



RESEARCH SERIES: USE AND ABUSE OF EXTRADITION IN THE WAR ON DRUGS*

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Recalibrating Extradition: Colombia's Supreme Court takes a step in the right direction

Executive Summary

When Colombia's Supreme Court rejected the United States Government's request to extradite Alexander Farfán Suárez, alias "Gafas," in February of this year, the reaction by the US Government was swift and stern. Both the Justice and State Departments began to prepare a "diplomatic note" in which they expressed their disgust with the decision and questioned the legitimacy of it. William Brownfield, the US Ambassador to Colombia, said he was "confused by the decision," before adding, "It is a top priority of the United States to bring to justice those who kidnap American citizens abroad."¹

Farfán Suárez was of special interest to the United States because he was part of the Revolutionary Armed Forces of Colombia, or FARC, insurgent group that kidnapped and held three US Pentagon contractors since 2003. The Colombian Armed Forces, with logistical assistance from the US Government, captured "Gafas" and freed the three contractors, along with the French-Colombian politician Ingrid Betancourt and 11 Colombian military personnel, in July 2008. The US Government requested his extradition shortly thereafter. Following the Supreme Court's decision to deny that extradition, the US Government complained that it was not consistent with previous court decisions, above all the decision to extradite Juvenal Ovidio Ricardo Palmera, alias "Simon Trinidad," a FARC leader who faced similar charges in the US in 2004. Colombian President Alvaro Uribe was also very critical of this and other decisions by the court, which were based on the central argument that the crimes in question were committed in Colombian territory, and therefore should be tried in Colombia.

In spite of the criticism towards the court's decisions, the Fundación Ideas para la Paz (FIP), a non-profit think tank in Colombia, supports the court's position, which we understand as a way to recalibrate the balance of power between the branches of government in Colombia and to reestablish territorial limits in

extradition cases. However, it's necessary to clarify that we are worried about the possible inconsistencies in this new and more active position of the court, in particular the court's decision not to address the question of political crimes.

We think the court's decisions in the Farfán Suárez and other extradition cases have judicial merit and were not motivated by political concerns as some analysts and politicians have claimed. These decisions tend to be, in our judgement, decisions that will recalibrate the extradition process so that it will be a more selective rather than a routine legal tool when it comes to processing cases of Colombians accused of crimes abroad.

However, the FIP believes that the court has not been consistent. We understand that the court is an institution that can change its position over time, but we would hope that there would be some consistency when it comes to the difficult decisions regarding extradition. We think the court is mistaken when it searches for well-defined, physical borders with regards to certain crimes but does not apply the same logic to drug trafficking crimes. What's more, many of these crimes and criminals tend to be part of insurgent groups with political ends, which requires the court to consider questions of political crimes with more care and precision. The court, however, has avoided these questions and the consequences could be terrible when the rebels or other groups that define their ends as "political" begin to negotiate peace with the government.

Context

Since President Alvaro Uribe Velez became president in August 2002, the Colombian government has authorized more than 900 extraditions, most of them to the United States. The extraditions have helped Colombia establish a strong relationship with the US Government, which has given Colombia a large amount of logistical and financial assistance for its counternarcotics and counterinsurgency programs. To be sure, the \$550 million in an-

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nual aid to Colombia makes it the largest recipient of US aid outside of the Middle East or Central Asia.

For the United States, extradition represents one of the most important aspects of the bilateral relations.² Both the Justice and State Departments say that extradition is what gives them the ability to dismantle large criminal organizations in Colombia. “We could not do our job with extradition. It’s the only weapon we have to pressure them there,” said one US prosecutor.³ US and Colombian prosecutors, as well as counternarcotic agents in both countries, credit the pressure of extradition as being a key element in the dismantling of the Medellín, Cali, North Valley and paramilitary drug cartels in the last 20 years.

