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# The Rule of Law or the Rule of Fear: Some Thoughts on Colombian Extradition

LUZ E. NAGLE\*

## I. INTRODUCTION

The recent escalation of the war on drugs in Colombia has awakened the need for a more in-depth analysis of the Colombian government's extradition practice. Little has been written on the topic, not only because of its complexity, but also because extradition is a dangerous and volatile political issue in Colombia. Many lawyers, judges, and politicians, who were intent on sending nationals abroad to face foreign justice, have been murdered.

Following the 1984 assassination of Justice Minister Lara Bonilla by drug traffickers in retaliation for the Minister's tough stance against their activities, President Belisario Betancur agreed to enforce the extradition treaty between Colombia and the United States.<sup>1</sup> A year later, when the Colombian Supreme Court was considering the constitutionality of the treaty, the M-19 guerrilla organization, possibly financially backed by the drug cartels, seized the Palace of Justice

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1. Extradition Treaty Between the United States of America and the Republic of Colombia, Sept. 14, 1979, reprinted in I.I. KAVASS & A. SPRUDZS, EXTRADITION LAWS AND TREATIES: UNITED STATES 140.3 (1985) [hereinafter Extradition Treaty]. The Extradition Treaty was entered into force on March 4, 1982. It is not yet published in T.I.A.S. I.I. KAVASS & A. SPRUDZS, *supra*, at 140.1. The treaty was very controversial and widely criticized in Colombia, primarily because of article 8, which permitted the extradition of Colombian nationals to the United States. This provision was considered a violation of Colombian sovereignty. Despite heated debate, both houses of the Colombian legislature passed the treaty on October 14, 1980. The treaty was then sent to President Turbay Ayala for his sanction. Ayala was out of the country at the time and delegated the sanction to the Minister of Government, Zea Hernandez. Acting under article 28 of the Colombian Constitution, Zea signed the treaty, which became Law 27 of 1980, on November 3, 1980. However, the treaty could not be immediately applied because the Colombian Supreme Court ruled that the Minister of Government enacted the treaty rather than the President who, as head of foreign relations under the Constitution, could not delegate those powers.

and took the Justices hostage.<sup>2</sup> The military stormed the palace in a poorly planned, all-out assault. Eleven Justices and many court officials were killed and important court records concerning extradition were destroyed.

Since that time, the Colombian government has chosen with few exceptions not to extradite Colombian nationals to the United States. The violence and intimidation brought to bear by the narco-terrorists have prompted the need for a careful reevaluation of the extradition treaty, including its legitimacy and enforceability under constitutional and international law. In the midst of grave political and social turmoil, a recently elected Constituent Assembly is now redrafting the Constitution. Although it will certainly consider extradition law, it remains unclear whether the extradition treaty with the United States will be enforced against major drug traffickers.

## II. COLOMBIAN EXTRADITION LAW

The Colombian Constitution contains no authority supporting the extradition of Colombians to other nations. However, extradition provisions appear in the Colombian Penal Code<sup>3</sup> and the Code of Criminal Procedure.<sup>4</sup>

### A. Penal Code

The Colombian Penal Code (*codigo penal*) contains statutory provisions that set forth principles of substantive criminal law. These norms establish the elements that define crimes and criminal conduct, the circumstances that exclude or modify punitive conduct, and regulations concerning punishment and security measures.

Article 1 of the Penal Code codifies the constitutional principle, *nullum crimen nulla poena sine lege*, which means that there is no crime or punishment without an existing law.<sup>5</sup> This article establishes that no one can be condemned for an act that, at the time of its commission, was not expressly declared punishable by statute, nor can they be subjected to punishments or security measures that are not

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2. Since the attack on November 19, 1985, the M-19 has become a legitimate and very powerful political party, although two of the original leaders, Jaime Bateman and presidential candidate Carlos Pizarro, have been assassinated by right-wing factions of the government.

3. CODIGO PENAL [PENAL CODE] (Colom.). It should be noted that in Colombia, a formalistic and positivistic criteria of law prevails over realistic criteria.

4. CODIGO DE PROCEDIMIENTO PENAL [C. CRIM. PROC.] (Colom.).

5. PENAL CODE art. 1 (Colom.).

articulated in the Penal Code.<sup>6</sup> Therefore, unless extradition is expressly set forth in the Colombian laws, it cannot be used as a tool against narcotics traffickers.

Several provisions of the Colombian Penal Code apply directly to extradition. For example, articles 13 through 15 prescribe norms for applying Colombian penal law for crimes committed both inside and outside Colombian territory.<sup>7</sup> For crimes committed within Colombian borders, the law applies to attempted and completed crimes.<sup>8</sup> Colombian penal law also pertains to those crimes initiated overseas and completed in Colombia, as well as those initiated in Colombia and completed overseas.<sup>9</sup> Colombian law regulates criminal conduct outside Colombian territory when the following types of crimes are committed: crimes against the existence and security of the Colombian State; crimes against the constitutional regimen, social and economic order; crimes against public health and administration; and forgery of currency, official writings, signatures, or bills of exchange.<sup>10</sup> These types of crimes are punishable even where the accused has been acquitted by the other State, or where the punishment abroad was less severe than that established under Colombian law.<sup>11</sup>

