



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

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Extradition and the FARC: Adding Fuel to the Fire?

Executive Summary

On May 25, President Alvaro Uribe received a letter from Salvatore Mancuso. Mancuso is a former commander of the *Autodefensas Unidas de Colombia* or AUC, a paramilitary group that acted as a government proxy for years in its battle against leftist rebels. The AUC negotiated a settlement with the government in 2004, and Mancuso turned himself in to authorities with the promise that he would not be extradited if he adhered to the peace process. But Mancuso, along with 14 other paramilitary leaders, were extradited to the United States last year. In his letter, which appeared in the local press in Colombia, Mancuso wrote that he is, “A mirror where [rebel leaders like] ‘Cano,’ ‘Jojoy,’ [guerrilla groups like] the FARC, the ELN; the new [drug] gangs, and the [new capo] ‘Don Mario’ can see themselves. No doubt they are thinking: If this is the treatment [we] the self-defense groups, who are supposed to be friends and allies of the [Uribe] government, are getting, what sort of treatment would they receive?”¹

Paradoxical as it may seem, this question is similar to the concerns of many of Colombia’s political sectors. Those sectors still harbor hope that the conflict between the government and the Revolutionary Armed Forces of Colombia (FARC) and National Liberation Army (ELN) rebel groups might still one day be resolved through political negotiations. The general dilemma could be rephrased as: Is it possible to create political and legal incentives to insure that the guerrilla groups, particularly the FARC, would sit down at a negotiating table with the government? Even in the event that the government were to establish clear rules for starting negotiations, would the subversive groups be afraid that these rules might change halfway through the process, as Mancuso has insinuated in the peace negotiations with the paramilitaries?

There are many factors working against possible peace negotiations with the guerrilla groups, including the actions of the insurgents themselves. Rebels traffic drugs and kidnap

both Colombians and foreigners. They commit massacres and regularly violate International Humanitarian Law. Nevertheless, *Fundación Ideas para la Paz* (FIP), an independent think tank based in Colombia, believes incentives must remain for the guerrillas to negotiate and clear rules regarding legal mechanisms such as extradition have to be in place in order for the guerrillas to feel comfortable in any peace dialogue.

We are not referring to the military pressure the government deems as part of its strategy to weaken the guerrillas. Nor are we arguing in favor of the rebels’ goals. We are, however, positing two ideas about the future of any peace process and the effects that extradition may have on it: First, the near certainty that the guerrilla groups will not accept a deal similar to the one that the government offered the AUC paramilitaries in their peace process; and second, that even in the most favorable situation for the government – such as a negotiation following the military defeat of the guerrillas – must include incentives for the guerrillas to lay down their weapons and return to civilian life.

Mancuso’s question also gives us a window into another issue at the heart of extradition: Does the Colombian government, in the context of the war on drugs and terrorism, have enough autonomy vis-à-vis the United States to define who is who in the Colombian war? In other words, to be able to negotiate with these groups, the government must be able to grant them political status or give them special legal benefits. However, questions have emerged since the government’s hasty extradition of the paramilitary leaders and its increasing use of the legal mechanism that have analysts, politicians and academics alike questioning the government’s sovereignty.

In our first policy brief, we studied how the extradition of 14 former AUC commanders served as an obstacle to achieving justice in Colombia as it related to the victims of that decades old conflict. This second policy brief shows how extradition, or the threat of extradition of FARC members to the United States, reduces the likelihood of political negotiation to end

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the conflict with the guerrilla organizations and does not, as both the US and Colombian governments would have us believe, substantially increase the probability of a military defeat of those organizations.

The reason is that extradition, as it has been used, makes the United States government into a de facto actor in the Colombian war. Indeed, the US seems to have the political clout to label the FARC a drug trafficking and terrorist group. In doing so, it narrows the Colombian government's room to maneuver, legally and politically, i.e., to define its enemies and, if it wishes, to negotiate with them so that they feel protected by law. One might argue that international human rights standards also create the same limits on the Colombian government since they prohibit pardons and amnesties for crimes against humanity such as massacres and kidnapping. But these international standards are part of international treaties that the Colombian government has signed. Whereas the policies of the United States government as it relates to the question of extradition is constantly changing and unpredictable. Extradition, to the extent that it has been politicized, limits the power of the Colombian government and the sovereignty of the Colombian state. This has a negative effect on the conditions for peace policy in Colombia, and also for suitable judicial cooperation to fight drug trafficking.

