supported by the information called for on the form. The request should be in writing, but in urgent cases it can be made by phone with written confirmation immediately thereafter.

Since provisional arrest is reserved for exceptional cases, OIA requires that if the fugitive is wanted for federal charges, the section within the Criminal Division of the Department of Justice possessing oversight responsibility for the case must also agree that provisional arrest is appropriate before further action is taken. For instance, the Narcotics and Dangerous Drug Section must approve the provisional arrest of a wanted narcotics trafficker. If the fugitive is wanted on state or local charges, the state extradition officer must support the request by attesting that the necessary documentation will be submitted on time and that all of the expenses of the extradition request will be covered.

When provisional arrest is affected, the time available to prepare, review, authenticate, translate and transmit the documents in support of the extradition request is significantly reduced. The maximum period for provisional arrest under the United States-Mexico Extradition Treaty is sixty days. With other countries the maximum period of provisional arrest under extradition treaties varies from forty days to three months.  

In most countries, including Mexico, the fugitive will be released from custody if the documents do not arrive within the sixty day period, and cannot be surrendered or extradited thereafter. OIA requests that, when provisional arrest is involved, the documents must be completed and sent to the OIA within fourteen days.

4. Documents Required for Extradition

In general, the federal or state authorities responsible for prosecuting the charges for which extradition is requested prepare the extradition documents. The Department of Justice has prepared a manual to assist prosecutors in this endeavor. The authority that prepares the papers must also pay all the expenses

244. HARRIS, supra note 222, at 9-15.120.
245. Id. The same document contained in the OIA manual and the Harris discussion contains the form by OIA used to compile the information. For the form, see also ABBELL & RISTAU, supra note 225, app. C § 9-15.231 (Supp. 1995).
246. See ABBELL & RISTAU, supra note 225, app. C (Supp. 1995) (providing the text of
incurred in connection with the request. Expenses include: the cost of document translation, any cost of legal representation in the foreign country, any charges levied by Mexico for boarding the fugitive pending extradition, the transportation and other expenses of the escort officers handling the fugitive’s physical return to the United States, and the cost of the fugitive’s transportation to the United States. In federal cases, the United States Attorney or Strike Force office should resolve any questions regarding costs with the Executive Office for United States Attorneys in Washington, D.C.

The documents required for extradition are: an affidavit from the prosecutor describing the case; authenticated copies of the indictment and arrest warrant; and evidence establishing the crime or proving that the fugitive was convicted, including sufficient evidence to identify the fugitive.247

5. Prosecutor’s Affidavits

An affidavit describing the state or federal laws applicable to the case, including the statute of limitations, must accompany every extradition request. The affiant, usually the prosecutor assigned to the case, should provide enough background to assure Mexican authorities that s/he is familiar with the case and with United States criminal law. The affiant should accomplish three major objectives:

First, the affiant must identify and attest to the authenticity of any court papers, depositions, or other documents submitted in support of the extradition request.

Second, s/he should clearly identify the charged offenses, and the penalties prescribed for the offenses. S/he should also indicate that the statutes involved were in force when the offenses occurred and are currently in full force and effect. If the laws are not still in effect, an explanation should be given. S/he must also specifically state that the applicable statute of limitations has not expired. The affiant should provide the text of each statute involved, including the applicable statute of limitations. If the statutes are relatively short, their texts can be revealed in the affidavit itself. If the statutes are lengthy, the text should be typed (not photocopied from an annotation) and attached as an exhibit to the affidavit.

Third, the affiant should briefly describe the facts underlying the charges, indicating in general who is accused and what the offenses are. The description of the crime should not simply track the language of the indictment, the applicable statute, or the treaty.

The prosecutor’s affidavit can be executed before any person lawfully authorized to administer oaths, although it is preferred that the affidavit be executed before a judge or magistrate.248

247. HARRIS, supra note 222, at 9-15.130.
248. Id. at 9-15.131.
6. Indictment and Warrant

Since a fugitive can only be extradited on the basis of a formal criminal charge and a person extradited can be prosecuted or punished only for the specific charge for which he was surrendered, even if there are other charges that could otherwise have been brought against him, the extradition documents should include a copy of the outstanding indictment or complaint concerning all charges on which the fugitive will be tried or punished after his surrender. The package should also contain copies of the outstanding warrant of arrest for each offense for which the fugitive is sought. If the fugitive is merely accused of a crime, the outstanding warrant will usually show that it was unexecuted and any contrary indictment should be explained.

If the fugitive has already been convicted, it is the outstanding warrant for bond jumping, jail break, etc., not the executed warrant for the offense underlying the conviction that must be submitted. Since the original indictment or complaint and warrant usually remains among the records of the court, the copies of those documents included in the extradition packet should show that they are true copies of the original. This can often be done by having the clerk of the court apply a stamp or seal to the document itself authenticating it as an original court record.\(^\text{249}\)

7. Evidence Establishing the Case

The United States-Mexico Extradition Treaty conditions the extradition of an accused person on the presentation of evidence sufficient to justify committal for trial under the law of the requested country. As a matter of policy, OIA does not submit an extradition request to any country unless it is persuaded that a prima facie case for extradition has been established.\(^\text{250}\)

The best method to show the Mexican Government that this requirement has been met is for the prosecutor to attach to the affidavit enough sworn statements from investigating agents, witnesses, co-conspirators, or experts to indicate that each crime in question was committed and that the fugitive committed it. The affidavits, read together, should contain evidence on each charge for seeking extradition.

Extradition affidavits should contain formal captions showing the title of the case and the court in which the prosecution is pending. Each affiant should clearly and concisely indicate the facts which s/he knows, avoiding hearsay, if possible. The affidavits can be executed before any person authorized to administer an oath, including a notary public.

The other method of documenting the case is for the prosecutor to forward ex-

\(^{249}\) Id. at 9-15.132.

\(^{250}\) For a discussion of this standard, see IVOR STANBROOK \& CLIVE STANBROOK, THE LAW AND PRACTICE OF EXTRADITION 28 (1980) (citing Schtraks v. Israel (1964) (AC 556) (setting forth the test of whether the evidence alone at trial would support a guilty verdict by a properly directed, reasonable jury).
cerpts from the grand jury transcripts establishing that the fugitive committed the offense. The United States tries, however, to avoid using grand jury transcriptions unless it is impossible to obtain affidavits, because the authorities in Mexico sometimes do not understand the purpose or function of a grand jury, and tend to accord grand jury transcripts less weight than affidavits or sworn statements containing the same information.

When the fugitive has already been convicted in the United States, the extradition packet generally need not contain evidence of a prima facie case. Instead, it should contain proof that the fugitive was convicted after having been present at trial and is unlawfully at large without having fully served his sentence. In federal cases, the Judgment and Committal Order (CR Form 25) is the best proof of conviction and sentence. A copy of that document should be authenticated like the indictment and arrest warrant and included as an attachment to the affidavit by the prosecutor. A similar judicial document proving conviction is available in state proceedings and should be submitted in state cases.

Proof that a convicted and sentenced person is unlawfully at large can generally be presented in the form of an affidavit from the warden of the prison from which he escaped or from his probation officer. Some extradition treaties provide that a convicted person need not be surrendered unless a specified minimum period of imprisonment remains to be served; the affidavit should also indicate the remaining portion of the sentence to be served and how the prisoner came to be at large.

The affidavits or grand jury transcripts must clearly show the identity of the fugitive. "Mistaken identity" is an accepted defense to extradition. The documents should therefore establish: (1) that the accused or convicted person did indeed commit the crime; and (2) that the person whose extradition is sought is the person accused or convicted. Normally, this happens by having the witnesses identify a photograph of the accused, which the foreign authorities can compare to the person arrested for extradition. Fingerprint cards, photocopies of passports or other evidence of identity can be used, provided they accompany sufficient proof to tie them to the accused.

8. Transmission of the Completed Documents to Washington

In cases prepared by federal prosecutors, the original and four copies of the documents should be sent directly to OIA, which reviews them for sufficiency and arranges for the seal of the Department of Justice to be affixed to them.

In cases prepared by state or local prosecutors, in most jurisdictions, the original and four copies of the papers are first sent to the extradition officer for the state. The extradition officer reviews the documents, attaches a requisition bearing the state seal to them, and sends them to OIA for review. Alternatively, the original and four copies of the prosecutor's affidavit and its attachments can be sent

251. Harris, supra note 222, at 9-15.133.
directly to OIA for review, with a copy sent to the state extradition officer. OIA will then affix the Department of Justice seal to the papers (instead of the state seal) before forwarding them to the State Department.

When OIA believes that the documents are in order, it sends them to the Department of State for final screening and action. The Department of State affixes its seal to the documents, and, if necessary, arranges for translation of the documents or for authentication of the documents at the Mexican Embassy in Washington. The State Department then sends the documents to the United States Embassy in Mexico City or the Consulate where the fugitive is located, along with instructions for formally requesting extradition.222

9. Presentation of the Extradition Request

United States diplomatic agents in Mexico present the documents to the Mexican Ministry of Foreign Affairs. As mentioned in section III.C above, the manner in which Mexico’s diplomats forward the case to the Ministry of Justice, which directs the appropriate authorities to make arrangements for the fugitive’s arrest, is discussed.253

10. Arrangements for Taking Custody After Extradition

Once Mexican authorities indicate they are ready to surrender the fugitive, OIA notifies the prosecutor and coordinates the logistics of the formal surrender. The law in Mexico provides that a fugitive found extraditable is freed if he is not removed within sixty days. Hence, the steps should be accomplished as quickly as possible.

First, agents in the United States Marshals Service must be selected to go to Mexico, take custody of the fugitive, and return with him to the United States. Federal law authorizes the President of the United States to take all necessary measures for the transportation and safekeeping of a relator whose extradition has been granted to the United States.254 OIA generally arranges for the Enforcement Operations Division of the United States Marshals service headquarters in Washington to designate the agents. At least two escort agents are usually sent for each federal or state fugitive. In exceptional circumstances, the prosecutor handling the case may request that a state or federal law enforcement officer, familiar with the case, be allowed to assist the Marshals in the transfer.

Once OIA receives notice of the names of the escort agents, it arranges for the Department of State to issue a President’s Warrant, the special authorization law enforcement officers require to accept custody of the fugitive on behalf of the United States and to convey him to his place of trial. The Secretary of State issues

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252. Id. at 9-15.140.
253. Id. at 9-15.150.
the warrant pursuant to Executive Order 11,517. After the warrant has been signed, arrangements are made for its delivery to the escort agents before their departure.

When all the arrangements are completed, OIA is informed of the agents' travel plans so that it can transmit this information to the Mexican Government and the relevant United States Embassy or Consulate Offices in Mexico. The notification assures that the agents obtain the assistance and cooperation of United States officials in Mexico upon their arrival.

Someone from the United States Embassy in Mexico normally meets the escort agents at the airport, sees them through customs, and introduces them to the appropriate authorities in Mexico's Attorney General's Office. Custody of the fugitive is usually handed over at the airport just before the escort agents and their prisoner leave to return to the United States. Federal law permits the United States Marshals Service or its agent to bring the relator directly to the United States district for which the extradition pertains, so that the United States Marshal or agent, if necessary, can obtain assistance from other law enforcement agents when transporting the relator.

The United States-Mexico Extradition Treaty provides that evidence or fruits of the offense seized in the course of the fugitive's arrest should be surrendered when extradition is granted. The agents may be asked to accept custody of such articles at the time the extraditee is surrendered. Frequently, however, the requesting country makes other arrangements, especially if the articles are of significant value.

11. Alternatives To Extradition

If extradition is not possible, or if the two governments prefer to use another method, such as deportation, the Mexican and United States governments arrange for this alternative. The United States also used more informal and even extralegal methods to gain custody of fugitives in Mexico, including abduction, often with the cooperation of some Mexican law enforcement officials acting outside of their official responsibilities. If the fugitive is a Mexican citizen, OIA can sometimes persuade Mexico to prosecute him there on the charges developed in the United States assuming that Mexico has jurisdiction.

255. Exec. Order No. 11,517, 3 C.F.R. 90, 907 (1966-1970). The Secretary has since redelegated this authority to the Deputy Secretary and the Legal Adviser although no formal redelegation has been published in the Federal Register.

256. See 18 U.S.C. § 3193 (1994) (setting forth the guidelines prior to extradition). The section states that any United States justice, judge, or magistrate may issue warrants and commence extradition proceeding so that a criminal charged with a universally recognized crime may be brought for a hearing before the court issuing the warrant. Id. See also ABBELL & RISTAU, supra note 225, § 13-4-2.

257. See, e.g., discussion infra Part VI.D (discussing the Garcia Abrego case).

258. See discussion infra Part VA.A (discussing the Alvarez-Machain case).
B. EXTRADITION FROM THE UNITED STATES TO MEXICO

The three stages of extradition requests initiated by Mexico to the United States include: judicial determination of extraditability, judicial and administrative review, and decision and surrender. The first stage of an extradition proceeding is the determination of facts that 18 U.S.C. § 3184 requires under this section. Facts are presented to a judge or magistrate deciding whether there is probable cause to believe that the person before the court is extraditable. The judicial officer’s decision is directed to the Secretary of State, deciding whether the fugitive should be extradited. The certificate of extraditable is non-final and thus cannot be appealed.

In the next stage, the decision is reviewed. Although the certification is not directly appealable, the fugitive may obtain collateral review by applying to the District Court for a writ of habeas corpus. The decision on the writ may be appealed. If the judicial decision is sustained, the Secretary of State reviews the matter administratively. This is the final action required for the fugitive’s surrender.

Once the Secretary of State signs a surrender warrant, the litigation is at an end, unless the fugitive obtains a stay. The United States Marshals Service handles transfer arrangements, but the prosecutor may be called on for advice during this phase as well. 259

1. Procedure Before the Extradition Magistrate 260

a. Representation of the Mexican Government

Extradition treaties generally, and the provisions of Article 1 of the United States-Mexico Extradition Treaty in particular, impose an obligation on the United States to transfer fugitives for trial or punishment to Mexico as the requesting state when the conditions specified in the treaty have been met. The Mexican Government generally makes a request for extradition or provisional arrest through the diplomatic channel (from its Embassy in Washington to the Department of State). The Department of State reviews the request to ensure conformity with the treaty and prepares a declaration authenticating the request and the treaty.

Since the 1970s, the Department of Justice ("DOJ") represented foreign governments in extradition cases before federal courts. The purpose of representing foreign governments in extradition cases is to ensure that the cases will be litigated under the high standards of the United States Attorney’s offices supported by a corps of DOJ attorneys with special expertise in this area. They thereby

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259. REPRESENTING FOREIGN GOVERNMENTS, supra note 142, at ix.

260. See 18 U.S.C. § 3184 (authorizing “any judge of the United States, or any magistrate authorized to do so by a court of the United States,” to conduct extradition proceedings, including receiving complaints, issuing warrants and determining extraditability).
achieve two goals: 1) assuring that every extraditable criminal is removed from the United States, and 2) encouraging reciprocal treatment from United States treaty partners. In 1996, however, the Mexican Attorney General's Office issued a memorandum disputing the efficacy of the representation by the United States Government in extradition cases.

b. Complaint

Every extradition case begins with the filing of a complaint under oath seeking the issuance of a warrant for the arrest of the fugitive. The complaint may be executed before a magistrate or a district judge, either one of whom may issue a warrant in an extradition case. A magistrate can conduct the extradition hearing only if the local rules so authorize. The Assistant United States Attorney assigned to the case is the complainant. The form of the complaint depends on whether the request seeks extradition in the first instance or provisional arrest with a hearing on extradition to follow.

United States law does not preclude the filing of a second or amended extradition complaint regardless of whether the first or original complaint is withdrawn voluntarily by the requesting State or dismissed by the extradition magistrate for failure to make out a proper case for extradition or to warrant the arrest of the accused for an extradition hearing. Similarly, the requesting State can proceed again where the second or subsequent request is based on additional evidence or where the discharge of the accused resulted from a technicality.

c. The Provisional Arrest

The legal basis for provisional arrest in United States extradition cases is contained in Article 11 of the United States-Mexico Extradition Treaty and in Section 3184 of Title 18 of the United States Code. A sworn affidavit establishes the facts required for provisional arrest, after which the magistrate issues a warrant and the fugitive may be detained for sixty days. The Mexican Government must present its formal demand for extradition, together with the supporting documents specified in the treaty, within the time specified in Article 11(3) of the Treaty. The application must contain a description of the offense for which the extradition is re-

261. Id. at 1.
265. For a discussion of the *Ruiz Massieu* case, see Sec. VI. F below, Collins v. Loisel, 262 U.S. 426 (1923), Desmond v. Eggers, 18 F.2d 503 (9th Cir. 1927), and Whiteman, *supra* note 224, § 27, at 939, 942 (citing Acting Secretary of State Herter to the Ambassador of Mexico (Antonio Carrillo Flores), note, May 18, 1960, MS. Dep't St., file 211.1215 Arias, Genaro/5-1760).
quested, a description of the person sought, including his whereabouts, an undertaking to formalize the request for extradition, and a declaration of the existence of a warrant of arrest issued by a competent judicial authority or a judgment of conviction issued against the person sought. The extradition hearing required under Section 3184 occurs after the formal request is made. The fugitive remains in custody during the interim.

