

**Criminal Prosecutions
Under Article 4 *of the*
MEXICAN FEDERAL
PENAL CODE**

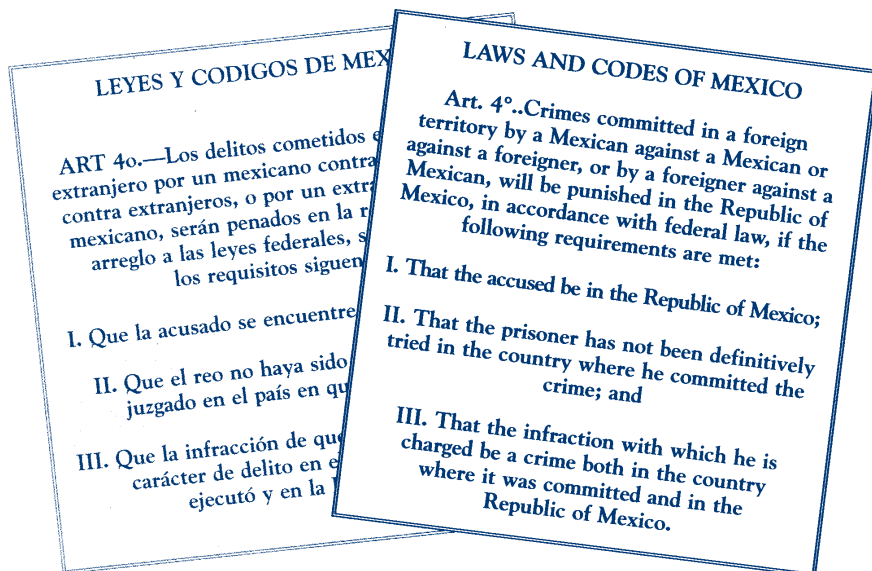


ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

Criminal Prosecutions
Under Article 4 *of the*
MEXICAN FEDERAL
PENAL CODE



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT



CONTENTS

INTRODUCTION.....	1
CHAPTER I	
Foreign Prosecutions: Case Criteria	3
CHAPTER II	
The Article 4 Case File.....	7
CHAPTER III	
Assistance Provided by the Office of the Attorney General.....	11
CHAPTER IV	
The Mexican Criminal Justice System	15
APPENDICES	
Appendix A	
Treaty on Cooperation Between the United Mexican States and the United States of America for Mutual Legal Assistance.....	19

INTRODUCTION

When a Mexican national commits a crime in the United States and then flees to Mexico, Texas prosecutors have two realistic options:

- 1) If the fugitive is an American citizen¹ the prosecutor can file a request for extradition under a treaty that exists between the United States and Mexico; or**
- 2) The prosecutor may seek prosecution of the offender in Mexico by Mexican authorities under Article 4 of the Mexican Federal Penal Code.**

The first option, extradition, is always the preferred avenue. When an individual accused of a crime is extradited to the United States, he or she will be tried, and if convicted, sentenced in the jurisdiction where the crime was committed.

Mexican authorities often extradite American citizens to the United States. Likewise, the United States commonly returns Mexican nationals for crimes committed in that country. However, complications with the extradition treaty arise when Mexico is requested to extradite its own nationals. Extradition may not always be a viable option for Texas prosecutors seeking to bring a Mexican criminal to justice.

A second option, an “Article 4 prosecution,” is so termed because of the unique statute of the Mexican Federal Penal Code that permits the prosecution of Mexican citizens who commit crimes in foreign territories. A prosecution of a Mexican national under Article 4 of the Mexican Federal Penal Code may be the best option available to Texas prosecutors.

The principal barriers to Article 4 prosecution in this state appear to be uncertainty about procedure and lack of familiarity with Mexican law. This manual is designed to facilitate the use of Article 4 by law enforcement authorities and to outline the assistance available through the Criminal Law Enforcement Division of the Office of the Attorney General.

Since 1994, the Texas Attorney General has worked with the Office of the Attorney General of Mexico to bring numerous dangerous criminals to justice. Both offices have an established record of cooperation in foreign prosecutions. Texas prosecutors are now able to seek justice in cases that in the past might have remained unresolved.

¹If the fugitive is a naturalized U.S. citizen who was born in Mexico, he is considered a Mexican national by the Mexican government, and extradition may not be a viable option. In such cases, a prosecution in Mexico under Article 4 is recommended.

CHAPTER I

Foreign Prosecutions: Case Criteria

THE MEXICAN JUDICIAL SYSTEM varies dramatically from those in Texas, other American States, and U.S. federal courts. One of the fundamental differences is Mexico's ability to prosecute one of its citizens for committing a crime outside its national boundaries. The Mexican Federal Penal Code, under Article 4, allows for the domestic prosecution of Mexican nationals who commit crimes in a foreign country—in this case the United States—and flee to Mexico in search of a safe haven from prosecution. Since such prosecutions do not take place in accordance with an international treaty, (in which case U.S. federal authorities would be obligated to intervene) under Article 4 it is possible for a state agency in the United States to request that a criminal be arrested and prosecuted in Mexico. For Texas, such requests have been traditionally handled by the State Attorney General, who works with Texas prosecutors to present requests under Article 4 to the corresponding authorities in Mexico.

Article 4 is concise and clear. Translated, it reads:

Crimes committed in a foreign territory by a Mexican against a Mexican or against a foreigner, or by a foreigner against a Mexican, will be punished in the Republic of Mexico, in accordance with federal law, if the following requirements are met:

- I. That the accused be in the Republic of Mexico;*
- II. That the prisoner has not been definitively tried in the country where he committed the crime, and;*
- III. That the infraction with which he is charged be a crime both in the country where it was committed and in the Republic of Mexico.*

Given the differences in the legal systems and substantive laws of our respective countries, coupled with the guidelines set forth in Article 4 of the Mexican Federal Penal Code, not all cases are appropriate for this type of prosecution. The Criminal Law Enforcement Division of the Office of the Attorney General (OAG) explores all pos-

sible avenues prior to determining whether a case is suitable for Article 4 prosecution.

EXTRADITION OF UNITED STATES CITIZENS VERSUS MEXICAN CITIZENS

The United States and Mexico signed an extradition treaty on May 4, 1978 that provides for the return of those who have committed crimes and fled across the United States/Mexico border.

In every case presented for review by the OAG, the option of extradition is considered.

