United States - Mexico Law Journal

Volume 11 *Presentations at the Eleventh Annual Conference: Water Law & White Collar Crime*

Article 27

3-1-2003

Bringing White-Collar Criminals to Justice - Fugitive Apprehension and Return and Obtaining Evidence Abroad

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BRINGING WHITE-COLLAR CRIMINALS TO JUSTICE – FUGITIVE APPREHENSION AND RETURN AND OBTAINING EVIDENCE ABROAD

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In an effort to begin to bring balance to what can be a perceived as an emphasis on extradition as a primary, if not exclusive, remedy to secure fugitives' apprehensions and returns, this comment identifies other legitimate alternatives to bring fugitives, such as white-collar criminals, to justice.[1] Because obtaining evidence abroad often plays a determinative role once transnational white-collar criminals face prosecution, this comment also highlights related evidentiary concerns.

Recent prominent cases illustrate the particular complexities of bringing white-collar fugitives to justice.[2] Needless to say, financial resources play a pivotal role in white-collar cases.[3] White-collar fugitives usually possess the resources to travel from jurisdiction to jurisdiction, move their holdings from site to site, and challenge every law enforcement action through protracted proceedings in home countries and/or other countries.[4] Often, home country proceedings focus on the legitimacy of the accusatory document and concomitant order for arrest.[5] In other country proceedings, the fundamental questions are principally whether the fugitive is charged in the home country and whether a valid arrest warrant exists against that fugitive on the specified charge or charges. These questions often serve as vehicles to delay the fugitive's return to the home country.[6]

APPREHENSION AND RETURN

Recent events in the United States and Mexico underscore the need to apprehend and return fugitives, especially white-collar fugitives, to the jurisdictions where they committed their crimes to ensure that justice can ultimately be served. There are

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1. *See, e.g,* Bruce Zagaris and Julia Padierna Peralta, *The Evolution of Mexico – United States Extraditions and Alternatives: From Fugitive Slaves to Drug Traffickers – 150 Years and Beyond the Rio Grande's Winding Courses*, 12 AM. U.J. INT'L L. & POLICY 519, 531-33, 613-21 (1997) [hereinafter Zagaris & Padierna]. The U.S. Attorneys' Manual identifies alternatives to bring fugitives to justice, including extradition. *See* USAM, *infra* note 7, § 9-15.000 (introducing issues concerning international extradition and related matters).

2. *See, e.g., Prominent Political Fugitives Oscar Espinosa [Villarreal] and Carlos Cabal Peniche Drop Efforts to Block Extradition to Mexico*, SourceMex (Aug. 15, 2001) (on file with author). Cabal Peniche fought extradition from Australia and Espinosa Villarreal fought extradition (and attempted to seek asylum) from Nicaragua. These are just two recent white-collar criminal cases that received significant media attention in Mexico.

3. Costs appear to exceed thousands, if not tens or hundreds of thousands, of dollars.

4. Proceedings can extend for months, if not years. *See Espinosa Villarreal and Cabal Peniche, supra* note 2, at 1-2.

5. *See id.*

6. *Id.*

multiple approaches to apprehend and return white-collar fugitives.[7] Extradition may be the most familiar alternative to obtain fugitives' apprehensions and returns.[8] However, other lawful measures, often more expeditious, should be considered.

Because white-collar fugitives usually have money and travel to avoid apprehension, the first approach focuses on travel documents. One remedy is to limit a fugitive's ability to travel. This administrative remedy may require the executive authorities of a requesting country to work directly with their counterparts of the requested country to terminate a travel authorization, such as a visa; or, in the case of the United States and Mexico, to cancel a border-crossing card.[9] These actions are unlikely to lead to the individual's immediate apprehension, but have the obvious advantages of affirmatively limiting the individual's geographic mobility and providing a cooperative basis to attack the issue frontally. If necessary, appropriate ancillary measures, such as surveillance, can mitigate the risk of flight as well.[10]

Denying or revoking an individual's passport is another administrative option.[11] However, passport denial or revocation is not a practice embraced by some countries. Countries that disfavor the practice tend to do so based on the underlying belief that a passport is intricately linked with nationality and is considered fundamental to an individual's identity.[12] Adopting the view that a passport is a travel document – and only a travel document – permits countries to employ an additional tool to combat transnational crime.[13] Preserving this premise in statute would establish an appropriate legal foundation to ensure that, for instance, Mexican

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7. *See* U.S. DEPT. OF JUSTICE, U.S. ATTORNEYS' MANUAL [hereinafter USAM] § 9-15.600-650 (1997) (identifying alternatives to extradition, such as immigration removals and lures), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/15mcrm.htm#9-15.600 (last visited Mar. 29, 2003).

8. *See* Zagaris & Padierna, *supra* note 1, at 531-33, 613-21 (focusing principally on the extradition relationship between the U.S. and Mexico, noting a trend of an increasing number of extraditions between the two countries, and advocating efforts to strengthen extradition between the two countries).

