

Ryan Lochte Case: A Primer On Extradition Practice

Law360, New York (September 2, 2016, 2:12 PM ET) -- Since gold medalist swimmer Ryan Lochte left Brazil on Aug. 16, 2016, after competing in the Rio Olympic games it seems as if everyone is talking about extradition — what it means and how it works. This article will examine those issues and, more specifically, address the extradition treaty that exists between the United States and Brazil and its application to Lochte.

The United States maintains extradition treaties with over 100 countries, from Albania to Zimbabwe. There's a reason for this: Extradition treaties are powerful bilateral diplomatic tools that help relations between foreign nations and the United States and vice versa. The United States wants its citizens to respect foreign laws and foreigners to respect the United States' laws so executing an extradition treaty with a foreign country helps guarantee that and also provides very specific guidelines for doing so. Additionally, the United States is a sovereign nation. This means that unless there is a treaty with another country, the United States is under no duty to return an American citizen charged with a crime on foreign soil to that foreign state for prosecution. It's interesting to note that many countries with which the United States maintains an extradition treaty do not support the death penalty and, as such, have refused to extradite fugitives to the United States as a result of that.



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In 1964, the Extradition: Treaty and Additional Protocol between the United States of America and Brazil was entered into law. The stated goal of the treaty was to "make more effective the cooperation of the respective countries in the repression of crime." (Extradition. Treaty and Additional Protocol between the United States of America and Brazil, page 2). As with most extradition treaties, in the treaty, extraditable crimes are specifically enumerated. The crimes include, among many others, murder, voluntary manslaughter, rape, malicious wounding, abduction, detention, deprivation of liberty or enslavement of women or girls for immoral purpose, arson, robbery, burglary, etc. As mentioned above, with regard to the death penalty, in our treaty with Brazil, that specific issue is addressed in Article VI, which states: "When the commission of the crime or offense for which the extradition is sought is punishable by death under the laws of the requesting State and the laws of the requested State do not permit this punishment, the requested State shall not be obligated to grant the extradition unless the requesting State provides assurances satisfactory to the requested State that the death penalty will not be imposed on such person." Now of course, nothing Ryan Lochte did rises to the level of a crime punishable by death either in the United States or Brazil, but he has been charged with false reporting of a crime. A crime that Brazil is taking seriously.

What is important to note is that merely being a suspect of a crime does not trigger the right to assert an extradition demand. In the days following the incident, Lochte was just that — a suspect, so all the talk of extradition was misplaced. Now that he has been

charged the landscape looks a tad different but currently not vastly different in terms of extradition. Could things change? Possibly, following additional investigation Lochte could be charged with other offenses in addition to the false reporting of a crime. Destruction of property or public urination charges might be levied against him. But, as one might imagine, destruction of property and public urination are not specifically delineated nor noted as extraditable crimes in the treaty. Fraudulent reporting of a crime may be, but that is open to interpretation. According to Article II, Subsection 13 of the Treaty, "The forgery, falsification, theft or destruction of the official acts or public records of the government or public authority including Courts of Justice, or the uttering or fraudulent use of same" is enumerated as an extraditable offense. Do Lochte's actions fall under that subsection? It is unclear. All we know is that he told his mother and a reporter that he was robbed by a security guard/police officer who held a gun to his head. By Lochte's own admission, we all now know that a gun was never held to his head. What we do not know is whether Lochte ever reported his initial claim to any government official or police officer. Or, did word simply get out by his mother and his interview? In any event, Lochte's "crime" seems to be one that is not extraditable when we continue our review of the treaty and examine Article III, Subsection 1 which states that:

the requested State shall extradite a person accused or convicted of any crime or offense enumerated in Article II only when both of the following conditions exist:

1. The law of the requesting State, in force when the crime was committed provides a possible penalty of deprivation of liberty for a period of more than one year; and
2. The law in force in the requested State generally provides a possible penalty of deprivation of liberty for a period of more than one year which would be applicable if the crime or offense was committed in the territory of the requested State.

From the information available, the crime Lochte is currently charged with is the violation of Article 340 of the Brazilian Penal Code, which says "provoking the action of authority, informing it of the occurrence of a crime or misdemeanor that did not take place is punishable by detention of one to six months or a fine." So, if this is the statute upon which his charge is based (as noted above this remains unclear) then the Article III, Subsection 2 requirements are not met. Brazil can then not rely on the treaty to seek extradition of Lochte. In order for Lochte to be charged with an extraditable crime, it would have to be something other than Article 340 and a crime that is punishable by more than a year.

However, without all the facts, which seem to be changing daily, for purposes of this article assume that Lochte was or will be charged with a crime that is enumerated in the treaty for which punishment is more than one year in prison. How would that work? As stated above, extradition is a diplomatic process and, as such, any extradition, no matter the charge, must go through diplomatic channels. Many steps precede actual extradition.

First, the U.S. Embassy of Brazil must request the involvement of the U.S. Department of State. Then an attorney with the State Department reviews the extradition demand. That attorney will confirm that, according to the treaty, the crime is in fact an extraditable offense and that all supporting documents are properly certified. Note, the United States does not extradite American citizens who are simply suspects of crimes, rather they must be charged with a crime (or already convicted of a crime). If those conditions are properly met, then the State Department attorney forwards a certificate attesting to his/her findings to the U.S. Department of Justice along with the Brazilian embassy's original request. The Office of International Affairs at the Justice Department reviews those documents and assigns it to the U.S. attorney's office for the judicial district where Lochte resides in North

Carolina. This is when Lochte would first be brought before a judge and is when the U.S. attorney's office obtains an arrest warrant.

Given his situation, it is more likely that Lochte's lawyer would be notified of the arrest warrant and Lochte would, on his own, turn himself in at a specific date and time. Lochte would then appear before a U.S. district judge and, unless waived by Lochte, the court would hold a hearing. The subject of the hearing would be much like what has transpired in the prior steps. First, proof of a treaty would have to be established and then the offense for which Lochte is being charged would have to be proven to be an extraditable one according to language in the treaty and current Brazilian law. If Lochte is found to have committed an extraditable offense, an order of extradition is issued and the secretary of state, John Kerry, would then make the final decision as to whether to return Lochte to Brazil. Brazil would then be notified and the physical extradition would begin. Note further that extradition orders are not immediately appealable, but Lochte could file a writ of habeas corpus once the order is issued which could stay the actual extradition.

As is evident from the above discussion, extradition is an extensive process. For serious crimes that are clearly extraditable and of supreme interest to diplomatic relations between the relevant countries, it is a critical part of diplomacy and strong relations among our allies and other sovereign states.

Though Lochte embarrassed the United States and disrespected the citizens and government of Brazil, given the treaty and what we know about Lochte's alleged crimes as well as his current charge at the time of this writing, the long process of extradition and the judicial resources it requires will not be expended. Moreover, in terms of diplomacy it is neither in Brazil nor the United States' best interest to seek extradition for Lochte and demand that he return to Brazil to answer for what occurred.

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