However, like most extradition agreements, the treaty between the United States and Mexico does not obligate either party to hand over its own nationals. In recent years, extraditions of Mexican nationals to face trial in the United States have been the exception rather than the norm. Thus, if it is determined that a suspect is a citizen of that country, an Article 4 prosecution is generally the best way to proceed. But if the suspect is indeed an American citizen, in most cases an extradition request will be honored by Mexico.

The extradition process is useful for securing the return of an American suspect to the United States, at the United States' request, if the individual is wanted for committing a crime in United States territory.

INTERNATIONAL EXTRADITION REQUIRES FEDERAL INVOLVEMENT

Prosecutors who are reluctant to forego domestic prosecution of Mexican nationals should be aware that extradition is not a quicker, easier alternative to preparing for prosecution under Mexican law. An extradition request calls for equally thorough case preparation and requires the use of official diplomatic channels. A request to Mexico under the United States/ Mexico Extradition Treaty must be approved by the United States Department of Justice and tendered by the Department of State.

PRESENTING A REQUEST FOR PROSECUTION IN MEXICO

As in a case for extradition, Article 4 requires that the criminal act for which a Mexican prosecution is sought be recognized as a criminal offense in both Mexico and the requesting country. These are essentially the same offenses for which extradition may be requested. While Article 4 has been traditionally invoked only in cases of serious crimes such as murder, kidnaping, and rape, prosecutors should consider lesser crimes that may be added to principal charges to extend the length of a sentence in Mexico.

Article 4, like extradition, requires evidence that is sufficient to warrant prosecution in Texas. Prosecutors should carefully review prospective Article 4 requests to ensure that cases are well developed and investigated before Article 4 prosecution is requested. Texas prosecutors should keep in mind that Mexican federal authorities are not obligated to accept and prosecute Article 4 cases. Notwithstanding, the Office of the Attorney General of Mexico has a long history of cooperation with U.S. border states in handling such cases. To ensure continued future cooperation, Texas prosecutors should consider filing only their strongest cases.

Furthermore, Article 4 is not applicable if the fugitive has been definitively tried in the United States. Under Mexican law, a person is considered to have been definitively tried when he or she has been tried and convicted or acquitted, has been sentenced if convicted, and has no appeal pending. However, there are many instances where domestic prosecution has been initiated, and Article 4 may still be applicable. If, for example, an individual has been tried and convicted in the United States but has fled to Mexico during the pendency of the appeal, he or she can still be prosecuted under Article 4. The same is true for people who escape while free on bond pending their trial.

If a fugitive has been tried and convicted but has fled to Mexico before sentencing or incarceration, Mexican law will permit Mexican authorities to incarcerate the defendant in a Mexican prison based upon the Texas conviction. In addition, a

fugitive may be charged for Unlawful Flight to Avoid Prosecution, a United States federal offense, once he or she crosses the border.

SECURING ARREST THROUGH ARTICLE 4

As with extradition, arrest under Article 4 prosecution is initiated through a formal request. The time constraints for arresting a fugitive pursuant to an Article 4 request are more stringent than those for an arrest pursuant to an extradition request. Whereas a person may be held under provisional arrest for 60 days while an extradition request is prepared, a fugitive may be held for only 4 days before a formal request is presented pursuant to Article 4.

Mexican law requires that an arresting authority in Mexico surrender any suspect to the federal judicial police within 24 hours of his or her arrest. Once a suspect is in custody, the Mexican federal prosecutor either rejects or files the complaint with the federal court. The federal court then has 72 hours to determine whether the complaint has merit. This is a total of 96 hours, including weekends and Mexican holidays, between arrest and either the release of the fugitive or the acceptance of the complaint for prosecution. It is therefore imperative that a prosecutor submit a complete case file along with the request for an Article 4 prosecution.

Additional information on arrest and detention can be found in Chapter IV, which gives an overview of the Mexican criminal justice system.

LOCATING THE FUGITIVE IN MEXICO

While the Texas prosecutor is conducting an investigation in the United States, he or she should attempt to ascertain a location for the fugitive or his or her family members, friends, or accomplices in Mexico. However, **Texas authorities should never conduct an investigation in Mexico without the prior knowledge and consent of Mexican authorities.** Conducting an unauthorized investigation in Mexico is a serious violation of Mexican law.

The **United States/Mexico Mutual Legal Assistance Treaty**, included in the Appendix, outlines procedures for the transfer of evidence between the

nations. This may provide an avenue for allowing a Texas investigator to accompany his Mexican counterpart, as an observer, in the gathering of information in Mexico. For more information on the Treaty or to find out how to conduct a lawful investigation in Mexico, Texas law enforcement officials should contact the Criminal Law Enforcement Division of the OAG.

SENTENCING AND TIME SERVED UNDER ARTICLE 4

Texas prosecutors will find that sentences in Mexico are generally comparable to those in Texas. The single notable exception involves juvenile offenders, which is discussed in Chapter IV.

For the most part, however, a person who is prosecuted under Article 4 will receive punishment as great as that which he or she would receive as a

result of a domestic prosecution. It should be noted that capital punishment is **not** an option in Mexico. Once the suspect in a Texas capital crime has fled to Mexico, capital punishment is effectively out of reach. Mexico will not extradite anyone wanted for a capital offense, regardless of nationality, unless United States authorities adequately assure Mexican authorities that they will not seek the death penalty.

TAKING PAROLE INTO ACCOUNT

Time actually served in Mexico differs significantly from time actually served in Texas. Parole does not exist under Mexican law; therefore, Mexican officials rarely commute or lessen sentences. Once sentenced in Mexico, a criminal may not have his or her term diminished for good behavior, as is typically the case in Texas.

COMPARISON OF TEXAS-MEXICO PENAL CODE OFFENSES AND RANGE OF PUNISHMENT

TYPE OF OFFENSE	TEXAS PENAL CODE § AND RANGE OF PUNISHMENT	MEXICAN PENAL CODE § AND RANGE OF PUNISHMENT
Capital Murder	§19.03(a)(2); life in prison or death	Title 19, Chapter II, Article 320; 20 to 50 years
Aggravated Robbery	§29.03; 5 to 99 years or life in prison	Title 22, Chapter I, Article 372; 2 to 15 years
Aggravated Sexual Assault	§22.021; 5 to 99 years or life in prison	Title 15, Chapter I, Article 265; 8 to 14 years
Aggravated Kidnaping	§20.04; 5 to 99 years or life in prison	Title 21, Chapter I, Article 366; 6 to 40 years

CHAPTER II

The Article 4 Case File

FILING A REQUEST FOR FOREIGN PROSECUTION under the provisions of Article 4 of the Mexican Federal Penal Code requires submitting a comprehensive case file. This file contains all necessary supporting documentation for the prosecution in Mexico and is presented to the Mexican federal authorities at the time of the formal request for prosecution.