This politicization increased during the administration of George W. Bush, and may be partly explained by his political affinity with the government of President Uribe. In the simplest terms, extradition reinforced President Uribe's hawkish strategy. The assumption was that the threat of extradition was enough to get the paramilitaries to come to the negotiation table, and it should also be for the FARC. But that assessment, in our opinion, disregards the differences between the paramilitaries' and the guerrillas' mentality as it relates to extradition. The threat of being subjected to foreign justice, "that of the empire," not only decreases the chances of political nego-

tiation with the FARC in the long term, but also ups the ante by adding a nationalistic component to the equation.

The Obama administration may be more sensitive to the need to preserve the rule of law, and may rethink his government's relations with Colombia. He might start by offering support for Colombia's Supreme Court, which recently faced criticism from both the Colombian and US governments for denying the extradition of several Colombians for crimes committed in Colombia. It would also help if his Justice Department would stop routinely invoking the international crime of terrorism to request the extradition of Colombians for actions that are far from being real threats to the United States. This would safeguard the stability of the Colombian justice system, and would make the use of extradition more efficient, less indiscriminate and more coherent in the fight against drug trafficking and terrorism.

At the same time, we would like to address a recent statement by Colombia's Justice and Interior Minister in which he suggested that Colombia and the United States consider negotiating a new extradition treaty. We don't believe that this is the time for such a treaty. Although a bilateral treaty would regulate this legal instrument, and limit inappropriate uses, there are other factors to consider, namely the current tension between the Colombian Supreme Court and the Uribe government. This tension, as we will outline in this brief, goes beyond the issue of extradition and could increase if an agreement were to limit the Supreme Court's powers in matters of extradition. Moreover, the Uribe government may try and weaken the state's possibilities of negotiation with the guerrillas, if one consequence was a lower likelihood he could punish the traffickers amidst the rebels' ranks. Finally, there is more than a slight risk of reigniting the political debate on extradition, which in the past has been very heated and painful for Colombians, and in which nationalist feelings could again distort clear thinking on the issue.

Extradition and the FARC: Context and background

In June, Colombia's Supreme Court denied the US request for the extradition of Elí Mendoza, alias "Martin Sombra," on the grounds that crimes with which he is charged in his US indictment were committed in Colombia. This FARC commander was in charge of the captivity of the three US Pentagon Contractors who were kidnapped in 2003, after their airplane crashed in rebel territory.²

Afterwards, US Ambassador to Colombia William Brownfield said that his government has received from Colombian authorities and the executive branch some tips on how to improve extradition requests in the future.³ With this comment, the official made clear that he thought

the Colombian Supreme Court's denials of some extradition requests were merely technical problems, issues that could be overcome with the assistance of the Colombian executive branch.

Although Ambassador Brownfield sought to downplay the importance of the confrontation between the two countries, on March 22, the US sent a "diplomatic note" to the Colombian government. In the note, the United States protested the Supreme Court's decision to deny the extradition of FARC commander Alexander Farfán Suárez, alias "Gafas," one of the many guerrillas who had guarded the three kidnapped US citizens. Farfán Suárez was captured when Colombian security forces rescued the three contractors last year.⁴ The court reasoned that Farfán Suárez had committed his crimes in Colombia, and, according to Article 35

of the Constitution, Colombians can only be extradited for crimes committed abroad.

Two weeks after the court denied the extradition of Farfán Suárez, it ruled in favor of extraditing Gerardo Antonio Aguilar Ramírez, alias “Cesar.” Aguilar Ramírez had worked closely with Farfán Suárez and guarded the three Americans for a time. In addition to kidnapping, Aguilar Ramírez was charged with drug trafficking, for which the court found cause to extradite him.⁵ The court, however, ruled that Aguilar Ramírez could only be tried for drug trafficking, adding fuel to the fire of this controversy.⁶

The government, through the Interior and Justice Ministry and the Office of the Vice President, expressed concern about the negative impact that these Supreme Court rulings might have on the fight against drug trafficking and judicial cooperation between Colombia and the United States.⁷ Ambassador Brownfield also publicly expressed his dissatisfaction, although he later apologized to Colombia’s Supreme Court.⁸ The Supreme Court, in turn, responded to the objections of the two governments, not defensively but firmly, citing the legal justification for its rulings and clarifying that it is not opposed to extradition.⁹

This controversy, along with the one that was unleashed over the extradition of the AUC paramilitary commanders, shook the public, which began to look at the issue of extradition again.¹⁰ The diplomatic note, as an official notification by the US Government, is of a more serious and revealing nature than mere comments made to the press by ambassadors and senior officials. It reflects the nature of the relationship that has been established between Colombia and the United States during the successive governments of Álvaro Uribe. Since 2002, more than 883 extraditions to the United States have been approved. This means an average of just over 100 extraditions have been carried out per year, which works out to over eight extraditions per month. Comparing this with the 78 extraditions approved by President Andres Pastrana (1999-2002) during his four years of government, it may be concluded that extradition has gone from being something exceptional, to being a routine procedure.