A request for provisional arrest identifies the fugitive by name and physical description if available, states that the person has been charged in Mexico with the commission of a crime (or convicted of a crime), identifies the charging document (or judgment of conviction), describes the facts underlying the charges or the circumstances of conviction, and confirms that a formal request for extradition follows. The standard for the minimum information required to secure provisional arrest is found in the United States Constitution, not the treaty.265

In connection with a request from the Mexican Government for a 1907 provisional arrest relating to Eduardo Ramirez for forgery committed at Nogales, Sonora, Mexico, the United States Attorney at Nogales requested from the Attorney General immediate details of forgery and copies of papers to frame a new complaint against the fugitive[s]; the facts in the Attorney General’s letter were not sufficient for the basis of a complaint.267 The Acting Secretary of State informed the Attorney General that, under Article 10 of the 1899 Extradition Treaty, requests for provisional arrest need only provide information that warrants issued in Mexico charged an extraditable crime, together with assurances that formal papers will follow.268 The letter further informed the United States Attorney General that the Mexican Government fulfilled its obligations under the provisions of Article 10.269 In addition, the letter noted that the same practice had been followed for years by United States district attorneys in New Mexico and Texas.270

While probable cause to issue a provisional arrest warrant is less than the probable cause required to extradite, courts have not explained the difference.271 The complaint contains the available information bearing on probable cause. The requirement of probable cause is met if the complaint sets forth sufficient facts on which to conclude that: (1) there exists an extradition treaty in force between the United States and Mexico, (2) a request for provisional arrest has been made, (3) the request pertains to a crime covered by the treaty, (4) a crime was committed, (5) the fugitive committed it, (6) a formal request will be submitted within the

266. Caltagirone v. Grant, 629 F.2d 739, 747 (2d Cir. 1980) (stating that provisional arrest and extradition proceedings require a showing of probable cause).
267. See HACKWORTH, supra note 12, at 103-04 (citing Letter from Ambassador Creel to Secretary Root regarding the sufficiency of extradition documents (Feb. 1, 1907)).
268. Id.
269. Id.
270. Id.
271. See, e.g., Matter of Extradition of Russell, 805 F.2d 1215, 1217 (5th Cir. 1986) (stating that evidence for a provisional arrest may be based on belief instead of personal knowledge).
time specified in the treaty or within a reasonable time, and (7) the fugitive is within the jurisdiction of the court.

Most treaties, and the United States-Mexico Extradition Treaty in particular, authorize the use of the procedure "in urgent cases." Fugitives often challenged their provisional arrests by claiming that the complaint failed to allege the urgency of the matter. The United States Government contends that the parties to the treaty must decide whether the situation is urgent. Once made, the United States Government argues that the executive branch's decision is not subject to judicial review. Courts have sustained this view.272

Challenges to provisional arrest that occur before the hearing assume the form of applications for habeas corpus or other extraordinary writs. The only matter that can be examined pursuant to such an application is the lawfulness of the fugitive's detention, which in turn depends on the existence of the threat, the authority of the magistrate, and the showing of the minimal probable case mentioned in Russell.273

d. Formal Extradition Request

When Mexico has made a formal request for extradition, supported by the documents specified in the treaty, they are filed together with the complaint. A warrant is issued as in the case of a provisional arrest. The fugitive is arrested and brought before the magistrate for an initial appearance. The procedure thereafter differs only in that the hearing occurs as soon as the fugitive is prepared to proceed. If a case has been started with a complaint for provisional arrest, no need exists to file a second complaint when the formal request for extradition arrives.

2. Arrest Warrant

a. Execution of Warrant

The Marshals Service executes warrants for the arrest of fugitives unless another law enforcement agency has already been involved in the case and has expended its resources in locating the fugitive.274 Once issued, the warrant is valid throughout the United States and may remain outstanding even if the fugitive is not found in the location where he or she was thought to be.275 If the fugitive is

272. See e.g., id. at 1216; United States v. Leitner, 784 F.2d 159, 160-61 (2d Cir. 1986) (acknowledging the practice that deference is given to the extraditing government's and the U.S. Government's determination of urgency).

273. For background on provisional arrest, see REPRESENTING FOREIGN GOVERNMENTS, supra note 142, at 2-3.

274. Id. at 5 (citing U.S. Attorney General, Policy on Fugitive Apprehension, Aug. 11, 1988) (on file with author).

275. See Shapiro v. Ferrandina, 478 F.2d 894, 899 (2d Cir. 1973) (establishing that a complaint and warrant in one district may be enforced in another based on the govern-
arrested outside the district in which the warrant was issued, a new complaint should be filed in the district of arrest and the hearing should be held there. The original complaint may be dismissed. 276

b. Notification of the Mexican Government

When a Mexican national is arrested, an independent obligation arises from the United States-Mexican consular convention to notify the nearest consular representative of the person's country of nationality. 277 The arresting agent normally handles this notification, but the Assistant United States Attorney should follow up because not every agency is aware of the potential obligation.

c. Initial Appearance

The purpose of the fugitive's first appearance before the magistrate is similar to that in Rule 5 of the Federal Rules of Criminal Procedure. The rules, however, do not apply in extradition cases. At the initial appearance, the magistrate should inform the fugitive of the following seven points:

d. Reason for Arrest

The reason for the fugitive's arrest, i.e. the foreign request for provisional arrest or extradition based on a charge or conviction in the requesting state, will appear in the complaint that may be recited to the fugitive by the court.

e. Possibility of Waiver or Simplified Extradition

The provisions of Article 18 of the United States-Mexico Extradition Treaty permits a fugitive to waive extradition or elect simplified extradition. Waiver is also possible without an express treaty provision. The fugitive should be informed of the options at this stage of the proceeding. In seeking provisional arrest, Mexico may sometimes include only one of several charges outstanding against a fugitive. Since the fugitive's waiver or election of simplified extradition may limit Mexico to trying the fugitive on the count specified in the request, the Assistant United States Attorney should notify OIA before the fugitive waives or chooses simplified extradition so that OIA can be sure that no other charges are outstanding. As soon as the election is made, the Assistant United States Attorney informs OIA so that OIA can instruct the Mexican Government to send escorts.

In waiving extradition, a fugitive does not admit anything about the crime. He or she simply agrees to return to the requesting state as soon as the escorting agents can arrange for transport. In a simple waiver, the fugitive may lose the benefit of the "rule of specialty," meaning that he or she could be tried in the re-

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276. REPRESENTING FOREIGN GOVERNMENTS, supra note 142, at 4-5.
277. Id. at 6.
questing state for any crime, not just the one mentioned in the request. Alternatively, the fugitive may consent to extradition. The magistrate will then enter a certification of extraditability to be transmitted to the Secretary of State. In such cases, the fugitive receives the benefit of the rule.278

f. Appointment of Counsel

Magistrates routinely appoint counsel for indigents in civil extradition cases, even though the Sixth Amendment guarantees the right to counsel to the accused only in criminal prosecutions. The Criminal Justice Act280 does not list fugitives in extradition cases among the classes of persons entitled to appointed counsel. Rule 44 of the Federal Rules of Criminal Procedure limits appointment of counsel to defendants in criminal cases. The United States Government does not oppose such appointments.

g. Date for Bail Hearing

In extradition cases a presumption exists against release on bail. The fugitive, however, can apply for bail, and the magistrate should set an early date for a hearing on such bail motion. The United States Government opposes release on bail in extradition cases.281

h. Timing of Extradition Hearing

A fugitive taken into custody pursuant to a request for provisional arrest can expect to remain in custody until after the extradition documents are received because bail is generally not granted. The United States-Mexico Extradition Treaty permits sixty days for completion of the formal request.282 In such cases, the fugitive will want to schedule the hearing for the day the documents are due, but such requests are impossible to accommodate because of the language of the treaty and the multiple steps involved in transmitting the documents to the court.

Provisional arrest clauses require only that Mexico as the requesting state present its formal request and supporting documents through the diplomatic channel within the deadline. They do not specify that the documents be delivered to the court by that date.283

The Office of Legal Advisor at the Department of State reviews the extradition request to ensure procedural regularity and conformity with the treaty. A certified copy of the request together with the original supporting documents is sent to

278. Id. at 6-7.
279. See infra Part IV.i.1.
280. 18 U.S.C. § 3006A.
281. REPRESENTING FOREIGN GOVERNMENTS, supra note 142, at 8.
283. See United States v. Clark, 470 F. Supp. 976, 978 (D. Vt. 1979) (establishing that the respondent did not suffer any legal wrong due to the government’s twelve day delay).
OIA, which transmits them to the United States Attorney's Office. The Assistant United States Attorney responsible for the case files the original with the court and serves a copy on counsel for the accused.

To permit time for delivery of the papers from Washington, D.C., or from Mexico to the court, the hearing should be scheduled at least ten days after the due date for the documents. The Assistant United States Attorney should undertake to inform the court and counsel on the day of the deadline whether the request and supporting documents have been received, with the understanding that the fugitive will move for his release if the documents have not been received.

Although treaties are the supreme law of the land, in some cases magistrates ignored the Constitution and purported to rewrite the treaty's deadline for submitting formal documents by setting an early hearing date or threatening to grant the fugitive's bond motion. Direct review of such decisions may not be available in time to avert the potential harm.284

Under the prior extradition treaty of 1899 between Mexico and the United States,285 the United States Attorney General opined that the forty days during which a prisoner may be detained under the terms of Article X of that treaty to await document production, sustaining extradition meant forty days prior to the production of the documents to the State Department in the United States or to the corresponding branch of the Mexican Government. If such documents were produced within the forty days, the suspected criminal had no absolute right of release under the treaty, but might be detained for a reasonable additional period to afford time for an investigation into probable guilt or innocence.

i. Bail

Fugitives requesting bail will claim a "constitutional right to bail," and base their request on statutory286 and case law concerning pre-trial release. The Eighth Amendment requires only that bail, if granted, not be excessive.287 While bail in extradition and deportation proceedings involves similar considerations as in ordinary criminal considerations, the potential for fugitives to flee and the international implications are often overriding.288

United States prosecutors remind courts of the potential adverse impact on United States foreign relations if bail is given to a fugitive who thereafter flees,

284. REPRESENTING FOREIGN GOVERNMENTS, supra note 142, at 8-9.
287. U.S. CONST. amend. VIII.
288. An asserted due process right to bail by aliens in deportation cases has been rejected. See Doherty v. Thornburgh, 750 F. Supp. 131, 139-40 (S.D.N.Y. 1990) (discussing the Circuit Court's view on allowing bail in extradition cases). The court emphasizes that the risk of flight outweighs the fugitive's due process rights. Id. See discussion infra Part VI.H. (describing the situation in which a fugitive received bail after the first four extradition requests and deportation requests were rejected).
thereby preventing the United States from fulfilling its treaty obligations. Many courts will not grant bail to fugitives absent special circumstances. Supra note 142, at 10-11.

j. Discovery

The United States Government vigorously opposes discovery on the basis that the United States case requires an inquiry of extremely limited scope by the magistrate in determining extraditability. supra note 142, at 10-11. Due to the narrow focus of the proceeding, and the lack of factual issues in some cases, the accused has no right to discovery.

k. Extradition Request and Support Documents

(1) Description

The documents submitted to the court in support of an extradition request normally include: the formal request for extradition, supporting documents, and a certificate from the principal United States diplomatic or consular officer in Mexico. Once the documents are received at the Department of State, the Legal Adviser's office attaches a covering declaration to the documents and forwards the package to the Department of Justice.

The treaty requires that the formal request for extradition, supported by the documents specified in the treaty, be submitted through diplomatic channels. The formal request is made in the diplomatic note from the Embassy of Mexico in Washington to the United States Department of State, or alternatively in a diplomatic note from Mexico's Ministry of Foreign Affairs to the United States Embassy in Mexico City. The note also transmits the supporting documents required under the treaty. The original note remains at the Department of State, which substitutes a copy for the original.

The Department of State prepares a declaration executed by an attorney in the Office of the Legal Adviser. The declaration attests to the existence of the treaty (a copy of which is attached to the declaration), its existence in force, and its coverage of the offenses for which extradition is requested. The declarant also certifies that the copies of the diplomatic note and the treaty are true and accurate and authenticates the certification of the supporting documents by the principal United

289. See United States v. Williams, 611 F.2d 914, 915 (1st Cir. 1979) (limiting special circumstances to instances where the justification is both plain and pressing).


291. REPRESENTING FOREIGN GOVERNMENTS, supra note 142, at 10-11.

States diplomatic or consular officer in Mexico. The declaration is itself authenticated by the seal of the Department of State. The diplomatic note, supporting documents and authenticated declaration with their attachments are referred to as the extradition package.293

(2) Certification under 18 U.S.C. § 3190

The supporting documents submitted by Mexico should be accompanied by a certificate from the principal United States diplomatic or consular officer resident in or accredited to Mexico to the effect that the documents are "properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped."294 Normally the certificate is submitted on a standard form used by the Department of State. Documents certified in accordance with the statute "shall be received and admitted into evidence."295

Fugitives sometimes challenge the sufficiency of the certification. They do this through experts in the law of Mexico who testify that the documents were not "properly and legally authenticated" as required by the statute. They also challenge the certificate as not coming from the "principal diplomatic or consular officer."296

The diplomatic or consular officer's certificate is conclusive on the propriety and legality of the underlying authentications.297 Hence, issues concerning authentication should be rare. When a fugitive's counsel receives a photocopy of the request that fails to reproduce a seal visible only on the original, claims are sometimes made that the authentication is defective. Also, documents are sometimes authenticated on the reverse, which is frequently not photocopied.298

(3) Copies; Filing; Service

The Department of State requests that Mexico submit the original and three copies of extradition packages. The State Department generally keeps one copy and forwards the original and the remaining copies to OIA. The latter keeps a copy and forwards the original and a copy to the United States Attorney's Office.299

The State Department marks the original and files it with the court with ribbons and seals intact, or in the form received. Before filing it, the prosecutor should compare the original with the copy received from the Mexican Government to ensure that they correspond because any additional copies (e.g., for service on the fugitive's attorney or working copies for the prosecutor and the court) will be made from that copy, which will be easier to reproduce than the ribboned

293. REPRESENTING FOREIGN GOVERNMENTS, supra note 142, at 12.
295. Id.
296. REPRESENTING FOREIGN GOVERNMENTS, supra note 142, at 13.
298. REPRESENTING FOREIGN GOVERNMENTS, supra note 142, at 12-14.
299. Id. at 14.
original. If the copy is also fastened with ribbon, it may be disassembled. The ribbons, however, should not be removed from the original without the permission of the court. Then they should be removed only if no copies were received with the request, and the original must then be photocopied.300

(4) Translations

Extradition requests submitted in Spanish from the Mexican Government will be accompanied by an English translation. The extradition statute does not specify the form of the translation, and the United States-Mexican extradition treaty is likewise silent on the formal requisites. Courts generally presume that the translations are correct, thereby putting the burden on the fugitive to show that they are incorrect in some material respect.301

I. Extradition Proceedings

(1) Purpose of Extradition Hearing

The extradition hearing has the purpose of requiring the magistrate to hear and consider the evidence of criminality presented by the Mexican Government and to determine whether it suffices to sustain the charge under the treaty.302 In particular, the extradition hearing determines if there is probable cause to believe that a crime was committed and that the person whose extradition is requested committed the crime.303

(2) Burden of Proof

The Mexican Government, as the complainant, bears the burden of establishing that the conditions for extradition set forth in the treaty and the essential elements identified in United States case law have been met.304

(3) Standard of Proof

Under applicable case law the complainant must show probable cause, which signifies evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt.305 While a preponderance of the evidence standard is required in most preliminary matters such as probable cause determinations, a reviewing court will sustain the finding of probable cause in an extradition case if there exists "any evidence" to support it.306

(4) Necessary Elements

For a person to be extraditable, the court must find the following elements: ju-

300. Id. at 16.
303. REPRESENTING FOREIGN GOVERNMENTS, supra note 142, at 16.
306. Mirchandani v. United States, 836 F.2d 1223 (9th Cir. 1988).
risdiction (personal and subject matter); existence of an extradition treaty currently in force; existence of charges; extraditable offense and satisfaction of the dual criminality requirement; and probable cause (including identity of the fugitive). 307

(5) **Nature of Proceeding and Applicable Rules**

Because the extradition hearing is not a criminal trial or an adjudication of the merits of the charges underlying the request for extradition, 308 the constitutional guarantees pertaining to criminal prosecutions do not apply. 309

Statutes and case law that control the conduct of criminal trials do not apply in extradition cases. For instance, the Federal Rules of Criminal Procedure and the Federal Rules of Evidence specifically exclude extradition proceedings from their operation. 310

(6) **Evidentiary Rules**

The courts allow broad latitude in receiving evidence in extradition hearings. 311 Federal Rules of Evidence do not apply in extradition proceedings, but some rules of evidence apply uniquely in extradition.

(7) **Hearsay Is Admissible**

The Mexican Government, in making extradition requests, must present "evidence sufficient to sustain the charge." 312 The magistrate must receive in evidence depositions, warrants, and other papers if they are certified by the principal diplomatic or consular officer of the United States resident in Mexico as being legally authenticated so as to entitle them to be received for similar purposes by the tribunals of Mexico. 313 Documents certified in accordance with Section 3190 are conclusively admissible. 314

(8) **Contradictory Evidence Is Inadmissible**

In extradition proceedings the court decides only probable cause. The fugitive, therefore, cannot offer evidence tending to establish innocence, i.e., she may not introduce evidence of an alibi or any other affirmative defense because such matters are irrelevant to the issue before the court. Extradition magistrates are not expected to decide conflicting factual claims made by Mexico as the requesting state on the one hand and the fugitive on the other. Courts often refuse to hear evidence from the accused bearing on the credibility of the witnesses. 315 The accused may,
however, introduce evidence that clarifies or explains Mexico’s evidence in such a way as to “obliterate probable cause” because the question of probable cause is relevant.316

**m. Available Defenses**

(1) **Core Defenses**

The fugitive may claim that one of the essential elements listed in Part I.(4), *supra*, is lacking. The majority of serious challenges to the completeness of an extradition request focus on either identity or the extraditability of the offense.317

(2) **Jurisdiction**

Extradition treaties, including the Mexico-United States extradition treaty, require the extradition of persons charged with, or convicted of, any of the crimes and offenses covered by the treaty committed within the jurisdiction of one of the signatories, found within the territory of the other. The United States extradition statute also provides for extradition whenever a treaty or convention for extradition exists between the United States and a foreign government for offenses “committed within the jurisdiction of any such foreign government.”318

The United States denied two extradition requests from Mexico in cases charging defendants with embezzling funds from Mexico outside of Mexico. In 1924, Mexico requested extradition of Ignacio Morán, who during his service as Mexican Consul at Berlin, allegedly embezzled funds of the Mexican Government which were later found in New Orleans. The Mexican Government based its extradition on its alleged jurisdiction since the offense was committed in the discharge of the official duties of a Mexican Consul.319 The Secretary of State denied extradition because jurisdiction in the treaty referred to places under the sovereign power of the signatories.320

In 1926, the Acting Secretary of State denied the Mexican Government’s extradition request for Alfonso Casola, charged with embezzlement during his tenure at the Mexican Consul at Nogales, Arizona. The money was said to have been taken from the consular funds. The government argued that the crime was not committed within the jurisdiction of Mexico.321

316. See discussion *infra* Part VIE (discussing the admission of such evidence in the cases of *Contreras*, *Collins v. Lisel*, 259 U.S. 309 (1922), and *Petrushansky v. Marasco*, 325 F.2d 562 (1964)).
320. See HACKWORTH, *supra* note 12, at 70 (citing letter from Mexican Chargé d’Affaires Téllez to Secretary of State Hughes, Mar. 7, 1924, MS. Dep’t St., file 211.12M791/1; Mr. Hughes to the Mexican Charge d’Affaires (Benitez), May 5, 1924).
321. *Id.* (citing note from Ambassador Téllez to Secretary Kellogg, Feb. 23, 1926, and the Acting Secretary of State (Grew) to Sefior Téllez, Mar. 6, 1926, MS. Dep’t St., file 211.12C26/4).
The existence of concurrent jurisdiction is not a sufficient basis to deny an extradition request. For instance, in the case of Millard K. Davis, Mexico requested Davis' extradition for stabbing his victim in Mexico, although the death of the victim occurred in California. The defendant raised concurrent if not exclusive jurisdiction of California as the reason the United States, as a requested State, was bound to deny the extradition request. The district and appellate courts, however, concluded the offense completed at the time the fatal blow was struck, and hence the crime was committed “within Mexico's jurisdiction, thereby requiring his surrender notwithstanding the possibility that he might also be tried for murder in California.”