In some cases, Mexican authorities may ask for additional testimony or evidence after reviewing the case file and the formal request for prosecution. It is therefore advisable for prosecutors to make every effort when preparing the case file to anticipate and provide all necessary documents, evidence, and other supporting materials.

This chapter provides detailed instructions for preparing the case file for an Article 4 prosecution. Agencies wishing to file a request for Article 4 prosecution should contact the OAG Criminal Law Enforcement Division at (512) 463-2170 for technical and logistical assistance.

CONTENTS OF THE ARTICLE 4 CASE FILE

The Article 4 case file is similar to a file prepared by a prosecuting attorney prior to prosecuting an individual in a Texas court. It must include the following documentation:

- Authenticated copies of all statutes upon which the charges are based
- Warrant of arrest
- Grand jury indictment(s)
- Affidavit authenticating case file contents
- Documentation as to suspect's identity, whereabouts, and citizenship:
 - 1) Complete physical description of the suspect, including photographs and fingerprints, if possible;
 - 2) Address in Mexico where the suspect is believed to be located;
 - 3) Copies of the suspect's Mexican birth certificate, baptismal certificate, or any other

documents substantiating Mexican citizenship, if possible.

- All police, technical, and evidence reports associated with the case (described in detail later in this chapter)
- A table of contents with a complete chronological listing of documents as arranged in the case file

The above must be duly translated by a reputable professional translator. Once translated, the entire case file must be legalized.

Detailed instructions for all of the necessary steps, including translation of the file, are provided in this chapter and Chapter III. The case file must be accompanied by several letters and documents. Examples are included in figure II-1.

THE PROSECUTING ATTORNEY'S AFFIDAVIT AND TEXAS STATUTES

The prosecuting attorney with jurisdiction in the case must prepare an affidavit that names the suspect, provides a brief summary of the facts, and specifies all charges and their penalties under Texas law. The affidavit, which should be executed before a judge, should clearly identify and attest to the authenticity of each attached document and state that the suspect has not been previously arrested or tried in the United States. This documentation, along with all other requests and contents of the case file, is to be included in the Spanish translation of the case file.

Authenticated copies of all state statutes that authorize criminal prosecution in Texas must be included in the case file. This is necessary so that Mexican prosecutors can determine whether the case meets the requirement of Article 4, Subsection III: **that the offense be a crime in both countries.** The prosecuting attorney is urged to consult with the Criminal Law Enforcement Division of the OAG to determine which Texas statutes to include.

The Texas prosecutor must authenticate state statutes by filing a motion requesting that a district court judge take judicial notice of the relevant statutes and enter an order authenticating the same. Such an order should comply with the self-authen-

tication provisions of Tex. Rule Crim. Evid. 902(1). An example of the motion and order authenticating statutes are supplied in *Figure II-1*.

POLICE AND TECHNICAL REPORTS

Copies of all pertinent crime reports, investigative reports, and related documents must be included in the case file. These documents include, but are not limited to:

- Preliminary investigation report
- Medical records
- Follow-up investigative reports
- Statements of physicians attending victims
- Property reports
- Documents identifying victims
- Evidence reports
- Witness statements
- Technical reports (e.g., hair and fiber analyses)

- Expert reports (e.g., fingerprint comparisons)

If possible (and applicable), the victim's attending physician should address injuries contributing to death. The following should also be included in murder prosecution case files:

- Autopsy report(s) by the medical examiner and results of inquests, if applicable
- Death certificate(s)

All reports must contain the signature of the reporting officer. Originals of the reports, statements, documents, and evidence should be retained by the requesting agency and not submitted to the Mexican prosecutor. These materials may be needed for Texas prosecution, if the suspect is apprehended in the United States. The head of the investigating agency (sheriff or chief of police) must certify by letter that the investigative reports are true copies of originals on file in his or her department.

WITNESS STATEMENTS

Witness and informant statements should be as brief as possible while containing all essential facts. Whenever possible, signed statements from a minimum of two witnesses should be provided regarding the suspect's actions and/or the facts surrounding the crime. Witness statements are especially important if there are no documents that establish the suspect's nationality. In such a case,

the statement should clearly indicate the witness' knowledge that the suspect is a Mexican citizen. The witness should also provide the suspect's place of birth, if possible.

If witnesses cannot be found to address all of these matters, statements from two investigators that attest to the suspect's citizenship and the victim's identity can be included. An investigator's statement can also include observations of the crime scene as to cause of death and observations of the autopsy as substantiated by the medical examiner's reports.

If the original statement from a witness fails to clearly substantiate the identity of the suspect or the suspect's involvement in the crime, the Mexican prosecutor may require that the witness be produced either in Mexico or, if unable to travel to Mexico, at the nearest Mexican consulate. The Mexican prosecutor or consul may then personally interview the witness. The OAG will make all necessary arrangements for such an interview if it is required.

EVIDENTIARY WEIGHT OF CONFESSIONS

Texas law enforcement officials should also note that Mexican law does not allow for a person to be charged with a crime solely upon the basis of his or her confession.

In an Article 4 case where the suspect was first arrested in Texas and later released on bail, the Mexican judges who preside over that person's prosecution in Mexico will make certain that proper procedure was followed while the person was detained in Texas. Although it cannot be used as the sole basis for conviction in Mexico, a confession made by a person who had due access to Mexican consular authorities will carry more weight in a Mexican court.

CONSULAR NOTIFICATION UNDER THE VIENNA CONVENTION

In virtually all circumstances where a foreign national is arrested in the United States, the arresting authority must inform that person that he or

she has a right to contact the appropriate consular authorities in the United States. The Office of the Attorney General of Texas has developed the *Magistrate's Guide to the Vienna Convention on Consular Notifications*, which details procedures that must be followed by Texas magistrates when arraigning a foreigner in the United States. For a free copy of the guide, please contact the Criminal Law Enforcement Division of the OAG or view the guide on the OAG Web site, www.oag.state.tx.us.

PHOTOGRAPHS AND PHYSICAL EVIDENCE

The case file should include copies of photographs of the crime scene, the autopsy (in case of murder), the victim(s), the evidence, and any other scene or object pertinent to the investigation. All photo-

graphs of the evidence, including those of murder weapons, should be accompanied by descriptions on appropriate departmental forms, with signatures of the investigators or criminologists if scientific analyses and examinations were conducted. The same applies to autopsy photographs, which should be accompanied by descriptions signed by the medical examiner. Multiple photographs of the same thing need not be included.