Despite Colombia’s clear commitment to the US justice system, it took only a few denials by the court to spark an angry diplomatic note. The implication is clear: Colombia needs maintain space to maneuver against decisions by the US government in the fight against drug trafficking and/or international terrorism. Will it achieve this space?

The FARC Factor

When Colombia’s Supreme Court began investigating connections between right-wing paramilitary groups and politicians, it sparked a clash between the court and the executive branch in part due to a battle for power within the government but in part because the investigations touched many of the president’s political allies. Many the legislators under investigation for the so-called

“para-politics” were or are political allies of the government and supported President Uribe’s his multiple bids for office. Moreover, the clash has intensified, fueled by a string of other scandals and events illustrate the power struggle between the executive branch and the Supreme Court.

To be sure, extradition has become another battlefield between the two powers, so much so that in the wake of the tension with the United States following the denial of the recent extradition requests for the rebel leaders, the Colombian presidency joined US’ voices of protest. After meeting with his US counterpart Eric Holder, Colombia’s Justice and Interior Minister Fabio Valencia Cossio said it may be time to discuss a new extradition treaty with the United States “if the recent decisions of Colombia’s Supreme Court blocked the administrative mechanisms that have been operating smoothly” since 1997.¹¹

At a press conference the Colombian minister clarified his statements by suggesting that the treaty would incorporate the arguments for the court’s recent decisions. But it is hard to disregard the veiled threat. In fact, the treaty could supersede the court’s authority to approve or deny extradition requests, or it might establish conditions that hamper the criteria for evaluation that the high court has been applying so far.

The controversy that arose concerning the extradition of FARC members increased the divide between the powers. The controversy actually stems from an earlier court decision in which the court ruled against recognizing the political status of the paramilitaries. Following that decision the Uribe government accused the court of having “an ideological bias.”¹² Then President Uribe went so far as to describe the court as being hostile to the peace process with the AUC. In sum, for the government, the high court is more lenient in its rulings on actions by the guerrillas than the paramilitaries, i.e., the court has acknowledged the rebels’ altruistic motivation of political offenders, and it views the paramilitaries as greedy, selfish criminals.¹³

There is no evidence that the Supreme Court, in its recent rulings on extradition, is changing the legal doctrine that substantiates its decisions. Nor has it overstepped its boundaries or applied any sort of “ideological bias” when considering extradition requests. In our view, two opposing dynamics might explain the increase in negative rulings on extradition requests. On the one hand, the Supreme Court has decided to be more committed to upholding the guarantees of due process, and more rigorous in assessing extradition requests. It is possible that this change in attitude resulted from the tension within the branches of government, but it remains within the parameters of the rule of law and its independence, as guaranteed by the Colombian constitution.

For its part, the US government has been pushing for a change in policy on extradition in two senses: first, expanding the scope of extradition requests to include members of the FARC. This group has provided justification for this through its increasing involvement in the illegal drug trade. Second, the fight against terrorism has served as a pretext for the United States to expand its influence

outside of its borders. The latter includes the Antiterrorism Act of 1986 and the creation of the “Clinton List” in 1990. This objective has led to an increase in the number of extradition requests for Colombians in connection with the crime of providing “material support to foreign terrorist groups” (FARC logistical support networks), even though the criminal acts have been committed entirely within Colombia. These two cases were uncommon prior to 2002, but as they have become more frequent they have caused more friction with the Supreme Court in the extradition process.

Part of the tension may be explained by the fact that the justice system is based on the rationale of making individuals accountable for acts that are considered crimes, and that have been duly proven. The strategy that the United States Department of Justice has applied in recent years to request the extradition of FARC members is dangerously close to attempting to prosecute and punish them for “belonging” to an organization that the US Government has classified as being a drug trafficking or terrorist organization in political terms. Pursuant to this logic, the specific acts that may be attributed to the people requested in extradition recede into the background. Entering into the controversial field of defining the political nature of the organization, and making mere membership a criminal offense, distorts the judicial process and in doing so the requesting state, the United States, usurps the role that corresponds primarily to the Colombian state.