Article 9 of the old Colombian Penal Code of 1936 directly addresses extradition. It states:

Extradition shall be granted or offered in accordance with public treaties. In the absence of treaty, the Government shall offer or grant extradition in conformity with the proceedings prescribed in the Code of Penal Procedure and after opinion favorable thereto by the Supreme Court of Justice in case it is to be granted.<sup>12</sup>

However, this article further states that the extradition of "Colombian citizens or of political-social wrongdoers" shall not be granted under any circumstances.<sup>13</sup>

6. *Id.*; see also OFFICE OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, CRIMINAL LAW SYSTEM OF COLOMBIA 18 (1963) (referring to the Colombian Penal Code of 1936) [hereinafter CRIMINAL LAW SYSTEM OF COLOMBIA].

7. PENAL CODE arts. 13-15 (Colom.).

8. *Id.* art. 13.

9. *Id.*

10. *Id.* art. 15.

11. *Id.*

12. *Id.* art. 9, as translated in THE COLOMBIAN PENAL CODE (P. Eder trans. 1967). Another situation occurs where there is no extradition treaty. In this case, the government may grant or offer the extradition according to the procedures given by the Code of Criminal Procedure. D. CLAVIJO ROSANIA & F. JAVIER GIRALDO VILLA, EXTRADICIÓN Y NARCOTRÁFICO 110 (1988).

13. PENAL CODE art. 9 (Colom.).

On November 3, 1980, the United States-Colombia Extradition Treaty was approved by the Colombian government under the authority of the 1936 Penal Code.<sup>14</sup> Subsequently, the Colombian government enacted Decree 100, a new penal code replacing the 1936 Code.<sup>15</sup> Article 17 of the new law, which replaced article 9 of the 1936 Code, states:

Extradition will be requested, granted or offered in accord with the international treaties. If there are not international treaties, the government will request, offer or grant it in conformity with the procedures established by the code of criminal procedure. The extradition of Colombian nationals will be subjected to whatever has been established in the international treaties. In no case will Colombia offer the extradition of its nationals [without prior request]. Neither will [Colombia offer] those indicted or condemned for political crimes.<sup>16</sup>

This provision of the new Colombian Penal Code sets forth the following principles of extradition: 1) The regimen of extradition in Colombia is governed, in the first place, by whatever is established in international treaties. When extradition is requested by a foreign State, it will be granted according to the terms of the treaty signed between Colombia and that State. If the treaty does not cover certain situations, this gap will be filled by the Colombian Code of Criminal Procedure.<sup>17</sup> 2) If there is no extradition treaty between Colombia and the requesting State, the extradition is ruled by Decree 50 of 1987, articles 641 through 642 of the Code of Criminal Procedure. 3) Under international treaties, Colombian nationals may be extradited upon formal request. 4) Colombia may offer aliens for extradition without request. 5) Colombia will not extradite individuals accused of political crimes. This applies both to Colombian nationals and

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14. See Extradition Treaty, *supra* note 1. Before the negotiation of the United States-Colombia Extradition Treaty in 1979 and its approval by the Colombian government on November 3, 1980, article 9 of the 1936 Penal Code governed Colombian extradition.

In Colombia, extradition can be passive or active. It is passive when the Colombian government grants or offers the extradition of an individual to the requesting country. It is active when Colombia requests or obtains a criminal from a foreign territory.

15. See PENAL CODE (Colom.).

16. *Id.* art. 17, which provides:

*La extradición se solicitará, concederá u ofrecerá de acuerdo con los tratados públicos. A falta de éstos el gobierno solicitará, ofrecerá o concederá la extradición conforme a lo establecido en el Código de Procedimiento Penal.*

*La extradición de colombiano se sujetará a lo previsto en tratados públicos.*

*En ningún caso Colombia ofrecerá la extradición de nacionales, ni concederá la de los sindicados o condenados por delitos políticos [C.C.P., 773].*

17. C. CRIM. PROC. (Colom.).

aliens present within Colombian borders.<sup>18</sup>

One may ask whether the United States-Colombia Extradition Treaty was negotiated by the Colombian government without considering article 9 of the old Penal Code, or whether article 17, which allows the extradition of Colombian nationals upon request, was enacted to ensure the applicability of the 1979 extradition treaty.<sup>19</sup> In either event, the constitutionality of extraditing Colombian nationals to foreign nations under the authority of article 17 was immediately challenged. On January 31, 1985, the Supreme Court declared article 17 constitutional.<sup>20</sup> Article 17 continues to be good law today, and article 9 of the 1936 Penal Code is no longer enforced.

### B. Code of Criminal Procedure

The Colombian Code of Criminal Procedure contains procedural norms that apply to the substantive criminal law found in the Penal Code.<sup>21</sup> The Code of Criminal Procedure governs extradition only in the absence of treaties, international conventions, international usages, or customary international law.<sup>22</sup> It sets forth a very formalistic approach to extradition that begins with a petition for extradition of a fugitive.