It is not usually necessary to introduce physical evidence for a Mexican prosecution; photographs and accurate descriptions on investigative reports will suffice in most instances. At times, the Mexican prosecutor may ask for additional evidence or to view the physical evidence. Again, the OAG will arrange for the transfer of such evidence if it is required.

FIG. II-1: The District Attorney, in whose jurisdiction the crime occurred, must file a motion to have the relevant Texas statutes authenticated. The judge may then sign the form on the left below.

<p style="text-align: center;">Cause Number —</p> <p>THE STATE OF TEXAS § IN THE DISTRICT COURT VS. § — TH JUD. DISTRICT [NAME] § — COUNTY, TEXAS</p> <p style="text-align: center;">MOTION TO TAKE JUDICIAL NOTICE AND AUTHENTICATE STATUTES</p> <p>Comes now the State of Texas by and through the undersigned Assistant District Attorney in and for — County, State of Texas, and moves that this court take judicial notice pursuant to Tex. Rule of Crim. Evid. 201(d) of the statutes attached hereto and incorporated herein by reference that were in effect on about [date]. The State of Texas intends to prosecute the named defendant in Mexico pursuant to Article 4 of the Mexican Penal Code. Since Mexican authorities require that the attached statutes be authenticated, the State moves that the court authenticate same in accordance with Tex. Rule of Crim. Evid. 902(1) by certifying the attached statutes are true and correct copies of Tex. Penal Code §§ ____.</p>	<p>Respectfully submitted,</p> <p>_____ [Name] Assistant District Attorney [Address]</p> <p>State Bar No.: —</p>
<p style="text-align: center;">Cause Number —</p> <p>THE STATE OF TEXAS § IN THE DISTRICT COURT VS. § — TH JUD. DISTRICT [NAME] § — COUNTY, TEXAS</p> <p style="text-align: center;">ORDER</p> <p>This day in open court, the State of Texas requested that the court take judicial notice of the statutes attached hereto and certify same. The court finding good cause to enter such an order, takes judicial notice of such statutes, and does hereby certify that such statutes are true and correct copies of the statutes that were in effect on or about [date]. It is hereby ordered that in witness of such certification the court's seal be affixed hereto, and such documents by virtue of this court's seal are deemed to be self-authenticating documents, in accordance with Tex. Rule of Crim. Evid. 902(1).</p> <p style="text-align: right;">Signed and entered this [date].</p> <p style="text-align: right;">_____ [Name], Judge Presiding —th Judicial District Court — County, Texas</p>	

CHAPTER III

Assistance Provided by the Office of the Attorney General

SUCCESSFUL ARTICLE 4 PROSECUTION requires careful preparation, correct authentication of all necessary documents, and timely attention to procedure, as outlined in this chapter. Agencies interested in requesting an Article 4 prosecution should contact the Criminal Law Enforcement Division of the Office of the Attorney General of Texas at (512) 463-2170 for assistance.

In preparation for an Article 4 prosecution, the prosecuting attorney shall:

- review the case
- arrange for translation of the case file with a professional translator
- submit all documentation and the corresponding translation to the OAG

The OAG will then:

- review the case
- review the translation
- draft additional documents necessary for filing of the case with Mexico
- act as a liaison with Mexican authorities throughout the process
- make formal requests if evidence and information needs to be obtained from or transferred to Mexico during either the investigation of the case or the trial in Mexico
- arrange for the legalization of the case file by requesting the *Apostille* from the Secretary of State's Office (see "Legalization of File" below and *Fig. III-2*); and
- file the request with the Mexican Federal Attorney General's Office

THE PROSECUTING ATTORNEY'S REVIEW

The requesting agency, if other than the prosecuting attorney, must submit its evidence to the prosecuting attorney's office that has jurisdiction over the case. The prosecuting attorney will then evaluate the case to determine whether there is sufficient legal evidence

to warrant prosecution in a Texas court. A Mexican prosecutor, like his United States counterpart, must present sufficient evidence before a Mexican court of law to sustain a conviction. A Mexican prosecutor will not file a case if there is insufficient evidence to warrant an arrest and subsequent prosecution. Despite the procedural and substantive legal differences in our two countries, it is likely that the Mexican prosecutor will find sufficient evidence to warrant a prosecution only if his Texan counterpart believes the evidence would warrant a prosecution in the United States.

Once the prosecuting attorney has reviewed a case file and determined that there is sufficient evidence to warrant a prosecution, he or she should prepare an affidavit to authenticate relevant Texas statutes, as explained in Chapter II. This affidavit should also attest to the authenticity of all other documents in the case file.

The prosecuting attorney's office, as well as the investigating agency, should remember that Article 4 prosecution is voluntary on the part of Mexican officials. The system should not be abused or overburdened. Prospective cases should be scrutinized. It bears repeating that prosecutors should not submit cases for prosecution in Mexico that would not meet the sufficiency-of-evidence standard in Texas courts.

TRANSLATION OF THE CASE FILE INTO SPANISH

The requesting Texas prosecutor must prepare two versions of the case file: one in English and one in Spanish. The Spanish translation must be notarized by the translator and legalized along with the original case file by *Apostille*. Care should be taken to ensure that only the most qualified individuals are solicited to execute necessary translations.

The conviction and punishment of the suspect depend almost exclusively on the contents of the case file. Before it is submitted to Mexican authorities, the file should be checked for accuracy and detail several times over, and the translation should reflect the meticulousness of the original. A poor translation of the case file could result in delays and would undoubtedly cause an added, undue burden upon Mexican prosecutors. It is therefore imperative that the translation be assigned to a reputable professional and thoroughly proofread by another.

It is also advisable that a contract be signed with the translator or agency, most of whom will provide one upon request. The contract should outline fees, payment schedules, deadlines, and clauses of confidentiality.

The Office of the Attorney General will do a final proofreading of the translation. The OAG also is available to provide referrals to reputable, reasonably priced translators throughout the state.

The OAG has bilingual staff who are experienced with reviewing an entire case file and its corresponding translation. Currently, prosecuting attorneys must cover all costs associated with the preparation of the case file, including translation costs.

