

# **ARTICLE 4 OF THE FEDERAL DISTRICT CRIMINAL CODE OF MEXICO: AN ALTERNATIVE TO EXTRADITION TO THE UNITED STATES**

In furtherance of the interests of international relations and administrative justice, the United States and Mexico have devised by treaty and law, means for bringing to trial individuals who commit crimes on foreign soil. One method is via the Mexican-American Extradition Treaty.<sup>1</sup> This procedure includes relinquishment of the fugitive from the asylum country to the demanding country. If the fugitive is a national of the asylum country, however, wanted for an offense which is punishable by death, extradition under the Treaty is unlikely.

Mexican Criminal Code provides an alternative to extradition in these circumstances, by allowing a Mexican national who is wanted by the United States authorities for a crime committed in U.S. territory, to be tried for the crime in Mexican courts under Article 4.<sup>2</sup> For example, in a pending case, a Mexican national shot and killed a Mexican-American in Tucson, Arizona. He then fled to Nogales, Sonora, Mexico where he was found two years later. Mexico denied extradition as it prohibits capital punishment, which was a possible and probable sentence in this case.

This comment briefly examines the process of extradition under the Treaty, noting the ineffectiveness of the Treaty when the fugitive is a national of the asylum country and wanted for an offense which is punishable by death in the demanding country. It then focuses on Article 4 of the Mexican Criminal Code which offers an alternative process to the extradition system in cases where the Treaty fails. This comment concludes with a strong recommendation that the United States consider Article 4 as an alternative to extradition.

## **THE MEXICAN-AMERICAN EXTRADITION TREATY<sup>3</sup>**

In order to extradite a prisoner from Mexico, the Treaty requires that extradition requests be presented through proper diplomatic channels. First, the demanding United States' state must contact the U.S. Attorney's Office. The federal prosecutor then contacts the U.S.

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<sup>1</sup>Mexican-American Extradition Treaty, May 4, 1978, United States-Mexico, 31 U.S.T. 5059, T.I.A.S. No. 9656.

<sup>2</sup>Artículo 4, Código Penal Para El Distrito Federal [Article 4, Federal District Code].

<sup>3</sup>For a more in-depth analysis of the Mexican-American Extradition Treaty, see Note, *An Analysis of the Prisoner Transfer and the Prisoner Extradition Treaties Between the United States and Mexico*, 1985 *Ariz. J. Int'l & Comp. L.* 227.

Department of State, which in turn notifies Mexican officials. Authorities in Mexico must be given sufficient information concerning the fugitive and the alleged offense. The Treaty further requires that certain documentation be provided to the asylum country's authorities. This documentation includes: (1) an affidavit from the prosecutor describing the case, (2) authenticated copies of the indictment and arrest warrant, (3) a copy of the applicable law or statute involved, (4) evidence establishing the crime, including sufficient evidence to identify the criminal, and (5) a statute of limitations for the offense.<sup>4</sup>

However, under the Treaty, extradition is not available for all crimes committed. The Treaty specifically delineates which crimes are extraditable.<sup>5</sup> Offenses not extraditable, in general, are political or military in nature.<sup>6</sup> Extradition attempts may be futile where the fugitive is a national of the asylum country. More importantly, however, extradition may be denied "where the offense is punishable by death under the laws of the requesting party and the laws of the requested party do not permit such punishment for that offense."<sup>7</sup>

In the case, therefore, where the Mexican national committed the crime of murder in the United States and then returned to his native land for safe harbor, the United States was unsuccessful in its attempts to extradite him as Mexico does not recognize capital punishment.<sup>8</sup>

In the alternative, the Treaty provides that where extradition is not available due to the asylum country's unwillingness to surrender its citizen, authorities "shall submit the case to its competent authorities for the purpose of prosecution, provided that [Mexico] has jurisdiction over the offense."<sup>9</sup>

#### MEXICO'S JURISDICTION TO PROSECUTE UNDER ARTICLE 4

The above mentioned scenario offers a logical opportunity for application of Article 4 in lieu of extradition. Article 4 states:

Crimes committed in foreign territories by a Mexican against other Mexicans or foreigners, or by a foreigner against a Mexican, may be prosecuted in the Republic [of Mexico], according to federal law, if the following requirements are met.