#### 1. Petitions (*Exhorto*)

When an official of a requesting nation petitions the Colombian government for collaboration in an extradition, the petition is handled

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18. *Id.*

19. Under the Colombian legal system, laws may be modified by enacting another law on the same subject at a later time. Accordingly, the later law (*ley posterior*) will prevail. When the United States-Colombia Extradition Treaty became law in Colombia, it prevailed over article 9, thereby allowing the extradition of Colombia nationals for the first time.

20. The Supreme Court is the third branch of the Colombian government. Article 55 of the Colombian Constitution establishes three branches of government: legislative, executive, and judicial. The Supreme Court is an independent branch, theoretically free of any government interference. The 24 Supreme Court justices are appointed through a unique method called *cooptación*, meaning that the residing justices of the Court appoint the new justices whenever there is a vacancy. No executive or legislative approval is required or permitted. COLOMBIA CONST. arts. 148-49. The justices serve for a term of five years. The Supreme Court's duty is to preserve and uphold the Constitution as the supreme law of the nation. The Court is divided in four separate panels, each comprised of six justices. The panels are: penal, civil, laboral, and constitutional. CRIMINAL LAW SYSTEM OF COLOMBIA, *supra* note 6, at 18. The court sits as a full bench only when a case or controversy involves a constitutional challenge.

21. C. CRIM. PROC. (Colom.).

22. *Id.* art. 641.

through diplomatic channels.<sup>23</sup> The Ministry of Foreign Relations sends the petition to the Superior Tribunal of the District Panel of Criminal Decision (*Tribunal Superior del Distrito, Sala de Decisión Penal*) ("Tribunal"), which appoints and authorizes the judge or official who will preside over the extradition proceedings. There is no prescribed time limit for the proceeding. Rather, the proceeding must be concluded in the "least possible" time.<sup>24</sup> The Tribunal only authorizes proceedings that are constitutional and within the provisions of the Penal Code.<sup>25</sup> The judge or authorized officer will grant petition requests only if they do not violate the principles and guarantees of the Colombian Constitution and laws.<sup>26</sup>

## 2. Overseas Proceedings

When the extradition process requires proceedings to take place beyond Colombian borders, a Colombian judge must send a "pleading letter" (*carta rogatoria*) to a judicial authority of the country where the proceedings are to take place. The letter is sent through the Ministry of Foreign Relations who forwards it to the named authority. The judge will then directly commission the Colombian Consul or a diplomatic agent in the respective country to perform the proceedings according to Colombian law. The Colombian Consul and diplomatic agents are thereby empowered to execute all judicial proceedings for which they are commissioned.<sup>27</sup> When the proceedings are concluded, the fugitive is returned to the requesting judge. Again, this must be done through diplomatic channels, via the Colombian Consulate or the consulate of a friendly nation.

## 3. The Power to Offer or Grant Extradition

The Colombian Ministry of Justice has the power to offer or grant extradition, subject to the provisions of the treaty or the Colombian Penal Code.<sup>28</sup> The government's discretion to offer or grant extradition is subject to Supreme Court review and approval (*concepto*).<sup>29</sup>

There are two basic requirements for the offer or grant of extradi-

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23. *Id.* art. 642.

24. *Id.* art. 643.

25. *Id.* art. 644.

26. *Id.* art. 645.

27. *Id.* art. 646. These agents may not take interrogatories.

28. *Id.* art. 647.

29. *Id.* art. 648.

tion. First, dual criminality requires that the conduct motivating the extradition be a crime both in the requesting nation and in Colombia. Moreover, the crime must be punishable in Colombia by no less than four years of imprisonment.<sup>30</sup> Second, a resolution of the accusation, or its equivalent, must have been pronounced overseas.<sup>31</sup>

The government may also limit the offering or granting of extradition on other conditions or stipulations that it considers appropriate. However, the Colombian government must adhere to the doctrine of specialty, and demand that the requested person will not be tried for a prior crime different from the one motivating the extradition. In addition, the extradited individual must not be subjected to sanctions different from those that Colombia would impose. If the crime motivating the extradition is punishable by the death penalty in the requesting State, the extradition will be allowed only on the condition that the requesting nation commute the death penalty.<sup>32</sup>

All petitions for extradition must be accompanied by the following documents: a copy or an authentic transcript of the sentence, if the requested person has been convicted of a crime; a copy of the accusation or its equivalent, if the requested person has merely been accused; a statement of the exact place and date that the conduct prompting the extradition petition was committed; all information possessed by the requesting State about the requested individual that will help Colombian officials establish the identity of the individual; and an authentic copy of the criminal dispositions which apply to the case. These documents should be issued in conformity with the legislation of the requesting State and, if necessary, translated into Spanish.<sup>33</sup>

#### 4. Ministry Procedures

When the Ministry of Foreign Relations receives the petition for extradition and the required documentation, it thoroughly reviews the case. The Ministry recommends how to proceed and whether or not to act in conformity with any international agreements, customary international law, or, in the absence thereof, the Code of Criminal Procedure.

When the Ministry has made its inquiries and recommendations,

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30. *Id.* art. 649.

31. *Id.*

32. *Id.* art. 650.