LEGALIZATION OF THE CASE FILE

On October 5, 1961, via the Hague Convention, the requirement of diplomatic or consular legalization for foreign public documents was abolished. Previously, public documents executed in the territory of one contracting State and which had to be produced in the territory of another contracting State, had to be submitted to the consulate nearest to where the crime was committed. There the Consul General would stamp said documents with his Consular seal to formally legalize said documents.

Today, all that is required is a certificate known as an *Apostille*, which can be obtained from the Secretary of State's Office. The *Apostille* is issued at the request of the person who has signed the document or of any bearer. [See Fig. III-1: *Sample letter requesting Apostille from Secretary of State.*]

When properly completed, the *Apostille* certifies the authenticity of the signature, the capacity in which the person signing the document has acted, and, where appropriate, the identity of the seal or stamp that the document bears.

The signature, seal, and stamp on the *Apostille* are exempt from all certification. [See Fig. III-2: *Model of Apostille certificate.*]

SUBMISSION OF THE CASE FILE TO THE MEXICAN AUTHORITIES

The Criminal Law Enforcement Division of the OAG will present the case file to the Mexican Federal Attorney General's Office, describing the crime and its prescribed penalty in Texas and specifying the name(s) of the suspect(s).

FIG. III-1: Sample letter requesting Apostille



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

Criminal Law Enforcement
Office: (512) 463-2170
Fax: (512) 474-4570

February 17, 2003

Ms. Wynnell Noelke
Statutory Documents Section
Secretary of State's Office
1019 Brazos
Austin, Tx 78701

Dear Ms. Noelke:

I would like to request your assistance in providing us with an Apostille for Jim Hamlin, the District Clerk of Dallas County, Texas (and/or his Deputy, C. Hutchinson). This document will be used by our office to file a certified copy of a Final Judgment and Sentence from Dallas County, Texas with the Mexican Attorney General's Office in Mexico City in the matter of the State of Texas vs. Mario Zamorano, Jr.

Once this document is prepared, I would greatly appreciate it if you would mail it to the following address: David L. Garza, Assistant Attorney General, 300 W. 15th Street, 7th Floor, Austin, Texas 78701. Thank you very much for your prompt and courteous attention to this matter.

Sincerely yours,

David L. Garza
Assistant Attorney General
Criminal Law Enforcement Division

FIG. III-2: Model of Apostille Certificate

APOSTILLE

(Convention de La Haye du 5 octobre 1961)

1. Country:

This public document

2. has been signed by

3. acting in the capacity of

bears the seal/stamp of

.....

Certified

5. at

6. the

7. by

8. N°

9. Seal/stamp:
.....

10. Signature:
.....

CHAPTER IV

The Mexican Criminal Justice System

IN ORDER TO FULLY appreciate the importance of the Article 4 case file, the Texas prosecutor must envision the trial as it occurs in Mexico: without a jury, without live testimony, and without cross-examination of witnesses by attorneys. The following are highlights of the major phases in a Mexican criminal investigation and prosecution. [See Fig. IV-1: *The Mexican Criminal Trial*].

THE PRELIMINARY INVESTIGATION

When the Mexican Public Ministry (Ministerio Público—The Mexican Federal Attorney General is a division of the Public Ministry) receives a written notice requesting an Article 4 prosecution, it directs the federal police to undertake an investigation. This initial phase of a criminal prosecution in Mexico is commonly referred to as the “*averiguaciones previas*,” or preliminary investigation. In Article 4 cases, the investigation consists primarily of a review of the evidence in the case file. On the basis of this investigation, the Ministry makes a formal decision regarding charges.

If no criminal act appears to have taken place, the officials close the case at that point. This is not a dismissal, however, and the case may be re-opened should additional evidence be provided. If the case lacks sufficient evidence for formal charges to be filed but is deemed to have merit, it is placed on hold by authorities until the necessary information and/or proof are gathered.

If the case is considered to have merit and all necessary documentation has been gathered, it is then forwarded to the presiding judge, who issues an arrest warrant. Once apprehended, the suspect is detained for 72 hours while the judge reviews the evidence contained in the case file. If the evidence is deemed to be insufficient, the case is dismissed. If the evidence is deemed sufficient, the judge issues a detention

order, “*auto de formal prision*,” by which the suspect is imprisoned to await trial.

If the case fails at any point in this process and the suspect returns to the United States and is apprehended by Texas authorities, he or she may still be prosecuted in Texas. Once Mexican authorities approve and accept a case file and have apprehended the suspect, however, prosecution rests fully in the hands of Mexican courts.

PERIOD OF INSTRUCTION

The first phase prior to the Mexican trial is the “*period of instruction*.” During this phase, the prosecutor may present additional evidence and the defense is allowed to present its case. This phase is handled completely by way of written documents. For the purposes of Article 4 prosecution, all necessary documentation and evidence should already be in the case file.

Cross-examination may take place during the *period of instruction*. The need for this type of cross-examination is relatively rare, however, since most questions should have been answered and included in the case file in the form of a legalized statement or interview. Following that, the attorneys make their formal written conclusions which are presented to the judge.

THE TRIAL

Mexico’s criminal prosecutions vary significantly from those in the United States in that there are no jury trials. Decisions are made solely by the presiding judges and may be appealed twice thereafter. Trials occur behind closed doors, and statements and lawyers’ deliberations before the judges are kept to a minimum. Witnesses seldom appear to testify in person, since judges make their decisions by carefully studying the evidence presented before them, including depositions and formal statements. Under this system, the evidence contained in the Article 4 case file is the major determinant in the outcome of a trial.

In the unlikely event that the judge deems it necessary to hear live testimony, he may subpoena the desired witness to appear before the court, or he may direct that the witness be interviewed further. If such a witness is in the United States, the OAG will make the necessary arrangements for an interview before Mexican authorities.

THE DECISION BY THE JUDGE

After evidence has been submitted and taken into account by the judge, the defending and prosecuting attorneys formally appear before the judge and present their final arguments. Additional evidence can be presented in this final stage.

At the close of the final arguments, the judge weighs all of the evidence presented and determines guilt or innocence. If he finds the defendant guilty, it is also the judge who imposes the sentence. The judge writes his entire decision, fully detailing the evidence that was presented, and explains the reasoning for such decision. Once the written decision is presented, it becomes final as long as all parties are in agreement.

If either of the parties has an objection regarding the judge's conclusions or the legality of the sentence, an appeal is automatically granted. During the appeal, the evidence and the judge's decisions are reviewed. If the decision is sustained following appeal, *habeas corpus* is available to the defendant as a last resort.