9. *See* Revocation of Visas, 22 C.F.R. § 41.122 (2003) (providing for cancellation and revocation of travel documents, including border crossing cards); *see also* Nonresident Alien Mexican Border Crossing Identification Cards; Combined Border Crossing Identification Cards and B-1/B-2 Visitor Visas, 22 C.F.R. § 41.32 (2003) (setting forth criteria for issuance and revocation of a border crossing card for Mexican citizens and residents).

10. Accredited liaison agents of the U.S. often work with host country counterparts to advance appropriate ancillary measures. The Federal Bureau of Investigation, for instance, has agents accredited in more than 40 offices overseas and recently petitioned Congress to increase that number. *See FBI Planning to Add Offices Overseas*, WASH. POST, Apr. 1, 2003, at A13. The Drug Enforcement Administration also has agents accredited to U.S. Missions abroad, along with the Bureau of Immigration and Customs Enforcement and the Bureau of Customs and Border Protection of the U.S. Department of Homeland Security (formerly the Immigration and Naturalization Service and the U.S. Customs Service).

11. USAM, *supra* note 7, § 9-15.640. *See also* Denial of Passports, 22 C.F.R. § 51.70 (2003) (establishing criteria to deny passports); Revocation or Restriction of Passports, 22 C.F.R. § 51.72 (2003) (setting forth provisions to revoke or restrict passports).

12. This position became a point of discussion on a number of cases while serving as Country Attaché to the U.S. Embassy in Mexico City. On occasion, revocation of a passport could have ensured a fugitive's inability to depart Mexico City. Mexican law, however, reportedly does not contemplate revocation, nor did officials appear receptive to advance legislation to that effect. *Compare* Ley de Nacionalidad [Nationality Law] art. 3(IV) (identifying passport as proof of Mexican nationality) *and* Reglamento de Pasaportes [Passport Regulation] art. 8 (underscoring that anyone of Mexican nationality can obtain a regular passport) *with id.* art. 3 (acknowledging that a passport can be confiscated or canceled for failure to comply with application requirements).

13. Accordingly, countries may wish to consider legislation to this effect. Denying or revoking the passport of prominent white-collar fugitives, such as Espinosa Villarreal and Cabal Peniche, may have empowered Mexican justice rather than permitted the fugitives to exploit two legal systems.

national fugitives in possession of a Mexican passport, who enter a Mexican consulate for particular services, could find themselves returning to their home country to face justice. Absent this mechanism, officials are often faced with more taxing measures, such as immigration removal or extradition, executive/judicial measures that often generate significant public disclosure and force the requesting state to expose aspects of a case prematurely.[14]

Where travel document cancellation or passport denial or revocation proves ineffective, fugitive removal through immigration proceedings (often captioned "exclusion/deportation" or simply "removal") can advance a white-collar criminal's apprehension and return to his or her home country. Immigration laws of the requested country provide legal justification for this action.[15] Often, the immigration action is grounded in the requesting country's disclosure of a charging document and accompanying order for arrest. As a general rule, removal through the immigration process is often more expeditious than extradition and affords the requesting state a greater degree of leverage to apply the fullest extent of the law.[16] Generally, the question is not whether the fugitive's return is achieved, but rather when the fugitive's return occurs.[17] However, removal through immigration proceedings cannot apply against nationals of the requested state, nor as a matter of practice will the requested state initiate this process against an individual who has or may have a claim of nationality in the requested state.[18]

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14. Supporting documents generally accompany a request for expulsion, deportation, and especially extradition. Prosecutors are placed in the delicate position of disclosing no more than necessary to meet the requested country's legal standards of something tantamount to probable cause – and nothing more – so that the defendant does not know the government's entire case pre-trial. Lost in efforts to advance extradition at the expense of other legitimate means for a fugitive's return is the aggrieved community's desire to obtain justice. While governments are reminded of the need to protect the fugitive's legal rights, tactics to promote premature disclosure, predicated on claims of fundamental fairness, frustrate attempts to ensure that justice is sought in the jurisdiction where the crime was committed. *See infra* note 53 (noting growing emphasis on intersection between extradition proceedings and human rights and fundamental freedoms).

15. Article 37(V) of Mexico's Ley General de Población [L.G.P.][General Population Law], for instance, permits immigration officials to revoke an individual's immigration status for the existence of "adverse antecedents" ("*malos antecedentes*"). The existence of an outstanding arrest warrant has been selectively considered an adverse antecedent. The Secretaría de Gobernación [Secretariat for the Interior] is responsible for suspending or prohibiting the entry of foreign nationals into Mexico. *See* L.G.P. art. 38.

16. An immigration expulsion, for instance, can take place within hours, if all logistics are addressed, because the fugitive can depart the asylum country on the next immediate flight to the country from which s/he came. Indeed, Article 33 of the Mexican Constitution grants the Mexican President the exclusive authority to remove immediately and without process any foreigner whom he or she determines to be unwelcome ("*inconveniente*"). MEX. CONST. art. 33.

17. *See Espinosa Villarreal and Cabal Peniche, supra* note 2, at 1-2.