However, for every large *capo* extradited, there appears to be at least one small or insignificant member of a drug organization who is also extradited. There’s a growing sensation that Colombia is increasingly extraditing what is popularly known in US agent lingo as “mopes,” especially if one compares the numbers. Colombian President Ernesto Samper (1994-1998) extradited 40 people, 17 of which went to the United States; President Andres Pastrana (1998-2002) extradited 89 Colombians, 61 of which went to the United States.⁴ But with more than 900 extraditions during President Uribe’s two administrations, it’s clear that extradition is no longer an extraordinary measure but rather a routine judicial procedure, which has even caused friction between the branches of power. According to one ex-Justice Minister in Colombia, Carlos Medellín:

“Never in history has Colombia allowed so many extraditions as now. Before, the extradition of a Colombian was a scandal, almost unthinkable not to mention unconstitutional. But in a short time, like two governments, it’s gone from being a taboo subject to what? 600, 700, 800 extraditions. And that in my opinion, is creating some friction [between the executive branch and] the Colombian judicial branch.”⁵

This friction is not solely due to the increasing number of extraditions. It has deeper roots. In 2002, the Uribe administration began a peace process with the United Self-Defense Forces of Colombia (AUC), the paramilitary groups that had acted as government proxies in its war against insurgents. As part of the peace process, these paramilitary groups agreed to give testimony about their wartime activities. Within this process, the Colombian Supreme Court began an investigation into the connections between prominent politicians and the right-wing militias, which has resulted in the detention or incarceration of over 50 politicians, including President Uribe’s cousin and close political confidant, Mario Uribe.

The friction between the two branches of power is more evident every day in Colombia.⁶ Indeed, the fight between the executive and judicial branches is everyday news, including personal insults between politicians and the judges and reports of wire-tapping of the judges’ telephones in order to leak embarrassing details of their personal lives to tarnish their public image.

Supreme Court’s Stance on Territorial Jurisdiction

It’s within this context that the Colombian Supreme Court has made some controversial decisions with regards to extradition. The majority have been decisions regarding leftist guerrillas, but the court has based these decisions on the territory in which the crimes allegedly took place and not on the possible political nature of the crime in question. The court’s avoidance of the political question, which we will discuss more at length later in this report, leaves a legal hole in which future cases of insurgents could fall victim. It also leaves open a critical question about the nature and political status of the rebels themselves, which may impeded peace negotiations in the future.

However, the court does appear to be taking a stand on the question of jurisdiction, as well as making a statement about the improvement of the Colombian justice system. National institutions can be prideful entities, and the recent advances in the Colombian judicial and penal system have given Colombians reason to be skeptical of the old argument vis-à-vis extradition: that the Colombian government cannot deal with these criminals.

The first case in which the court took a stand came from November 2003, when members of the FARC rebels tossed several grenades into the Bogota Beer Company bar. The bar is a well-

known hangout for US embassy personnel as well as well-to-do Colombian nationals, making the guerrillas’ motivations unclear. Nonetheless, after the blasts left 74 injured and one dead, the US Government requested the extradition of two of the four FARC members who were later captured. The court, however, argued in its decision issued on March 27, 2007, that the acts “were executed in Colombian territory, a circumstance that impedes the court from allowing [the extradition].”⁷

On October 7, 2008, the court made the same argument when it issued a decision on the case of Bladimir Culma Sunz, a guerrilla accused in the United States of providing material support to a designated terrorist group, in this case the FARC. Culma Sunz was part of the famous “Antenna Rising” indictment, which involved 11 guerrillas, among them Gerardo Antonio Aguilar Ramírez, alias “Cesar,” Nancy Conde Rubio, alias “Doris Adriana,” and Alexander Farfán Suárez, alias “Gafas.” The rebels stood accused of importing satellite telephones, weapons and munitions from the United States. The case took on particular importance because it provided US agents with knowledge of who was holding three US Pentagon contractors who had been kidnapped by the FARC in 2003 after their airplane crashed in southern Colombia. Culma Sunz was a middleman in the arms and telephone deal but authorities could not establish that he’d held the three US contractors captive at any time. In either case, the court said his crimes were committed in Colombia and rejected the US extradition request.⁸

In July 2008, the Colombian Armed Forces rescued the three US contractors along with the French-Colombian politician Ingrid Betancourt and 11 Colombian military personnel who'd been held captive by the FARC for years. In the process, the Colombian Army captured Farfán Suárez and Aguilar Ramírez, and the US Government promptly requested their extraditions for providing material support to a known terrorist organization, kidnapping, and, in the case of Aguilar Ramírez, drug trafficking. However, the court again held its ground, denying the extradition requests for material support and kidnapping based on the argument that the crimes were committed in Colombian territory.⁹

The court, however, allowed for the extradition of Aguilar Ramírez for drug trafficking. The reason, the court said, was that this crime can “produce a result” in a foreign land.¹⁰ The court, however, stipulated that the accused could only be tried for drug trafficking, lest the US violate the terms of his extradition. We will discuss drug trafficking crimes in greater length later in this report.