33. *Id.* art. 651.



it passes the case to the Ministry of Justice which examines the documentation.<sup>34</sup> If the Ministry of Justice finds substantial parts absent, the file is returned to the Ministry of Foreign Relations, accompanied by a detailed list of the elements that are required to complete it.<sup>35</sup> Upon completion of the ministerial review, the documents are returned to the requesting State to complete the file to the satisfaction of the Colombian government.

### 5. Supreme Court Procedure

When the documentation is complete, the Ministry of Justice sends the file to the appropriate panel of the Supreme Court.<sup>36</sup> The Court transfers the documentation to the named extraditable or his/her lawyer. For three days, any evidence needed for the defense is sought. This ensures the defendant's right to formulate and present a defense. If the Court considers it necessary, it will, *ex-officio*, produce evidence for the file. A five day period for allegations follows. After evidence has been produced and all the required proceedings have been completed, the Supreme Court issues its opinion (*concepto*).

A *concepto* rejecting extradition is binding on the government. However, a favorable *concepto* frees the government to act "according to the convenience of the nation."<sup>37</sup> The Supreme Court's opinion is not a substantive decision on the merits of the case. Rather, it merely determines whether the documentation in the file and the extradition procedures were in compliance with the Colombian Constitution and laws.

The Supreme Court decision authenticates and confirms the validity of the documents presented, as established by proof that the documents bear the necessary signatures and stamps. The Court also determines whether the documentation "completely" identifies the individual requested for extradition, based on whether the documents verify his or her physical description, age, weight, size, or other distinguishing physical characteristics.

The Court must also establish the existence of dual criminality. This requires that the offense charged constitute a crime in both Colombia and the requesting State. Generally, the criteria used in the

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34. *Id.* art. 652.

35. *Id.* art. 653.

36. The Supreme Court's penal panel (*Sala de Casacion Penal*) reviews extradition requests.

37. C. CRIM. PROC. art. 659 (Colom.).

Colombian legal system for applying double criminality is *in concreto*, meaning that the charged offense is explicitly described in the Colombian Penal Code as criminal and punishable.<sup>38</sup>

In addition, the Court reviews the completeness and validity of the sentence, writ, or resolution (*providencia*), issued by the respective authority of the requesting State. When the requested extradition is based on a treaty, the Court reviews the proper compliance to the treaty.<sup>39</sup> When the *concepto* is finished, the entire file is returned to the Ministry of Justice. The Ministry has fifteen days to issue a resolution granting or denying the extradition.

Thus, the Colombian extradition procedure is a mixed system, in which both the executive and judicial branches play a role. The executive prepares the technical aspects of the extradition request. Then the Supreme Court reviews the technical procedures used by the executive branch to insure compliance with the Constitution and the laws. Finally, the President authorizes or denies the extradition, based on his perception of what is in the best interest of the nation.<sup>40</sup>

### III. INTERNATIONAL TREATIES AND THE COLOMBIAN LEGAL SYSTEM

The Colombian procedure for adopting an extradition treaty involves all three branches of government, each having a defined role under the Constitution. The President of the Republic negotiates and signs international treaties.<sup>41</sup> The executive branch cannot delegate this function. The legislative branch, which consists of the Senate and the Chamber of Representatives, has the power to approve treaties negotiated by the President.<sup>42</sup> Upon approval by the legislature, the treaty becomes the law of the land. Once a treaty is law, its constitutionality and enforceability may be challenged by any Colombian citi-

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38. PENAL CODE arts. 1 (*legalidad del hecho punible*), 3 (*tipicidad*) (Colom.).

39. C. CRIM. PROC. art. 659 (Colom.). Where an extradition treaty lacks specific procedures for its implementation, the Court supplements the terms of the treaty with the Code of Criminal Procedure.

40. *Id.* art. 657.

41. The President of the Republic, as supreme administrative authority, has the power and duty to direct diplomatic and commercial relations with other powers or sovereigns; to appoint diplomatic agents, receive the corresponding agents, and conclude treaties and conventions with foreign powers which shall be submitted to the Congress for approval.

COLOMBIA CONST. art. 120(20).

42. *Id.* art. 76(22). "Congress is vested with making the laws. By means of the laws it exercises the following functions: . . . to approve or reject treaties and conventions entered into by the government with foreign powers . . ." *Id.*

zen before the Supreme Court.<sup>43</sup>

### A. *The Executive Branch*

The authority to enter into extradition treaties with foreign nations rests exclusively with the executive branch by virtue of its constitutional power to conduct foreign relations.<sup>44</sup> Negotiations are done through a plenipotentiary, with powers to draft and sign treaties. Article 120 of the Colombian Constitution defines the President as a "supreme administrative authority" who is empowered to "conclude treaties and conventions with foreign powers which [are] submitted to Congress for approval."<sup>45</sup>

The Colombian government considers treaties as if they were normal domestic bills presented to Congress by the President. These norms have been applied to treaties by analogy. The President can present projects of law to Congress through his Ministries, while reserving the right to veto the projects. The President's introduction of a treaty to Congress is considered an exercise of the executive's power to present projects of law to Congress.<sup>46</sup> When a bill passes both Houses of Congress, the President must sanction the law in accordance with the Constitution. If the President ratifies the law, he must exchange the Colombian ratification with the other country's ratification (*canje de ratificaciones*). At this point, the treaty is complete and effective.