(3) Dual Criminality

Challenges to the extraditability of an offense usually assert that the offense for which extradition is requested is not a crime in the United States (i.e., that dual criminality is lacking) or that the offense is not included among those for which extradition will be granted.

Article 2 of the Mexico-United States Extradition Treaty supplements the lists of extradition offenses in favor of a general dual criminality requirement. It requires extradition for willful acts that, even though not within the appendix of listed offenses, are punishable by deprivation of liberty the maximum of which will not be less than one year. The court still requires the complainant to establish what the corresponding offense would be if the crime had been committed in the United States. The prosecutor may analogize to federal law, the law of the state in which the fugitive was arrested, or the law of the majority of the states.

The court looks at the elements of the offense and the evidence on which the prosecutor relies to show criminal conduct under the pertinent statute.

Under former Section 651, which is now 18 U.S.C. § 3184, and under the former treaty with Mexico, providing $25 as the minimum amount stolen authorizing extradition, a United States court in Texas ruled that Mexico was not entitled to extradite a party allegedly stealing property valued less than $25. The party did not intend to convert the property to his own use and benefit, but turned the property over to United States officers in the United States.

Mexico's extradition request was refused when a court ruled that funds of a private corporation were not "public moneys" within the meaning of the extradition treaty between Mexico and the United States, which provided for extradition for the offense of embezzling public moneys.

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322. Ex parte Davis, 54 F.2d 723, 727 (1932).
323. REPRESENTING FOREIGN GOVERNMENTS, supra note 142, at 19-21.
324. Mexico-U.S. Extradition Treaty, supra note 53, art. 2(1).
326. In re Lucke, 20 F. Supp. 658 (D. Tex. 1937). See also HACKWORTH, supra note 12, at 42 (discussing the case of Gustave Lelevier in 1907 wherein Mexico's request for provisional arrest and detention was denied because evidence at the hearing showed the amount taken did not exceed $25).
In another incident involving the crime of embezzlement or speculation of public funds by an officer of Mexico, the United States Supreme Court ruled it was covered as an extraditable crime within the treaty.\(^3\)

In an important case involving the sensitive subject of kidnapping, a United States court ruled that persons effecting the forcible seizure and abduction of an escaped bond defaulter from Mexico to Texas, in order to obtain a reward, were guilty of the extraditable offense of "kidnapping" under the laws of Texas and Mexico and the prior extradition treaty between Mexico and the United States.\(^2\)

A request by Mexico under the prior extradition treaty for certain offenses including the obtaining of money, valuables, or other personal property by threats or false devices, a complaint seeking issuance of a warrant for extradition of a defendant charged with the commission of a "crime of fraud" said to be more specifically referred to in the treaty was denied because the court ruled it did not charge an offense covered by the treaty and did not sufficiently apprise the defendant as to the charge. While the treaty made the obtainment of money, valuables or other personal property by threats or false devices an extraditable offense, drawing a check without sufficient funds in settlement of a profit-sharing contract between defendant and an association of collective farmers was not an extraditable offense under the treaty.\(^3\)

In 1960, in the case of Alejandro Lezoni D’Almagro, Mexico requested D’Almagro’s extradition for the crimes of breach of trust and fraud for defrauding a government slaughterhouse in four contracts for the purchase and sale of cattle. Although these crimes are not listed in the treaty, obtaining money by false devices is listed. In determining that the crimes of fraud and breach of trust come within the treaty, the court found that while “larceny” or “larceny by false pretenses” is punishable in New York, the facts and circumstances as shown by the evidence indicate that the essential elements required to constitute the crime of larceny by false pretenses under the laws of New York State are lacking.\(^3\)

In a case applying the 1861 extradition treaty, a United States court found that a printed theater ticket in the usual form, stamped on its face with an inscription in the style of a seal, which set out the name of the manager in printed characters was the subject of forgery at common law. The court reasoned that under the 1861 extradition treaty, “printing” was “writing” in the legal sense of that term, so that a signature by impression from a stamp was a valid signature.\(^3\)

(4) Treaty Based Defenses

The Mexico-United States Extradition Treaty provides several defenses, in-

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329. Villareal v. Hammond, 74 F.2d 503 (5th Cir. 1934).
331. Whiteman, supra note 224, at 778-79.
cluding the political and military offenses exceptions. Questions arising under the application of the political offense exception must be decided by the Executive authority of the requested state (e.g., the United States). In addition, the political offense exception cannot apply to the murder or other willful crimes against the life or physical integrity of a Head of State or Head of Government or of his family, including attempts to commit such an offense, or an offense which the United States may have the obligation to prosecute by reason of a multilateral international agreement (e.g., Montreal Convention on Air Hijackings or 1988 Vienna Drug Convention).

Extradition cannot be granted when the Mexican Government is making an extradition request that is barred by the statute of limitations provisions in either the United States or Mexico. A defense to a Mexican Government's extradition request theoretically could be that capital punishment could be imposed on the fugitive. Mexico, however, does not have the death penalty, and the United States Government does not invoke this defense. A common defense to an extradition request to the United States is the principle of non bis in idem, which precludes extradition of a fugitive adjudicated and either acquitted or punished for the offense for which extradition is requested.

n. Procedure at the Extradition Hearing

(1) Opening Statement

The United States prosecutor in an opening statement normally recapitulates the points in the extradition hearing memorandum, including particularly the narrow scope of the proceeding, the standard of proof, and the elements required to establish extraditability, and addresses any issues likely to be raised by the fugitive.

(2) Mexican Government's Case

Because the burden of proof is on the requesting state (e.g., Mexico), the United States prosecutor on behalf of the Mexican Government goes first. Its case in chief will consist largely or solely of the extradition package. Since reliance on hearsay is the norm in extradition proceedings, oral testimony is rare. Important cases with complex facts, however, such as the Contreras and Ruiz Massieu cases, involved extended oral testimony. The United States prosecutor usually pre-marks the original extradition package filed with the court as an exhibit, de-

333. Mexico-U.S. Extradition Treaty, supra note 53, art. 5(1)-(2).
334. Id. art. 5(3). The treaty precludes extradition when the offense for which extradition is requested is a "purely military offense." Id.
335. Id. art. 5(2).
336. Id. art. 7.
337. Id. art. 8.
339. REPRESENTING FOREIGN GOVERNMENTS, supra note 142, at 24.
340. See discussion infra Parts VI.G, H.
scribing for the record the documents to which the tabbed exhibits refer. The United States prosecutor then moves the package into evidence, puts on any additional evidence, and rests.\textsuperscript{341}

(3) \textit{Fugitive's Case}

The fugitive either contests the evidence or presents an affirmative defense. In the latter case, s/he offers supporting evidence.

(4) \textit{Rebuttal}

When the fugitive presents an affirmative defense, or when s/he has been allowed to present explanatory evidence that must be rebutted to establish probable cause, the United States prosecutor introduces rebuttal evidence.

(5) \textit{Argument}

At the conclusion of any rebuttal evidence and the proceeding, both the United States prosecutor and the fugitive's counsel can make an argument.\textsuperscript{342}

\section*{o. Certification of Extraditability and Order of Commitment}

(1) \textit{Separate Findings}

The certification of extraditability constitutes the court's finding that the fugitive is extraditable. Normally it contains an order remanding the fugitive to the custody of the marshal pending the decision by the Secretary of State to surrender the fugitive. In preparing a certification of extraditability for the court, the prosecutor tries to include findings of fact and conclusions of law addressing all the elements required for extradition, with specific findings for each count or group of counts for which extradition is requested.\textsuperscript{343} The separate listing facilitates the task of the reviewing court if the fugitive seeks a writ of habeas corpus.

Some courts suggested that the adoption of verbatim proposed findings by the extradition magistrate justifies a de novo review and revision of those findings.\textsuperscript{344} Still, the prosecutor should prepare proposed findings to assist the court.\textsuperscript{345}

(2) \textit{Procedure Following Certification}

If the magistrate deems the evidence sufficient to sustain the extradition charge, s/he must certify the same together with a copy of all testimony taken before him to the Secretary of State.\textsuperscript{346} A certified copy of the certification is delivered to the Secretary of State or to the Assistant United States Attorney for delivery to the Secretary by the clerk.

The Secretary of State makes the final decision concerning the surrender of the

\textsuperscript{341}. \textit{REPRESENTING FOREIGN GOVERNMENTS}, \textit{supra} note 142, at 24.
\textsuperscript{342}. \textit{Id.} at 26.
\textsuperscript{344}. \textit{See generally} Caplan, 649 F.2d 1336.
\textsuperscript{345}. \textit{REPRESENTING FOREIGN GOVERNMENTS}, \textit{supra} note 142, at 26.
fugitive on the basis of a memorandum prepared in the office of the Legal Adviser for the Department of State. The memorandum contains a copy of the certification and a summary of the evidence, including any defenses offered by the fugitive.

The Assistant United States Attorney orders a copy of the relevant portion of the transcript and ensures that it reaches the Department of State within 30 days of the entry of the order.347

The date of the certification is important because the requesting state (e.g., Mexico) generally must move the fugitive within two calendar months of the commitment order.348 The two months commence as soon as the order is entered.349 Hence, it is essential to notify OIA upon entry of the order so that it can inform the Department of State and the Mexican authorities. OIA normally notifies the police or the prosecutor in Mexico or its representative in Washington to ensure that the information is received in a timely manner. The Department of State also notifies Mexico’s Embassy. The two month deadline is interrupted if the fugitive seeks judicial review of the finding of extraditability.350 The time runs anew from the conclusion of the proceeding in which review is sought.351

The Legal Adviser’s office will not submit a case for the Secretary’s decision if the fugitive seeks review of the finding of extraditability by filing a petition for writ of habeas corpus. The Assistant United States Attorney should notify OIA if a petition is filed.

If the fugitive does not seek judicial review, the case proceeds administratively. Once the Legal Adviser’s office informs OIA of the Secretary’s decision, OIA notifies the Mexican authority.352

(3) Procedure When Court Does Not Certify

If an extradition court does not find that a proper case for extradition has been made, the Secretary of State does not review the matter. In 1956, in connection with the request of Mexico for the extradition of Kathleen Riggs, the extradition magistrate, stating that insufficient evidence was found to warrant extradition, forwarded to the Secretary of State the documentary evidence introduced at the hearing, as well as a certified transcript of the proceedings “for your consideration and determination as to what disposition should be made of this matter” and stating that insufficient evidence was found to warrant extradition. The Secretary replied that since the extradition magistrate found insufficient evidence to warrant the surrender of the accused, the Department had no action to take in the matter.353 In practice, a consideration in the aftermath of a decision of non-
extraditability may be a discussion of refiling another extradition request or initiating deportation proceedings.

(4) Procedure for Waiver of Extradition

When Mexico makes an extradition request, the relator may waive extradition at any point after the arrest. In a simple waiver, the fugitive executes an affidavit of waiver before the magistrate committing him to the custody of the marshal to await transfer to the escorting agents. Since extradition does not occur in a simple waiver, no finding of extraditability is made, and no certificate is sent to the Secretary of State. As the rule of specialty does not apply in the case of a simple waiver, the United States considers that the relator may be prosecuted for an offense other than that mentioned in the original request and may be re-extradited without limitation, although the domestic law or practice of the requesting state may in some cases extend the protection of the rule to the fugitive.

The United States informs the relator at the earliest opportunity of the right to waive extradition or to elect simplified extradition if the treaty so provides. If the fugitive decides to waive, s/he must complete an affidavit of waiver and appear before the magistrate, who will ascertain that the fugitive is aware of the right to a hearing and that s/he voluntarily relinquishes it. If the magistrate is satisfied, s/he signs an order committing the fugitive to the custody of the marshal until the arrival of the agents from the requesting state.34

V. THE UNITED STATES-MEXICO EXTRADITION TREATY

A. BACKGROUND


B. PROVISIONS

The treaty allows extradition for offenses committed outside the territory of the requesting state where either the person sought is a national of the requesting state or the law of the requested state provides for punishment of the same offenses in similar circumstances.37 Similar provisions are found in existing United

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and letter from Mr. Dulles to Judge Armstrong (May 22, 1956), MS. Dep’t St., file 211.121 Riggs, Kathleen/5-1156).


States extradition treaties with Spain, the Federal Republic of Germany, Japan, and Norway. Such provisions are useful, inter alia, in the area of narcotics and counterfeiting violations.

Although the existing treaty is comparatively modern, it uses the list method for extraditable offenses, whereby the crime, to be extraditable, must be one of the thirty-one listed crimes in the appendix of the treaty and be punishable in accordance with the federal laws of both countries. In addition, to be extraditable, a crime must be punishable by deprivation of liberty for not less than one year. Even if the crimes are not one of those included in the Appendix, a treaty country must extradite or prosecute if the crimes involve willful acts which are punishable, in accordance with the federal laws of both countries, by a deprivation of liberty for no less than one year. If extradition is requested for the execution of a sentence, there must be not less than six months remaining in the sentence. The treaty specifically includes attempts and conspiracies to commit an offense, as well as the participation in the execution of an offense. Such provisions are useful in prosecuting organized crime. The treaty also provides for granting extradition when, for the purpose of granting jurisdiction to the United States Government, the law or charged crime specifies transportation of persons or property, the use of the mail or other means of carrying out interstate or foreign commerce as an element of the offense in both countries. The latter provisions are standard language for modern United States extradition treaties and are designed to clarify that, notwithstanding identical or similar language in their counterpart crimes, such counterpart crimes will not be deemed to fail the dual criminality test.

Article 3 limits extradition to cases where there exists sufficient evidence, according to the laws of the requested state, for trial of the person sought had the offense been committed in the requested state. Additionally, Article 3 applies to cases where sufficient evidence exists to prove that the person sought is the person convicted by the courts of the requesting state.

Article 4 defines the territorial application of the treaty and expands the normal context of that concept to include aircraft in flight. The provision also extends jurisdiction to acts of aircraft piracy, whether or not they occur over the territory of either of the treaty countries.

358. S. EXEC. REP. No. 96-21, at 20.
359. Id.
361. Id. art. 2(1).
362. Id. art. 2(3).
363. Id.
364. Id. art. 2(4)(a).
366. Id. art. 3.
367. Id. art. 4(1).
368. S. EXEC. REP. No. 96-21, at 20.
369. Id.
Article 5 contains the political offense exception clause. It does, however, exclude from the category of political offense (a) murder or other willful crimes against the life or physical integrity of a Head of State or Head of Government, or their families, as well as (b) those offenses which a treaty country is obligated to prosecute by reason of a multilateral agreement. A similar limitation is included in the United States-German extradition treaty.

In June 1988, under the 1899 extradition treaty, as amended by the additional conventions of 1902, 1925, and 1939, the Mexican Government refused to extradite William Morales to the United States. William Morales was a convicted Puerto Rican terrorist arrested in 1978 on explosives and weapons charges. He was chosen as a leader of the Puerto Rican FALN, a terrorist organization allegedly responsible for 100 bombings in the United States and Puerto Rico. After his conviction by a United States district court, he was sentenced to ninety-nine years.

In 1979, while in Bellevue Hospital in New York, being fitted for a pair of artificial hands, Morales escaped by cutting through a mesh wire window and lowering himself down a forty-foot rope made of artificial bandages. Two New York police officers were killed attempting to arrest Morales. Escaping to Mexico, he was arrested on May 28, 1983, after a shootout in the state of Puebla. He confessed to planning the bombing of the site where United States and Mexican congressmen held a conference. After spending several years in a Mexican prison, Morales was released and received safe passage to Havana, Cuba, under the protection of the DGI, the Cuban intelligence service.

In response to Mexico's refusal to extradite Morales to the United States, the United States recalled its Ambassador from Mexico for one week, and denounced the action of the Mexican Government as "outrageous." It stated that such action "undercuts the fight of international terrorism by legal means."

Article 6 contains a prior jeopardy provision. It excludes extradition in cases where the person requested has been prosecuted or tried and convicted or acquitted in the requested state for the offense for which extradition is requested.

Article 7 prevents extradition where prosecution or enforcement of the penalty for the offense for which extradition is requested becomes barred by lapse of time according to the laws of the requesting or requested state.

371. Id. art. 5(2)(b).
374. Id.
375. Id. at 34-35.
376. Id. at 35.
Article 8 of the extradition treaty provides that, when the offense for which extradition is requested is punishable by death under the laws of the requesting state, and the laws of the requested state do not permit such punishment for that offense, extradition may be refused unless the requesting state provides assurances as the requested state considers it likely that the death penalty will not be imposed, or if, imposed will not be executed. A similar article is included in most recent United States extradition treaties. The problem primarily occurred when the United States requested extradition from a requesting state that does not have the death penalty.