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<sup>4</sup>J. Harris, Procedure For Requesting International Extradition, U.S. Department of Justice (unpublished manuscript).

<sup>5</sup>Treaty, *supra* note 1, at appendix.

<sup>6</sup>*Id.* at Article 5, Section 1.

<sup>7</sup>*Id.* at Article 8.

<sup>8</sup>Artículo 24, Código Penal Para El Distrito Federal [Article 24, Federal District Criminal Code].

<sup>9</sup>Treaty, *supra* note 1, at Article 9, Section 2.

1. The accused is present in the Republic,
2. The accused has not been definitively tried in the territory where he committed the crime, and
3. The offense for which he is accused in the foreign territory is a recognizable crime in the country in which it was committed and in the Republic.

The plain language of Article 4 requires that the accused must be a Mexican national,<sup>10</sup> as Mexico has its own interests to safeguard.<sup>11</sup> These interests are (1) if the accused is a Mexican national it is not conceivable that Mexico shall become an asylum for its citizens who commit crimes against others abroad and (2) if the victim is a Mexican national, Mexico has an obligation to protect its citizens against crimes committed upon them.<sup>12</sup>

Article 4 provides that Mexico's federal courts shall have jurisdiction of the case.<sup>13</sup> The proper tribunal is the federal district court of the state wherein the accused is found.<sup>14</sup> In the case discussed, the accused was located in Sonora, Mexico. Thus, the federal district court in Sonora had jurisdiction.

Article 4 not only requires the fugitive to be physically present in Mexico, it also requires that the accused not have been definitively tried in the country where the offense occurred [United States]. "Definitively tried" in this case means that a sentence has not been executed and that the accused is not simultaneously being tried in the foreign country. This ensures that the accused will not be subject to double jeopardy based on the doctrine of *non bis in idem*, no one can be tried twice for the same crime.<sup>15</sup>

Lastly, Article 4 requires that the offense committed abroad be simultaneously recognized as a crime in the country in which the offense occurred and in Mexico itself. This arises from the doctrine

<sup>10</sup>This is based on the civil law principle of "Nationality as a Basis of Jurisdiction" which is "the view that judicial jurisdiction can be based on defendant's nationality, so that [in] any kind of action...a court has jurisdiction if the defendant is a citizen of the forum country." Rudolph B. Schlesinger, *Comparative Law* 852 (4th ed. 1980).

<sup>11</sup>Francisco Gonzales De La Vega, *ElCodigo Penal Comentado* [The Penal Code Commentated], (5th ed. 1981).

<sup>12</sup>*Id.*

<sup>13</sup>Mexico, like the United States, has federal and state courts; Mexico's principle of "Federal Sovereignty" denies local sovereignty in foreign matters involving Mexican nationals.

<sup>14</sup>Artículo 7, *Codigo Penal Para El Distrito Federal*; see also the comments to Article 4 which state that if the accused is a Mexican national, there is no reason to try him in the federal district court of the State where he resides but the state where he is found.

<sup>15</sup>Comments to Article 4, *supra* note 2; see also Article 23 of the Mexican Constitution which provides that "no one may be tried twice for the same offense, since justice requires either an acquittal or conviction."

of *nullem crimen sine previa lege* which requires that the offense be deemed illegal conduct at the time and place of its commission.<sup>16</sup> This concept is akin to an "ex post facto law."<sup>17</sup>

## PROCESS OF PROSECUTION UNDER ARTICLE 4

### *Initiation*

Initiating prosecution in a Mexican tribunal pursuant to Article 4 is similar to the process of extradition. The request is presented through diplomatic channels beginning with the state Governor's Office and continuing through the United States Department of Justice, the Department of State, and finally, the Mexican Embassy.<sup>18</sup> Whereas the extradition process is rigid, always requiring involvement by the Department of State or the Department of Justice, Mexican prosecution under Article 4 is more flexible. In urgent cases, as where the fugitive is dangerous, Mexican authorities and the foreign authorities may communicate directly.<sup>19</sup>