18. Nationals are not subject to the expulsion, deportation, and removal laws of their home country. Some governments, such as Mexico, interpret their nationality law broadly so that an individual born in the U.S. to U.S. parent(s) of Mexican lineage, where the U.S. citizen did not speak Spanish, had voted in the U.S., and served in U.S. armed forces, could still claim Mexican citizenship or have one asserted on his or her behalf. *See* MEX. CONST. art. 30 (establishing criteria for acquisition of Mexican nationality); Ley Orgánica de la Administración Pública [Organic Law for Public Administration] art. 28(II) (noting that the Secretaría de Relaciones Exteriores [Secretariat of Foreign Relations] is empowered take actions to safeguard Mexicans); *see also* Reglamento para la Expedición de Certificados de Nacionalidad Mexicana [Regulation for Issuing Mexican Nationality Certificates] (establishing framework to solicit proof of Mexican nationality before the Secretariat of Foreign Relations). *But cf.* MEX. CONST. art. 38(V) (noting that rights and privileges of a Mexican citizen are qualified, especially if the individual is a fugitive from justice); Nationality Law art. 6 (creating a presumption that a Mexican has acquired another nationality if the Mexican commits a legal act to acquire or preserve or affirm that nationality before a legal authority or in a public document).

Often instrumental in advancing the immigration process is an Interpol fugitive diffusion or red notice.[19] Interpol is an intergovernmental organization dedicated to disseminating police information among its member states.[20] Its constitution in part explains that the mission of Interpol is to ensure and promote the widest possible mutual assistance between criminal police authorities within the limits of the laws existing in the different countries and in the spirit of the Universal Declaration of Human Rights.[21] The mission is accomplished through an information exchange network of the national central bureaus of each of the member countries.[22] Apart from laying a legal foundation for an immigration action, notice of a fugitive diffusion or red notice in a country where the fugitive is found can also serve as the predicate for an arrest pursuant to a pending extradition request or provisional arrest request.[23]

Extradition is another approach to advance white-collar criminal apprehension and return.[24] Extradition is the mechanism by which a requested country will surrender an accused or convicted individual to stand trial or face punishment in a requesting country.[25] The legal basis, with very limited exception, is grounded on a bilateral or multilateral treaty. Depending on particular bilateral relationships, extradition is often perceived as the least effective means to bring a fugitive to justice, especially a white-collar fugitive.[26] As between the United States and Mexico, an extradition request can occur once treaty requirements have been met.[27] The request, received and acknowledged in the requested state, can serve as the predicate to apprehend the fugitive in the requested country, or if a person is in custody in the requested state and serving time for having been definitively judged and sentenced, a recently enacted protocol to the U.S.-Mexico Extradition Treaty can permit the temporary surrender of a fugitive to the requesting country under specific circumstances.[28] Challenges are certainly common in the extradition

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19. The diffusion or red notice is also referred to as an international all-points-bulletin. Its dissemination alerts law enforcement officials of other countries to an individual's criminal status.

20. *See* INTERPOL *at* http://www.interpol.int (last visited Mar. 29, 2003). Membership in the international criminal police organization numbers approximately 180 countries, including the U.S. and Mexico. *See also* 22 U.S.C. § 263a (authorizing Attorney General "to accept and maintain, on behalf of the United States, membership in the International Criminal Police Organization").

21. *Id.*

22. *See id.*

23. The domestic laws of some countries permit host country officials to act directly on the Interpol diffusion. In the U.S., law enforcement officials must seek a warrant, unless another legitimate basis, such as an immigration hold, is available.

24. *See* USAM, *supra* note 7, § 9-15.100-500.

25. *See* Geoff Gilbert, *Aspects of Extradition Law* (Dordrecht, The Netherlands) (1991).

26. A review of the bilateral extradition relationship between the U.S. and Mexico demonstrates that few white-collar criminals are extradited between the two countries. *See* Justice Official Testifies on U.S.-Mex. Counter-Drug Efforts Before the Subcomm. on Criminal Justice, Drug Policy and Human Res. of the House Comm. on Gov't Reform, 106th Cong. 3140 (2000) (statement of Dep. Ass't Att'y Gen. Mary Lee Warren), *available at* http://usinfo.state.gov/regional/ar/mexico/mxdrg3.htm (last visited Mar. 29, 2003).

27. *See* Extradition Treaty Between the United States and Mexico, May 4, 1978, art. 10, 31 U.S.T. 5059. [hereinafter U.S.-Mexico Extradition Treaty]; *see also* 18 U.S.C. § 3184 (empowering U.S. authorities to execute requests); Ley de Extradición Internacional [International Extradition Law] arts. 17, 21 (providing that the Secretariat of Foreign Relations determines whether sufficient legal bases, or "*fundamentos*," exist to advance and execute a request).