MANNER IN WHICH PENALTIES ARE APPLIED

Texas prosecutors normally decide how to charge a defendant based on the effect their choice will have on issues such as parole, probation, cumulative sentences, complexity of trial presentation, and double jeopardy. However, Mexican prosecutors do not factor in these considerations. Instead, they present all possible charges to the Mexican courts, who in turn decide whether to pursue some or all of the charges. Texas prosecutors likewise need to include all possible offenses in the Article 4 prosecution file.

Even when an offense may appear to be a lesser included offense in Texas, it might be prosecutable in Mexico as a separate offense, which could lead to increased punishment.

A NOTE ON JUVENILE OFFENDERS

Prosecutors contemplating Article 4 prosecution in Mexico for an offender under the age of 18 should note two important differences between Mexico and Texas. First, Tex. Penal Code § 8.07 sets 17 as the age of criminal responsibility; Mexico sets the age at 18. Second, Mexican juveniles are not necessarily handled by the criminal system.

Although juvenile offenders may in some cases be incarcerated in Mexico, they are less likely to serve a long sentence. Most will serve time in a rehabilitation facility, not a prison. In Mexico, a juvenile offender is more likely to receive psychological and social services up until the age of majority. Moreover, jurisdiction over the juvenile offender typically ceases in Mexico once he or she reaches the age of majority.

Texas prosecutors should consult with the Criminal Law Enforcement Division of the OAG prior to discounting an Article 4 prosecution of a juvenile, since Mexican prosecutors might grant an exception in the case of an egregious offense.

When a Texas prosecutor opts to pursue a Texas prosecution instead of an Article 4 prosecution, Tex. Code Crim. Pro. Art. 12.04(a) excludes time in which a defendant absents himself from the state. Therefore, when Texas prosecutors certify and indict juvenile offenders between 17 and 18 years of age, they should exercise due diligence to serve the Texas warrant.

Prosecutors should check with their local sheriff's office warrant division to ensure that the sheriff's office exercises due diligence. Furthermore, when entering **Texas Crime Information Center (TCIC)** warrant information, all aliases and identifying information should be included. This will increase chances for arrest should the offender re-enter the United States.

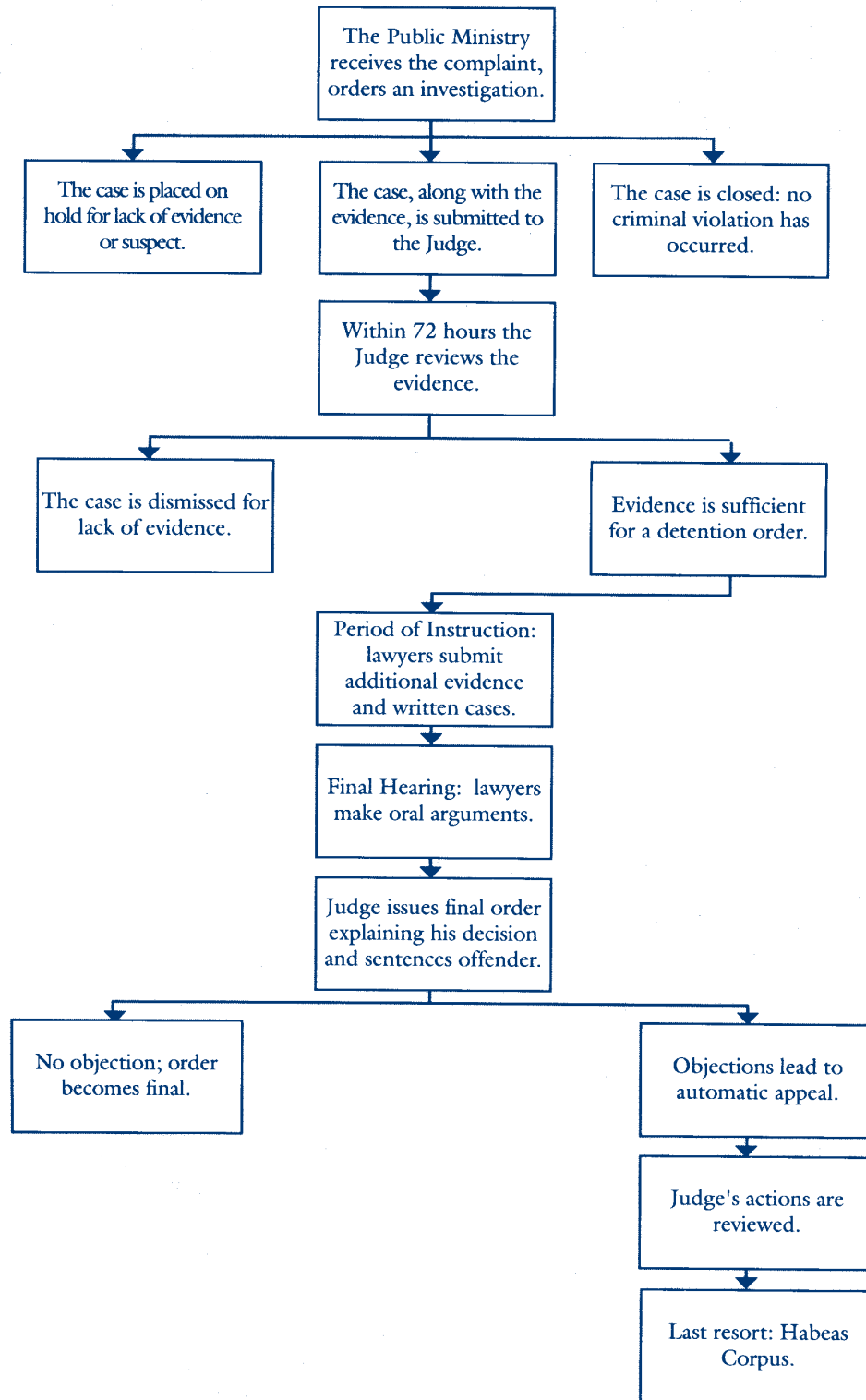
THE FUTURE OF ARTICLE 4 PROSECUTION

The Office of the Attorney General of Texas has provided this manual as a resource to encourage Texas prosecutors in their efforts to obtain justice for crime victims. The fact of an international boundary should not confer immunity on criminals from any country. Assistance in this matter is available from this agency. Law enforcement officials are encouraged to call the Office of the Attorney General of Texas.

Texas prosecutors should continue to seek extradition of United States citizens who commit crimes and flee to Mexico to escape justice. When Mexican or other foreign nationals commit crimes in the United States and flee to their native country, they, too, should be brought to justice by the most effective legal means currently available: prosecution under Article 4 of the Mexican Federal Penal Code.