Extradition vs. Humanitarian Agreement: Simón Trinidad and Sonia

The US Government’s change in policy concerning the FARC may be seen in the 2004 extradition of Juvenal Ovidio Ricardo Palmera, alias “Simon Trinidad,” and Anayibe Rojas, alias “Sonia.” The extradition of these guerrilla commanders made it more difficult to reach a “humanitarian agreement” to swap guerrilla inmates being held in Colombian prisons for civilian and military hostages in FARC captivity. At that time, this appeared to be President Álvaro Uribe’s objective. It was like throwing away the key to the lock. In doing so, President Uribe eliminated the pressure by foreign governments and some influential opinion sectors in Colombia. It was also a way of ratifying the hard line of the democratic security policy, which rules out making any concession to this group that is considered drug trafficking terrorists. In sum, nobody can get Simon Trinidad or Sonia out of their US prisons.¹⁴

The failure of the FARC in the use of the perverse strategy of its policy of kidnapping, seems to have proven President Uribe right. There has been no need for a humanitarian agreement to recover the surviving kidnapped civilians, although 25 policemen and soldiers still remain in the guerrilla group’s captivity. In all truth the government has won the battle for public opinion, to the point that the FARC’s most valuable “political assets,” the kidnapped civilians and politicians, were turned into the pathetic source of national and international disparagement.

What seems clear is that the strategic decision to extradite Simón Trinidad and Sonia not only prevented a humanitarian agreement it had strategic consequences as well. From that moment, as if some invisible line had been crossed, the US justice system began to call for guerrillas with all of its might. On March 1, 2006, barely a year and three months after the extradition of Palmera and Rojas, the federal court in the District of Columbia produced what is considered to be the US justice system’s biggest collective indictment ever on drug trafficking.¹⁵ In this indictment, 50 FARC members were accused of drug trafficking including the group’s Secretariat, the Joint General Staff, heads of its blocs, fronts, and mobile columns, and people associated with the organization.¹⁶ It even implicated some who were already dead.

The lesson that the US Department of Justice learned from the extradition of Palmera and Rojas, led to the removal of any reference of a political nature in the indictment of the 50 FARC members. In fact, the court ruling on the extradition request for Palmera reads, “In the foreign charges, clear recognition is made ... of the FARC as an organization that seeks, through the use of arms and political ends, to take power in Colombia, for which it has been dedicated to drug trafficking, through which, according to the content of the indictment, ‘it finances the war with the Colombian Government’ and makes it possible to acquire money, weapons, and equipment.”

Based on this recognition the court puts forth the following consideration: “Should the regulation set down in Article 35, paragraph 3, of the 1991 Constitution, as amended by Law No. 1 of 1997, which states that extradition shall not be applied for political crimes, be extended to crimes related to this? May drug trafficking, in all its forms, be considered as a crime related to a political offense?”

The answers to these two questions are the following:

- a) The Colombian legislation has not explicitly defined which crimes may be related to political crime, to wit “it may be said that so long as an extradition request does not cite a specifically political crime, it would be valid, so long as it meets the other requirements by law.”
- b) As to the possibility of considering drug trafficking as related to political crime or rebellion, the court has said that “no criminal activity that constitutes drug trafficking may be tied to political crime as a factor to deny an extradition request, not only because the legislation does not consider it in that way, but also because the international community refuses to grant it that nature.”

To substantiate this last statement it refers to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, adopted in Vienna on 19 December 1988, and which Colombia incorporated into national legislation in Law 67 of 1993, which states in Article 3 section 10:

“For purposes of cooperation between the parties foreseen in this convention, in particular the cooperation foreseen in Articles 5, 6, 7, and 9 on offenses that as established in accordance with this article shall not be considered economic or political crimes, or as politically motivated crimes, notwithstanding the constitutional limitations and the fundamental principles of each parties’ domestic law.”

Despite the above considerations, the court warned the national government “that if it were to grant the delivery (of Simón Trinidad), requested by the United States Government, this would be under the condition that he could be tried and sentenced there, but not for activism in an illegal group because, on its own, that would be considered a political offense, for which extradition is not appropriate.”

The Department of Justice felt concern over these considerations by the court on political crime and the crimes in connection with this. Not for preventing the extradition of Simón Trinidad, because he was extradited, but because these raise the risk that any extradition request may be denied as being based on the subject’s “illegal activism” in the FARC, which is part of the realm of political crime. In the indictment, the “clear recognition of the FARC as an organization that seeks political ends, through the use of weapons,” was eliminated entirely and replaced by the simple and clear description of being a drug trafficking organization.

