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United States International Drug Control Policy, Extradition, and the Rule of Law in Colombia

Mark Andrew Sherman*

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Abstract

The United States has been fighting the importation, distribution, and possession of illicit drugs for a long time.

KEYWORDS: policy, drug, Colombia

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I. INTRODUCTION	662
II. THE UNITED STATES-COLOMBIA EXTRADITION RELATIONSHIP IN HISTORICAL AND POLITICAL CONTEXT.....	670
A. <i>The Early Years</i>	670
1. The 1888 Convention and 1940 Supplementary Convention	670
2. Dark Times in Colombian Politics	671
B. <i>The Recent Record</i>	674
1. Post-National Front Colombian Politics and Relations with the United States....	674
2. The 1979 Treaty and the Palace of Justice Seizure	677
III. THE RULE OF LAW IN COLOMBIA AND THE DELETERIOUS EFFECT OF THE RECENT UNITED STATES-COLOMBIA EXTRADITION RELATIONSHIP	683
A. <i>States of Siege and Emergency Under the Colombian Constitution</i>	683
B. <i>Martial Law and the Rule of Law in Colombia</i>	685
C. <i>The SCJ Decisions of December 12, 1986 and June 25, 1987</i>	686
1. The December 12, 1986 Decision	686
2. The June 25, 1987 Decision.....	687

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** Visiting Fellow & Senior Instructor, The Catholic University of America, Columbus School of Law; B.A., The George Washington University, 1986; J.D., University of Miami, 1989. This article is a result of research performed during the spring and summer of 1990 in the United States and Colombia. I am grateful to Richard L. Fricker, and certain Colombian friends - including members of the Colombian Bar and press, and former high-ranking members of the Colombian government whose names I will not mention for security reasons - without whose help this work would be conspicuously deficient. I thank Harold A. McDougall for his comments on the draft. This article is dedicated to my fiancée, Jennifer Frank.

D. Decree Number 1860	690
E. The SCJ Decision of October 3, 1989.....	695
IV. CONCLUSION	698

I. INTRODUCTION

The United States has been fighting the importation, distribution, and possession of illicit drugs for a long time.¹ However, only within the past fifteen to twenty years has international drug control become a major priority in the formulation of United States foreign policy. The recent United States emphasis on international drug control appears to be a result of the perceived national security threat posed by domestic increases in drug consumption, drug-related crime, and chemical dependency, and by the strength of multinational enterprises involved in

1. Nineteenth century legislation includes the Act of February 23, 1887, Chap. 210, 24 Stat. 409, which banned the importation of opium into the United States by Chinese subjects and criminalized participation of United States citizens in opium trafficking. Hogan & Doyle, *The Federal Response: A Growing Role*, CRS REV. (Nov.-Dec. 1989). The beginning of the 20th century was marked by a meeting of the newly created Shanghai Opium Commission in 1909 and by a Hague Conference and accompanying international convention in 1912. *Id.* at 11. See Hague Convention on Narcotic Drugs, Jan. 23, 1912, T.S. No. 612, 38 Stat. 1912, 8 L.N.T.S. 187. Following from the prescriptions of the Hague Convention, which advocated greater domestic drug control, Congress passed the Harrison Narcotics Act of 1914, Pub. L. No. 63-223, 38 Stat. 785, which remained the principal drug control statute in the United States until 1970. Hogan & Doyle, *supra*, at 12. The Harrison Act was a tax law requiring all those legally involved in narcotics commerce to register with the Internal Revenue Service, to pay a tax, and to comply with certain order form requirements. *Id.* at 11. In 1937, Congress passed the Marihuana Tax Act, Pub. L. No. 75-238, 50 Stat. 551, which mirrored the Harrison act. Between 1935 and 1963, Congress increased the penalties for unlawful distribution and possession of illicit drugs. Hogan & Doyle, *supra*.

In 1961, President John F. Kennedy formed the President's Advisory Commission on Narcotics and Drug Abuse (the Prettyman Commission), and the Commission's 1963 report served as a blueprint for legislation in the years that followed. *Id.* at 12; see also Single Convention on Narcotic Drugs, March 30, 1961, 18 U.S.T. 1407, T.I.A.S. No. 6298, 520 U.N.T.S. 151 (amended by 26 U.S.T. 1439, T.I.A.S. No. 8118, 976 U.N.T.S. 3). In 1970, Congress passed the Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1242, and the Controlled Substances Import and Export Act, Pub. L. No. 91-513, 84 Stat. 1285, which made substantial changes in the system of penalties for violations of law and increased regulation of the pharmaceuticals industry. Hogan & Doyle, *supra*, at 12; see also Convention on Psychotropic Substances, Feb. 21, 1971, T.I.A.S. No. 9725, 1019 U.N.T.S. 14956. More recent United States domestic legal machinations and international agreements concerning drug control are addressed *infra* notes 3, 67, 70, and 106.