CHAPTER IV: THE MEXICAN CRIMINAL JUSTICE SYSTEM

FIG. IV-1: The Mexican Criminal Trial



**APPENDIX A: TREATY ON COOPERATION
BETWEEN THE UNITED MEXICAN
STATES AND THE UNITED STATES
OF AMERICA FOR MUTUAL
LEGAL ASSISTANCE**

The Governments of the United Mexican States and the United States of America (the Parties),

Desiring to cooperate in the framework of their friendly relations, and to undertake mutual legal assistance to provide for the best administration of justice in criminal matters,

Have agreed as follows:

**Article 1
Scope of the Treaty**

1. The parties shall cooperate with each other by taking all appropriate measures that they have legal authority to take, in order to provide mutual legal assistance in criminal matters, in accordance with the terms of this Treaty and subject to the limitations of their respective domestic legal provisions. Such assistance shall deal with the prevention, investigation and prosecution of crimes or any other criminal proceedings arising from acts which are within the competence or jurisdiction of the requesting Party at the time the assistance is requested, and in connection with ancillary proceedings of any other kind related to the criminal acts in question.

2. This Treaty does not empower one Party's authorities to undertake, in the territorial jurisdiction of the other, the exercise and performance of the functions or authority exclusively entrusted to the authorities of that other Party by its national laws or regulations.

3. Subject to the provisions of paragraph 1 of this Article, requests for assistance under this Treaty will be executed, except that the requested Party may deny a request to the extent that:

- a) execution of the request would require the requested Party to exceed its legal authority or would otherwise be prohibited by the legal provisions in force in the requested State, in which case the Coordinating Authorities referred to in Article 2 of this Treaty shall consult with each other to identify alternative lawful means for securing assistance.
- b) execution of the request would in the judgment of the requested Party prejudice its security or other essential public policy or interest;
- c) the Executive of the requested Party regards the request as concerning an offense which is political or of a political character;
- d) the request relates to military offenses, except those which constitute offenses under ordinary criminal law; or
- e) the request does not comply with the provisions of this Treaty.

4. In conformity with this Article and in accordance with the other provisions of this Treaty, such assistance will include:

- a) the taking of testimony or statements of persons;
- b) the provision of documents, records and evidence;
- c) the legal execution of request for searches and seizures as ordered by the judicial authorities of the requested Party in accordance with its constitutional and other legal provisions;
- d) the legal execution of request for the taking of measures to immobilize, secure, or forfeit assets as ordered by the judicial authorities of the requested Party in accordance with its constitutional and other legal provisions;
- e) the voluntary transferring of persons in custody for testimonial or identification purposes;
- f) serving documents;
- g) locating or identifying persons;
- h) exchanging information; and
- i) other forms of assistance mutually agreed by the Parties, in conformity with the object and purpose of this Treaty.

5. This Treaty is intended solely for mutual legal assistance between the Parties. The provisions of this Treaty shall not give rise to a right on the part of any private person to obtain, suppress, or exclude any evidence, or to impede the execution of a request.

Article 2

Coordinating Authorities

1. With the purpose of ensuring due cooperation between the Parties in providing to each other mutual legal assistance which falls within the scope of this Treaty, the United Mexican States designates as its Coordinating Authority its Procuraduria General de la República, and the United States of America designates as its Coordinating Authority the Central Authority of the United States Department of Justice. The Coordinating Authority of the requested State shall promptly comply with the requests or, when appropriate, shall transmit them to other competent authorities to do so. The competent authorities of the requested State shall take all necessary measures to promptly execute the request in accordance with Article 1.

2. The Coordinating Authorities shall consult regularly with each other in order to secure the most effective implementation of this Treaty and to anticipate and resolve problems that may arise in its application.

3. For those purposes, the Coordinating Authorities shall meet at the request of either one of them and at a time and place to be mutually agreed.

Article 3

Limitations on Assistance

1. Before refusing the execution of any request pursuant to this Treaty, the Coordinating Authority of the requested Party shall determine whether there are conditions whose satisfaction would make possible the rendering of assistance. If the requesting party accepts the assistance subject to those conditions, it shall comply with them.
2. The Coordinating Authority of the requested Party shall promptly inform that of the requesting Party of the reason for denying the execution of a request.

Article 4

Contents of the Request for Mutual Assistance

1. Requests for assistance will be submitted in writing and translated into the language of the requested State. In urgent cases, the request may be submitted orally and the requested Party will take the necessary measures it is competent to undertake, with the understanding that as soon as possible the request will be formalized in writing.
2. The request will include the following data:
 - a) the name of the competent authority conducting the investigation, prosecution or proceeding to which the request relates;
 - b) the subject matter and nature of the investigation, prosecution or proceeding;
 - c) a description of the evidence or information sought or the requested acts of assistance;
 - d) the purpose for which the evidence, information, or other assistance is sought; and
 - e) the method of execution to be followed.
3. To the extent necessary and possible, a request shall also include:
 - a) available information on the identity or physical description and whereabouts of a person to be located;
 - b) the identity or physical description and location of a person to be served, that person's relationship to the investigation, prosecution or proceeding, and the manner in which service is to be made;
 - c) the identity or physical description and location of persons from whom evidence is sought;
 - d) a precise description of the search to be conducted and of the objects to be seized; and
 - e) any other information necessary under the laws of the requested Party to permit the execution of the request.
4. In cases of requested service of documents that are to be processed by the Coordinating Authority, those documents will be attached to the request and duly translated, certified, and authenticated.
5. The requested State shall keep confidential a request and its contents unless otherwise authorized by the Coordinating Authority of the requesting Party. If the request cannot be executed without breaching the required confidentiality, the Coordinating Authority of the requesting Party shall so inform the Coordinating

Authority of the requesting Party, which shall then determine whether the request should nevertheless be executed.

Article 5 **Costs**

The requested Party shall pay all costs relating to the execution of the request, except for the lawful fees of witnesses and expert witnesses and the expenses related to travel of witnesses pursuant to Articles 8 and 9 of this Treaty, which fees and expenses shall be borne by the requesting Party.