The FARC Indictment and Its Impact on Possibilities for Peace Negotiations (or Demobilization)

The 2006 judicial decision by the District of Columbia Court shows that a US court decision could have impact on the potential for a negotiated solution to the military conflict with Colombia’s guerrillas. Although it should be clarified that President Álvaro Uribe has not given up on his intention to defeat the FARC militarily, under the democratic security policy, negotiation would only take place after the military surrender of the guerrillas, with the sole purpose of establishing the conditions for disarmament, demobilization, and the reintegration of combatants.

But even this residual function of negotiation might be threatened by yet unknown decisions by the US Government, channeled through the Department of Justice. Although it is often said that the US justice system enjoys strong autonomy from the executive branch, one should not forget that the prosecutors who bring charges come from the Department of Justice, and they are subject to the policy guidelines handed down by the US government.

The question arises: What legal guarantees can the Colombian government offer to guerrillas in the process of collective demobilization – be this full or partial demobilization – knowing that US charges of being terrorists or drug traffickers may be hanging over their heads? The unexpected extradition of 14 paramilitary

commanders only confirmed that peace negotiations with the Colombian government and the rulings by judges and prosecutors in Colombia are too weak or ineffective to ensure truth, justice and reparation for the victims in Colombia. This is all the more reason why members of the guerrilla groups should be skeptical about the Colombian state’s ability to uphold the legal arrangements with demobilized combatants that are agreed on in peace negotiations or prior to demobilization.

At the time that the indictment of the 50 FARC members was issued, it was said that this was in response to lobbying by the Uribe government before the US Government; although some voices claimed otherwise. Andrés Pastrana, then Colombia’s ambassador to Washington, said that the decision had come from the US Department of Justice.¹⁷ It is also undeniable that President Álvaro Uribe’s demonstrated willingness to extradite members of that organization, encouraged the issuance of the indictment. With Simón Trinidad and Sonia as the foot in the door for the extradition of FARC guerrillas, only a slight push was needed to turn this into a major thoroughfare. With this indictment, the United States reinforced its status as a frontline player in the Colombian State policies for peace and war.

The FARC as an Organization: Between Drug Trafficking and Terrorism

US involvement in defining policy on the actors in the Colombian conflict is nothing new. During the 1980s, US Ambassador to Colombia Lewis Tamb, coined the term “narcoguerrillas” to identify the ties between the FARC, illicit crops, and coca processing laboratories. At that time some sectors considered the epithet as ideological and biased. Nowadays no one denies that this relationship is an established fact, although the extent of the organization’s involvement in the drug trade is debatable. Nor can it be denied that the internal armed conflict has been able to survive largely thanks to the resources that the armed groups earn from illicit crops. Nonetheless, these facts do not preclude the discussion on the identity of the FARC as an organization.

The answer to the question, what is the FARC, depends both on empirical evidence and political considerations: Is the FARC, despite its drug trafficking activities, a group that sustains an ideology, a political mission, and therefore the vocation to take political power by force? Has the drug trade become an end in itself for the FARC, a way of life or, to the contrary, is it a “related offense” that serves to finance the political and military ends?

We have discussed the court’s refusal to consider the crime of drug trafficking as an adjunct to rebellion. But based on the facts, and empirical verification, the grounds for denying this relationship are less convincing. For example, French sociologist and renowned expert on the Colombian conflict Daniel Pécaut answers these concerns by noting that the FARC “leadership still upholds political aims, but many of the combatants are mixed up with drug

trafficking problems. The FARC's unity is fairly weak."¹⁸ Drug trafficking as a source of resources to finance armed actions gives rise to organizational problems but does not supercede the political nature of the FARC.

The debate is equally relevant in terms of labeling the FARC a terrorist organization. The US definition of terrorist refers to "premeditated, politically motivated violence perpetrated against non-combatant targets by subnational groups or clandestine agents."¹⁹ The point is that the Department of State has the authority to define individuals or groups as terrorists and, to that extent, limit judicial authority to judge acts by members of these organizations.

In Colombia's legal and political traditions, there has always been a distinction between political offenders and common criminals, based on constitutional provisions. Nonetheless, in recent years, especially after Álvaro Uribe's government denied the existence of the internal armed conflict, the guerrillas have been dubbed as terrorists or drug traffickers. However, the FARC engages in many military and violent actions that are not strictly consistent with the notion of terrorism, but rather those of commanded armed forces that are fighting the Colombian security forces.

