



~~CRIME~~

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on the Prevention of Crime
and the Treatment of
Offenders**

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**International cooperation in combating transnational
crime: new challenges in the twenty-first century**

**The Extradition of Material Witnesses, by D. Batchelor
(Canada)**

Statements submitted by experts*

Note by the Secretariat

1. In its resolution 53/110 of 9 December 1998, the General Assembly emphasized the importance of the workshops to be held within the framework of the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, and invited Member States, non-governmental organizations and other relevant entities to support financially, organizationally and technically the preparations for the workshops, including the preparation and circulation of relevant background material.
2. In its resolution 54/125 of 17 December 1999, the General Assembly encouraged Governments to make preparations for the Tenth Congress, including by establishing national preparatory committees, with a view to contributing to a focused and productive discussion of the topics and to participating actively in the organization of and follow-up to the workshops, the submission of national position papers on different agenda items and the encouragement of contributions from the academic community and relevant scientific institutions. In the same resolution, the Assembly called upon the specialized agencies and other relevant United Nations bodies and institutes and other intergovernmental and non-governmental organizations to participate effectively in the Tenth Congress and to contribute to the formulation of regional and international measures aimed at preventing crime and ensuring justice.
3. Pursuant to rule 60 of the provisional rules of procedure for United Nations congresses on the prevention of crime and the treatment of offenders (A/CONF.187/2), written statements related to the work of the Congress submitted by the designated representatives, individual experts or observers are to be distributed by the secretariat to all delegations in the quantities and in the languages in which the statements are made available to the secretariat for distribution, provided that a statement submitted on behalf of a non-governmental organization is on a subject in which it has a special competence.

* The designations employed and the presentation of the material in this publication do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country, territory, city or area or of its authorities, or concerning the delimitation of its frontiers or boundaries.

THE EXTRADITION OF MATERIAL WITNESSES

A paper presented to the Tenth Congress on the Prevention of Crime and the Treatment of Offenders in Vienna in April 2000 by Dahn Batchelor *criminologist* living in Mississauga, Ontario, Canada.

The scenario I am going to give you is something that actually happened. Only the names have been changed. In July 1996, a Canadian police detective, Sergeant Lawson from the Fraud Department of the Toronto Police Services, met with an official with the security department of one of Canada's largest banks. They discussed the case of a man from the United States who had been fraudulently using a VISA credit card.

The suspect's name was Robert Davies and the card he had been using belonged to a woman living in London, England. Mr. Davies had wracked up \$60,000 in Canadian funds worth of VISA transactions at a large department store. It was subsequently learned that the card owner did not authorize the use of the card to that extent. The card owner was the girlfriend of the suspect and she had permitted him to use her card to pay off his \$250-a-night hotel bill in Toronto but only for that purpose.

When the police arrested the suspect, he showed them his passport and it was in the name of Robert Davies, an American citizen who lived in Florida. After his fingerprints were taken and a copy of them faxed to the FBI, it was learned that Robert Davies was not the suspect's real name. His real name was Frank Davies and that the name he had been going under was that of his brother who also lived in Florida. The police in Toronto upon learning this, charged their suspect with the additional offence of "impersonation" because he had impersonated his brother.

Now to prove impersonation, the prosecutor's office required the cooperation of the suspect's brother and as such, they needed him to go to Toronto (all expenses paid) to testify against his brother. When the police in the city in Florida where the brother lived, served the Canadian subpoena on the brother, he laughed in their face and told them that he wasn't going to Toronto to testify against his brother. And he didn't.

To prove fraudulent use of the VISA credit card, the prosecutor needed the cooperation of the suspect's girlfriend in England and as such, they required her to go to Toronto (again, all expenses paid) to testify that she didn't authorize the use of her VISA card for the additional \$60,000 transactions. When she was served a Canadian subpoena by the London police, she told the London police that she too wouldn't be going to Toronto to testify against her boyfriend. And she didn't.

Now what we have here is a case in which there have been supposedly four victims. I say, supposedly because I am not sure about the complicity of the suspect's brother and girlfriend in this matter or even if there was complicity on their parts. The

bank is certainly out \$60,000 and the department store may be out that money if the bank insists on being paid back by the store.

Since the suspect's brother and girlfriend refused to go to Canada to testify against him, there is no evidence of any wrongdoing and as such, the court is forced to dismiss the charge against him. In effect, the suspect literally gets away with a \$60,000 fraud.

Suppose, Mr. Davis had murdered a citizen of Canada and his girl friend in England who had witnessed the murder and returned back to England, had refused to go Canada to testify against her boyfriend and the brother of the accused who lived in Florida could give evidence that the accused had confessed to him that he had committed the murder and he too refused to go to Canada to testify against his brother, what then would happen? Without any further evidence, the accused murderer would be set free.

Why is it possible for criminals to get away with committing such crimes? Why is it that thousands of accused persons around the world can walk out of the court rooms in their countries as free persons in scenarios such as the ones I have just described to you?

The answer is painfully obvious. It is, because at this present time, legally impossible to extradite a material witness from his or her own country into another country. The question we must answer then is, "How do we solve this problem?"

I have studied the "Model Treaty on Mutual Assistance in Criminal Matters" and my own county's Extradition Act and I have found nothing in either of these two documents that assists us in any way. This means, in my respectful opinion, that the United Nations, through the cooperation of its member states, must create (for want of a better title) a "Model Treaty on the Extradition of Material Witnesses".