The United States Protests

The US Government protested the court's decisions in the Aguilar Ramírez and Farfán Suárez cases through a “diplomatic note,”¹¹ in which the US Government made various references to apparently contradictory decisions that the court had made in the past.¹² As William Brownfield, the US Ambassador to Colombia, said later, “Although we accept these decisions, we would note that the court has reached a different conclusion in several instances over the past year in cases with similar sets of facts.”¹³

The clearest case that supports Brownfield's argument is that of Juvenal Ovidio Ricardo Palmera, alias “Simon Trinidad,” a high-level member of the FARC that was captured in Ecuador and extradited from Colombia to the United States in 2004 to face terrorism, kidnapping and drug trafficking charges. Like the cases of Farfán Suárez and Aguilar Ramírez, Palmera was accused of participating in the kidnapping of the three US contractors. He was a member of the FARC's high command and the highest level guerrilla ever extradited.

In its decision authorizing Palmera's extradition, the court only addressed the question of territoriality when it spoke of the drug trafficking charges. In other words, it did not attempt to discern where the events took place as it had in the other cases when it analyzed the terrorism and kidnapping charges. By not delineating the difference, the court could determine with ease that Palmera's crimes were transnational. “Although said conspiracy took place within the national borders, it had a transnational impact,” the court said.¹⁴

In addition to the contradictions presented in the Palmera case, we should also mention two more cases, one of which was part of the “Antenna Rising” indictment. In February 2008, Nancy Conde Rubio, alias “Doris Adriana,” was captured with 160 other members of this vast FARC support network. Rubio was the go-be-

tween for the network in Venezuela and the US. The US requested her extradition, and the court allowed it on April 1, arguing that the charges against her were transnational in nature:

“In analyzing the situation before us, it's clear that [Rubio's] actions occurred in the country soliciting her extradition. In essence, it was there where the other members of the conspiracy bought the satellite telephones and SIM cards, whose service depends on US operators, so as to assist the First Front of the FARC in their criminal activities.”¹⁵

Conscious of the prior decisions, the court appeared to make an effort to distinguish this decision from the others: “[The indictment] makes her a protagonist in sustaining the logistics of the First Front of the FARC, especially as it relates to communications, who effect, as we have already stated, goes will beyond the national boundaries.”¹⁶

Lastly, we should mention the case of Jose Maria Corredor Ibaque, alias “El Boyaco,” and his wife, Edilma Morales Laoiza, alias “La Negra,” both of whom were alleged FARC collaborators who were captured and extradited last year. The charges against the two included drug trafficking and support of a designated terrorist organization. However, the court's decisions on these two did not even mention the question of territory as it related to the crimes.¹⁷

The Legal Impact of the Court's Decisions

Since 2002, the Uribe administration has used extradition to dismantle some of the most feared criminal organizations in the continent but also to win support in the United States. What's more, as President Uribe himself has said, extradition has become a way to manage the internal, civil conflict in Colombia.¹⁸ As we wrote in our first policy brief of this series, extradition played a determining role in the recent negotiations with the paramilitary groups. Now the government seems to be using it against the FARC rebels. Extradition, therefore, has become not just a substitute for Colombian justice, it has become the ultimate justice system, the one that represents efficiency and the one that is most feared by all types of criminals.