It may be said that despite the official rhetoric of the Bush and Uribe governments, which attempts to disregard the political aspects of the FARC, to pigeonhole the group as a narcoterrorist organization, the empirical reality, when looking with objectivity, makes it impossible to reduce the group to that notion. The FARC is a political-military, Marxist-Leninist-inspired, grassroots, peasant organization, that perpetrates serious violations of international humanitarian law through acts of terrorism, and that uses resources from drug trafficking to finance its endeavor to take power in Colombia. This particular configuration of tendencies has led to the deterioration of its actions into terrorism, and involvement in drug trafficking raises doubts about the morality of the behavior of some of its members. However, the core of the organization upholds its political motives and it is this fact that gives us hope that negotiating peace is possible. Otherwise, the only alternative would be the long and costly military annihilation of fragmented FARC units that have splintered off and turned into criminal gangs or drug traffickers.

The Truth about the FARC's Legal Situation

The District of Columbia indictment attempts to resolve the dilemma over the true nature of the FARC while sidestepping the ambiguity of the facts, and failing to make explicit the political considerations. One of its sections bears the significance-laden title: "The role of the FARC as the main supplier of cocaine to the United States and the world." It describes how in the early 1980s the guerrilla organization controlled crop production regions by charging a "tax" on the coca growers. In the 1990s it became involved in the direct administration of coca processing laboratories, and ended

up selling the finished product (cocaine) in association with those who were shipping it to the consumer markets. It is said that both the Secretariat and the Joint General Staff designed and implemented coercive policies (enforced through death and violence) to promote and control the coca trade. Thus the FARC became the sole authorized buyer of coca base in areas under its control. It decreed that farmers should get more money for coca base to stimulate production, and it began and sustained a campaign to expel the paramilitaries from coca-producing areas. According to the indictment, the sophistication of the FARC made it possible to oblige producers to improve the purity of their product, to bolster its market share against other potential cocaine suppliers.

The text describes at length the FARC's financial policy, which it defines as highly dependent on revenues from the illegal trade in cocaine. On this subject it concludes that profits from drug trafficking are distributed through the organization "for the enrichment of the Secretariat, the General Staff, the fronts, and the mobile columns, to purchase weapons and supplies for all the members of the FARC."

The most controversial claim in said indictment is the following: "The FARC controls 70% of coca grown in Colombia. Colombia produces approximately 80% of the world's supply of cocaine, and approximately 90% of the cocaine imported to the United States. As such, the FARC is responsible for more than half of the cocaine supply in the world, and over 60% of the cocaine shipped to the United States."

This is obviously the simple application of a rule of three, whose main premise –that the FARC controls 70% of coca production in Colombia– is apparently unsubstantiated. Nowhere is the source of this information cited, but is it clearly disproportionate. According to some analysts, the indictment skews the FARC's income by 200%.²⁰ More reliable estimates suggest that in 2003 the FARC took in around US \$1 billion through its illegal activities, including drug sales. Since then, given the blows that it has suffered from the Álvaro Uribe government, that income is estimated to have fallen to US \$500 million or \$600 million in 2007.²¹

Finally, it is worth mentioning that the indictment states that the FARC ordered the kidnapping and murder of US citizens in retaliation for Plan Colombia and US support for the Colombian Government's policy of crop spraying. It is somewhat paradoxical that whereas the Colombian Government was trying to downplay the internal armed conflict, the US Government invented a quasi-military enmity with the FARC, to further justify the legal war that is apparently being waged through extradition.

Political Solutions Through Legal Channels?

As well as the fact that the FARC indictment, as a legal document, classifies the group as drug traffickers, it should be mentioned that in early October 1997, and most recently on 11 October 2005, the US Secretary of State declared the FARC a foreign terrorist organization, and placed it on the corresponding list. Since that

time, some requests for the extradition of FARC members have been made based on the grounds of the “federal crime of terrorism,” more specifically charges of “conspiracy to provide material support to a foreign terrorist group.”

The indictment of 50 FARC members seems to be more of a political manifesto than a legal document. In fact, although testimony, documents, and intercepted communications were presented to substantiate the charges of drug trafficking for the 50 accused, some US lawyers believe that it will be very difficult to make a conviction stick for any of them. The reason is very simple: There is no evidence that they have broken US law.²² This is because all of the criminal activities described took place in Colombia, in that the shipping of cocaine across the border was done, in general, by organizations other than the FARC.