28. *See* Protocol to Extradition Treaty Between the United States and Mexico, Nov. 13, 1997, S. TREATY DOC. NO. 105-46 (1988). The Protocol entered into force in May 2001, after the U.S. and Mexico exchanged the instruments of ratification during U.S. Attorney General John Ashcroft's first visit to Mexico to meet with Mexican

context, and the relationship between the United States and Mexico has recently been plagued with issues that hinder extradition.[29]

White-collar offenses as prescribed in various countries often do not mirror each other by content and elements, necessitating particular scrutiny of the underlying facts and circumstances alleged in a specific request.[30] Without establishing dual criminality, the requested country is generally precluded from any treaty action.[31] Because Article 7 of the U.S.-Mexico Extradition Treaty provides that "extradition shall not be granted when the prosecution or the enforcement of a penalty for the offense for which extradition has been sought has become barred by lapse of time according to the laws of the requesting or requested Party,"[32] the statute of limitations for the particular white-collar offense may frustrate the advancement of a particular request.[33] White-collar criminals will often claim political animus by the requesting country, and, interestingly enough, at the same time publicly declare confidence in the requesting state's judicial system.[34] An effect of these discrepancies can be that while representatives from both countries work closely to overcome issues, justice appears stalled - and impunity seems prolonged - until the fugitive's apprehension is ensured.

To address this latter issue, a requesting country can solicit the fugitive's provisional arrest if permitted under the terms of the extradition treaty.[35] Article 11

Attorney General Rafael Macedo de la Concha. *See A Principios del Mes de Marzo de Este Año, Durante Su Visita a los Estados Unidos de América, el Procurador Rafael Macedo de la Concha, Extendiù una Invitaciòn al Procurador General de Ese Paìs, John D. Ashcroft, para Visitar a México*, Boletín 330/01 de la Procuraduría General de la República (May 21, 2001), *available at* http://www.pgr.gob.mx/cmsocial/bol01/may/b33001.html (last visited Mar. 29, 2003).

29. *See* Alejandro Gutierrez and Ricardo Ravelo, *Mediante amparos, los capos del narcotrafico empiezan a frustrar el compromiso de Mexico con Estados Unidos de extraditarlos*, PROCESO, No. 1319, Feb. 10, 2002, at 16-19; *see also* U.S. DEP'T OF STATE, INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT V-1, V-34-35 (2003) [hereinafter INCSR] (focusing on efforts of Mexico, among other countries, to combat drug trafficking in 2002), *available at* http://www.state.gov/documents/organization/18170.pdf (last visited Apr. 24, 2003).

30. *See* U.S.-Mexico Extradition Treaty, *supra* note 27, art. 2. As opposed to previous list provisions, dual criminality is a standard requirement to advance an individual's return through extradition.

31. U.S. law, for instance, imposes the requirement of specific intent, which must be affirmatively established. The prosecution can meet this burden by relying on multiple forms of evidence, including circumstantial evidence. Many Mexican white-collar crimes imply intent or permit inference, something more akin to a strict liability theory. *See, e.g.*, Código Penal Federal [C.P.F.] [Federal Penal Code] art. 400 bis (establishing a presumption of culpability for goods or resources whose legitimate origin cannot be established – *"no pueda acreditarse su legítima procedencia"*). While the underlying facts of a Mexican case may in fact demonstrate specific intent on further analysis, supporting documents on their face must demonstrate that the treaty requirements of dual criminality and the legal standard to prosecute in the requested country are met. U.S. documents face similar scrutiny in requests to Mexico.

32. U.S.-Mexico Extradition Treaty, *supra* note 27, art. 7.

33. White-collar criminals tend to face less severe sentences in Mexico, and the statute of limitations generally runs more quickly for these kinds of crimes in Mexico than for similar crimes in the U.S. So a three-year statute of limitations under Mexican law would preclude advancement of a request if in fact a U.S. charging document was filed, for example, four years after the illicit act.

34. *See Espinosa Villarreal and Cabal Peniche*, *supra* note 2, at 1-2.

35. Provisional arrest is an extraordinary detention mechanism to ensure an international fugitive's apprehension. *See* U.S.-Mexico Extradition Treaty, *supra* note 27, art. 11; 18 U.S.C. § 3184 (authorizing issuance of warrant); *id.* § 3187 (noting a provisional arrest and detention in the U.S. can run up to 90 days); USAM, *supra* note 7, § 9-15.230 (referencing provisional arrest); *see also Martin v. Warden*, 993 F.2d 824, 828-29 (11th Cir. 1993) (noting no right to speedy trial in extradition cases). *Compare U.S. v. Wiebe*, 733 F.2d 549, 553-54 (8th Cir. 1984) (articulating minimum standards to obtain arrest warrant for provisional arrest) *with Parretti v. U.S.*, 122 F.3d 758, 773 (9th Cir. 1998), *op. withdrawn en banc*, 143 F.3d 508 (9th Cir. 1998) (questioning standard to obtain provisional arrest warrant).

of the U.S.-Mexico Extradition Treaty provides that "in the case of urgency, either Contracting Party may request, through diplomatic channels, the provisional arrest of an accused or convicted person."[36] The application shall contain "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 person sought."[37] "On receipt of such a request, the requested party shall take the necessary steps to secure the arrest of the person claimed."[38] "Provisional arrest shall be terminated if, within a period of sixty days after the apprehension of the person claimed, the executive authority of the requested party has not received the formal request for extradition of the documents mentioned in [the previous Article]."[39]