Article 9 deals with the extradition of nationals and is similar to provisions signed in other recent United States extradition treaties. It provides that neither treaty country is required to extradite their nationals, although the executive authority of the requested state will have the power to extradite in its discretion, if not prevented by its laws and it deems such extradition proper. The Article takes into account the Mexican law prohibiting the extradition of its nationals but permitting their prosecution in Mexico for offenses committed abroad. Mexican law, like the laws of most countries in Latin America and countries following the civil law system, prevents the extradition of nationals, except in "extraordinary circumstances." This fundamental tenet becomes even more deeply enshrined because of incursions of Mexican sovereignty by United States law enforcement officials, but has contributed continuously to friction and major incidents, such as the kidnapping of Dr. Alvarez-Machain.

The treaty provides that, if extradition is not granted, the requested state submits the case to its authorities for the purpose of prosecution, provided that the requested state has jurisdiction over the offense. This provision worked poorly in practice. The inability of United States law enforcement authorities to obtain the extradition of Mexican nationals and their disappointment with either the law concerning the prosecution of the fugitive or the slowness with which the Mexican criminal process works led to discussions during the hearings over ratification of NAFTA and the institution of a new procedure in Mexico to improve prosecution of such cases.

Articles 10-21 provide for the procedures to accomplish extradition. The treaty allows provisional arrest in cases of urgency. It requires, however, that such requests be made through the diplomatic channel, whereas most modern extradition

379. Id. art. 8.
381. U.S.-Mexico Extradition Treaty, supra note 53, art. 9(1). See supra Part II.B (discussing the case of Ex parte McCabe, 46 Fed. 363 (1891), which held that under the 1861 Mexico-U.S. extradition treaty the U.S. courts had no authority to extradite U.S. nationals).
384. Id. art. 11(1).
treaties allow competent authorities to communicate directly in such cases.\textsuperscript{382} The application for provisional arrest must only contain a description of the offense for which the extradition is requested, a description of the person sought and his whereabouts, an undertaking to formalize the request for extradition, and a declaration that either a warrant of arrest or a judgment of conviction has been issued.\textsuperscript{386} On receipt of such a request, the requested state must take the necessary steps to secure the arrest of the person claimed.\textsuperscript{387} A requested state must terminate provisional arrest if, within a period of sixty days after the arrest of the person claimed, the executive authority of the requested state has not received the formal request for extradition and the supporting documents.\textsuperscript{388}

In practice, provisional arrest is usually requested to prevent the further flight of a fugitive from a country in which s/he sought sanctuary, or to prevent them from going into hiding in that country after becoming aware that another country is attempting extradition. Provisional arrest can also be requested: if the subject's prior criminal history and the circumstances of the offense for which extradition is sought indicate serious danger to the public safety in the country from which extradition is sought. Provisional arrest is especially sought in the case of most organized criminals shown to pose a serious danger to public safety in the country from which extradition is sought.

In the United States, the minimum period under a treaty within which a requesting state must submit a formal, fully documented extradition request after the provisional arrest of a requested person, is forty days. Under some United States treaties, the period is as low as three months. Under most of the modern U.N. treaties, the period is sixty days.

If the Executive authority of the requested State considers the evidence furnished in support of the request for extradition insufficient to fulfill the requirements of the treaty, the requested State requests the presentation of the necessary additional evidence.\textsuperscript{389} With respect to the length of time within which such additional or supplementary documents may be produced, this is a matter within the discretion of the extradition magistrate and to be determined by such magistrate on the ground of reasonableness.\textsuperscript{390}

After the extradition documents are received, it normally takes at least two to four weeks before counsel is prepared for the extradition hearing and the extradition magistrate can schedule it. A person provisionally arrested under a United States extradition treaty, choosing to contest extradition, can expect to spend from two to four months in custody before an extradition hearing, unless provisionally released.

\textsuperscript{385} Id. art. 11.
\textsuperscript{386} Id. art. 11(1).
\textsuperscript{387} Id. art. 11(2).
\textsuperscript{388} Id. art. 11(3).
\textsuperscript{389} U.S.-Mexico Extradition Treaty, supra note 53, art. 12.
\textsuperscript{390} See Whiteman, supra note 224, at 927 (citing the 1940 request by Mexico for the extradition of Pedro Canavati).
The period of potential incarceration in the United States-Mexico extradition treaty for provisional arrest is longer than that normally provided in Western Europe. For instance, the European Convention on Extradition restricts the use of provisional arrest to cases of urgency. The period within which a formal, fully documented request must be filed under the Convention is eighteen days. In no event can it exceed forty days. If the relator informs the requested State the she agrees to be extradited, the requested State may grant extradition without further proceedings and take all measures allowed under its laws to expedite such extradition.391 In such cases, the rule of speciality does not apply.

Under Article 14(1) of the treaty, the requested State must promptly communicate to the requesting State its decision on the request for extradition.392

Under Article 14(2), in the case of complete or partial rejection of a request for extradition, the requested State must state the reasons for rejection.393 Practically, the notification also provides an opportunity for discussion on the possibility to achieve the objectives of the extradition request, and, if so, how (e.g., new extradition request with supplementary charges and/or new documentary support).

Under Article 14(3), if the extradition is granted, the surrender of the relator occurs within such time as may be prescribed by the laws of the requested State. The competent authorities agree on the date and place of the surrender of the person sought.394

Universally, the surrender of a relator is the function of the executive branch of the requested State.395 In the case of the United States even when requests are made on the border, surrender must await the action of the Secretary of State. Only after the Secretary of State or his delegate receives the certified copy of a United States district court can s/he issue a warrant for the surrender of the relator.396 In terms of the place of surrender, the United States and Mexico allow the requesting State to collect the relator at the place of detention,397 at a designated place on the border,398 or at a designated place in the requesting State.399

Article 19 of the treaty provides that, to the extent allowed under the law of the requested State and subject to the rights of third parties, a requested State will surrender articles, instruments, objects of value or documents relating to the offense, whether or not used for execution or which in any other manner may be material

392. Id. art. 14(1).
393. Id. art. 14(2).
394. Id. art. 14(3).
395. Whiteman, supra note 224, at 1044; See also 18 U.S.C. § 3186 (authorizing the Secretary of State to order a person found extraditable to be surrendered).
396. Whiteman, supra note 224, at 1045.
397. See id. at 1072-73.
398. Id. at 1073.
399. Id. (relating that in 1961 the Mexican Government delivered Paul Flato to New York where New York authorities requested his extradition in 1953).
evidence for the prosecution.\textsuperscript{400} For instance, in 1960, on the extradition of Artemio Molina and Francisco Quintana to Mexico on murder charges and after certain ballistics comparison tests were made by United States authorities, the United States delivered the pistols to Mexican authorities.\textsuperscript{401}

Article 22 provides that the treaty is retroactive in effect as to extraditable offenses committed before the date of entry into force and punishable under the laws of both treaty countries when committed.\textsuperscript{402}

Article 23 provides that the treaty enters into force on the date of exchange of the instruments of ratification.\textsuperscript{403} The treaty superseded the extradition treaty.\textsuperscript{404}

IV. CONTEMPORARY EXTRADITION ISSUES: DRUGS, CAMARENA, THE ALVAREZ-MACHAIN AND GARCÍA ABREGO CASES

Since the 1978 extradition treaty between the United States and Mexico went into effect in 1980, contemporary extradition practice between Mexico and the United States reflected both a continuation of many of the prior issues and problems, such as the use of irregular rendition and the difficulty in obtaining the extradition of nationals. Indeed, the frustration of the United States with the inability to prosecute expeditiously and punish harshly the persons implicated in the 1985 assassination of former agent Enrique Camarena of the Drug Enforcement Administration ("DEA") resulted in the abduction of Mexican Dr. Humberto Alvarez Machain and later the controversial decision of the United States Supreme Court withholding jurisdiction over him. The latter case and a series of other extradition cases resulted in diplomatic tension between Mexico and the United States and the erosion of confidence and trust in extradition and criminal cooperation in the region.

In hearings before the Senate Foreign Relations Committee in 1988, United States Government officials revealed that the United States Government infrequently utilized the extradition treaty. Specifically, officials stated that the United States neither made many formal requests for extradition from Mexico nor obtained the return of any fugitives. The United States Executive Branch reported that Mexico did return one fugitive to the United States under the predecessor extradition treaty, Mr. Flato in 1961 for a fraud crime. The United States did have extradition requests pending with the Mexican Government in 1988, one of which included the request for alleged narcotrafficker Verónica Kiera-Wahl. The United States Executive Branch also reported that the Mexican Government returned a number of non-Mexican narcotic traffickers to the United States pursuant to their domestic legal authorities and locally prosecuted a number of fugitives for violent

\textsuperscript{400} U.S.-Mexico Extradition Treaty, supra note 53, art. 19.
\textsuperscript{401} Whitman, supra note 224, at 1062-63.
\textsuperscript{402} U.S.-Mexico Extradition Treaty, supra note 53, art. 22(1).
\textsuperscript{403} Id. art. 23(2).
\textsuperscript{404} Id. art. 23(3).
In practice, the Mexican Government used deportation in lieu of extradition. It is expected that extradition will be used more frequently in the near future.

Recently, both governments used extradition more frequently. An early extradition by Mexico to the United States concerned an ex-official director of the Police of the Federal District. The Mexican Attorney General’s office reported a number of extradition cases connected with narcotics trafficking. Inter-governmental cooperation between the two governments increased, although at times the United States Government tried to hold free trade issues hostage to better progress on extradition matters.

A recent development was the conclusion in 1994 of the Treaty to Prohibit Abductions. This treaty contains an important acknowledgement of the state of international law, even though it was not submitted for ratification.

A. THE CAMARENA AND ALVAREZ-MACHAIN CASES

On February 7, 1985, Drug Enforcement Administration ("DEA") agent Enrique Camarena Salazar and his Mexican pilot, Alfred Zavala Avelar, were murdered. Four gunmen kidnapped Camarena in broad daylight after he departed from the United States consulate in Guadalajara. United States Attorney General William French Smith and DEA chief Francis "Bud" Mullen made demands. Even President Reagan personally communicated with President de la Madrid requesting assistance.

On March 6, 1985, the tortured bodies of Camarena and Zavala were found at a remote ranch sixty miles southwest of Guadalajara. One of the persons believed responsible was Rafael Caro Quintero, a notorious trafficker. Mexican federal and state police intercepted Quintero two days later, led by Armando Pavón. Quintero bribed his way to Costa Rica. Subsequently, Pavón admitted accepting a $275,000 bribe to allow Quintero’s plane to leave Guadalajara airport. Pavón was sentenced to a jail term in Mexico City.

In April 1985, local authorities in Costa Rica, acting on a DEA tip, captured Quintero, along with four heavily armed bodyguards. Sara Cristina Cosío Martínez, the kidnapped seventeen-year-old daughter of a wealthy Mexican businessman, who is also the brother of an official in the Partido Revolucionario Institucional ("PRI" or Institutional Revolutionary Party), was found with the narcotraficantes. See Mutual Legal Assistance Treaty Concerning the Cayman Islands, S. Exec. Rep. No. 100-26, at 103-04.

405. See MUTUAL LEGAL ASSISTANCE TREATY CONCERNING THE CAYMAN ISLANDS, S. EXEC. REP. NO. 100-26, AT 103-04.
408. For a discussion of the role of Caro Quintero in the Mexican drug trade as well as the link with Colombia and the United States, see ELAINE SHANNON, DESPERADOS: LATIN
Quintero was returned to Mexico. In 1989, a court in Guadalajara, after four years of proceedings, convicted him, along with twenty-three persons, of various offenses, including the murder of Camarena and Zavala. The court imposed a sentence of forty years for the murder of the two men. In addition, for his conviction on kidnapping and drug trafficking charges, he received an additional seventy-six years in prison.

Soon after Quintero’s arrest, Ernesto Fonseca, a major trafficker sought in the case, was arrested with twenty-three other persons, many of them federal enforcement agents.

Fonseca Carrillo, while admitting to involvement in trafficking and bribes and involvement in Camarena’s killing, denied murdering Camarena and accused Miguel Felix Gallardo, another notorious trafficker. Fonseca received a fifty year sentence for the two murders and 104 more years in prison on charges of kidnapping, drug trafficking, arms smuggling, and criminal association.

Since the Mexican penal code does not permit the death penalty for capital crimes, the sentences were among the harshest allowed in Mexico. Quintero tried to escape in 1987. The media reported the favorable treatment afforded the two prisoners (i.e., private suites in the jail with luxuries and the right to overnight visits by female and other friends). Both Quintero and Fonseca could have received harsher sentences, including the death penalty, in the United States, and neither would have received the comparatively pleasant prison conditions experienced in Mexico. The United States law enforcement community’s concern about their comparatively lenient sentences and post-conviction treatment in Mexico illustrates the tensions and controversies that emanate from Mexico’s refusal to...
extradite persons and prosecute them in Mexico.

On April 2, 1990, five or six armed men apprehended Humberto Alvarez-Machain, a Mexican doctor, in his office in Guadalajara, drove him to the State of Nuevo León, Mexico, and flew him to El Paso, Texas. When the plane landed in El Paso, DEA agents arrested him as he left the plane to stand trial in Los Angeles on the torture and murder of a United States drug agent, Enrique "Kiki" Camarena Salazar. The DEA paid $20,000 in reward payments to the Mexican individuals kidnapping Dr. Alvarez-Machain.

On June 15, 1992 in a 6-3 decision, the United States Supreme Court held that, when an extradition treaty is silent on whether one signatory country may utilize kidnapping as an alternative to extradition, jurisdiction sustains notwithstanding protests by the other signatory country. The decision reinstated a federal case against Dr. Alvarez-Machain, a Mexican gynecologist accused of participating in the torture and murder of an American narcotics agent outside Guadalajara in 1985. Lower courts barred the case against the Mexican physician on the basis of improper kidnapping to the United States. In essence the Court based its decision on two prongs: an interpretation of the extradition treaty and reliance on the Executive for resolving such sensitive issues. The long and stinging dissent, relying heavily on customary international law, candidly expresses that courts throughout the civilized world will be deeply disturbed by the "monstrous" decision.

1. Majority Opinion

The first inquiry of the majority was whether the kidnapping of Dr. Alvarez-Machain from Mexico violated the extradition treaty between the United States and Mexico. The Court found that the extradition treaty provides nothing on the obligations of the United States and Mexico to refrain from kidnapping people from the territory of the other country or the consequences under the treaty if such an abduction occurs.

In its review of the extradition treaty, the Court noted that Article 9 allowed a requested country to refuse to extradite its own nationals if prevented by its laws...
and instead to submit the case to its competent authorities for the purpose of prosecution. In this way, according to counsel for Dr. Alvarez-Machain, a requested country preserved its rights and sovereignty. The Court rejected such an interpretation of the treaty, stating that Article 9 does not provide the only way in which one country may gain custody of a national of the other country for the purposes of prosecution. In addition, the Court held that the history of negotiation and practice under the Treaty does not show that kidnappings outside of the Treaty constitute a violation of the Treaty. The Court noted that, according to the Solicitor General, the United States informed Mexico as early as 1906 of the doctrine in Ker v. Illinois,423 whereby the Court rejected the defendant’s argument that he had a right under the extradition treaty to be returned to this country only in accordance with its terms.424 The Court therefore reasoned that the treaty’s language, in the context of the history, does not support the proposition that the treaty precludes kidnapping outside of its terms.425

The next issue for the Court was whether the treaty should be interpreted so as to include an implied term prohibiting prosecution where the defendant’s presence is obtained by means other than those established by the treaty. The Court noted that Dr. Alvarez-Machain’s counsel argued that the treaty must be interpreted against the background of customary international law. Because international kidnapping is so clearly forbidden in customary international law, no need existed to include such a clause in the treaty itself. According to the Court, the defendant did not argue that the sources of international law provide an independent basis for the right asserted by the defendant not to be tried in the United States, but only that international customary law should assist in interpreting the treaty terms.426

The Court rejected the argument that the support of customary international law prohibits kidnapping because no customary international law relates to the practice of nations regarding extradition treaties. It relates only to the practice of nations with regard to international law more generally.427 The Court in particular, rejected the idea that it should infer from the treaty that a prohibition of all means of gaining the presence of an individual outside of its terms goes beyond established precedent and practice.428

A critical element in the Court’s decision was its rationale based on a similar dispute in a case involving the United Kingdom. The Court reasoned that even if defense counsel and the amici are correct that the kidnapping was “shocking” and in violation of general international legal principles, the decision of whether Dr. Alvarez-Machain should be returned to Mexico is one for the Executive Branch. The Executive Branch resolved a similar dispute with the United Kingdom after

423. 119 U.S. 430 (1886).
425. Id. at 666.
426. Id.
427. Id. at 667.
428. Id. at 668-69.
the United States Supreme Court held that United States prohibition laws applied to foreign merchant vessels, as well as domestic vessels, within the territorial waters of the United States. This application meant that the carrying of intoxicating liquors by foreign passenger ships violated those laws. Thereafter, the United States and United Kingdom successfully negotiated a treaty that provided the United States the right to seize foreign vessels beyond the 3-mile limit, the United States’ objective, and gave British passenger ships the right to bring liquor into United States waters so long as it was sealed while in those waters, the U.K.’s objective.\(^\text{429}\)

2. Dissenting Opinion

The dissenting opinion used treaty interpretation to infer that the treaty could not possibly allow kidnapping. Otherwise the right of the requested state to deny extradition and to require it to try individuals (Article 9) renders meaningless those provisions and the provisions requiring sufficient evidence to grant extradition (Article 3), withholding extradition for political or military offenses (Article 5), and so forth.\(^\text{430}\) The dissent notes that all of the safeguards against the requirement to extradite are frustrated if the treaty were to silently reserve an optional method of resorting to self-help, including violating the territorial integrity of the requested state whenever law enforcement authorities deem force more expeditious than legal process. The Court noted that, if it thought it more expedient to torture or simply to execute a person rather than attempt extradition, such options would be equally available because they too were not explicitly prohibited by the extradition treaty.\(^\text{431}\) According to the dissent the Court’s "failure to differentiate between private abductions and official invasions of another sovereign's territory explains its erroneous application of international law, which the dissent characterized as 'shocking' disdain for customer and conventional international law principles . . . ."\(^\text{432}\)

In focusing on the majority opinion’s influence by the intense interest of the United States Government to punish a brutal murder of an American law enforcement agent, the dissent warned that such motive provides no justification for disregarding the Rule of Law.\(^\text{433}\) The dissent warned that the example set by this decision affects other tribunals\(^\text{434}\) around the globe.\(^\text{435}\) The dissent further ex-

\(^{429}\) Id. at 669-70, 675 n.16.
\(^{430}\) Id. at 673 (Stevens, J., dissenting).
\(^{431}\) Id. at 673-74.
\(^{432}\) Id. at 685-86.
\(^{433}\) Id. at 686.
\(^{434}\) Id. ("[T]he way that we perform that duty in a case of this kind sets an example that other tribunals in other countries are sure to emulate.").
\(^{435}\) Id. at 687. The dissent referred to the recent South African case of *S* v. *Ebrahim*, in which the court held that the prosecution of a defendant kidnapped by agents of South Africa in another country must be dismissed. 1991 SA 8-9 (CC). The court in this case reasoned that an abduction violates customary rules of international law that are part of South
pressed its disapproval in that it suspected most courts "throughout the civilized world—[would] be deeply disturbed by the 'monstrous' decision" of the majority. 436

3. Diplomatic Reaction

At the highest level of its government, Mexico denounced the Supreme Court decision as "invalid and unacceptable." Many other United States allies around the world, including Canada, Argentina, and Colombia, criticized the policy of kidnapping. As a result, on June 15, 1992, Mexico announced that it would suspend the activities of the thirty-nine American drug agents stationed in Mexico and recall the three narcotics-control officers in the United States. Mexico, however, has not ordered the DEA agents out of the country pending the discussions. 437 Most importantly, the following day Mexican and United States officials met in Mexico City to begin discussing changes in the extradition treaty and the DEA's Mexican charter. On November 23, 1994, the two countries concluded a new treaty prohibiting transborder abductions. 438 Mexican officials also indicated the intent to demand the repatriation of Dr. Alvarez for prosecution in Mexico. 439

4. Decision of Acquittal

On December 14, 1992, United States District Judge Edward Rafeedie acquitted Dr. Humberto Alvarez-Machain. The acquittal of Dr. Alvarez-Machain on all charges precludes any further trial or holding of Dr. Alvarez-Machain. Although the acquittal temporarily eases some of the pressure from the controversy surrounding the decision by the United States Government to arrogate to itself the right to kidnap citizens of countries in certain circumstances, the case will not end the demands by foreign governments to renegotiate their extradition treaties with the United States. 440

In explaining his acquittal, Judge Rafeedie exclaimed, "this is whole cloth, the

African law, thereby depriving the court of its competence to hear the case. Id.