In the Arizona-Sonora murder case described earlier, Mexican authorities initiated the procedure by contacting U.S. authorities and requesting that documentation be sent immediately as the accused was also facing charges for crimes committed in Mexico. The documentation requested was: a coroner's certificate of autopsy, a death certificate, an autopsy report, witnesses' affidavits, the prosecutor's affidavit, the relevant statute of limitations, the relevant state statutes or codes, and descriptive information on the fugitive and his whereabouts. All of these needed to be certified.<sup>20</sup> Additionally, when dealing with Mexican authorities on this more direct level, it is necessary that the documents be notarized for authenticity purposes by the Mexican consulate.<sup>21</sup>

Once Mexican authorities receive the documents submitted by the foreign country, Mexico has exclusive jurisdiction of the case through its finality.<sup>22</sup> The entire prosecution rests with the Mexican judicial

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<sup>16</sup>Comment to Article 4, *supra* note 2, at n. 3.

<sup>17</sup>Black's Law Dictionary defines "ex post facto law" as a law which provides for the infliction of punishment upon a person for an act done which, when it was committed, was innocent. Black's Law Dictionary 520 (5th ed. 1979).

<sup>18</sup>Letter from Lisa Cacheris, Office of International Affairs, U.S. Department of Justice (April 1, 1987).

<sup>19</sup>Interview with Jose Antonio Rivera Cortes, Mexican Consul, in Tucson, Arizona (April 7, 1987).

<sup>20</sup>Letter, *supra* note 18.

<sup>21</sup>Interview, *supra* note 19.

<sup>22</sup>*Id.*

system, its laws, attorneys, and judges. An understanding of Mexico's criminal procedure, therefore, is imperative to complete analysis of Article 4 prosecution.

### *Pretrial Procedure*

The *ministerio publico* (the federal prosecutor) of the state where the accused is located reviews the documents and launches a *consignacion*, a 72-hour investigation of the case.<sup>23</sup> Within that time period, he must determine whether there is sufficient information to issue a *denuncia*, essentially a "complaint." Also within that time period, the prosecutor must submit the case to the federal judge of the district where the fugitive is located in order to obtain an *orden de aprehension*, a formal arrest warrant. If the judge does not issue an arrest warrant, then the prosecutor may dismiss the case or continue the investigation. If the accused is not brought before a judge within 72 hours, then the charges must be dismissed.<sup>24</sup>

If, however, the accused is arrested, he must be brought before a judge within 48 hours for his *declaracion preparatoria* or general statement.<sup>25</sup> At the hearing, the judge informs the accused of the charges against him, his constitutional rights to counsel<sup>26</sup> and against self-incrimination, and the names of the witnesses against him. After the accused makes a statement, a public defender is appointed.<sup>27</sup>

Once the hearing is concluded, the judge has 72 hours to decide whether to dismiss the case for lack of evidence or to proceed on probable cause to trial. If the judge finds no probable cause, he issues an *auto de libertad falta de merito*, an order stating that the accused shall be released and the case dismissed for lack of merit. If, however, the judge determines that there is probable cause, he issues an *auto de formal prision*, a formal accusation informing the accused of the charges.<sup>28</sup> The case is then set for trial.

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<sup>23</sup>Interview with Fernando Tapia, Professor of Spanish, University of Arizona, former judge and lawyer in Mexico (April 23, 1987).

<sup>24</sup>*Id.*

<sup>25</sup>This is similar to the "initial appearance" stage of a prosecution in the United States requiring either the appearance before a magistrate within 24 hours after a suspect is arrested, or his release. The time requirement in Mexico is mandated by Article 20, Section III of the Mexican Constitution.

<sup>26</sup>In theory, the Mexican Constitution, Article 20, Section IX, affords the accused the right to counsel from the moment he is detained. However, in practice, counsel is not appointed until this stage of the proceeding. See generally, Comment, *El Derecho Y El Hecho: Law and Reality in the Mexican Criminal Justice System*, 8 Chicano L. Rev. 40 (1984-85).

<sup>27</sup>Comment, *El Derecho Y El Hecho: Law and Reality in the Mexican Criminal Justice System*, 8 Chicano L. Rev. 40 (1984-85).