Such a treaty might follow the same procedures in extraditing criminals such as;

1. The Minister of Foreign Affairs of the requesting state, would, with the agreement of the Minister of Justice of that state, enter into a specific agreement with another state for the purpose of giving effect to a request for the extradition of material witnesses to another state.
2. A request by an extradition partner for the provisional arrest or extradition of a material witness would be made to the Minister of Foreign Affairs of the other state. Further, a request by an extradition partner for the provisional arrest of a material witness could also be made to the Minister of Justice of the requesting state through Interpol.
3. The Minister of Justice would, after receiving a request by an extradition partner for the provisional arrest of a material witness, authorize the Attorney General of the granting state, to apply through its court in the community in which

the material witness resides, for a provisional arrest warrant, if the Minister is satisfied that the offence in respect of which the provisional arrest is requested is necessary and is in accordance with the standards, guidelines and instruments as set down by the United Nations, and if they are, the extradition partner would grant the request for the extradition of the material witness.

4. A judge in the community in which the material witness resides, may, on an application of the Attorney General, issue a warrant for the provisional arrest of a person, if he or she is satisfied that there are reasonable grounds to believe that it is necessary in the public interest to arrest the person, including the need to prevent the person from escaping in order to avoid being extradited to the requesting state in which he or she is to give evidence as a material witness.

5. The Minister of Foreign Affairs of the granting state may, after receiving a request for extradition and being satisfied that the conditions set out in accordance with the standards, guidelines and instruments as set down by the United Nations are met in respect of the reasons mentioned in the request, issue an authority to proceed that authorizes the Attorney General of the granting state to seek, on behalf of the extradition partner, an order of a court for the committal of the material witness pending his or her extradition to the requesting state.

6. The Attorney General of the granting state may then, after the Minister of Foreign Affairs issues an authority to proceed, apply to a judge in the community in which the Attorney General believes the material witness resides or to which the person is on his or her way, or was last known to be, for the issuance of a warrant for the arrest of that person.

7. The judge to whom an application is made could then issue a warrant for the arrest of the material witness, in accordance with that authority to do so, with any modifications that the circumstances require. A warrant that is issued under such an order must of course be executed and served anywhere in the granting state in order for it to be effective.

8. A person who is arrested under this part of the treaty would have to be brought before a judge or a justice within twenty-four hours after the person is arrested or as soon as reasonably can be expected.

9. The justice before whom a person is brought for the purpose of extradition would then order that the person be detained in custody and brought forthwith before a judge for a hearing of the matter pertaining to the reasons of his or her extradition.

10. On application by the Attorney General or his or her representative, if the judge is satisfied that the purpose of the extradition meets the requirements as set down by the treaty and is satisfied that the interests of justice are also met, he or she

could then order that the extradition of the material witness be undertaken, subject to appeal by the material witness.

11. The Minister of Foreign Affairs would have to seek any assurances from the requesting state a condition that the material witness not be prosecuted, nor that a sentence be imposed on or enforced against a material witness in respect of any offence or conduct that person may have committed in the requesting state prior to the date the request was made other than that of perjury or contempt of court with reference to the court proceedings under which the extradition was requested.

12. The hearing judge should refuse to make a 'surrender order' if the judge is satisfied that the surrender would be unjust or oppressive having regard to all the relevant circumstances; or the request for extradition is made for the purpose of investigating, prosecuting and punishing that material witness for a crime he or she would be accused of doing in the requesting state prior to the time when the request was made.

13. The hearing judge should further refuse to make a surrender order if he or she is satisfied that the prosecution of a person is barred by prescription or limitation under the law that applies to the extradition partner or the conduct in respect of which extradition is sought is a military offence that is not also an offence under criminal law; or the conduct in respect of which extradition is sought is a political offence or an offence of a political character.

14. If the judge in the granting state hearing the request of the requesting state is satisfied that the assurances given by the requesting state are given or that the conditions agreed to by the extradition partner are going to be met, then he or she may authorize the extradition of the material witness to the custody of the requesting state.

There will be circumstances of course where extraditing material witnesses may be too costly. For example in the first scenario I gave you, extraditing the brother from Florida as a material witness may be too costly considering the fact that the offence of impersonating is not that serious a crime in Canada. At the same time, his evidence may be pertinent to the charge his brother in Canada is facing, that is, obtaining goods by false pretenses.

Instead of bringing the material witness to Canada to give his or her testimony, the requesting state, under the auspices of my proposed "*Model Treaty on the Extradition of Material Witnesses*", follow the guidelines I set down in that proposed treaty (or something similar to them) and instead of sending him to the requesting state, the prosecutor and defence in the requesting state, during the trial of the accused person in their state, would be able to conduct their examination of the material witness in a court in the material witness's community as authorized by that court's authority, via closed circuit television.

This could come about by having the material witness arrested at the request of the requesting state and brought before the judge in the court in the witness' community that recognized the subpoena if the judge who reviews the documents sent to his court in the witness' community is satisfied that the request is genuine and that the evidence of the witness is pertinent, necessary and made in accordance with the treaty and its guidelines. The judge could then order that the material witness be kept in custody until that stage of the trial in the requesting state requiring his or her testimony is reached. Since the presiding judge in the witness' community could administer the oath, if the witness commits perjury in his court during the trial or refuses to answer questions, he or she could be found in contempt by the judge in his community.

Perhaps more creative minds than mine will come up with another solution to this problem. Justice may be blind, but it doesn't help to have material witnesses poke their fingers in her eyes as a final indignity. This problem should be addressed as soon as possible.

This archiving project is a collaborative effort between United Nations Office on Drugs and Crime and American Society of Criminology, Division of International Criminology. Any comments or questions should be directed to Cindy J. Smith at CJSmithphd@comcast.net or Emil Wandzilak at emil.wandzilak@unodc.org.