440. For additional discussion of the decision, see Bruce Zagaris, U.S. Court Acquits Alvarez-Machain While Mexico Calls for the Extradition of Two DEA Agents for Kidnapping, 8 INT'L ENFORCEMENT L. REP. 469-71 (Dec. 1992). See also 139 CONG. REC. H8430-03 (1993) (statement of Rep. Gonzalez) (introducing legislation to prohibit the United States from apprehending alien suspects without the permission of the nation where the suspect is located).
wildest speculation," of the government's contention that Alvarez injected Camarena with drugs to revive him so his captors could torture him. In particular, Judge Rafeedie explained that the government offered no evidence to prove that Camarena had been injected with the drug lidocaine to keep him alive so he could be interrogated, and furthermore, the government failed to demonstrate that a syringe found in the room containing traces of the drug belonged to Alvarez. 441

Assistant United States Attorney John L. Carlton in his arguments against acquittal contended that the evidence showed that Alvarez-Machain had the skill to keep Camarena alive. The evidence showed Alvarez-Machain sitting in the kitchen cleaning his syringes and participating in the conversation in the living room. He was essentially there for a purpose. Carlton also explained that after his arrest, Alvarez-Machain admitted to being present at the torture. In addition, a syringe was found bearing traces of lidocaine, a pain reliever, and Alvarez-Machain's fingerprints were lifted from the laundry bags at the scene.

Judge Rafeedie stated, however, that the government must offer stronger evidence to show that a man is guilty of kidnapping, murder and torture; mere suspicion and hunches do not provide an adequate basis for presenting cases to a jury. 442 Judge Rafeedie said that although Alvarez may have done the acts alleged by the government, the prosecution could not prove its case, as a result of the absence of evidence. 443 Additionally, Judge Rafeedie expressed his dismay that, at the time the United States Government arrogated to itself the right to abduct Dr. Alvarez-Machain, it had even less evidence about Alvarez' participation in the crimes than during the trial. 444

Judge Rafeedie denied, the previous week, a defense motion to acquit a Mexican co-defendant, Rubén Zuno Arce, the brother-in-law of a former Mexican president. Zuno is accused of conspiring to plan the kidnapping and killing of Camarena. At an earlier trial Zuno was convicted, but Rafeedie set aside the verdict because the prosecution referred to matters not in evidence in its closing argument. The continuation of the trial against Zuno still involves sensitive evidence because witnesses against Zuno testified that high-ranking government, military and police officials were involved in the plot to kill Camarena. Zuno's counsel, without denying the accusations, insisted their client is a legitimate businessman not part of the conspiracy. 445

5. Mexican Officials Call for Extradition of DEA Agents

On July 20, 1990, the Mexican Government asked the United States to arrest and extradite Héctor Berrelleze, the DEA agent heading Operation Leyenda, a nine-member unit based in Los Angeles conducting a five-year search for

442. See Mydans, supra note 413, at A20.
444. Id.
445. Id.
Camarena’s murderers, and Antonio Gárâte, a former Mexican police official and informer for the drug agency. On December 15, 1992, the Mexican Attorney General’s Office called for the extradition of Gárâte and Berrellez on the allegations that they ordered the April 1990 kidnapping of Alvarez-Machain. Formal extradition procedures effectively make it difficult for such officials to travel to most countries since many countries allow extradition for kidnapping. Politically, refusal of the United States to meet an extradition request for the two individuals in the wake of Judge Rafeedie’s opinion, makes it more difficult for the United States Government to push its own agenda for extradition in cases such as the Pan Am Lockerbie bombing.

B. TRANSBORDER ABDUCTION TREATY

On November 23, 1994, the Mexican and United States governments concluded a Treaty to Prohibit Transborder Abductions. The proposed treaty is not in effect and the Clinton Administration has not submitted it for ratification to the Senate because the Administration believes the circumstances are not yet ripe.

A transborder abduction occurs when a person is removed from the territory of one treaty country by force or threat of force and by federal, state or local government officials of the country to whose territory the person is taken, or by private individuals acting under the direction of such officials. A transborder abduction does not occur in cases involving: transfers of persons, pursuant to a treaty; deportations, expulsions, voluntary departures, exclusions, or other actions taken pursuant to immigration laws; or other actions jointly agreed upon by the heads of the Attorney General’s Office or the chief deputy of such office.

A treaty country can trigger a fact-finding procedure if it has reason to believe that a transborder abduction may have occurred from its territory. If the requested state concludes, pursuant to a fact-finding procedure, that a transborder abduction occurred, it will promptly return the abducted individual to the requesting state. The requested state, after returning an abducted person, may then request his extradition, and the requesting state must comply with its obligations under the 1978 Extradition Treaty to extradite the individual or submit the

446. For background on the Mexican extradition request and the supposed surprise by the United States at the request, see Bruce Zagaris, Mexico Requests Extradition of DEA Agent and a Former Mexican Law Enforcement Official for Kidnapping Dr. Alvarez Machain, 8 INT’L ENFORCEMENT L. REP. 261 (July 1990).

447. For additional background, see Tod Robberson, Mexico Seeks DEA Agents on Charges of Kidnapping, WASH. POST, Dec. 16, 1992, at A10.


449. See ABBELL & RISTAU, supra note 225, at A.676.3, art. 3(1).

450. Id. art. 3(2).

451. Id. art. 4.

452. Id. art. 5.
case to its competent authorities for the purpose of prosecution.453

The treaty specifically provides for the prosecution, and any applicable administrative and civil sanctions under the laws of both treaty countries, of individuals responsible for transborder abductions, including extradition.454 The treaty states that its provisions are intended solely to establish the rights and obligations of the treaty countries. Private persons, therefore, cannot bring actions alleging violations of the treaty.455

C. UNITED STATES EXTRADITES TWO FOR MURDER OF CARDINAL POSADAS

On September 16, 1994, the United States District Court in San Diego issued an extradition order for Carlos Enrique Garcia, a Mexican national in his early twenties, and Jesus Zamora-Salas, a twenty-one year old United States national. The charges, homicide, attempted homicide, conspiracy, possession of firearms reserved for the military, storing firearms reserved for the military, and damage to Mexico’s transportation and communication infrastructure, all related to the May 24, 1993 shooting at the International Airport, Guadalajara, Jalisco, Mexico.456 The Mexican Government alleged that the Arellano brothers in Tijuana sent a group of men as a “hit squad” to Guadalajara to search for and ultimately murder rival drug lord, Joaquin Guzman Loera (also called “El Chapo”).457 Instead of finding and killing “El Chapo,” the “hit squad” became entangled in a shootout at the Guadalajara airport that resulted in the death of Roman Catholic Cardinal Posadas and at least six others.458

On July 15, 1993, Magistrate Judge Louisa Porter in San Diego issued a provisional arrest warrant, resulting in the arrest of Zamora on July 16 and Garcia on July 20, 1993. The court granted the defendants’ motion made on February 22, 1994 to terminate the provisional arrest warrant. Nevertheless, Mexico proceeded with the extradition requests.459 Between April 5, 1994 and June 3, 1994, the court held five days of hearings concluding with written final arguments.

The court, in a decision issued by Magistrate Judge Leo S. Papas, found probable cause that the offenses occurred: the dual criminality requirement in the treaty covered the crimes at issue and sufficient evidence as to the identity of the defendants existed. Presaging a problem for Mexican extradition requests to the United States, the court stated in dicta that the only question was whether the plethora of evidence identifying and linking defendants to the offenses acceptable in light of respondents’ arguments that the statements of four co-conspirators were so tainted because of torture that any probable cause established by the

453. Id. art. 5(3).
454. Id. art. 6.
455. Id. art. 7.
457. Id. at 917.
458. Id.
459. Id. at 916.
statements was "obliterated." Despite appeals to the United States Court of Appeals for the Ninth Circuit, a petition for an emergency stay to the United States Supreme Court, and a request to the United States Department of State, both defendants were extradited. Nevertheless, the court's concern about the potential taint on the Mexican Government's evidence by its methods of obtaining testimony foreshadowed continuing problems plaguing Mexican extradition requests to the United States.

D. UNITED STATES EXTRADITES A SUSPECTED NARCOTRAFFICKER ON TAX CHARGES

A successful extradition under the current extradition treaty has been the United States extradition on February 2, 1994 to Mexico of Kamel Nacif Borge for tax crimes. The Mexican Government first brought criminal charges and then requested the extradition of Kamel Nacif Borge in early 1993. Nacif was living in Las Vegas and Mexico. His business was cattle exportation. Although the Mexican authorities suspected that Nacif may have engaged in other criminal activities, they only charged him with tax fraud for not paying taxes on roughly $15 million in income.

Nacif vigorously, although unsuccessfully, contested the extradition request. Once the United States extradited him on February 2, 1994, the United States Government froze Nacif's bank accounts in the United States pursuant to Article 19 of the Mexico-United States Extradition Treaty. Nacif subsequently pled guilty in Mexico and agreed to pay a fine of $1 million in order to avoid incarceration.

The extradition of Nacif demonstrates the growing tendency of governments to extradite for fiscal crimes. Multilateral development banks are trying to persuade other governments to prosecute for tax crimes as Mexico did in the Nacif case. Mexico has been able to convict defendants of tax fraud easily. The convictions, the use of the United States-Mexico Extradition Treaty, and the ability to freeze and obtain large fines all constitute major victories for the Mexican and United States Governments.

E. MATTER OF BOLAÑOS GUILLÉN—FRAUDULENT MISUSE OF THE EXTRADITION PROCESS

A modern case in the United States courts, In the Matter of the Extradition of Bolaños Guillén, illustrates the problems in extradition between the United

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460. Id. at 923.
463. For background on Mexican tax fraud and related crimes, see MEXICAN BAR ASS’N, 3 ELFORO No. 3 (1990).
States and Mexico. On December 24, 1990, Mexico brought an extradition complaint against Demetrio Bolaños Guillén, arrested on charges of abuse of confidence in violation of Article 382 of the Mexican Criminal Code. The Mexican Government charged that Bolaños signed a receipt for 950 million pesos from Alfonso Gaytán Esquivel as a confidence deposit for safekeeping. Thereafter, he refused to return the money when requested. Both the accused and the alleged victim were important political figures. The accused was a former head of the Mexican Stock Exchange and his uncle was a former President of Mexico. After ruling in favor of the government on the issues of the statute of limitations and dual criminality, the court found lack of probable cause as required by Article 3 of the Treaty. In explaining its decision, the court stated that "the facts presented here strongly suggest a fabricated claim and fraudulent misuse of the extradition process." The dicta presaged some future setbacks in even more important Mexican extradition requests to the United States.

F. MEXICO DEPORTS GARCÍA ABRrego TO THE UNITED STATES

On January 15, 1996, Mexico deported Juan García Abrego, one of the world’s most wanted drug kingpins, to the United States in what law enforcement agencies tout as a major victory for criminal cooperation between the two governments. Juan García Abrego, is accused of heading the multimillion-dollar Gulf cartel drug trafficking enterprise that controls approximately one-third of Mexico’s cocaine smuggling. In 1993, a Houston grand jury indicted García Abrego on charges of running a multimillion-dollar cocaine operation with close ties to the Cali cartel in Colombia. Agents from the Mexican Attorney General’s Office arrested him on January 13, 1996 at a restaurant in Monterrey, Nuevo León. He was flown to Houston and taken to the Harris Country jail. The FBI listed him on its Most Wanted Fugitives List since March 1995.

From his base across the Texas border, García Abrego maintained a large private army and used monthly bribes to high-level government officials to conduct distribution of Colombian cocaine within the United States, operating in markets from Houston to New York. Over more than a decade, García Abrego developed a cocaine smuggling business worth an estimated $10 billion, based in the northeastern Mexican state of Tamaulipas. He has been accused of ordering dozens of killings, including several massacres. The victims include his rivals in the drug

468. Id. at A2. In particular, he is accused of masterminding a 1991 slaughter in which nineteen people were killed in the border town of Matamoros, Mexico. Id. According to officials, in the spring of 1991, twenty-five persons in Matamoros and Brownsville, two border towns, were killed in a thirty day battle between García Abrego and his rivals. Id.
trade, as well as several journalists.469

Bob Weiner, director of public affairs for the White House office of national drug control policy, cited Abrego's arrest as an important signal that international cooperation can break the formerly impenetrable shield of the narco-traffickers.470 Reportedly, Abrego holds United States, as well as Mexican, citizenship. The Mexican Government claims that he is a foreigner and not a Mexican national.471 Depending on the credibility of reports, the apparent possession of both United States and Mexican citizenship was a technicality that proved to be García Abrego's undoing.472 Mexican officials used a provision in the Mexican Constitution allowing the deportation of foreigners in order to overcome the prohibition against extraditing its nationals without a trial, thereby allowing Mexico to circumvent lengthy extradition or deportation hearings.473 His arrest and deportation may also show the effectiveness and importance of international drug cooperation, which frequently assumes a priority in United States-Mexico bilateral relations.474

In a well known case against American Express Bank and its bankers, which brought the largest convictions for money-laundering in United States history against two bankers, testimony elicited at the 1994 trial supported that García Abrego spent tens of millions of dollars yearly in bribes to officials to protect his drug network.475 The bank officials were sentenced to jail for accepting some $30 million in deposits for representatives of García Abrego.476

During a Texas trial in August 1995, former aides to García Abrego testified that he “[Garcia Abrego] owned many homes in Monterrey, as well as ranches all across northern Mexico and twenty prize race horses.”477 Francis Pdrez Monroy, García Abrego's cousin, testified that “[Garcia Abrego] was paying millions in bribes each month to Mexican officials.”478 One former associate testified that García Abrego shipped forty tons of cocaine from Mexico to the United States during an eight-month period in 1989.479 Circumstantial evidence linked García Abrego to high-level government payoffs and the 1994 assassinations of Luis Donaldo Colosio, the PRI's presidential candidate, and José Francisco Ruiz Massieu, the party's secretary general, whose brother directed a drive against the Gulf cartel.480

469. Id.
471. See Dillon, supra note 464, at A2. FBI records reportedly record his birth date as September 13, 1944 in La Paloma, Texas. Id. Former aides to García Abrego testified in court, however, that he insists he was born in Mexico and has no U.S. nationality ties. Id.
472. Id.
473. Id.
474. Id.
475. Id.
478. Id.
479. Id.
According to the testimony of Thomas Constantine, the administrator of the DEA, in August before the Senate, Garcia Abrego made his mark by pioneering deals in which Mexican traffickers take their payment in cocaine from their Colombia suppliers rather than in cash.\(^\text{481}\) The receipt of payment in cocaine enabled Mexican drug traffickers to establish new downmarket links, become more profitable, and participate more actively in politics in order to stay in business.

On January 17, 1996, United States Magistrate Frances Stacy presided over a presentment and bail hearing, ordering Garcia Abrego held without bond until a February 6 arraignment on the indictment carrying twenty charges.\(^\text{482}\)

The arrest and deportation is politically advantageous to President Ernesto Zedillo, whose government wanted to carry out the operation without assistance from the United States to demonstrate its ability and willingness to crack-down on drug trafficking and drug corruption.\(^\text{483}\) It also demonstrates to druglords that they cannot continue to carry out their lucrative businesses and violence with impunity.

**G. THE CONTRERAS CASE**

On September 9, 1992, in the case of José Cruz Contreras, a United States Magistrate Judge denied an extradition request from the Mexican Government. The denial was based on the allowance of recanting testimony and, as a result, the finding of insufficient evidence of probable cause of extraditability.\(^\text{484}\) The case represents one of a series of setbacks for Mexican extradition from the United States.