### B. *The Legislative Branch*

The Colombian Constitution also prescribes the functions of Congress to create laws and to "approve or reject treaties and conventions entered into by the government with foreign powers."<sup>47</sup>

The Constitution does not explicitly require Congress to approve international treaties, as it does with regard to domestic legislation. However, in reality, the procedure followed for treaties is the same as that for all domestic legislation. When treaties are submitted by the President, they are debated in both chambers of Congress. Each chamber may object or approve the treaty in whole or in part.

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43. *Id.* art. 214.

44. *Id.* art. 120(20).

45. *Id.*

46. Article 118, subsection 7 provides that the President has joint power with the Congress to form laws. *Id.* art. 118(7).

47. *Id.* art. 76(22).

Article 81 states that no bill shall become law without the following requisites: 1) it must be officially published by Congress before it is sent to the respective committee (*Comision Permanente*); 2) it must be approved in the corresponding committee of each house on first reading, by an absolute majority of votes; and 3) it must be approved in each house on second reading, by an absolute majority of votes. Changes or modifications can be made, but they may not change the essence of the bill.<sup>48</sup>

Finally, the Constitution prescribes that a bill does not become law until it receives the sanction of the government.

After a bill has been approved by both Houses, it shall be sent to the government, and if it also approves it, the government shall promulgate it as law. If it does not approve it, it shall return it with its objections to the house in which it originated.<sup>49</sup>

The approval of a treaty by Congress is more than a legislative act. It is an act of political control. Congress approves treaties when it considers them convenient and useful to the political goals of the nation.

### C. *The Judiciary*

The Colombian Constitution states that the Supreme Court is entrusted with protecting the integrity of the Constitution by deciding on the constitutionality (*exequibilidad*) of all the laws and decrees promulgated by the government.<sup>50</sup> The Colombian Supreme Court ruled on the constitutionality of an early treaty with the United States in 1914.<sup>51</sup> The Court held that it did not have jurisdiction to decide on the constitutionality of a law that approved international treaties, either before or after the exchange of ratifications. The Court stated

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48. *Id.* art. 81.

49. *Id.* art. 85. The President may object to a bill on the basis of inconvenience or unconstitutionality. However, article 86 establishes specified time limits for the President to object to, or approve bills passed by Congress. The President has "six days, when the bill has no more than twenty articles, ten days, when the bill has from twenty-one articles to no more than fifty and up to twenty days, when the bill has more than fifty articles." *Id.* art. 86. Furthermore, the President is "bound to approve and promulgate" bills to which he does not object. *Id.* Article 86 also contains a provision requiring the President to publish any bills he either sanctioned or objected to in the "Diario oficial" within the specified time when the Congress adjourns. *Id.*

50. *Id.* art. 214.

51. Extradition Treaty Between the United States of America and the Republic of Colombia, July 19, 1914, reprinted in I.I. KAVASS & A. SPRUDZS, *EXTRADITION LAWS AND TREATIES: UNITED STATES* (1985).

that it could not determine the constitutionality of a law if the law was challenged before the exchange of ratifications between the signatory countries, because the treaty had not yet become the law of the land.<sup>52</sup> If the treaty was challenged after the exchange of ratifications, the Supreme Court could not pass on its constitutionality because it was then the law of the land, and, as such, may require a compromise with international law in order to uphold the treaty. Thus, the Court declared itself absolutely incompetent to make such a decision<sup>53</sup> and affirmed the principle that no country can unilaterally revoke its international agreements.

In 1980, when the Supreme Court initially decided the challenge to the approval law permitting Colombian nationals to be extradited pursuant to the United States-Colombia Treaty, it ratified the Court's position of absolute incompetence, as stated in the 1914 case. The Court determined that approval laws were *sui generis* because they were the product of presidential negotiations and subject to congressional scrutiny. If the Court ruled upon approval law issues, it would effectively become a negotiator of international treaties. This would infringe upon constitutional dispositions establishing that international treaties are to be exclusively executed by the executive and legislative branches of government. Furthermore, the Court inferred that domestic law must yield to international law, and therefore, it could not constitutionally review international treaties. Accordingly, the domestic laws of Colombia, including the Constitution, are subject to the terms and conditions of international treaties.

Since 1986, when the newly formed Supreme Court assumed jurisdiction over approval laws, legal scholars have adopted two positions on the issue of Supreme Court competence to rule on treaties. The first maintains that the Supreme Court is competent to hear claims of unenforceability or unconstitutionality made against such laws. However, the Court can only rule on flaws in the procedures by which the treaty was enacted. It cannot decide on the constitutionality of the treaty, because it is a political issue that may only be decided by the executive and legislative branches of government.<sup>54</sup> Once the treaty ratifications have been exchanged between countries, the treaty becomes effective and the Court loses jurisdiction.

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52. *Id.*

53. *Id.*

54. Few scholars, lawyers and politicians agree with this position. See L. CARLOS PÉREZ, A. HOLGUÍN SARRIA & A. HOLGUÍN SARRIA, 2 DOCUMENTOS DE LA EXTRADICIÓN 155 (1988).