Perhaps that is why the US Government has refrained from making extradition requests based on the above-described indictment. So if this legal document is so ineffective, it is worth asking why a political document disguised as a legal document was produced. The most obvious answer is that its intention is to maintain political influence in the Colombian conflict under the guise of judicial cooperation to fight international crime. This approach is more readily accepted than overt political intervention.

It is also conceivable that the Bush administration believed that fear of extradition contributed to the success of the peace process with the paramilitaries, and is trying to replicate that model in the demobilization and disarmament of the FARC. It could be an attempt to back the policy of President Álvaro Uribe, but it shows a mistaken assessment or lack of ability to differentiate between the two organizations. It is possible that within the FARC the fear of extradition might increase as more guerrillas are sent to US prisons, but so far this has had only marginal impact. No top commander has been extradited. In fact even Simón Trinidad and Sonia were only mid-ranking officials within the organization. It could also be said that for extradition to be truly dissuasive for the FARC would take time and the extradition of many high-ranking officials. That would be a slow, costly, and inefficient strategy.

Looking at this strategy from the perspective of a possible peace agreement, the threat of applying foreign justice as a negotiation chip could heighten enmity rather than reduce it, and could hinder attempts at possible rapprochement. Brandishing “the sword of imperial justice,” encourages nationalism, which is always opportunistic, and could even breathe new life into the dim view that Colombians now have of the political legitimacy of this guerrilla organization.

We furthermore believe that this approach undermines two areas simultaneously: the justice system, that is forced to abandon the legal standards of truth and justice, and use political criteria defined by the US Government. And the political sphere, by breaking with the principle of sovereignty, tying the hands of the Colombian State to define the criteria for dealing with the dynamics of the internal conflict.

Conclusions

In this paper we have shown that US Justice Department policy on extradition has been expressed as an increase in the number of requests for FARC members. These requests were based on allegations of drug trafficking that are not always duly substantiated, or allegations of having provided material support to terrorist groups abroad, including actions that are not a real threat to the United States.

This strategy can be described as the politicization of extradition, turning it into an instrument that prosecutes and punishes merely for belonging to the FARC, which is described as an organization dedicated exclusively to drug trafficking and terrorism. This distorts the logic of legal procedures, which is based on establishing personal responsibility for demonstrated crimes. Furthermore, it usurps political power that should correspond to the Colombian government, meaning the power to define the nature of the actors involved in the Colombian internal conflict.

Given the above, we believe that the politicization of extradition undermines judicial cooperation in combating drug trafficking, and curtails the Colombian government’s autonomy to define policy for peace. This has a negative effect on opportunities for establishing the political and legal incentives so that the FARC guerrillas would agree to enter into peace talks to end the armed conflict. Nor can we say that this strategy has been efficient or effective at forcing the FARC to abandon the armed struggle. It comes at high financial cost to the United States –in addition to the Plan Colombia budget– and it puts strain on the Colombian justice system and harmonious relation between the branches of government, as has been observed in recent years.

We believe that the Supreme Court acted correctly in being more stringent in considering extradition requests, emphasizing that it will not automatically agree to charges of terrorism or extradition for crimes committed in Colombia. In the same vein it should apply strict criteria when considering extradition requests for members of the FARC who are charged with drug trafficking. Not all of the FARC’s drug activity extends beyond the borders, nor necessarily violates US law in that the export/import of narcotics might have been carried out by other organizations. The Colombian justice system must uphold its exclusive jurisdiction to try such crimes.

Recommendations

To the US Government

Review the Justice Department policy on extradition requests to bring the policy back into line with legal orthodoxy, namely that the allegations shall be based on attributable individual acts, substantiated by evidence that will hold up in court.

This means foregoing the strategy of making affirmations with “political ends” in legal instruments such as indictments, be-

cause these distort the nature of the legal process. This logic becomes an impediment to the independent development of peace policy in Colombia. The US government must acknowledge that in Colombia, as in the United States, the rule of law prevails which implies the separation and independence of the branches of power. As such, it should refrain from exercising political pressure –notes of protest– when legal decisions made by competent and independent Colombian entities do not meet the expectations of the United States.

To the Colombian Government

Although the current peace policy of Álvaro Uribe's government leaves little space for political negotiation with the guerrillas, and this is matched by equal reluctance on the part of the FARC to give demonstrations that are conducive to that possibility, the government has the constitutional obligation to protect the autonomy of the state to define policy on war and peace in Colombia's internal conflict.