The obvious advantage of seeking and executing a provisional arrest is that the white-collar criminal is taken into custody and no longer a flight risk, unless a bail exception can apply.[40] Disadvantages mirror those noted above and also include the treaty-imposed deadline to provide supporting documents to continue the individual's custodial status and advancement of extradition proceedings.[41] In white-collar cases, preparing the supporting documents can be particularly troubling given the inherent complexities of an investigation and the additional need to translate the documents.[42] Additionally, challenges and protracted hearings over periods of years are not uncommon, especially regarding white-collar fugitives.[43]

Finally, a requested country's own legal system may impose extra-treaty requirements, often to comply with a constitutional norm. The Mexican Constitution, for instance, requires that a judge receive supporting documents within two months,[44] while the extradition treaty expressly conditions timely delivery to Mexico's executive.[45]

The Mexican Supreme Court interpreted the Mexican Constitution in October 2001 to find that a prospective life sentence is unconstitutional,[46] though Article 8

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36. U.S.-Mexico Extradition Treaty, *supra* note 27, art. 11.

37. *Id.*

38. *Id.* art. 11(2).

39. *Id.* art. 11(3).

40. *See Wright v. Henkel*, 190 U.S. 40, 63 (1903) (explaining in seminal decision why bail is generally not permitted in the extradition context).

41. U.S.-Mexico Extradition Treaty, *supra* note 27, art. 11(3).

42. To the extent that all arguments and evidence must be evident within the supporting documents, clarity can often be determinative in complex cases. Moreover, scores of documents, particularly financial statements, can generate exorbitant translation fees.

43. Challenges have shown that some white-collar fugitives can return to their home country uncuffed as a result of legal machinations in their own home country, with a court order in hand to guarantee release. *See Espinosa Villarreal and Cabal Peniche, supra* note 2, at 1-2.

44. MEX. CONST. art. 119. *See also* "Amparo en revisión 5707/89," 6 SEMANARIO JUDICIAL DE LA FEDERACIÓN [S.J.F.] 29 (8a época 1990), *available at* http://www.scjn.gob.mx (last visited Mar. 29, 2003) (reporting decision of Mexican Supreme Court, Tesis [Thesis] P. XLIV/90, that explains art. 119's 60 day detention is an exception to art. 19's prohibition that detentions cannot exceed 72 hours).

45. U.S.-Mexico Extradition Treaty, *supra* note 27, art. 11(3).

46. *See* "Contradicción de Tesis 11/2001," 14 S.J.F. 15 (9a Ápoca 2001), *available at* http://www.scjn.gob.mx (last visited Mar. 29, 2003) (declaring in Tesis [Thesis] P./J. 127/2001 that life imprisonment is an unusual punishment forbidden under art. 22 of the Mexican Constitution because it affords the convicted no opportunity to rehabilitate, a constitutional protection identified in art. 18). In practice, Mexican courts routinely sentence individuals to consecutive terms of years sentences. These sentences in practice are tantamount to life sentences. *See Condenan a 500 años de prisón a tres involucrados en el caso Chimalhuacán*, LA JORNADA, Oct. 24, 2001, at 47 (reporting 500-year sentence); *Decretan a taxista 82 años de cárcel*, REFORMA, Feb. 7, 2002,

of the U.S.-Mexico Extradition Treaty provides that the requested state's exclusive sentencing basis to deny an extradition is a prospective capital sentence.[47] With respect to the United States, the provisional arrest section of the extradition treaty states that the requesting country need only present a valid warrant against a particular fugitive,[48] while the U.S. Constitution requires that issuance of the U.S. warrant be based on probable cause.[49]

Some fugitives realize that facing justice squarely may truly be their best option and elect to forgo challenges to extradition, determining for him- or herself that waiving the extradition process under the extradition treaty can potentially provide the defendant, after returning to the requesting country, with benefits for having cooperated.[50] The fugitive will notify the court or appropriate executive official to affirmatively request a waiver of extradition or extradition proceedings and immediate removal from the requested country.[51] Under this approach, a fugitive's return can be effected expeditiously.

Common to each of these scenarios is that the requesting state is taking action so that the fugitive returns to stand trial, be sentenced, or serve a sentence. Viewed through the lens of pragmatism, much of taxpayers' expenses could be saved if white-collar fugitives would voluntarily return to the requesting country. It is ironic to hear white-collar fugitives publicly espouse the integrity of their home country's judicial system, yet insist on challenging their return, preemptively exposing themselves to the requested state's judicial system.[52] While challenging extradition proceedings conforms to the laws of the requested state and international law and practice,[53] as well as affords the fugitive all the protections under the laws of the

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at 2B (reporting 82-year sentence). In fact, death during a kidnapping can result in a 70-year sentence. *See* C.P.F art. 366(III).

47. Article 8 of the extradition treaty states: "When the offense for which extradition is requested 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, extradition may be refused unless the requesting Party furnishes such assurances as the requested Party considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed." U.S.-Mexico Extradition Treaty, *supra* note 27, art. 8.