The lackadaisical application of the legal rules used to govern this juridical tool is what has led to this metamorphosis. Some Colombian lawyers who have defended Colombians awaiting extradition maintain that the process is “a joke,” given that there is little analysis of the legal aspects and long-established rules of conduct.¹⁹

In its recent decisions, it appears as if the Colombian Supreme Court would like to rectify this situation and reestablish extradition as a judicial tool used in extraordinary circumstances. To be sure, the court has taken a fresh look at its role, and, given the increasingly abusive use of the mechanism by the executive branch, is ap-

plying a strict interpretation of the rules of extradition. In fact, many analysts argue that the court has not changed anything about the rules regarding extradition, as some critics have claimed. It has simply decided to adhere to them.²⁰

However, the court seems to get itself in trouble when it searches for the limits of criminal activity. In the case of Nancy Conde Rubio, who was extradited as part of the “Antenna Rising” indictment, it seems as if the court is focused on the fact that she coordinated the criminal activity with someone who was operating in a foreign land. In other words, she spoke directly with someone abroad and that is why the court decided to extradite her. However, the court does not apply the same logic in drug trafficking cases. To be sure, the court seems satisfied with the notion that the drugs leave the country without trying to discern whether the accused communicated or coordinated with anyone in a foreign land. With this same logic, anyone in a logistical network of the type that Conde Rubio ran, could be extradited. But they are not, as we have seen in the case of Bladimir Culma Sunz, who operated alongside Conde Rubio but was not extradited.

In fact, the court appears to have two borders. One border is physical and that’s the border the court uses when it studies terrorism and kidnapping cases. Ironically, as is evident in kidnapping cases, these crimes do transcend borders above all when the victims are foreigners and their relatives can be left without their emotional and economic providers. The other border the court appears to have is virtual, above all when it deals with drug trafficking cases in which the accused has had no contact with the drug distributors and has not committed any crime outside of Colombian borders.

The court’s logic as it relates to drug trafficking crimes appears to be the following: that any activity in Colombia that has to do with the illegal narcotics trade (production, processing, transportation and distribution) will have an impact in the US market. We understand that US indictments specify where the drugs are allegedly destined. But the reality is that there are multiple final destinations of illegal drugs produced in Colombia, including local, regional and international markets the world over. The court also ignores that the accusation must show with clarity that the accused intended the drugs to enter the US. The court argues that it is not within its jurisdiction to argue over the facts, simply evaluate whether the correct process has been followed. But FIP believes the court should demand more evidence, especially as it relates to cases involving guerrilla members who are far down the distribution chain.

What’s more, the court’s avoidance of the political issues at stake leaves a gaping legal hole that could hurt the country’s chances of obtaining peace in the future. Colombia’s guerrillas have long defined their struggle as political and their criminal activities as part of their efforts to topple the state. However, the Colombian Government has attempted to obfuscate this fact by refusing to recognize the internal conflict as a civil war or any other denomination that might allow the rebels to obtain political recognition. And the court, for its part, has made the decision not

to intervene in this issue via its decisions on extradition cases, something FIP wrote about at length in the second policy brief of this series.

In sum, the magistrates of the court appear to be taking an unsustainable long-term stance, trying to establish a physical boundary where they should be establishing a legal boundary by evaluating the possibility of classifying some of these criminal acts as “political” or at least “connected” to the political activity of being a rebel. If these are not “political” crimes, it’s also the court’s job to establish that argument as well and therefore avoid confusion and obstacles in any future peace negotiation. In other words, the court should establish conceptual borders that derive from the criminal acts themselves and leave a solid and legal foundation for a negotiation with any illegally armed group.

The Political Impact of the Court’s Decisions

The court’s decisions make the situation between the executive and judicial branches more tense. But while we understand that this conflict colors the recent decisions of the court, we do not believe that they can be attributed to this conflict. The court’s actions are more the result of its view that extradition has been distorted and has become a routine rather than an extraordinary event, even while the Colombian judicial system has improved. Nevertheless, the battle between the branches does appear to have given the court the necessary push to take on the executive branch in matters of extradition.

The court’s recent decisions have also made the Colombian Government’s relations with the United States Government more tense. In addition to the “diplomatic note,” some analysts, such as Rafael Nieto, a former Viceminister of Justice in Colombia, fear that the court’s decisions may mean the beginning of the end of extradition, a view FIP does not share. “The truth is that extradition has been a vital part of the counterdrug efforts in Colombia in good measure because Colombia’s judicial and prison system has never really had sufficient strength to contend with the power of the drug traffickers, and you don’t have to go back too far in history to prove it,” he said.²¹

In reality, the court has simply recalibrated a legal tool that was twisted. For different reasons, the court, as well as the presidency, allowed for the lapse and subsequent increase in its use. The president had overstepped his bounds in asking for extraditions that did not merit the use of the tool. This approach helped open the doors to a better relationship with Colombia’s finest ally, the United States, but devalued and weakened Colombia’s legal system. Meanwhile, the court had become a rubber stamp, a notary for the wishes of the president.