Article 6 **Limitations on Use of Information or Evidence**

1. The requesting Party shall not use any information or evidence obtained under this Treaty for purposes other than those stated in the request without the prior consent of the Coordinating Authority of the requested Party.
2. When necessary, the requested Party may request that information or evidence furnished be kept confidential in accordance with conditions which its Coordinating Authority shall specify. If the requesting Party cannot comply with such a request, the Coordinating Authorities shall consult to determine mutually agreeable conditions of confidentiality in accordance with Article 1 of this Treaty.
3. The use of any information or evidence obtained under this Treaty which has been made public in the requesting State in a proceeding resulting from the investigation or proceeding described in the request shall not be subject to the restriction referred to in paragraph 1 of this Article.

Article 7 **Testimony in the Requested State**

1. A person in the requested State whose testimony is requested shall be compelled by subpoena, if necessary, by the competent authority of the requested Party to appear and testify or produce documents, records, and objects in the requested State to the same extent as in criminal investigations or proceedings in that State.
2. Any claim of immunity, incapacity, or privilege under the laws of the requesting State shall be resolved exclusively by the competent authorities of the requesting Party. Accordingly, the testimony shall be taken in the requested State and forwarded to the requesting Party where such claims will be resolved by its competent authorities.
3. The Coordinating Authority of the requested Party shall inform that of the requesting Party of the date and place for the taking of the testimony of the witness. When possible the Coordinating Authorities shall consult in order to secure a mutually agreeable date.
4. The requested Party shall authorize the presence in the taking of the testimony of such persons as specified by the Coordinating Authority of the requesting Party in its request.
5. Documents, records, and copies thereof shall be certified or authenticated in accordance with the procedures specified in the request. If certified or authenticated in such manner, they shall be admissible in evidence as proof of the truth of the matter set forth therein.

Article 8

Transferring Persons in Custody for Testimonial or Identification Purposes

1. A person in custody in the requested State who is needed as a witness or for purposes of identification in the requesting State shall be transported to that State if such person consents and if the Coordinating Authority of the requested Party has no reasonable basis to deny the request.

2. For purposes of this Article:

- a) the requesting Party shall have the authority and obligation to keep the person transferred in custody unless otherwise authorized by the requested Party;
- b) the requesting Party shall return the person transferred to the custody of the requested Party as soon as circumstances permit or as otherwise agreed between the Coordinating Authorities;
- c) the requesting Party shall not require the requested Party to initiate extradition proceeding to secure the return of the person in custody; and
- d) the person transferred shall receive credit for service of the sentence imposed in the requested Party for time served in the custody of the requesting Party.

Article 9

Appearing in the Requesting State

When the appearance of a person who is in the requested State is needed in the requesting State, the Coordinating Authority of the requested Party shall invite the person to appear before the appropriate authority of the other Party, and shall indicate the extent to which the expenses will be paid. The Coordinating Authority of the requested Party shall communicate the response of the person promptly to that of the requesting Party.

Article 10

Providing Records of Government Agencies

1. The requested Party shall provide the requesting Party with copies of publicly available records of government departments and agencies in the requested State.

2. If its legal provisions do not prohibit it, the requested Party may provide any record or information in the possession of a government office or agency, but not publicly available, to the same extent and under the same conditions as it would be available to its own law enforcement or judicial authorities.

3. Documents, records and copies thereof shall be certified or authenticated in accordance with the procedures specified in the request. If certified or authenticated in such manner, they shall be admissible in evidence as proof of the truth of the matters set forth therein.

Article 11

Immobilizing, Securing and Forfeiture of Assets

1. The Coordinating Authority of either Party may notify that of the other when it has reason to believe that proceeds, fruits or instrumentalities of crime are located in the territory of the other Party.

2. The Parties shall assist each other, to the extent permitted by their respective laws, in procedures relating to the immobilizing, securing and forfeiture of the proceeds, fruits and instrumentalities of crime, restitution and collection of fines.

Article 12

Search and Seizure

1. A request for search, seizure and delivery of any object acquired thereby to the requesting State shall be executed if it includes the information justifying such action under the laws of the requested Party.

2. The authority that has executed a request for search and seizure shall provide to the Coordinating Authority such certification as may be specified in the request concerning the identity of the object seized, the integrity of its condition, and the continuity of custody thereof. Such certification shall be admissible in evidence in the requesting Party as proof of the truth of the matters set forth therein.

Article 13

Location or Identification of Persons

1. The requested Party shall take all necessary measures to locate or identify persons who are believed to be in that State and who are needed in connection with an investigation, prosecution, or proceeding within the scope of this Treaty.

2. The Coordinating Authority of the requested Party shall promptly communicate the results of its inquiries to the Coordinating Authority of the requesting Party.

Article 14

Serving Documents

1. The requested State shall cause to be served any legal document transmitted by the Coordinating Authority of the requesting Party for the purpose of service.

2. Any request for the service of a document requiring the appearance of a person before an authority in the requesting State shall be transmitted within a reasonable time before the scheduled appearance.

3. The requested State shall return proof of service as specified in the request.

Article 15

Compatibility of This Treaty With Other International Agreements and Domestic Law

Assistance and procedures provided by this Treaty shall not prevent a Party from granting assistance through the provisions of other international agreements to which it may be a party or through the provisions of its national laws. The Parties may also provide assistance pursuant to any bilateral or multilateral arrangement, agreement, or practice which may be applicable.

Article 16

Ratification and Entry Into Force

1. This Treaty shall be ratified by the Parties in accordance with their respective constitutional procedures and the instruments of ratification shall be exchanged at Washington, as soon as possible.

2. This Treaty shall enter into force on the date of the exchange of the instruments of ratification.

Article 17

Termination

Either Party may terminate this Treaty by giving written notice through diplomatic channels to the other Party at any time. Unless otherwise agreed by the Parties, termination shall become effective six months after the date such notice is given. The requests for assistance that may be pending at the termination of the Treaty may be executed if agreed by both Parties.

Article 18

Review

The Parties shall meet at least every two years from the date of entry into force of this Treaty, at a time and place to be mutually agreed upon, in order to review the effectiveness of its implementation and to agree on whatever individual and joint measures are necessary to improve its effectiveness.

IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective Governments, have signed this Treaty.

DONE at Mexico City, on the ninth day of the month of December of the year of nineteen hundred and eighty seven, in two originals, in the English and Spanish languages, both texts being equally authentic.

FOR THE GOVERNMENT OF
THE UNITED MEXICAN STATES

SERGIO GARCIA RAMIREZ

ATTORNEY GENERAL OF THE REPUBLIC

FOR THE GOVERNMENT OF
THE UNITED STATES OF AMERICA

CHARLES R. PILLIOD, JR.

AMBASSADOR