On January 10, 1989, in Madero, Tamaulipas, Federal Police and the Mexican Army raided the residence of oil workers' union leader Joaquín Hernández Galicia to execute a "Proceedings of Physical Inspection" (search warrant). They confiscated approximately eighteen cases of weapons containing about 200 Uzi submachine guns and about 25,000 rounds of ammunition and arrested over forty persons, including Hernández Galicia.\(^\text{485}\)

Written confessions of eleven of the persons arrested at Hernández Galicia's residence identified Contreras as the source of the weapons. These confessions served not only as the basis for the indictment in Mexico against Contreras, but


\(^{482}\) See Dillon, supra note 464, at A2; Pierre Thomas, Drug Figure Ordered Held Without Bond, Wash. Post, Jan. 17, 1996, at A24.


\(^{485}\) Id. at 1463.
also formed the documentary foundation of the Petition for Extradition. Con-
treras was previously a politician in Mexico and served as mayor of the border
town of Reynosa, Tamaulipas. He became a successful businessman in South
Texas. Galicia's confession states that he procured the help of Contreras in ob-
taining weapons because of the latter's proximity to the border. The confessions
relate that on December 10, 1988, Contreras, a Hidalgo County, Texas law en-
forcement officer, and his associates delivered the contraband weapons to
Galicia's home. The weapons were fully automatic and were of the type sold by
a Belgian manufacturer exclusively to certain governments. The manufacturer
does not sell them commercially over the open market.

After Contreras' indictment in Mexico on September 25, 1989 for the crimes
of amassing arms and smuggling firearms in violation of Articles 83 and 84 of the
Federal Law of Firearms and Explosives, Mexico requested the extradition of
Contreras. The narrow issue was whether "explanatory evidence" in the form of
recanting testimony could be admitted or whether the court should deem it as
contradictory evidence not admissible in an extradition proceeding. The evidence
had the purpose of challenging the voluntariness of these confessions and at-
ttempted to show that they were coerced and subsequently recanted at the first op-
portunity in a judicial hearing. After hearing testimony about the method of ob-
taining the confessions, the court concluded that the original statements were not
given voluntarily. Witnesses alleged their confessions were due to coercion, tor-
ture, and other forms of intimidation. The defendants were not allowed to speak to
their attorney before they recanted their original statements at a hearing before the
Mexican court. As a result, the court concluded that the original statements (e.g.,
confessionals) were untrustworthy and not credible. Hence, the denial of the ex-
tradition.

H. THE RUIZ-MASSIEU CASE

Major setbacks for Mexico-United States extradition relations have been the
four unsuccessful efforts by the Mexican Government to extradite Mario Ruiz-
Massieu, followed by the unsuccessful effort of the United States to deport him.
The case was important because of the political importance the Zedillo Admini-
stration accorded to anti-narcotics and other forms of corruption and the reasons
given by the federal magistrates in their decisions, especially some unfortunate
derogatory comments about the Mexican judicial and legal systems.

Mario Ruiz Massieu is a member of one of Mexico's most influential and po-
litically active families. In recent years he occupied several high-level positions in

486. Id.
487. Id.
488. Id. at 1465-70.
489. PROCURADURÍA GENERAL DE LA REPÚBLICA (MEXICAN ATTORNEY GENERAL OFFICE),
INFORME SOBRE EL CASO MARIO RUIZ MASSIEU (INFORMATION ABOUT THE CASE OF MARIO
RUIZ MASSIEU) 9 (Mexico, Jan. 2, 1996) (on file with the American University Journal of
International Law and Policy).
the Mexican Government, including Deputy Attorney General in 1993, Under Secretary for the Department of Government in 1994, and Deputy Attorney General in May 1994. On September 28, 1994, his brother José Francisco Ruiz Massieu, Secretary General of the PRI and an outspoken critic of the Mexican political system, was assassinated. This was only months after the March 1994 assassination of Luis Donaldo Colosio, then the PRI presidential candidate. Within hours, Mario Ruiz Massieu, as Deputy Attorney General, initiated an investigation into his brother’s murder. On November 23, 1994, Ruiz Massieu resigned as Deputy Attorney General and withdrew his membership in the PRI. In a dramatic and widely publicized speech, he announced that his resignation was caused by the PRI’s continuous efforts to frustrate the investigation of his brother’s murder and its obstruction of the search for the persons ordering former Deputy Múñoz Rocha to act—persons he alleged to be very high-ranking members of the PRI. In February 1995, Mr. Ruiz Massieu published a book elaborating on the themes of his resignation address.

Immediately, Mexican authorities alleged that Ruiz Massieu committed the crimes of intimidation, concealment, and acting “against the administration of justice,” the latter crime analogous to obstruction of justice in the United States, in connection with the investigation of his brother’s assassination. Contemporaneously, Ruiz Massieu claimed that he and his family received both death and kidnapping threats. On March 2, 1995, he appeared for an official interrogation before Mexican authorities concerning the allegations of criminal activity committed while holding office.

Later, on March 2, 1995, Ruiz Massieu and his family entered the United States as non-immigrant visitors in Houston, Texas, where they owned a home since October 1994. On the following day, they boarded a plane en route to Spain. When the plane stopped at Newark Airport, United States Customs officials arrested Ruiz Massieu pursuant to §5316 of Title 31 of the United States Code on a charge of reporting only approximately $18,000 of the $44,322 in his possession. The United States Government did not pursue the charge and subsequently had it dismissed.

On March 5, 1995, a Mexican court issued an arrest warrant for Mario Ruiz Massieu, charging him with intimidation, concealment, and acting “against the administration of justice.” The following day, at Mexico’s request, the United States presented a complaint for Ruiz Massieu’s provisional arrest and sought his extradition. On June 9, 1995, a Mexican court consolidated the allegations into a single charge of acting “against the administration of justice.”

In the interim, the United States froze and seized, under seal and without notice or explanation, Ruiz Massieu’s Houston bank account containing approximately nine million dollars. On June 15, 1995, the United States Government instituted a civil forfeiture action against the account.


491. See Massieu, 915 F. Supp. at 687 (citing United States v. Nine Million Forty One
On June 13, 1995, the first extradition proceeding began before Magistrate Ronald J. Hedges. Magistrate Judge Hedges previously declined to issue a certificate of extraditability due to his finding of lack of probable cause, in part because Mexican authorities procured multiple statements by inflicting torture.

On June 20, 1995, two days before Hedges' initial opinion, Mexico filed its second request for extradition based on newly filed charges of embezzlement. These charges focused on the $9,000,000 in the Houston bank account and the 2,500,000 pesos allegedly disbursed without adequate documentation while Mr. Ruiz Massieu was in office. In an opinion filed September 25, 1995, Magistrate Judge Hedges again declined to issue a certificate of extraditability because of the lack of probable cause that the funds had been illegally obtained or disbursed.

Before refiling new extradition request, the United States Government unsuccessfully tried to have the extradition matter reassigned to another magistrate judge on the basis that the outcome of the extradition would significantly impact foreign policy implications for the United States. The United States Government, therefore, wanted to ensure that the legal merits received the most careful and senior-level consideration possible. Magistrate Judge Hedges' opinion noted that, if the United States Government thought the matter was of such importance in the first instance, it would have made an application at the time of the first request. The implication, according to his opinion, was that refusal to issue a certificate of extraditability appeared to be the cause for the motion and indicated a misunderstanding or disdain for the entire magistrate judge system.492

On August 31, 1995, the Mexican Government refiled its initial request for extradition based on the charge of acting "against the administration of justice." Although the government produced nine new statements allegedly incriminating Mario Ruiz Massieu, Magistrate Judge Hedges on September 13, 1995, again ruled insufficient probable cause to believe that Mr. Ruiz Massieu committed the acts alleged, and dismissed the complaint.493

On October 10, 1995, the Mexican Government initiated a fourth extradition proceeding by refiling its prior extradition application based on the previously rejected embezzlement charges. This time, Magistrate Judge Stanley R. Chesler presided over the hearings on the application. Near the end of the hearings, the government produced evidence that "clearly establishe[d]" that 800,000 of the alleged 2.5 million pesos embezzled were not, in fact, proceeds of the alleged embezzlement. Thereafter, the United States Attorney's Office for the District of New Jersey withdrew from further representation of the Mexican Government and was replaced by the United States Department of Justice. Magistrate Judge Chesler issued a lengthy opinion denying the certification of extraditability, stating that "the government's effort to establish an inference of criminality on the basis of unexplained wealth fails because it does not rise to the level where any nexus between

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493. Id. at 688.
those funds and the funds that Mr. Massieu is alleged to have embezzled has been established. 494

On December 22, 1995, immediately after Magistrate Judge Chesler issued his opinion, the Immigration and Naturalization Service ("INS"), pursuant to a previously unserved and unannounced detainer dated September 29, 1995, took Mario Ruiz Massieu into custody and served him with an INS Order to Show Cause and Notice of Hearing. The notice advised Ruiz Massieu that he was ordered to show cause as to why he should not be deported because, the Secretary of State made a determination that, pursuant to Section 241(a)(4)(C) of the Immigration and Nationality Act495 reasonable grounds existed to believe his presence or activities in the United States would have potentially serious adverse foreign policy consequences for the United States496.

On January 17, 1996, Mario Ruiz Massieu filed a complaint requesting that the order of deportation be preliminarily and permanently enjoined and that Section 241(a)(4)(C) of the INA be declared unconstitutional. The complaint contained three core constitutional claims: (1) the deportation proceeding shows selective enforcement in retaliation for Mr. Ruiz Massieu's exercise of his First Amendment right to criticize the Mexican political system; (2) the deportation proceeding represents a de facto extradition and is an attempt to overrule, albeit indirectly, four federal court decisions, in violation of the separation of powers; and (3) Section 241(a)(4)(C)(i) of the INA is unconstitutionally vague, in violation of the due process clause of the Fifth Amendment. The United States Department of Justice, on behalf of all defendants, responded that Section 241(a)(4)(C)(i) withstood constitutional attack both facially and as applied to Mr. Ruiz Massieu. Additionally, it argued that the court lacked jurisdiction to hear the case because: (1) at issue was a nonjusticiable political question; (2) Mr. Ruiz Massieu had failed to exhaust his administrative remedies under the INA; and (3) the doctrine of constitutional avoidance counseled against the court reading the ultimate issues presented in Mr. Ruiz Massieu's complaint. On February 28, 1996, United States District Judge Maryanne Trump Barry held that the court had jurisdiction, Section 241(a)(4)(C)(i) of the Immigration and Nationality Act ("INA")497 is void for vagueness, deprived Ruiz Massieu, and other aliens similarly situated, of the due process right to a meaningful opportunity to be heard, and was an unconstitutional delegation of legislative power.498

On July 29, 1996, the United States Court of Appeals for the Third Circuit reversed the order of declaratory and injunctive relief previously granted by the district court against the deportation of Mario Ruiz Massieu.499 Without reaching the

494. Id. (quoting from the transcript of Dec. 22, 1995 proceedings before Magistrate Judge Chester).
merits of the constitutional questions decided by the lower court (e.g., void for vagueness, violation of procedural due process, and an unconstitutional delegation of legislative power), the appellate court held that under Section 106(c) of the Immigration and Nationality Act the proposed deportee and plaintiff Mario Ruiz Massieu must exhaust available administrative remedies before initiating a federal court review of his claims.

Prior to the latter decision, the five adverse decisions on such an important case led to disappointment, befuddlement and anger on the part of the Mexican and United States Governments. The Mexican Government noted two potentially adverse tactical steps taken by the United States. The decision to try to have the second extradition request decided by a magistrate judge other than Magistrate Judge Hedges hardened the latter’s resolve and diminished his and perhaps the entire United States District Court for the District of New Jersey’s discretion in favor of the executive branches. The decision by the Office of the United States Attorney for the District of New Jersey to decline to represent the Mexican Government further in the proceedings and the replacement by two experienced and high-level attorneys offended the Government of Mexico. This implied that the most experienced and best personnel should have been assigned to this sensitive case from the outset.

Most importantly, the Mexican Attorney General’s office agonized over the fact that, even with proof that on the day of his resignation Ruiz Massieu took 800,000 pesos without authorization, the court still found insufficient probable cause. In addition, the Mexican Attorney General noted that, while the findings of Magistrates Hedges and Chesler were very different, both ultimately concluded the issue on insufficient probable cause.

The United States Government sought to deport Mario Ruiz Massieu, and it is expected that an immigration judge in Newark, New Jersey would rule by the end of May or the beginning of June 1997 on the Government’s deportation request. In March 1997, a federal jury allowed the United States Government to seize $7.9 million of a $9 million bank account from Ruiz Massieu after United States prosecutors said the money linked to drug trafficking activity. It is interesting to note that one constant factor present in the cases lost by the Mexican Government is that José Antonio “Tony” Canales, a United States defense counsel based in

500. 8 U.S.C. § 1105a(c).
501. Massieu, 91 F.3d at 421.
503. Id. at 16.
504. Id. at 14-15.
505. Id. at 17.
Houston and former Assistant United States Attorney, represented the relators.523

VII. BORDER STATE APPROACHES

Informal relations and the circumvention of the extradition treaty characterized extradition along the Mexican-United States border. Article IX of the 1899 extradition treaty between the United States and Mexico provided that, in cases of crimes committed in a border State of one country by an accused found in a border State of the other country, requests for the institution of extradition proceedings may be made by the chief executive of one State to the chief executive of the other.509 Diplomatic practice required the issuance of a formal request for extradition through diplomatic channels even in cases in which proceedings were instituted under Article IX of the 1899 Convention.510

In the United States, the conduct of most criminal investigations by municipal police, combined with the fact that many criminal offenses still do not fall under federal jurisdiction, resulted in more involvement by city and state police agencies throughout the United States in transnational travel and communication than ever before. This is especially true for city and state police forces located on the border.511

Relations along the Mexican-United States border are quite diverse, ranging from close and long-standing personal relationships overcoming bureaucratic requirements, to bitter antagonism and suspicions often stemming from corrupt and criminal behavior by the Mexican police.512 During the 1970s and 1980s, United States state and municipal police agencies near the Mexican border regularized and formalized their cross-border relations, in part by creating specialized liaison units to handle cross-border matters.513 Moreover, not only border cities instituted specialized units. In 1984, the Los Angeles Police Department established a Foreign Prosecution Liaison Unit in response to statistics indicating that approximately 100 of its 237 murder warrants named suspects of Mexican nationality.514

Cross-border law enforcement cooperation operates on a scale and level of familiarity unparalleled by transnational law enforcement relationships that occur at a distance. One factor contributing to the informality of relations between police on the Mexican-United States border is the jurisdictional and bureaucratic dis-

509. 1899 Extradition Treaty, supra note 20, at 1824-25, 1 MALLOY at 1184.
510. Whiteman, supra note 224, at 909.
511. NADELmANN, supra note 1, at 177-78.
512. Id. at 178.
513. Id.
514. Id. (citing Daryl F. Gates & Keith E. Ross, Foreign Prosecution Liaison Unit Helps Apprehend Suspects Across the Border, 57 POLICE CHIEF 153-54 (1990)).
tance between law enforcement agents in border locals and the central government. Police in border towns often do not desire to deal with federal authorities other than those stationed in the vicinity. When investigating a case or seizing a fugitive entails working the other side of the border, the police officer contacts counterparts across the border directly. When such contact is perceived as either unnecessary or potentially problematic, police officials periodically decide to act on their own to gain custody, notwithstanding any infringements on sovereignty. Unlike national agents, local police need not worry about accounting for their cross-border operations to a national headquarters with a keener sense of appropriate international behavior than the local or state police chief.515

United States border states also have special liaison units to facilitate either the extradition or prosecution of Mexican nationals suspected of serious crimes. For instance, in 1975 the California Attorney General established a Mexican Liaison Program in the Bureau of Investigation of the California Department of Justice. The Attorney General authorized special agents of the California Department of Justice to travel into Mexico to confer with Mexican authorities and establish guidelines and procedures in accordance with the laws of Mexico to facilitate locating and prosecuting fugitives in Mexico.516

When a suspect of Mexican nationality is located in Mexico, the concerned law enforcement agency in California can contact the Mexican Liaison Unit and request assistance in filing a foreign prosecution. The district attorney with jurisdiction over the county where the offense was committed must authorize and approve the filing of the case in Mexico.517

The requesting police agency submits the completed investigative package to the unit for review and compliance with Article IV518 requirements in Mexico. All documents must be translated into Spanish. The case is then submitted to the Mexican Consulate in the area where the crime was committed for legalization of the English portion of the material. The Ministry of Foreign Affairs in Mexico also performs additional legalization.519

515. Id. at 180-81.
517. See id. at 478 (citing the state regulations).
518. Article IV of the Mexican Federal Penal Code provides the Mexican Federal Judiciary System with the legal means to prosecute criminal suspects for crimes committed in a foreign country. Basic requirements for prosecution are: either the suspect or the victim is a Mexican citizen; the suspect is located in the Republic; the defendant has not been tried and convicted or tried and acquitted in the country in which he committed the offense; and the offense for which the person is charged constitutes an offense in both the foreign country in which the crime was committed and in the Republic of Mexico. MEX. CONST. art. 4.
519. NAFTA Hearing, supra note 513, at 478.
When these procedures are completed, the California Mexican Liaison agent travels to Mexico to present the case to the Mexican Federal prosecutor of the state where the suspect is located for judicial processing and eventual prosecution. A prosecution in Mexico bars all future prosecution by California or by another government (i.e. the United States Government) on these charges. Occasionally one or more representatives from the requesting agency accompanies the California agents to Mexico to assist in presenting the case to Mexican authorities.523

From 1975 until early 1992, the California Department of Justice paid for all expenses related to foreign prosecution. Thereafter, the requesting agencies assisted in defraying travel, lodging, legal costs, etc. The maximum estimated cost, if shared with another participating agency, is $600 per agency. The California Department of Justice also pays salary and overtime for the United States agents.521

Statistics compiled for the period 1981 to September 1993 revealed the following information:

1. Total number of Article IV's filed: 149
2. Number of convictions obtained to date: 29
3. Number of acquittals to date: 4
4. Number of fugitive warrants still outstanding: 116522

Of the 149 cases filed in the Republic of Mexico, approximately 95% (141) were homicides. The remaining 5% (eight) were for rape, mayhem, vehicular manslaughter, and attempted murder.523

No statewide data exists as to the number and types of crimes allegedly committed by Mexican nationals fleeing to Mexico to avoid prosecution, however, an informal survey obtained from police personnel from the City of Los Angeles and the City and County of Fresno, California exists. Fresno County reports that each year a large percentage of robberies and homicides are committed by criminals, fleeing to Mexico to avoid arrest and prosecution in the United States. Some large United States metropolitan areas experience problems with Mexican nationals suspected of committing major crimes and fleeing the jurisdictions. It was estimated that in the City of Los Angeles approximately five percent of the criminals sought for violent crimes fled to the Republic of Mexico. Many of the fugitives are Mexican citizens prosecuted in Mexico for crimes committed in California. Essentially more than ten percent of all violent crimes in the Fresno area can be attributed to such fugitives, many of whom could be prosecuted in Mexico.524

The Mexican Liaison Unit helps to coordinate many conferences and meetings between Mexican and United States officials. The conferences are intended to ex-

520. Id.
521. Id.
522. Id.
523. Id.
524. Id. at 489-79.
amine ways to strengthen communications among the two countries in the areas of drug trafficking, auto theft, homicides, and missing persons.  