<sup>28</sup>*Id.*

### Trial

When Mexico won independence from Spain, it retained the European civil law tradition.<sup>29</sup> The most significant difference between that tradition and the common law tradition, for purposes of this comment, is that a criminal trial is inquisitorial as opposed to accusatorial.<sup>30</sup> As one author states, in civil law countries, "the central function of the criminal process . . . [is] the ascertainment of truth."<sup>31</sup> In the common law accusatorial method of prosecution, the trial is between the accused and the accuser, the state. In contrast, an inquisitorial prosecution is an inquest by a judge as to the events and facts surrounding the charges.<sup>32</sup> The judge bases his determination solely on the rigid code law and code of procedure, applying the law to the fact pattern. His decision is rendered in writing and in privacy with only the specific parties involved.<sup>33</sup>

A trial in Mexico, therefore, is best characterized as a judicial investigation. With little involvement from attorneys, the judge reviews the documents (the *constancia*) provided to him, and makes his determination. The *constancia* may consist of the accused's written confession, written statements from *peritos* or experts, and written testimony from lay witnesses.<sup>34</sup> The process of reviewing the *constancia* is termed the *probatorio*.<sup>35</sup> Once the judge has reviewed the proof provided, he reviews the written *conclusiones* or arguments of the federal prosecutor and the public defender. Finally, the judge makes his determination and, if it is guilty, renders the sentence provided in the criminal code. In the case discussed earlier, then, Article 4 will result in the accused being tried under the applicable homicide provisions of the Mexican Criminal Code. Although the results and process may not be the same as if he were extradited to the United States for trial, he will at least be required to account for his crimes in some manner.

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<sup>29</sup>*Id.*

<sup>30</sup>Julio Acero, *Procedimiento Penal* [Criminal Procedure] (6th ed. 1968).

<sup>31</sup>Rudolph B. Schlesinger, *Comparative Criminal Procedure: A Plea For Utilizing Foreign Experience*, 26 *Buffalo L. Rev.* 361, 372 (1977).

<sup>32</sup>This process is similar to a grand jury investigation in the United States, which inquires into the situation prior to indictment of an individual.

<sup>33</sup>In common law systems, the judge merely outlines applicable statutory and case law, leaving the prosecution and defense to persuade the jury as to the outcome. *Supra* note 31.

<sup>34</sup>It should be noted that all evidence in civil law countries is presented in written, not oral, form.

<sup>35</sup>For a more indepth discussion of the criminal process in Mexico see Acero, *supra* note 30.

## UNITED STATES RECOGNITION OF MEXICAN PENAL JUDGMENTS

In the event that a person, convicted or acquitted in Mexican courts pursuant to Article 4, decides to reenter the United States, a question arises as to the effect of the Mexican judgment. Although no statutory provision nor case law requires the United States to give full effect and recognition to the Mexican ruling, several factors should be considered. Both the United States and Mexico recognize the principle of "double jeopardy."<sup>36</sup> Further, the Extradition Treaty and the Prisoner Exchange Treaty<sup>37</sup> provide that judicial entities in the United States and Mexico agree to respect and give full effect to the judgments of each other's courts.<sup>38</sup> Lastly, at least one United States court has recognized a Mexican conviction for enhancement of sentence purposes.<sup>39</sup>

In addition, as mentioned previously, extradition is unlikely in the case of a national accused of a capital crime in another country. Therefore, unless another process is provided, the accused will never be made to account for capital crimes committed abroad. In the case of Mexico and the United States, Article 4 of the Mexican Criminal Code provides the alternative process, assuring that the accused is brought to justice in some manner. Authorities in the United States should not fail to recognize Article 4 as such a viable alternative to extradition in capital crime cases.

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<sup>36</sup>The constitutions of the United States and Mexico recognize this guarantee; see also Article 4(2) of the Criminal Code.

<sup>37</sup>Mexican-American Treaty on the Execution of Penal Sentences, Nov. 25, 1976, United States-Mexico, 28 U.S.T. 7399, T.I.A.S. No. 8718, Article 4(9).

<sup>38</sup>See generally, Honorable Luis Fernando Doblado, *International Cooperation On Penal Matters Between Mexico and the United States*, 1985 Ariz.J.Int'l & Comp. L. 201.

<sup>39</sup>U.S. v. Fleischman, 684 F.2d 1329 (9th Cir. 1982).