But, as the former Attorney General Alfonso Gómez Mendez said, the court has begun to regain ground:

“We have to return extradition to its original purpose. It’s conceived as a mechanism of international cooperation against international criminals in which a criminal that commits a crime in a country and seeks refuge in another country, can be extradited back to the first country where he committed the crime. In Colombia we had distorted [this mechanism] and it had become instrument of political negotiation, above all with this government, and in a substitute for the national justice system.”²²

The Human Impact of the Court’s Decisions

While the court’s decisions were positive on the whole, FIP believes that it needs to take a stronger stance to avoid further abuse of this judicial tool. First, the decisions do not establish a clear line of jurisdiction for a foreign nation. The court attempts to establish physical boundaries for the criminal acts when the most important aspects of these cases are to establish legal boundaries. This lack of definition makes their interpretations of the law incoherent and inconsistent, and it’s the people who are extradited who are paying the consequences. Without a clear method and logic, extraditions occur without merit or those that should happen do not.

Second, the court’s avoidance of the question of political crimes leaves Colombia in a difficult position as it approaches any possible peace process with the guerrilla organizations. To be more specific, extradition could impede the prisoner swaps between imprisoned rebels and soldiers or civilians being held by the insurgents, swaps that have direct and indirect human consequences. Directly, the prisoners of war can reunite with their families when a swap occurs. Indirectly, the swaps have led to peace negotiations. Indeed, the talks concerning prisoner swaps since Uribe took power have also included the question of possible peace talks.

However, the United States Government’s increasing number of extradition requests, along with the higher number of rebel leaders being extradited to face drug trafficking and kidnapping charges, reduces the chances of peace talks with the insurgents. The fact that the court has sided with guerrillas in many of these recent cases seems coincidental. But the court’s refusal to tackle the question of political crimes seems entirely by design.

Third, the routine nature of the extraditions has numbed Colombians to the effects of these cases. Colombians have spilled a lot of blood over extradition, but the war on drugs is still of vital importance to Colombia’s relationship with its finest ally, which often leaves its critics to stew in silence. Ironically, apathy in Colombia has increased as the “size” of the drug traffickers extradited has decreased. With the exception of some large traffickers from the remnants of the old cartels, the paramilitaries and some members of the FARC, extradition has become a tool to be used against the little guy. We will tackle this subject in our next policy brief.

Conclusion

For a multitude of reasons, the Colombian Supreme Court has taken a more active position with regards to the question of extradition, rejecting several recent requests by the United States Government on the grounds that the criminal acts had occurred inside Colombian territory. These controversial decisions have come amidst a public battle between the executive and judicial branches in Colombia. They have also been cases involving leftist guerrillas who are wanted in the US for crimes against its citizens. But these decisions are not due to this public battle between the branches of government and are not related to the fact that the suspects were leftist guerrillas. And they should be seen in a positive light considering the increasing abuse of the legal tool that has led to the extradition of many low level members of drug organizations. Extradition has become all too routine in Colombia. The court seems to be recalibrating this mechanism, returning it to its rightful place as a means of dealing with extraordinary cases. However, the court can go further and be more coherent in its decisions. It has tried to create physical boundaries for some criminal acts and virtual ones for others. And it has refused to tackle the biggest question of all: determining whether some of these crimes are political in nature. This void in the legal discussion may leave Colombia vulnerable when it comes time to talk peace with some of these guerrilla leaders who are being extradited.

Recommendations

To the Colombian Government

Eliminate Political Motivations: As the executive, President Alvaro Uribe has discretion over extraditions. But he has been using it as a political tool to win favor with the US Government and to rid himself of potential political problems. We believe the executive needs to be more juridical in his thinking and less political, and that he consider the long-term consequences of his actions, rather than the short-term political gain. He also needs to respect the competent authority and judgement of his colleagues in the Colombian Supreme Court and not use his pulpit or his power to attack and undermine it.