With the above-mentioned activities and its limited resources, the Unit is limited in enforcement activities. The majority of the cases accepted for foreign prosecution are related to homicides. The addition of new personnel and resources could enable the Unit to expand and assist in the foreign prosecution of other crimes of violence, including rape, robbery, kidnapping, gang related activities, drive-by shootings, child molestations, aggravated assaults, etc. Until now, foreign prosecution has rarely been sought unless the crime is associated with a homicide. Special Agent Mercado of the California Department of Justice believes that consideration should be given to establishing a Mexican Liaison Task Force consisting of federal, state, and local officers to pursue foreign and especially Mexican prosecution matters.

Despite the comparatively informal and close working relationship of law enforcement officials along the border, the sheer number of law enforcement and arrest/extradition cases sometimes mirrored the problems between the central governments, including kidnappings. For instance, the Mexican Government frequently complained about kidnappings of its nationals by the Texas Government. Several months after the Alvarez-Machain case, the Mexican Government filed a formal protest over the kidnapping of Héctor Morales and Omar Ayala, residents of Palau in the Mexican state of Coahuila, wanted for the April 1989 murder of a seventy-nine year old woman stabbed more than thirty times during the robbery of her home in Beaumont, Texas. In addition, the sheer number of law enforcement transactions, the frequent amount of meetings and communications between law enforcement, and the blurring and assimilation of cultural traditions led to greater acceptance and a higher incidence of informal cooperation between border enforcement agencies.

VIII. NEW APPROACHES TO THE EXTRADITION OF NATIONALS: SPECIAL PROCEDURE IN MEXICO TO PROSECUTE NATIONALS COMMITTING SERIOUS CRIMES ABROAD AND THE INCREASED EXTRADITION OF NATIONALS

A longstanding source of tension between the United States and Mexico is the prohibition against extraditing nationals in Article IV of the Mexican Constitution. As a result, as mentioned in the preceding section, many areas in the United

525. Id. at 478.
526. Id.
527. Id.
States along and near the border encountered numerous cases of murder and serious violent crimes involving suspected Mexican nationals believed to be in Mexico. The problem of the inability to reach Mexican nationals suspected of serious violent crimes became a cause celebre threatening the fragile coalition for the ratification of NAFTA in the United States Congress. For instance, hearings on the ratification of NAFTA focused on two high profile cases, the cases of Serapio Zúñiga Ríos and Juan Navaro Lerma.

A. THE CASE OF SERAPIO ZÚÑIGA RÍOS

Serapio Zúñiga Ríos, from Loma Linda, Mexico, was suspected of kidnapping a four and one-half year old girl from her bed at home, molesting her, and leaving her hanging in a blanket tied to a tree on September 14, 1992. He was charged with kidnapping, two counts of child molestation, including rape and sodomy, burglary, assault with a deadly weapon, and infliction of great bodily injury during the commission of the sex crimes.

Sheriff Cois Byrd, County of Riverside, State of California, testified that an arrest warrant issued for Zúñiga Ríos on September 29, 1992, and that the State unsuccessfully sought the extradition of Zúñiga Ríos to stand trial for the crimes. Byrd explained that his office had strong physical evidence corroborating statements taken from the victim leading his office to believe Ríos is the prime suspect in the case. He stated that he knew of no instances where the United States successfully extradited wanted persons from Mexico to stand trial. There were ten other cases of which he was aware that involved arrest warrants for Mexican nationals, most involving murder charges. According to Byrd, his office pursued prosecution in Mexico under Article IV shortly before his testimony, but was not aware of any progress.

Congressman Clay E. Shaw, Jr. testified that, because of the cumbersome, inefficient nature of the extradition process, the extradition papers were not formally submitted to the Mexican Government until June of 1993, nine months after the crime. Meanwhile, the victimized family paid thousands of dollars to a private investigator to locate Ríos, found living with his family in Mexico. If an efficient extradition process existed when the crime occurred, and decent cooperation existed from the Mexican Government, Ríos would have been brought to justice by now.

The girl's mother (identified only as "Susan") testified that tremendous turf

531. See NAFTA Hearing, supra note 513, at 479-81.
532. Id. at 479.
533. Id.
534. Id. at 479-80.
535. Id. at 480.
536. Id.
problems existed among county, state, and federal authorities on the case. Even
after the involvement of members of Congress and the delivery of a letter signed
by forty-eight members of the United States Congress to President Salinas on Oc-
tober 22, 1993, asking for the extradition of Ríos, no progress occurred. The lack
of action on an official level with extradition resulted in the family hiring a pri-
vate detective for $25,000 to locate Zúñiga Ríos and monitor him so that he could
be located and arrested once the extradition paperwork was complete. In Novem-
ber 1992, Zúñiga Ríos was located at the home of his parents in Loma Linda,
Mexico where his wife and two daughters reside. He remained in that vicinity un-
til July 1993. The mother was told that for an additional $30,000 Zúñiga Ríos
could be delivered to the United States authorities. For five of those months, she
said, the Mexican authorities knew of the crime and the whereabouts of Zúñiga
Ríos, but chose not to pursue him.\footnote{537}

The mother stated that she could have pursued Article IV prosecution instead
of extradition. The Office of Foreign Prosecution told her, however, that more
than likely this case would not be prosecuted under Article IV because most of
those prosecutions are reserved for murder cases. In addition, the Mexican Gov-
ernment could not use either DNA evidence or the laser photographs of the teeth
marks.\footnote{538}

Despite the existence of an arrest warrant, the INS, unaware of the arrest, ap-
proved Zúñiga Ríos for his permanent residency status.\footnote{539} When the mother con-
tacted the FBI for assistance in September 1992, the FBI responded that the case
did not fall under its jurisdiction and thus refused involvement. In July 1993,
however, it decided to become involved after encouragement from Congressman
George Brown’s office. Thereafter, the FBI filed a federal arrest warrant for
Zúñiga Ríos for fleeing the United States to avoid prosecution.\footnote{540}

The Mexican Government only started to respond due to the involvement of
Congressmen Shaw, Brown, and Calvert and their letters to the Justice Depart-
ment, as well as the pendency of the ratification of NAFTA. Even then, the Mexi-
can Government only seriously responded after the case was brought to the atten-
tion of Mexican President Salinas by then Secretary of State Warren Christopher
and Ambassador Jones.\footnote{541} On December 17, 1993, the Mexican Government an-
nounced it arrested Zúñiga Ríos in connection with the above case.\footnote{542}

B. THE CASE AGAINST JUAN NAVARRO LERMA

Antonio Manriquez, husband of the murder victim, testified about the difficulty
in bringing to justice Juan Navarro Lerma, also known as Juan Maciel Lerma,

\footnotesize{537. \textit{Id.}} \footnotesize{538. \textit{Id.}} \footnotesize{539. \textit{Id.}} \footnotesize{540. \textit{Id.}} \footnotesize{541. \textit{Id.}} \footnotesize{542. \textit{Id.}}}
who on February 14, 1993 murdered his wife Ignacia Moreno Manriquez in the
parking lot outside Loma Linda Medical Center in Loma Linda, California. Ignacia and her son had been treated at the hospital for the flu. Juan Navarro had been lying in wait to murder her and took Juanito Jr., their four year old child, with him, only to return him approximately two weeks later. The crime left the three children, Anabel, eleven, Lucia, eight, and Juanito, Jr., four, orphans.543

In August 1993, Manriquez spoke to Detective Brown, head of the sheriff's office in San Bernardino. Brown said that he had leads and that Navarro was in Mexicali, Baja California, Mexico. Manriquez stated, however, that he was the one who told Brown of Navarro's location after Manriquez personally visited Mexicali to ask for help from the authorities there. Brown's answer was that they needed an arrest warrant in Mexico, but that in so doing, the United States lost its rights to try him in a United States court.544

Manriquez stated that he asked for assistance from any and all government agencies that he believed might have some sort of jurisdiction in the case—Congressmen in California and Washington; the INS in Calexico, California; the Mexican Consulate in San Bernardino, California; President Clinton; and the President of Mexico.545

Manriquez stated that Navarro is a fugitive living in Mexico under the alias of "Paco". The Mexican authorities cannot apprehend him without orders from the United States, and for reasons beyond Manriquez' comprehension, the United States authorities will not send this order.546

C. EFFORTS BY MEXICAN GOVERNMENT TO STRENGTHEN EFFORTS TO PROSECUTE MEXICAN NATIONALS ACCUSED OF VIOLENT CRIMES IN THE UNITED STATES

Coincident with the controversy over the inability to gain custody or prosecute Mexican nationals suspected of violent crimes in the United States and the threatened blocking of NAFTA's ratification, the Mexican Government improved its efforts. These efforts to accommodate such prosecutions did not start suddenly in December 1993.547 It has been an ongoing process.548 For instance in August 1990, the Mexican Government agreed on an expedited procedure to charge Mexican citizens accused of crimes in the United States. After the United States files a copy of the charges with the Mexican Embassy in the United States, the Mexican Government then prosecutes the case in Mexico. In November 1990, Mexico initiated the first prosecution under the new procedure.549

On December 17, 1993, the Mexican Office of the Attorney General an-

543. Id. at 481.
544. Id.
545. Id.
546. Id.
547. Id.
548. Id.
549. For further discussion, see Zagaris, supra note 526, at 411.
nounced that agents of the Federal Judicial Police ("FJP") arrested Serapio Zúñiga Ríos on December 15, 1993 in accordance with the arrest warrant issued against him by the Judge for criminal matters of the Seventh Federal District. The FJP detained Zúñiga Ríos in the Mexican State of Querétaro for his alleged role in perpetrating the crimes of rape, sexual abuse, illegal deprivation of freedom, and bodily injury. The Mexican Office of the Attorney General issued an arrest warrant on the basis of Article IV of the Penal Code for the Federal District, requiring that crimes committed by a Mexican citizen abroad be penalized.

On March 3, 1993, the Office of the Attorney General of Mexico received a request from the Sheriff of Weld County, Colorado, for the detention and trial in Mexico of the persons charged with the murder of United States citizens José Juan Lara and his wife Aurelia Durán Lara. The couple was carrying the payroll for the agricultural workers employed at the farm managed by Lara, when six Mexican men allegedly intercepted their car and murdered them. Alberto Matías Martínez was arrested in the United States and sentenced to life in prison for his participation in the crime. The other five suspects fled to Mexican territory. Thereafter, Mexican authorities started to investigate the events, pursuant to the United States request.

On October 19, 1993, a Federal Judge in the Mexican State of Hidalgo issued a warrant of arrest against David Zamudio, Antonio Martínez, and Víctor Badillo. They were captured on November 21, 1993. On the same day Mexican authorities obtained information leading to the location and arrest of the two other suspects. On November 25, 1993, Efrain Castillo was arrested and confessed to having murdered the other suspect, Benigno Cerón Flores.

To assist United States prosecutors in ensuring the successful prosecution of cases in Mexico, the Mexican Attorney General's Office prepared a memorandum on domestic prosecution and evidentiary rules in Mexico. It discusses the requirements to convict a person in Mexico, including the type and kind of evidence required in the following cases: homicide; rape; drug-related cases; fraud and breaches of trust; tax crimes; firearms and explosive crimes; and criminal association. The memorandum assists United States prosecutors in determining the types of evidence a Mexican prosecutor needs to prosecute the crimes covered. The Mexican Attorney General's Office also prepared an English translation of the Mexican rules of evidence from its Federal Criminal Prosecutorial Law of Evi-

551. Id. at 9.
553. Id.
554. MIGUEL A. MÉNDEZ, DOMESTIC PROSECUTION AND EVIDENCE REQUIRED IN MEXICAN CRIMINAL CASES, (Embassy of Mexico to the United States, Nov. 1995).
The Mexican Office of the Attorney General tried to centralize more of the oversight of Article IV prosecutions by monitoring such cases. It receives and assigns the evidence required to prosecute Article IV cases to the prosecutors in the field. Monitoring may also enable the Office to identify and help resolve difficulties in problem cases. In addition, monitoring enables the Office to respond to the inevitable political questions that often flow from the handling of these cases.\(^{555}\)

Supplementing the memorandum of the Mexican Attorney General’s Office, United States state attorney general’s offices and other state law enforcement agencies on the border prepared their own memoranda and guides on prosecuting cases in Mexico.\(^{557}\)

D. NEW EXTRADITIONS OF MEXICAN NATIONALS

On April 26, 1996, in a move signifying the start of a new practice departing from the long-standing practice against extraditing its nationals, the Mexican Government granted the United States extradition requests for two Mexican nationals, Francisco Gámez García, alias “Frankie,” and Aarón Morel LeBarón.\(^{558}\)

In the case of Francisco Gámez García, an Arizona state court already found him guilty of crimes of sexual abuse and sexual conduct with a minor. Gámez García was on provisional release when becoming a fugitive.\(^{559}\)

Mexico granted extradition on the basis of the 1978 extradition treaty preventing acts from being punished more than once under the general principle of criminal law known as non bis in idem. The principle is set forth in the provisions at Article 23 of the Mexican Constitution and Article 6 of the extradition treaty. As a result, Gámez García cannot be extradited in Mexico under the provisions of Article 7 of the Mexican Law on Extradition because of the adjudication of his case in Arizona.\(^{560}\)

Gámez García manifested his willingness to be sent to the United States as soon as possible to face the charges pending in the Arizona court and decided not to exercise his right to initiate an amparo against the extradition. As a result, he

\(^{556}\) Interview by Bruce Zagaris with Mary Troland, Deputy Director, OIA, Crim. Div., U.S. Dep’t of Just. (Aug. 28, 1996) [hereinafter Troland Interview].
\(^{557}\) Id.
\(^{558}\) Id.
\(^{559}\) See id. (discussing Gámez García’s guilty verdict for acts occurring in September and October 1993, when he sexually abused a minor as a guest in the minor’s house); discussion supra Part VII.A.
\(^{560}\) Id.
was delivered to the United States on April 17, 1996. The Mexican Government justified extraditing Gámez García, although a Mexican national, because he had already been sentenced.

In the case of Aarón Morel LeBarón, Mexico granted extradition under the treaty in connection with criminal charges pending in United States District Court in Houston, issuing an arrest warrant in connection with conspiracy to commit murder and participation in a racketeering and corrupt influenced organization ("RICO").

The allegations are that since 1968, LeBarón has been a director of a sect known as the Church of the Primigenial Lamb of God. Among the edicts of the sect is the murder of any member deciding to abandon the sect. In this connection, LeBarón allegedly ordered the murders of Duane K. Chynoweth, Mark Chynoweth, Ed Martson and Jenny Chynoweth, an eight year old girl. The homicides occurred on June 27, 1988 in Houston and Irving, Texas.

The Mexican Ministry of Foreign Affairs decided to grant extradition in conformity with the extradition treaty, taking into consideration the opprobrious nature of the crimes and their extremely grave effects on the fundamental values of society. In addition, the United States Government classified LeBarón as a United States national, based on the United States citizenship of both his father and mother. The question of the status of LeBarón’s nationality facilitated extradition by Mexico.

Mr. Morel LeBarón did not invoke the right of amparo against the order granting extradition. Hence, under the provisions of the last paragraph of Article 32 of Mexico’s Law on International Extradition, on April 25, 1996, Mexico delivered him to the United States.

In 1995, the Mexican Government expelled to the United States Juan Chapa García, a Mexican national indicted in the U.S. for alleged organized crime activities concerning illicit narcotics trafficking. The two cases, along with the decision to hand García Abrego over to the United States, indicate that the Mexican Government is beginning to extradite more frequently and otherwise surrender its nationals to the United States.

561. Id.
562. Troland Interview, supra note 553.
564. Id.
565. Id.
566. Id.
567. Troland Interview, supra note 553.
IX. ANALYSIS AND PROSPECTS FOR STRENGTHENING EXTRADITION AND OBTAINING CUSTODY OF ALLEGED CRIMINALS

In the short and long term, future globalization, free trade, and other factors guarantee a rise in crossborder criminality and will exert pressure on extradition. The political pressures for extradition or prosecution of perpetrators of transborder criminality requires analysis and prospects for strengthening extradition and obtaining custody of alleged criminals.

A. A MEXICAN PERSPECTIVE

A fundamental problem for the Mexican Attorney General’s Office is that United States extradition law relies heavily on case law, thereby requiring Mexican attorneys to pay attention and constantly update extradition jurisprudence and case law for the judicial circuit with jurisdiction over a particular extradition request. In criminal law, the United States uniquely concedes to fugitives the facility of opposing or appealing definitive resolutions of extradition. Of particular difficulty is the potential that federal extradition decisions, while subordinate to the United States Constitution and federal laws and treaties, can invalidate a federal law or treaty if the court finds a decision unconstitutional.\(^{568}\)

Another perceived difference is that the United States criminal system allocates unique and exclusive power to the judicial authority, precluding the executive branch’s ability to alter, modify, or appeal judicial determinations, especially when a court makes a decision contrary to the existing extradition treaty.\(^{569}\) The Mexican Attorney General’s Office is especially troubled by the difficulties of fulfilling the provisions of Articles 3 and 13 of the extradition treaty when it requests extradition:

(a) Article 3 Evidence Required: “Extradition shall be granted only if the evidence be found sufficient, according to the laws of the requested Party, either to justify the committal for trial of the person sought if the offense of which he has been accused had been committed in that place or to prove that he is the person convicted by the courts of the requesting Party.”