drug trafficking.²

Although the United States seems to be amenable to multilateral approaches devoted to the reduction of international drug trafficking, a more searching inquiry reveals that it has given such approaches short shrift.³ Rather, the United States takes the position that expanding extraterritorially the reach of its jurisdiction to prescribe and enforce its criminal laws is the most effective way of reducing international drug

2. See THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES 7, 28 (1990). Consumption of and trafficking in illicit drugs is also on the rise in Western Europe. See Zagaris & Fantauzzi, *European Integration and the Volcano of Illicit Drug Trafficking: Will 1992 Bring the Promised Avalanche of Cooperation?*, INT'L ENFORCEMENT L. REP. 190 (May 1990); Ernestus, *West German Government Considers Three Anti-Narcotics Initiatives*, INT'L ENFORCEMENT L. REP. 201 (May 1990). Some commentators have suggested that the relatively new United States emphasis on international drug control stems from the loss of the Soviet Union as the prime United States enemy. In essence, the United States has chosen drug traffickers as the "new" enemy. *Nightline: Washington's Dwindling Importance* (ABC television broadcast April 27, 1990) (comments of P.J. O'Rourke, columnist for Rolling Stone Magazine). Note, however, that such commentary preceded more recent events in the Persian Gulf.

3. From the beginning, the United States has participated in the search for multilateral solutions to stem international traffic in illicit drugs. See generally Bassiouni, *The International Narcotics Control Scheme*, in 2 INTERNATIONAL CRIMINAL LAW: PROCEDURE 507 (M. Bassiouni ed. 1986); Comment, *International Narcotics Control: A Proposal to Eradicate an International Menace*, 14 CAL. W. INT'L L.J. 530 (1984). The United States is a party to the most recent multilateral convention, see *United Nations: Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, Dec. 20, 1988, U.N. Doc. E/CONF. 82/15, Corr. 1 and Corr. 2, reprinted in 28 I.L.M. 493 (1989), and has endorsed the establishment of an International Criminal Court with jurisdiction over internationally recognized crimes such as terrorism, narcotics trafficking, genocide, and torture. See H.R. Con. Res. 66 (1990) (Currently under review by subcommittees on Human Rights and International Organizations and International Operations of the Committee on Foreign Affairs, United States House of Representatives).

Despite all of this, the United States has insisted on pursuing its own policy and prescribing and enforcing extraterritorially its domestic law. In this regard, the lack of United States financial support of multilateral and regional agencies charged with initiating programs to fight narcotics production, processing, trafficking, and abuse, such as the United Nations Fund for Drug Abuse Control (UNFDAC) and Inter-American Drug Abuse Control Commission (CICAD), reveals the actual absence of United States commitment to multilateral and regional solutions. For example, in Fiscal Year 1989, the United States Congress earmarked a mere \$2,000,000 to UNFDAC and only \$1,000,000 to CICAD. International Narcotics Control Act of 1988, 22 U.S.C. § 2222 (1988). In 1990, there was no such appropriation.

trafficking.⁴

While the United States policy is certainly bilateral in nature because extraterritorial enforcement of domestic criminal law requires the cooperation of other states, it is a mistake to infer that such cooperation is always voluntary. This is particularly true when the United States policy involves third world nations, where the culture differs radically thereby heightening the probability of friction caused by conflicting political priorities. Ultimately, when a less developed country is reluctant to cooperate with United States international drug control policy, the United States wastes no time in resorting to its substantial bargaining power. Thus, the United States drug control relationship with many third world nations is actually one of at least partial coercion.⁵ Naturally, such arm-twisting by any nation in pursuit of a foreign policy objective is bound to upset the governments with which that country must work, but which may have differing perspectives on, and approaches to, the same objective. This describes the current situation existing among the United States and certain Latin American countries.⁶

4. On the expanding nature of United States extraterritorial jurisdiction to prescribe and enforce see Zagaris & Rosenthal, *United States Jurisdictional Considerations in International Criminal Law*, 15 CAL. W. INT'L L.J. 303 (1985); see also Note, *Constructing the State Extraterritorially: Jurisdictional Discourse, the National Interest, and Transnational Norms*, 103 HARV. L. REV. 1273 (1990).