The second position contends that the Court has no jurisdiction over these laws at any time, regardless of whether the claims refer to flaws in the procedure, or are made before the exchange of ratifications. The rationale for this position is that treaties are complex acts in which the treaty and its approval law become one. They cannot be separated for the Court to decide their constitutionality. To do so would violate the negotiating power of the President.

The Colombian Supreme Court adopted the first position in its June 25, 1987 decision, reaffirming its prior decision of December 12, 1986.<sup>55</sup>

#### IV. THE DILEMMA OF ENFORCING THE COLOMBIA-UNITED STATES EXTRADITION TREATY

It is important to understand how social and political factors affect the application of Colombian extradition law in a country under siege. Violence, crime, intimidation, and corruption in Colombia have forced citizens, judges, and politicians to adopt a tenuous position of enforcing the extradition treaty between the United States and Colombia. Countless assassinations of judges and political officials, including eleven Supreme Court Justices, two attorneys general, and three presidential candidates, have prompted many officials to pressure the Colombian Supreme Court to change its position on extradition and discontinue extraditing Colombian nationals.

Under these conditions, can it be said that the Colombian law operates freely? Can the Supreme Court possibly make decisions on extradition that are justified by analysis, logic, and conviction? Or will personal fear and political pressure result in the breakdown of law, rather than in its fulfillment?

Many factors point to fear as being the dominant motivation in law-making and judicial confirmation. Many Colombians legally, morally, and intellectually support the extradition of Colombian nationals. But they are voiceless and remain silent because of fear.

No branch of the Colombian government has been more intimidated than the judiciary, which, even without the constant threat of violence, operates under enormous strain. The poorly paid judges are the "Cinderellas" of the Colombian Justice system, laboring under absurd workloads. "Superior" judges in any one of the major cities have as many as 4,000 unsolved violent deaths on their dockets.

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55. For a discussion of the Colombian Supreme Court decision on the extradition treaty between the United States and Colombia, see *id.* at 360.

These judges are lucky if they have firm suspects in more than ten of those cases! In an average month, a judge may bring five to seven cases to conviction and sentencing. Generally, these are limited to cases with defendants already in custody. Cases without imprisoned defendants are usually neglected, because judges are required to first resolve cases with suspects in custody. Moreover, in the Colombian criminal justice system, the judiciary, not the police, investigates crimes. Judges inspect crime scenes and interrogate witnesses.<sup>56</sup> They may even have to type the record of the court proceedings with a manual typewriter because no secretaries are available. It is extremely difficult to be effective under these conditions. Evidence is often lost mysteriously by police officers who are bribed to misplace it. Cases are shelved for years by corrupt court officials paid to keep them from going to trial. Bringing a case to trial can take up to five years or longer. Even when a case is heard, many witnesses will not testify for fear of retaliation against themselves and their families. The overwhelming majority of criminal cases have no indictment and no trial. The judiciary is replete with inefficiency, bureaucracy, overwork, and corruption. The few competent and honest judges feel as though they are caught in the middle of nowhere. The Colombian Government and the judiciary simply cannot enforce the Penal Code effectively against the threat of the drug cartels. However, extradition of these criminals is an alternative source of enforcement.

In 1941, the United States-Colombia Extradition Treaty of 1886 was amended, making drug offenses extraditable. However, the treaty did not mention the extradition of Colombian nationals. In 1979, the treaty was again amended. The new treaty clearly authorized the extradition of each country's nationals at the discretion of the executive authority of the requested nation.<sup>57</sup> This was a significant departure from Colombia's prior position of exempting its own citizens from extradition to other countries. Although there was strong opposition to the treaty by politicians and the Colombian press, it was passed by Congress in October 1980, and sent to President Turbay for approval.

On November 3, 1980, the Minister of Government, empowered by presidential decree, approved the bill containing the extradition

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56. Since judges are usually not provided with vehicles or protection to investigate crime scenes, diligent inspection is often delayed or not performed.

57. See Extradition Treaty, *supra* note 1, art. 8. "[T]he Executive Authority of the Requested State shall have the power to deliver [its Nationals] if, in its discretion it be deemed proper to do so." *Id.* art. 8(1).

treaty between the United States and Colombia.<sup>58</sup> In mid-1981, the President of the United States submitted the treaty to the Senate for its "advice and consent." The treaty was approved by the United States Senate and took effect in March 1982.<sup>59</sup>

Many Colombian lawyers first considered the extradition treaty to be an answer to the basic necessity of fighting crime. It was considered a tool which would prevent offenders from committing crimes with impunity by bribing and intimidating officials. But this theoretical and legalistic view of the extradition treaty changed radically as the violence against pro-extraditionists increased in the early 1980s. The government, namely then President Belisario Betancur, disagreed with the Supreme Court over the United States' first request to extradite Lucas Gomez Van Grieken and Emiro de Jesus Mejia under the 1979 treaty. The Supreme Court ruled in favor of extraditing the two men. President Betancur exercised his presidential discretion and denied the extradition request. He justified his decision on the basis that Colombia had a tradition of not extraditing its own nationals. Even if the Colombian government signed a treaty authorizing extradition of nationals, the executive reserved the discretion to deny extradition in any given case. In addition, the majority of nations adhere to the principle that nationals cannot be extradited to face justice for crimes committed in foreign countries.<sup>60</sup> Betancur's justification was intended to be a doctrine of jurisprudence. However, many scholars believed it was political in nature and created a dangerous precedent.