The October 2001 decision in effect undercut the strength of the January 2001 Mexican Supreme Court decision that affirmed the Executive's absolute discretion to extradite Mexican nationals. *See* MINISTRO PRESIDENTE GENARO DAVID GÓNGORA PIMENTAL, SUPREMA CORTE DE JUSTICIA DE LA NACIÓN, TERCER INFORME ANUAL DE LABORES, Dec. 14, 2001, at 15. Everardo Arturo Páez Martínez, a member of the Arellano-Felix drug trafficking organization, was the first Mexican national to be extradited under that ruling. *See Everardo Arturo Páez Martínez, alias "Kitti","El Morro", "El Pelón" y "Cuarenta", Uno de los Miembros Más Importantes del Cartel de los Arellano Félix, Fue Entregado en Extradición al Gobierno de los Estados Unidos de América,* Boletín 287/01 de la Procuraduría Federal de la República (May 4, 2001), *available at* http://www.pgr.gob.mx/cmsocial/bol01/may/b28701.html (last visited Mar. 29, 2003). Though select lower courts sought to revive the "exceptional case" standard set forth in Article 14 of the International Extradition Law, the Government of Mexico, as a matter of practice is extraditing Mexican nationals. *See* INCSR, *supra* note 29, at V-34-35.

48. U.S.-Mexico Extradition Treaty, *supra* note 27, art. 11.

49. U.S. CONST. amend. IV.

50. Criticis argue that no fugitive will knowingly cooperate and return to face justice. *Cf.* INCSR, *supra* note 29, at V-34 (reporting that fugitives waived extradition in 2002).

51. *See* U.S.-Mexico Extradition Treaty, *supra* note 27, art. 18. In the U.S., a fugitive can file a formal request to waive extradition or seek summary extradition before the magistrate or district court judge, depending on the jurisdiction in question, who then makes an on-the-record finding of a knowing and voluntary waiver. In Mexico, a fugitive's written request to the Mexican court or appropriate Mexican authorities of the Foreign Ministry can lead to a fugitive's summary extradition.

52. *See Espinosa Villarreal and Cabal Peniche, supra* note 2, at 1-2; *supra* text accompanying note 3.

53. A plethora of publications underscores efforts to ensure human rights and fundamental freedoms in

requested country, the result is generally the same: the fugitive returns to the requesting country to face justice.[54] Legal machinations, particularly in high-profile white-collar cases, do little to serve the public at large and, depending on the degree of publicity, can adversely impact the integrity of the court.

A final issue to address is prosecution in a home country pursuant to the country's domestic law for illicit acts performed outside the home country.[55] Except in very limited circumstances, the United States lacks this legal option. Mexico, however, possesses it. Mexico has a provision under Article 4 of its Federal Penal Code that permits the prosecution in Mexico for crimes that are committed outside Mexico. Article 4 requires that the fugitive be a Mexican national or an individual who victimized a Mexican national, be found in Mexico, and not have been definitively judged in the country where the crime was committed. The crime committed abroad must also be a federal crime in Mexico.[56] White-collar crimes, such as tax evasion, generic and specific frauds, and public corruption, generally meet this dual criminality requirement. Accordingly, Mexican nationals who commit crimes outside Mexico or anyone who commits crimes against Mexican nationals outside Mexico can potentially find themselves standing trial in Mexico for those crimes.

Domestic prosecution in Mexico for crimes committed outside Mexico can be initiated in two ways. The first is by directly filing a formal complaint along with supporting documents against the alleged criminal in Mexico, or in the Mexican Embassy or one of its consulates if the prosecutor is outside Mexico. The second way is by indirect action, one that arises pursuant to Article 9 of the Extradition Treaty, when the Mexican executive elects to deny an extradition based on Mexican nationality.[57] In practice, this means that a white-collar criminal who is a Mexican national or who victimized a Mexican national or nationals should not be able to use Mexico as a haven for his or her actions abroad. The number of white-collar cases prosecuted under this legal provision has been few, but in light of Mexican court rulings opposing extradition, the number should increase in the near future.

OBTAINING EVIDENCE ABROAD

Criminals, including white-collar criminals, neither respect nor observe international borders. Practically, that means that evidence required in one

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extradition proceedings. *See, e.g.*, Ann Powers, *Justice Denied? The Adjudication of Extradition Applications*, 37 TEX. INT'L L.J. 272, 291 (2002). This comment principally focuses on legitimate alternatives to ensure fugitive apprehension and returns. The intersection between those alternatives and human rights were beyond the scope of the presentation.

54. *See Espinosa Villarreal and Cabal Peniche, supra* note 2, at 1-2.

55. *See generally* USAM, *supra* note 7, § 9-15.650.

56. Article 4 of the Mexican Federal Penal Code states: "Crimes committed in a foreign country, by a Mexican citizen against Mexican citizens or against a foreign citizen, or by a foreign citizen against Mexican citizens, shall be punishable in the Republic, in accordance with the federal laws, if the following requirements are met: (I) That the defendant is found in the Republic; (II) The defendant must not have been definitively judged in the country where the crime was committed, and (III) The offense being charged must be a crime in the country in which it was committed and in the Republic of Mexico." C.P.F. art. 4.