(b) Article 13.1 Procedure: “The request for extradition shall be processed in accordance with the legislation of the requested Party.”

These provisions give the United States courts complete discretion to evaluate the evidence that sustains an extradition request and enable them to invade the sphere of competence of Mexican courts. The requirement practically obligates Mexican prosecutors not only to know and apply its own national law, but also to

\(^{568}\) José Ignacio Rodríguez García, La Extradición en las Relaciones Bilaterales México-Estados Unidos de América (Extradition in Bilateral Relations Mexico-U.S.) 3-4 (undated, but prepared in the Mexican Attorney General’s Office in spring 1996).

\(^{569}\) Id. at 5.
pay attention to and include United States criminal procedure, particularly the requirements of probable cause. The latter requirement is viewed as complex and elusive.

The verification of probable cause is a requirement whose origin comes from a constitutional mandate with a superior priority to the treaty. Hence, it is fundamental that the prosecutors make formidable arguments to persuade the judge of its existence. In comparison, the provisions of Title 8 of the Mexican Federal Code of Criminal Procedures require the Mexican prosecutor to verify the existence of the body of the crime and presume guilt. To the contrary, in the United States the verification of probable cause is sustained primarily in case precedents and not in the criminal procedure code. In summary, the criteria to determine if the elements for deciding whether evidence sufficient to justify extradition exists differ between Mexican and United States courts. The comparatively tougher extradition standards in the United States require strengthening the training, resources, and ability of attorneys in the Mexican Attorney General’s Office, especially in United States law, comparative, and international law.

The Mexican Attorney General’s Office believes that, while, upon receipt of an extradition request, it presents to the court the request and evidence required by its legal system, the United States Attorney General’s Office (Office of International Affairs) only presents the request and accompanying evidence as elaborated by the Mexican authorities. The United States does not identify and rectify errors and omissions prior to presenting the extradition petition as its Mexican counterparts do pursuant to the provisions of Article 20 of the Mexican International Extradition Law. The United States thereby violates the principle of international reciprocity and the requirements of Article 10(2) of the Mexican International Extradition Law.

The Mexican Attorney General’s Office is also considering hiring American lawyers specialized in extradition, criminal law, and criminal procedure and considering the negotiation of a protocol.

B. A UNITED STATES PERSPECTIVE

The United States publicly lobbied for a new extradition treaty containing modernized provisions that reduce the opportunities to refuse extradition requests. For instance, on July 11, 1996, following a two-day conference of anti-drug officials, United States drug czar General Barry McCaffrey called for a new extradition treaty as part of a five-year plan to combat drug trafficking. As suggested by Enrique Mercado, a special agent in the California Department of Justice's

570. Id. at 5-7.
571. Id. at 8.
572. Id. at 9-10.
573. Id. at 11.
Mexican Liaison Program, consideration should be given to establishing a Mexican Liaison Task Force consisting of federal, state, and local officers to pursue foreign and especially Mexican prosecution matters.

Most importantly, from a substantive perspective the United States wants to revise the provision on extradition of nationals, emulating some of its recently concluded extradition treaties. The United States experience with "domestic prosecutions" demonstrates that they are woefully ineffective and inefficient in practice. Evidence collected in the United States often cannot be transferred to Mexico for effective use in trial because rules of evidence differ or other technical, legal, or procedural differences interfere. Witnesses and victims are often unable or unwilling to travel to Mexico to participate in judicial proceedings whose language and procedures they may not understand.

In this regard, Article III of the proposed United States-Bolivia extradition treaty requires and authorizes the extradition of Bolivian nationals for certain listed serious offenses, while allowing the Bolivian Government to exercise discretion in the decision to surrender citizens sought for more minor crimes. The list of offenses deemed serious enough to warrant extradition of nationals on a consistent basis includes murder or manslaughter, kidnapping, rape, sexual offenses involving children, armed robbery, drug trafficking, fraud or counterfeiting, terrorism or organized crime activity, trafficking in archeological treasures, and other crimes punishable in both countries by at least ten years' imprisonment.

Countries, other than Bolivia, undertaking to extradite nationals to countries reciprocating include Italy, Guatemala, Chile, and Uruguay. Argentina is reevaluating its position.

The United States wants to clarify the procedures for "provisional arrest," the process by which a fugitive in flight can be detained while the documents in support of extradition are prepared. The United States wants to supplant the list of extraditable offenses with an agreement that an offense is extraditable if it is punishable under the laws of both parties by deprivation of liberty for a minimum period of more than one year or by a more severe penalty. The United States believes that such a list, as the one included in the treaty with Bolivia, grows increasingly out of date as time passes.

577. See id. at 2.
578. See id. at 2.
579. Id.
580. See id.
The United States also wants to supplant the current provisions on lapse of time, which state that extradition will not be granted when the prosecution or the enforcement of the penalty for the offense for which extradition is sought has been barred by lapse of time according to the law of the requesting or requested state. Instead, current United States extradition practice is to apply the extradition treaties retroactively; that is, they apply to offenses committed before and after the date the treaty enters into force and to cases still pending at the time of its entry into force.

C. OTHER PERSPECTIVES

A difficult impediment to successful extradition relations is the view by Mexicans that the United States tramples on its sovereignty and violates its law. The ways to overcome this barrier, while not compromising the need to apprehend and prosecute fugitives, appear to be: (1) a legally binding commitment by the United States Government that it respects Mexican sovereignty and does not abduct persons in Mexico; (2) a continued strengthening of the resources and procedures whereby Mexico submits for prosecution persons wanted for serious crimes in the United States; (3) consideration of amending its law to extradite certain persons, including nationals, to the United States; (4) strengthening inter-Parliamentary and executive branch cooperation between the two governments; and (5) the establishment and development of a regional crimes organization to assist in resolving some of the most difficult and intractable criminal justice problems between the two governments.

Bilateral enforcement mechanisms between the United States and Mexico are already useful in identifying and providing a mechanism to resolve controversies in extradition and strengthen the operation of extradition cases. They also strengthen the operation of domestic prosecution (e.g. under Article IV of the Mexican Constitution) and the use of mutual assistance procedures when domestic prosecution is used. Bilateral enforcement mechanisms include, inter alia: periodical meetings between the respective Attorney General Offices to discuss extradition and Mutual Legal Assistance Treaties ("MLATs"); the state attorneys general border conferences held twice a year; high-level inter-agency binational conferences, in which the Attorneys General and Ministry of Foreign Affairs/State Department participate; Inter-Parliamentary meetings; and starting in February 1995 an unprecedented series of law enforcement plenaries and a host of working group meetings stemming from the plenaries. Among the topics regularly discussed are extradition and related fugitive issues, counternarcotics cooperation, prisoner transfer, money laundering, arms smuggling, and white collar crime.

Dep. Legal Advisor, Dep't of State) [hereinafter Borek Testimony].

582. Mexico-U.S. Extradition Treaty, supra note 53, art. 7.
583. See Borek Testimony, supra note 581, at 6-8.
584. Id.
585. Id.
To close gaps in the operation of extradition agreements some countries have shifted in criminal law jurisdiction, focusing on institutions superior to individual states,\(^5\) so that rather than speaking of "international," experts refer to supranational law and institutions.\(^2\) Regionally, in the context of integration, supranational institutions include the Council of Europe\(^2\) and the institutions of the European Community, which adopt directives and other instruments concerning matters such as criminalization of money laundering, customs, and immigration violations, anti-drug policy proposals, and the development of a European Police Force ("Europol").\(^3\) Indeed, an ongoing mechanism to help resolve controversies over extradition and constantly strengthen extradition in the context of overall criminal and law enforcement cooperation would be a permanent and intensive regional organization or group that supplements and facilitate cooperation and could help resolve controversies when they arise. Examples of such groups are the European Committee on Crime Problems within the Council of Europe and the Europol within the European Union.

Extradition is only one of several United States-Mexico criminal cooperation mechanisms. Others include mutual legal assistance, transfer of prisoners and execution of penal sentences, and various mini-or sectoral-agreements such as cooperation in drugs, tax, customs, commodities futures regulation, and enforcement. In the medium and long-term, the Mexican and United States Governments should consider constructing a framework to deal comprehensively with not only extradition, but a wide range of criminal issues.\(^4\) The most efficient structure would probably include a regional organization, such as an Americas Committee on Crime Problems to meet with the Assistant Ministers of Justice to provide political direction. Their meetings would be on a regular basis to discuss and take action and cooperate on procedural matters, such as mutual assistance, extradition, and transfer of prisoners, and substantive criminal matters, such as drugs, money laundering, customs, and a panoply of criminal justice problems.\(^5\)

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587. See generally Peter Hay, Federalism and Supranational Organizations (1966); Forest L. Grievs, Supranationalism and International Adjudication (1969).

588. For a discussion of the efforts and differences in trying to resolve transnational criminal problems on the national level, such as through expansion of extraterritorial jurisdiction, as well as internationally (e.g., improving interstate cooperation) and supranationally, see Principles and Procedures for a New Transnational Criminal Law (Albin Eser & Otto Lagodny eds., 1992).


590. For a discussion of international criminal cooperation in Western Europe, see id.


592. See Bruce Zagaris, Constructing a Hemispheric Initiative Against Transnational Crime, 19 FORDHAM INT’L L.J. 1888, 1898-1902 (1996). For an earlier account and international organization theory, see Bruce Zagaris & Constantine Papavizas, Using the Or-
X. CONCLUSION

The two governments, universities and think-tanks with Mexican-United States studies, and international criminal law programs, should stimulate research and discussion on the above issues. Politicians should start the consultative process as well, so that political proposals receive consideration by citizens in the two countries. Shaping the course of relations between the two governments and the Western Hemisphere as a whole, will test the ability of law to contribute positively to the dynamic change that is inevitable in this hemisphere. The sheer number of extradition cases between the two countries and the political significance of many of the cases make United States-Mexican extradition relations of immensely important for the region and even the Western Hemisphere.

The new efforts at integration in the hemisphere, especially the Free Trade Area of the Americas ("FTAA") movement and the various subregional integration efforts, including NAFTA, reflect the impact of globalization and the new regionalism. The goals of regional cooperation changed from those of import substitution, integration of production, and collective self-reliance to those of solidifying domestic reforms and ensuring future access to the larger North American and global markets to stimulate growth through increased foreign investment, greater competition, and more rapid diffusion of technology. The new direction of existing and proposed integration has an increasing criminal and enforcement component.

The position taken by Jamaica and the other small countries of the Caribbean suggests the emergence of a subregional integration movement as a basis for collective negotiated access for the Commonwealth Caribbean countries to the larger North American market, most likely in coordination with the countries of Central


593. For example, the Center for Strategic and International Studies has provided private and public for discussions by the Mexican Attorney General on Mexican-U.S. drug and criminal cooperation.


596. See Axline, supra note 595, at 208.
To the extent the new regionalism includes criminal cooperation, the countries in the region will want to conform their laws and policies to this criminal cooperation.

The role of Mexico in the new regionalism has been enhanced by its initiation of NAFTA and its key role in NAFTA. The dynamic of Central Americans going to Mexico over the decades for schooling in a wide variety of disciplines ranging from the social sciences, arts, and medicine to the military, with Central American officers receiving training in Mexico's War College, reflects the rich confluence between Central America and North America.

Nevertheless, traditional relations between Mexico and Central America are characterized by an attitude of certain mutual ambivalence and certain distrust. Traditionally, Central American views of Mexico demonstrated certain similarities with the apprehension Mexicans have towards the United States. Mexico's rich and engaging culture, its social history, and the political stability brought about—at least until recent years—by the centralized and semi-authoritarian nature of the still PRI-dominated political system attracted the admiration of some Central American countries. They have seen the postrevolutionary Mexican regime as a model of social change and political order. Central Americans also often resented their perception of Mexico's sporadic attempts to establish a base of influence in the region and to take unfair advantage of its Central American neighbors.

The most likely short-term scenario for Central American-Mexican-United States relations is that the key element will be the formation of a North American economic bloc and the strengthening of conservative positions in Central America, especially in the economic sphere. Hence, Central American-Mexican and Central American-United States bilateral relations would be modified through a United States-Mexican-Central American intermediation that would no longer be triangular, but linear.


600. The triangular perspective refers to the differences that the three actors (the United States, Mexico, and Central America) have in their interests and how foreign policy is reflected in these historical differences. Mexico's policies, behavior, and attitudes toward the region have always respected the autonomous decisions of each of the countries and have been a positive influence in terms of their national goals, even though Central America has not been Mexico's first priority and Mexico does not have the power or influence that the United States enjoys in the region. H. Rodrigo Jauberth, *Introduction, in The Difficult Triangle, supra* note 598, at 5.
A variation of the scenario consists of a drift toward a certain homogenization of the foreign and criminal policies of Mexico and the United States, at least as far as Central America is concerned. Mexico’s participation in this regard tends to become “depoliticized” and assumes an economic bias. Insofar as criminal cooperation and policy is concerned, however, the importance of the similarity of Mexican-Central American legal and cultural systems, especially in criminal law and procedure, and the gradual harmonization of Mexican-United States criminal law, especially insofar as they are covered by NAFTA (e.g. intellectual property protection, customs, and to a lesser extent, the environment), provides an opportunity for United States-Mexican leadership and/or intermediation with respect to Central America and the rest of the hemisphere. Until now, aside from United States-Mexican and other bilateral relations, the story of criminal justice harmonization in the Americas is virtually synonymous with United States efforts to harmonize drug control efforts in the hemisphere. The asymmetrical nature of criminal justice harmonization in the Americas contrasts greatly with harmonization in Europe. Criminal justice officials in Latin America dealt with other criminal justice matters in an ad hoc manner, but generally displayed little interest in the sorts of multilateral and intensive bilateral initiatives and institutions found in Europe.

Clearly, if governments and international organizations want to keep pace with transnational criminals and the dynamic changes offering new opportunities for

601. THE DIFFICULT TRIANGLE, supra note 598, at 164.
603. For a discussion of criminal procedure in Latin America, see KARST & ROSENN, supra note 173, at 56.
crossborder crime, they need to become more dynamic themselves and deal more comprehensively with international criminal cooperation and crime policy. In this new enforcement cooperation paradigm, extradition policy should be strengthened.
EXTRADITION REQUEST TO THE MEXICAN GOVERNMENT
EXTRADITION REQUEST TO THE UNITED STATES
MEXICAN EXTRADITION PRACTICES

EXTRADITION REQUEST TO THE MEXICAN GOVERNMENT

1. Requesting State

   Expresses intention to present formal extradition petition and requests provisional
detention of the suspect to the Foreign Affairs Ministry

2. Foreign Affairs Ministry determines if request is admissible

   NO
   Requested State is notified

   YES
   Foreign Affairs Ministry notifies the Attorney General's Office

   Attorney General's Office submits the district judge
   the provisional detention of the suspect


   Local federal prosecutor carries out
   provisional detention order

   Suspect before district judge

   Suspect has a right to a hearing, a defense and counsel

   Formal extradition request must be
   presented within 60 days

   Submitted

   No submitted
   Suspect released

   Foreign Affairs Ministry evaluates formal extradition petition together
   with appropriate translated-legalized documentation

   If found admissible, Foreign Affairs Ministry transmits extradition
   petition to the Attorney General's Office

   A

   Not admissible

   B
At time of request, the Foreign Affairs Ministry notifies the requesting State to submit an extradition petition to the district judge. The petition must be received within 60 days. The district judge issues an arrest warrant and seizes papers, money, and any objects related to the crime — if solicited by the requesting State. The suspect has the right to present permissible exceptions that must be proven within 20 days. If the district judge upholds the request, the suspect is informed of the content of the extradition petition and accompanying documents. The suspect may raise permissible exceptions that must be proven within 20 days. The district judge evaluates the evidence presented by both parties. The suspect accepts extradition, and the district judge issues an order for extradition. The Foreign Affairs Ministry decides on the extradition request within 20 days upon receipt of the court's opinion. If the request is denied, the suspect is notified of the denial and has the right to seek ordinary relief within 5 days. If the request is granted, the suspect is notified of the decision and is given 30 days to seek extraordinary relief. If the request is rejected, the suspect is notified of the denial and is given 30 days to seek extraordinary relief. If the request is referred to the Attorney General's Office for further review, the process begins again. If the request is referred to the Supreme Court, the Attorney General's Office is notified of the decision.
Foreign Affairs Ministry notifies requesting State

Foreign Affairs Ministry orders delivery of suspect

Foreign Affairs Ministry notifies of extradition decision to:

The Interior Ministry

The General Attorney's Office

General Attorney's Office coordinates with requesting State the date and place of delivery of the suspect

The delivery is made through the Attorney General's Office

Suspect must be removed no later than 60 days after approval of extradition request

Extradition carried out within 60-day period

Suspect released

END
EXTRADITION REQUEST TO THE UNITED STATES GOVERNMENT

- Judge
  - Notifies local federal prosecutor of sentence or apprehension order of suspect
  - The Attorney General’s Office is informed of the judicial decision
  - The Office of International Affairs at the Attorney General’s Office initiates the extradition proceedings
  - Formal extradition request and translated-legalized documents are submitted through diplomatic channels
  - Foreign Affairs Ministry delivers petition to competent authorities of requested State
  - Informs the requesting State (Mexico)

- State accepts or rejects petition
  - NO
  - YES

- Requested State informs Mexico’s Foreign Affairs Ministry of its decision
  - Foreign Affairs Ministry informs the Attorney General’s Office
  - Attorney General’s Office, via the Foreign Affairs Ministry, determines with the requested State the place and date of delivery of the suspect
  - Delivery of suspect orchestrated by Attorney General’s Office
  - Requesting State (Mexico) must extradite within 60 days

- Suspect released
  - NO
  - YES

- Extradition carried out
  - END
MEXICAN EXTRADITION PRACTICES

Summary Extradition

- Requesting State petitions summary extradition
  - Petition accepted
    - Requested State may expedite extradition of suspect, according to domestic law
    - Extradition carried out
    - END
  - Petition denied
    - Conventional extradition procedures

Deferred Extradition

- Requesting State petitions extradition
  - Judicial authorities of requested State charge and impose sentence on suspect
  - Foreign Affairs Ministry informs the requesting State
    - Once suspect has completed sentence in the requested State
      - Extradition carried out
      - END