Personally, I believe that President Betancur negated the extradition request solely for political reasons. He intended to inspire nationalism by gaining the support of radical organizations (unions, student groups, etc.), and by strengthening his political position as the protector of Colombian sovereignty and independence. As a conservative, he was taking a big step away from the former president's liberal political loyalties and interests. Betancur played up to the radical groups' common view that Colombia could no longer be subservient to the will of the United States. The extradition treaty with

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58. The bill was published as Law 27 of 1980.

59. SENATE COMM. ON FOREIGN RELATIONS, EXTRADITION TREATY WITH THE REPUBLIC OF COLOMBIA, S. EXEC. REP. NO. 34, 97th Cong., 1st Sess. (1981).

60. To this end, Betancur argued:

It is the nature of the Colombian citizen to be judged in a preferential manner in his country, by his judges, under its laws, his customs and language, all of which is warranted under the constitutional principle, which has its origin in the Declaration of the Rights of Men and Citizen, with its sources in the American Constitution.

F. RINCÓN, LA EXTRADICIÓN PARA LEGOS Y ESPECIALISTAS 123 (1984).



the United States symbolized that subservience. Negating extradition became a rallying point towards reconciling numerous political factions in Colombia. By not honoring the treaty, Betancur believed he could further Colombian independence and acquire the credibility necessary to solve internal problems.

During this time, there was widespread acquiescence among judges, lawyers, and citizens toward the proliferation of the Colombian drug trade. Colombia's economy benefitted from the enormous profits of narcotics sales. Many Colombian businessmen and politicians profited directly from the illicit drug trade. Protectionism towards the narcotics enterprises was disguised in nationalistic sentiments, aimed at preventing the United States from interfering with Colombia's sovereignty and control of its internal affairs. Betancur's resolve not to be intimidated by the United States was applauded at home and abroad. Unfortunately, the growing economic and political power of cartel-organized narco-traffickers (and the narco-terrorism associated with them) quickly grew out of control.

Undaunted, the United States continued pressuring Colombia to honor the extradition treaty or, at the very least, to fulfill their obligations under the treaty. Betancur continued to resist and pursued instead a strategy designed to curb the escalation of drug production and trafficking by internal enforcement within Colombian territory. This strategy proved to be a gross miscalculation which eventually led to disaster.

Betancur's Minister of Justice, Lara Bonilla (a member of an opposing political party), was a staunch supporter of extradition. He openly denounced members of Congress who were involved in drug trafficking and accepted bribes.<sup>61</sup> He stated:

Simply, the government fulfilled a treaty that is the same one that the Supreme Court has carried forward by request of the United States. The Court, at the same time has a term to say something on the subject. If the concept is favorable to the request of North America, the government is in a capacity to accept it or negate it. And if it is contrary to the request, the government has to subject it to the treaty . . . if our country . . . will retract from its compromises which it contracted in the international fight against delinquency, specifically against narco-trafficking, we couldn't have the least doubt that the consequences of the similar attitudes will

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61. At this time, Pablo Escobar was a member of the National Assembly and enjoyed close political ties with important politicians.

be disastrous in the order of economic cooperation. This will destroy the credibility of the nation not only in front of the U.S. but in front of all the countries of the world, and the country will also lose legal and moral authority to request extradition when the crime is committed in a foreign country. The country has negated reciprocity that was included in the treaty.<sup>62</sup>

The stand Bonilla took cost him his life, for he was assassinated by the drug cartels shortly thereafter. At Bonilla's funeral, President Betancur declared that he would henceforth honor the extradition treaty. Recognizing what he perceived as the popular, but silent, support for extradition, Betancur addressed the opening session of Congress:

Even though [I was] initially reluctant to accept the extradition treaty subscribed between Colombia and the United States, due to my humanist and democratic convictions, and my pure sense of national sovereignty, after the death of Lara Bonilla, I interpret the feeling of the country by recognizing that the trafficking of narcotics has no boundaries, and that those who do it should be judged anywhere in the world where justice requests may be facilitated.<sup>63</sup>

During the following two years, Colombia extradited approximately two dozen Colombian nationals on drug trafficking charges, in the hope that prosecution in the United States would deter the trafficking.<sup>64</sup> The United States-Colombia Extradition Treaty was the focus of many constitutional challenges. The Supreme Court displayed courageous leadership in protecting the law of the land by upholding the extraditions. Then disaster struck.

On November 19, 1985, the Palace of Justice was seized by members of the M-19 guerrilla movement.<sup>65</sup> The guerrillas killed over one hundred people, including eleven of the twenty-four sitting Supreme Court justices.<sup>66</sup> All but two of the surviving justices resigned, and

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62. See F. RINCÓN, *supra* note 60, at 129.

63. See *id.* at 145.

64. Those extradited were mid-level traffickers. Nevertheless, their extradition made an impact and resulted in the escalation of narco-terrorism against the Colombian state and the general populace.