57. Article 9(1) of the extradition treaty states: "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." U.S.-Mexico Extradition Treaty, *supra* note 27, art. 9(1).

jurisdiction can exist in another. In those situations, obtaining evidence from the other country can be challenging.[58]

Traditionally, letters rogatory served as the principal vehicle to obtain documents, public and private, from a foreign jurisdiction[59] – and they still do for defendants. Letters rogatory, court-to-court requests for assistance, are transmitted through diplomatic channels and require action by respective foreign ministries. Obviously, the process proved taxing and protracted for investigators and prosecutors. Thus, governments acknowledged an acceptable alternative for their law enforcement officials: treaties for international mutual legal assistance, commonly referred to as MLATs (Mutual Legal Assistance Treaty), to address the need for timely collection and delivery of testimony and documents abroad.[60]

In essence, a request initiated under an MLAT permits the central authority of one country to communicate directly with the central authority of another country outside the diplomatic process. Its immediate impact is expediency. Because the U.S. and Mexico are both parties to an MLAT, this means that, in practice, the U.S. Department of Justice communicates directly with the Mexican Attorney General's Office to advance and execute specific requests.[61] Requests between the U.S. and Mexico initiated under the treaty have grown significantly since it came into force, particularly Mexican requests to the United States.[62] The U.S.-Mexico MLAT places an affirmative obligation on parties to cooperate with each other to deal with the prevention, investigation, and prosecution of crimes, absent the invocation of one or more of several very narrow exceptions.[63]

Article 1(4)(b) of the U.S.-Mexico MLAT addresses document collection and general delivery of the kind of evidence on which a white-collar investigation and

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58. *See* USAM, *supra* note 7, § 9-13.510-535 (identifying multiple issues concerning evidence abroad), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/13mcrm.htm#9-13.510.

59. *See, e.g.*, Inter-American Convention on Letters Rogatory, Jan. 30, 1975, S. TREATY DOC. NO. 98-27 (1984), O.A.S.T.S. No. 43, *available at* http://www.oas.org; Additional Protocol to the Inter-American Convention on Letters Rogatory, May 8, 1979, S. TREATY DOC. NO. 98-27 (1984), O.A.S.T.S. No. 56, *available at* http://www.oas.org; *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. §§ 442, 471, 473 (1987).

60. U.S.-Mexico Treaty on Cooperation for Mutual Legal Assistance, Dec. 19, 1987, S. TREATY DOC. NO. 100-13 (1988) [hereinafter US-Mexico MLAT]. Multilateral treaties also exist and obligate parties to provide mutual legal assistance. One example is the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, T.I.A.S., 28 I.L.M. 493 (1989), *available at* http://www.incb.org/e/conv/1988. A regional example is the Inter-American Convention on Mutual Assistance in Criminal Matters, Jan. 10, 1995, S. TREATY DOC. NO. 105-25 (1997), O.A.S.T.S. No. 75, *available at* http://www.oas.org.

MLATs are not an exclusive basis for cooperation between two governments in the area of white-collar crimes. Executive agreements such as tax information exchange agreements and currency transaction information exchanges also exist. The Treasury Department is responsible for the implementation and execution of these agreements. Executive agreements overseen by other executive agencies also exist.

61. Direct communication may take the form of telephone calls, faxes, or face-to-face encounters. The Country Attaché for the U.S. Department of Justice can meet with counterparts directly in Mexico City, and Attachés of the Mexican Attorney General's Office accredited to the Mexican Mission in Washington, D.C., can meet with U.S. Department of Justice officials in Washington, D.C.

62. While precise numbers are not immediately available, a pattern over recent years shows that for each request the U.S. Central Authority presents to the Mexican Central Authority, the U.S. Central Authority receives approximately 3 requests from the Mexican Central Authority. A working group comprised of representatives from each central authority meets periodically to address specific case related concerns with the aim, among other duties, of resolving outstanding mutual legal assistance requests.

63. *See generally* U.S.-Mexico MLAT, *supra* note 60, art. 1(3).

prosecution are likely to turn.[64] Articles 7 and 10 implement the general reference. Specifically, they note that if the documents are certified in accordance with the procedure specified in the request, then they shall be admissible in evidence as proof of the truth of the matter set forth therein.[65] In short, documents can be admissible as a hearsay exception. Both public and private documents are contemplated under the treaty.

Responsiveness and timeliness of delivery tend to determine to what extent a white-collar investigation and prosecution can advance. Often financial institutions control the key documents in these kinds of cases. Domestic law controls whether financial institution officials expose themselves to liability for surrendering documents in an investigation and/or prosecution. Has there been a breach of confidentiality? Does the financial institution subject itself to criminal liability? An affirmative response to either of these questions can ensure an institution's decision not to assist, particularly if domestic law lacks an affirmative requirement to cooperate. The absence of subpoena authority or the presence of a limitation on which state authority can issue a subpoena impacts an investigation and a prosecution.[66] For instance, direct law enforcement cooperation may generate information that a prosecuting official requires for trial, but certification of those documents for prosecution purposes under the treaty might be frustrated under domestic procedural norms, particularly if the norms incorporate enforcement and regulatory powers in the same entity.[67] Obstacles aside, the ultimate goal remains unchanged: providing complete and accurate responses to the requesting state under the terms of MLAT.