In a practical sense, it should avoid internal and external pressure to adopt certain policies by shifting responsibility to an external power such as the United States, which could have serious political consequences in the future. The issue of extradition is ideally suited for the application of this strategy, but the question arises of what would happen in the future when this government or another comes with the intent to change this strategy toward the guerrillas, and finds that its powers are limited by the directives of US criminal policy.

Furthermore, adherence to the rule of law and the diligent enforcement of constitutional and legal provisions in extradition cases –which require the involvement of the Supreme Court of Justice– might be the best way to meet the obligations of judicial cooperation in the fight against drug trafficking, while preserving autonomy to make strategic decisions on peace policy.

To the Supreme Court of Colombia

Continue to pursue the work of ensuring that the constitution, the law, and international treaties are upheld in extradition proceedings, while making a major effort to prevent contradictions or changes that are not consistent with the principles upon which extradition requests are decided.

To the Colombian and US Governments

Do not negotiate a new extradition treaty under the current political climate that is characterized by strong tension between different branches of government in Colombia and the existence other priority issues on the bilateral agenda.

- 4 "E.U. protestó oficialmente por negativa de la Corte de extraditar guerrilleros acusados de secuestro," *El Tiempo*, 22 March 2009.
- 5 "Extradición de César concedió la Corte Suprema por narcotráfico pero no por secuestro." *El Espectador*, 20 March 2009.
- 6 This restriction is due to the principle of specificity, according to which an extradited person may only be tried for those crimes for which extradition was approved, and not for crimes that were explicitly rejected as grounds for extradition, or crimes other than those mentioned in the extradition request.
- 7 "Gobierno insistirá en la extradición de 'César' y 'Gafas'," *El Espectador*, 7 March 2009.
- 8 "Corte Suprema aceptó disculpas de Embajador de E.U. por reclamo contra negación de extradiciones," *El Tiempo*, 27 March 2009.
- 9 "Corte defendió su posición de no extraditar a quien sea juzgado en Colombia por el mismo delito," *El Tiempo*, 17 March 2009.
- 10 Extradición: ¿Un obstáculo para la justicia? Policy Brief No. 1, Ideas for Peace Foundation.
- 11 Ikeda, Nestor. "Colombia ofrece renegociar tratado de extradición con EE.UU." *Associated Press (AP)*, 9 June 2009.
- 12 Appeals court decision against the ruling by the High Court of Antioquia, of 22 November 2006, overturning the cessation of proceedings in the trial of paramilitary Orlando César Caballero Montalvo. Supreme Court of Justice, Penal Chamber, Case No. 26945. 11 July 2007.
- 13 "Fuerte golpe a la cohesión institucional. El gobierno Uribe desafió a la Corte Suprema de Justicia," *El Nuevo Siglo*, 28 July 2007.
- 14 The idea that one party would adopt a self-imposed limit, eliminating alternatives for action, in this case that of a humanitarian agreement, has been thoroughly analyzed by Jon Elster in his study *Tuercas y Tornillos, Una introducción a los conceptos básicos de las ciencias sociales*. Editorial Gedisa, Second printing, 1996, p. 28.
- 15 FARC Indictment in US on Drug Charges, Pablo Bachelet and Steven Dudley. *Miami Herald*. Available online at <http://www.redorbit.com/modules/news/tools.php?print&id=440123>
- 16 The content of the indictment is taken directly from the original in English. Available online at <http://files.findlaw.com/news.findlaw.com/cnn/docs/narco/usmarin306sind.pdf>
- 17 Wolf, Paul. The FARC Indictment. 3 May 2006. Available online at <http://www.colombianjournal.org/colombia234.htm>
- 18 "Colombia está abocada a esclarecer el drama de lo que ha sido la guerra sucia." *Almamáter*, Universidad de Antioquia, No. 577 (2009): p. 5.
- 19 Check National Strategy To Fight Terrorism. Department of State, 14 February 2003.
- 20 The FARC Indictment, *Ibid*.
- 21 Poner Fin al Conflicto con las FARC en Colombia: Jugar la Carta Correcta. International Crisis Group, Report on Latin America No. 30, 26 March 2009.
- 22 Wolf, Paul. The FARC Indictment. 3 May 2006. Available online at <http://www.colombianjournal.org/colombia234.htm>.

¹ "Mancuso pide ser 'gestor de paz,'" *Cambio* magazine, No. 831, p. 26.
² "Se queda en Colombia," *El Espectador*, Thursday, 18 June 2009. p. 7.
³ "Pedido de extradición del guerrillero de las FARC 'Martín Sombra' fue oficializado por E.U." *El Tiempo*, 24 April 2009.