65. The M-19 guerrillas are a left-wing revolutionary organization established in 1970. The group claims to be committed to democracy and peoples' rights in Colombia.

66. The feeling I had as a judge during this crisis was one of indescribable sadness, like being a two-year-old left without parents. I remember listening to one justice speaking over the phone live on the radio from inside the Palace during the attack, begging the army not to storm the palace, not to start shooting. To be a judge in a country without a Supreme Court gave me a sensation of total abandonment and loss.

the two remaining members had to appoint replacements to fill the vacancies. This was no easy task, because those who were qualified were reluctant to accept the posts.

On December 12, 1986, a new Supreme Court delivered its opinion on the validity of Law 27 of 1980,<sup>67</sup> which permitted the extradition of Colombian nationals, and declared it null and void. The Supreme Court purportedly based its decision on the principle that the President could not delegate his authority to conduct international relations to the Minister of Government. It stated that international relations is a political activity which requires presidential prerogative as the head of state. In its opinion, the Court referred generally to the Constitution, but did not indicate specific provisions. In fact, there are no specific provisions in the Constitution which explicitly distinguish between the President's political and administrative responsibilities. Nor are there provisions that specifically require him to exercise those responsibilities exclusively.

I am of the opinion that the decision was neither based on constitutional considerations nor on jurisprudential doctrine. Rather, it was the result of fear and coercion stemming from recent acts of terror, and the violent attack on the Supreme Court.

The Supreme Court had earlier declared Law 27 of 1980 unconstitutional on the technicality that it was not signed by the President. The new President, Virgilio Barco, tried to remedy the problem by signing Law 27 himself. His approval of the treaty was incorporated into Law 68 of 1986. Barco's opponents did not delay in challenging the constitutionality of the new law. One of the challenges was based on the grounds that since the Supreme Court had already declared Law 27 unconstitutional, President Barco had approved a law that did not exist.

Following the December 12, 1986, decision, the Supreme Court became divided on the issue of extradition. Twelve justices held that the decision taken by the Court with regard to Law 27 of 1980 invalidated not only the approved law, but also the treaty. The other twelve justices held that only the approval law was invalidated and not the treaty. They considered the approval law imperfection a procedural one which could be cured by subsequent presidential action, such as the signature of President Barco. Furthermore, these justices noted that there was no statute of limitation, because the Constitution did not prescribe a time limit for presidential approval of bills. The

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67. This law effectuated the treaty as the law of the land.

conflict required the Supreme Court to appoint a temporary associate justice to break the tie.<sup>68</sup> Initially, no one would accept the position. When the Court finally appointed an additional justice, he held that Law 68 of 1986 was invalid. Thus, in June 1987, the 1979 extradition treaty with the United States finally came to an end.

It is important to remember that throughout this period, anyone who publicly voiced a pro-extradition opinion was kidnapped or killed. Those whom the cartels could not buy, died. Those who survived were forced to leave the country. The drug cartels attempted to turn public opinion against extradition by terrorizing the nation with bombings of newspapers, public places, and businesses. The extraditables, as the cartel *capos* took to calling themselves, claimed responsibility for much of the terrorism, and promoted their macho slogan that they would rather have a grave in Colombia than a prison cell in the United States. They swore to fight extradition to the death.

Although the United States-Colombia Extradition Treaty is still in force, it is not enforceable in Colombia. The only way this situation can now be resolved is for the President to reintroduce the treaty as a bill to the Colombian Congress for approval. It would then have to be signed into law by the President. The only other alternative would be to simply denounce the treaty. If this occurred, however, Colombia would lose all credibility in the international arena. Furthermore, Colombia would face almost certain economic retaliation by the United States.

Meanwhile, the war on drugs has resulted in the continued killings of innocent Colombian citizens, caught between narco-terrorist actions and police enforcement retaliations. For all the good intentions of the present administration of President César Gaviria, the Colombian government still has no control over the situation. Furthermore, many Colombian legal scholars, who once may have agreed with the validity of the extradition treaty, have become more quiet now than at any time in the past. In fact, it now seems that politicians and legal scholars are looking for excuses to object to the treaty, in order to avoid having to approve it. The untenable bases of their objections include habeas corpus, retroactivity of the criminal law, analogies to crimes which violate typification of the criminal law, and even the semantics of the translation of the treaty into Spanish.

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68. The justice was appointed only to deliver the deciding vote.

## V. CONCLUSION

Lamentably, extradition has become the only effective instrument for Colombia to sanction narco-traffickers. Yet the Colombian government is too intimidated and traumatized to use it. It is a sad irony that Colombia is willing to extradite its nationals to the United States to be punished for crimes they committed overseas, while the numerous and atrocious crimes committed within its own borders go absolutely unpunished.

If criminals know with certainty that they will be penalized, crimes will diminish. However, Colombia must first implement an effective judicial system. Regardless of the United States' desire for Colombia to fulfill its extradition treaty obligations, the extradition treaty is, and will remain, incidental to Colombian internal problems that are completely out of control as a result of many years of deteriorating social order in an unequal and imbalanced society.