Timeliness of delivery can also be pivotal in these kinds of cases. While a response may in fact be complete and accurate, its arrival weeks or months after the target delivery date can hinder investigative and prosecutorial efforts. To that end, constant communication between identifiable and reliable points of contact must be encouraged.[68] Public servants from either country should be able to act immediately in their own official capacity to advance particular requests for assistance.[69] Both

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64. U.S.-Mexico MLAT, *supra* note 60, art. 1(4)(b).

65. *Id.* art. 7(5) ("If certified or authenticated in such manner, they shall be admissible in evidence as proof of the truth of the matters set forth therein."); *id.* art. 10(3) (employing same language).

66. Compulsory process is not fully prescribed in many countries' laws, including Mexico's. At best, government officials can summon or formally request, with full knowledge that the individual's refusal cannot be punished effectively. *Compare* Código Federal de Procedimientos Penales [Federal Code of Criminal Procedure] arts. 73-85 (empowering a Public Prosecutor to issue summons in defined circumstances); *id.* art. 116 (requiring individuals to report criminal activity and cooperate to advance *de oficio* investigations); *id.* art. 125 (empowering a Public Prosecutor to summons fact witnesses); *id.* art. 242 (articulating obligation to cooperate with Public Prosecutor) *with id.* art. 20 (establishing no penalty for failure to ratify a statement before a Public Prosecutor); *id.* arts. 42(III), 44(III) (prescribing a 36-hour arrest as a disciplinary measure for those who fail to assist Public Prosecutors); *id.* art. 85 (authorizing fine of up to 10 days of minimum wage for those who fail to comply with a court order).

67. The National Banking Commission in Mexico serves an investigatory and regulatory role. *See generally* Ley de la Comisión Nacional Bancaria y de Valores [National Banking and Stock Commission] art. 2 (setting forth authority to "supervise" and "regulate"), *available at* http://www.cnbv.gob.mx (last visited Mar. 29, 2003); *id.* art. 4 (enumerating the express authority of the Commission). These competing duties generate an inherent conflict of interest, which an appropriate legislative initiative can remedy. Efforts to expose and remedy the conflict received limited reception.

68. To the extent that transnational criminals do not acknowledge or respect international borders, sovereigns must advance and maintain 24/7/365 points of contact.

69. Depending on the specific official act, government employees in the U.S. receive absolute or qualified

countries should exercise discretion in deciding which requests to advance and prioritizing the needs for the most important cases.

Apart from document production, the treaty also contemplates searches and seizures,[70] and mobilizing, securing, and forfeiting assets.[71] In the area of white-collar crime, these provisions play a particularly important role because businesses, residences, safe-deposit boxes, and computers often contain crucial information to advance white-collar investigations and prosecutions. Invoking the provision to mobilize, secure, and forfeit assets can frustrate white-collar criminals' intent to use and relocate resources for further illicit ends. Consistent and frequent 24/7/365 points of contact between central authorities can play a determinative role in ensuring that appropriate law enforcement action is immediate and certain in these instances. Effective forfeiture laws enable governments to disrupt and dismantle white-collar criminal enterprises, and cooperation can be subsequently rewarded through asset sharing.[72]

Given multiple variables that permit white-collar criminals to seek impunity, all legitimate means to bring them to justice, not just extradition, should be pursued. To the extent the illicit acts of white-collar criminals often transcend national borders, seeking and obtaining evidence in other jurisdictions often play a determinative role in the criminals' prospective prosecution. Mutual legal assistance treaties become important tools to ensure that justice is served.

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immunity for their official acts. *See Malley v. Briggs*, 475 U.S. 335, 343 (1986) (affirming principle of immunity for official acts, particularly with aim not to impair "exercise of independent judgment"). Mexican officials regularly noted the absence of similar safeguards under Mexican statutory or case law. Risk of personal liability for appropriate officials impedes advancing countries' abilities to foster career public servants. On April 9, 2003, the Government of Mexico brought into force the Ley del Servicio Profesional de Carrera en la Adminstración Pública Federal [Law for Career Professional Service in Federal Public Adminstration], an important step to establish and nurture professional public servants in Mexico. *See* "Ley del Servicio Profesional de Carrera en la Adminstración Pública Federal," DIARIO OFICIAL (Primera Secc.), 10 de abril de 2003, at 44-60.

70. U.S.-Mexico MLAT, *supra* note 60, arts. 1(4)(c), 12.

71. *Id.* arts. 1(4)(d), 11.

72. Use of the Ley Federal para la Administración de Bienes Asegurados, Decomisados, y Abandonados [Mexican Federal Law for the Administration of Seized, Forfeited, and Abandoned Goods] in practice results in few reported forfeitures. Efforts to give full force and effect to this important law enforcement tool should be pursued.