Coherency: The Colombian Supreme Court must seek a coherent way to define criminal acts that is not limited to the physical place where they occur but the impact that they may have in both Colombia and the country that is asking for the extraditions. The court’s recent decisions have illustrated that it is still grasping for short-term answers to something that needs a long-term solution. This includes contemplating drug trafficking charges in the same way as it is contemplating terrorism and kidnapping charges.

Define Political Crime: The Colombian Government, on all levels, needs to create and maintain a definition for political crime. The changing stance of all the branches of govern-

ment on this question will make it more difficult in the future for these illegally armed groups to negotiate peace. The lack of clarity is typified by the court's refusal to take a stand on this issue in extradition cases. We urge the court to do so and therefore start to lay the foundation for a peace dialogue with any armed group that portends to have political motivations.

To the United States Government

Stop Questioning the Supreme Court: The public outcry following the Colombian Supreme Court's decisions to reject some recent extradition requests was an insult to the Colombian people and government. The Colombian Government has cooperated on every level in the war against drugs. In the interim, its judicial system has become stronger and its concerns over the long-term impacts of these extraditions more acute. The US Government needs to respect this.

Limit Jurisdiction: The US Government needs to reconsider how much jurisdiction it has over Colombia. Crimes committed in Colombia can and should be tried in the Colombian justice system. The two countries need to recalibrate this judicial tool of extradition so that it returns to being an exception rather than a rule.

Maintain Policies that Strengthen the Colombian Justice System: the increasing numbers of extraditions give the perception that Colombia's justice system is an appendage of the US's justice system. This is not positive for Colombia's or the US's long-term efforts to quell criminal activity in Colombia. The long-term solution is keep strengthening the justice system in Colombia. One way to do that is trust that Colombians can prosecute their own in complicated cases that often have international implications.

- 1 The US Embassy sent emails to FIP containing the ambassador's comments on the issue.
- 2 FIP interview with Myles Frechette, former ambassador of the United States to Colombia.
- 3 FIP interview with US prosecutor who preferred anonymity.
- 4 Colombia reinstated extradition in 1997 after it was outlawed in a constitutional convention in 1991.
- 5 FIP interview with Carlos Medellín, Ex Justice Minister
- 6 In relation to the branches of government in Colombia, we point out three constitutional articles that are very important. Article 113 establishes that even though the organs belonging to the different branches "have separate functions... they collaborate in a harmonious way in order to achieve their goals". Article 228 establishes that the decisions taken by the justice system are "independent" and that the judicial branch acts in a "disconnected and autonomous" way. Article 230 adds that the "judges in their sentences only have to comply with the rule of law". The true independence of a public organ is proven when tension or conflict with another power entity arises and not when an agreement is achieved.
- 7 Colombian Supreme Court decision, March 27, 2007, Case No. 24878, pp.29-30.
- 8 Colombian Supreme Court decision, October 8, 2008, Case No. 30038.
- 9 Colombian Supreme Court decision, February 4, 2009, Case No. 30561.
- 10 Colombian Supreme Court decision, February 19, 2009, Case No. 30560.
- 11 The Diplomatic Note is one of the most energetic way in which the United States government protest against actions of another country.
- 12 "Nota De Protesta No Ha Sido Entregada E.U. Oficializará Molestia Por No A Envío De Carceleros", *El Tiempo* Newspaper, March 7, 2009.
- 13 The US Embassy sent emails to FIP containing the ambassador's comments on the issue.
- 14 Colombian Supreme Court decision, November 24, 2004, p.14.
- 15 Colombian Supreme Court decision, April 1, 2009, Case No. 30033, p. 42-43.
- 16 *Ibid*, p.53.
- 17 Colombian Supreme Court decision, May 15, 2008, Case No. 26773.
- 18 Cited by Hernando Gómez Buendía in "La extradición: la liebre en lugar del gato". March 16, 2009. www.razonpublica.com
- 19 FIP interview with Colombian defense lawyer who wished to remain anonymous.
- 20 Jorge Orlando Melo, "La extradición, la Corte Suprema y el Gobierno: el baile de los equívocos". April 13, 2009. www.razonpublica.com
- 21 FIP interview with Rafael Nieto, former Viceminister of Justice in Colombia,
- 22 FIP interview with Alfonso Gómez Méndez, former Attorney General.