5. See *infra* note 70.

6. United States pursuit of international drug control by such means is usually defended by United States officials and other proponents on moral grounds. This, in turn, is reflective of a general United States attitude which has been particularly prevalent throughout the post-war era. In this regard, one well known commentator has suggested:

The disproportionately high level of United States activity and initiative in the international enforcement of criminal law reflects attitudes characteristic of United States approaches to international relations. Most notably, United States citizens often assume that the United States is obligated and even destined to play a leading role in dealing with most international problems. Far more than any other nation, the United States defines its national interests in such broad terms that few significant events lie outside their ambit. Global networks of military personnel, intelligence agents, and law enforcement officials are required merely to look after this wide array of interests. Yet criminal justice has historically been a domestic issue. Hence, other governments naturally respond to the United States expansive criminal law enforcement efforts with a mixture of gratitude, resentment, and ambivalence. Like other areas of international cooperation and conflict, foreign states welcome much of the United States assistance yet

Ultimately, the United States' position has had an adverse impact on its ability to carry out a successful drug control policy with the Andean nations of Colombia, Bolivia, and Peru—the producing, processing, and trafficking nations responsible for most of the world's supply of cocaine.⁷ Colombia presents a particular problem because it is the home of some of the most successful drug traffickers, and it is the traffickers whom the United States seeks to immobilize by subjecting them to the jurisdiction of its criminal laws. In this regard, the United States has had to work closely with Colombia to facilitate the extradition of suspected traffickers from that country to the United States.

The relationship that has evolved between the United States and Colombia is notable for its schizophrenia. On one hand, the United States demands the extradition of Colombian citizens suspected of breaking United States laws against drug trafficking, even where a suspect has acted wholly outside of United States territory. On the other hand, cocaine consumption is not a serious problem in Colombia, and drug trafficking is viewed by Colombians as one which can be reduced

react testily to the demands and pressures that frequently accompany it.

Nadelmann, *The Role of the United States in the International Enforcement of Criminal Law*, 31 HARV. INT'L L.J. 37, 39-40 (1990).

7. The policy has also strained United States relations with important Latin American allies such as Mexico, Costa Rica, and Honduras. With regard to Mexico, most recently the United States orchestrated the forceful abduction of Dr. Humberto Alvarez Machain to face charges in the United States stemming from the 1985 murder of DEA agent Enrique Camarena. The abduction was carried out without the host government's permission, and resulted in a severe rebuke from Mexican President Carlos Salinas de Gortari. See *U.S. Says it Won't Return Mexican Doctor Linked to Drug Trafficking*, N.Y. Times, April 21, 1990, at A3, col. 1. Ultimately, the trial court decided that the abduction was illegal, and that Alvarez must be returned to Mexico. *United States v. Caro-Quintero*, 745 F. Supp. 599 (C.D. Cal. 1990); *Defendant was Abducted in DEA Case, Judge Says*, Washington Post, Aug. 11, 1990, at A3, col. 5.

With regard to Costa Rica, the only established democracy in Central America, the foreign policy of the former Reagan Administration toward Nicaragua, i.e., encouraging United States assistance to the Nicaraguan *contras* by any means possible, including participation in drug trafficking, led to Costa Rica's current status as a transshipment point for cocaine and marijuana. See *Deputies Move to Continue Narcotics Probe*, Tico Times (Costa Rica), May 11, 1990, at 5, col. 1; *Accused U.S. Drug Trafficker Reported Comfy*, Tico Times, May 4, 1990, at 32, col. 1.

As to Honduras, in April, 1988, the United States pressured that country to deport to the United States suspected drug trafficker Juan Ramon Matta Ballesteros. See *Matta-Ballesteros v. Henman*, 896 F.2d 255 (7th Cir.), cert. denied, 111 S. Ct 209 (1990); *U.S. v. Matta-Ballesteros*, 700 F. Supp. 528 (N.D. Fla. 1988); Nadelmann, *supra* note 6, at 73.

through demand reduction in the United States combined with programs which will help stimulate the Colombian economy.⁸ Colombians object to having their fellow citizens extradited and tried in the United States, a nation whose culture and legal tradition differ markedly from those of Colombia, and whose people are the primary users of cocaine.⁹ Colombians assert that drug trafficking suspects who are Colombian citizens should be tried in Colombia, if at all.

Of course, the United States' response to the Colombian position is that the Colombian justice system is paralyzed by drug-related violence and corruption and, therefore, is incapable of dealing effectively with the problem.¹⁰ Thus, to the United States, the only solution is to bring alleged traffickers, including Colombian citizens, to the United States for trial.

The problem with the "paralysis" argument is that it is bolstered by at least three as yet unquestioned assumptions. First, the argument assumes that the United States' justice system is dealing effectively with international drug trafficking because those being extradited, prosecuted, and convicted are important players in the drug trafficking business, and their convictions will reduce the flow of illegal drugs into the United States. A second assumption is that Colombia should view the drug trafficking problem with a moral disdain equal to that of the United States. Finally, the argument assumes that all of the violence in Colombia attributed to drug traffickers has been, in fact, carried out by

8. See *Colombia Leader Emphasizes Anti-Terrorism*, N.Y. Times, Aug. 12, 1990, at A6, col. 1 (discussing new Colombian President Cesar Gavaria Trujillo's position that while "drug terrorism" is a Colombian problem, narcotics trafficking is "an international phenomenon that can only be resolved through joint action of all affected countries . . . [including] a substantial reduction in demand in consumer countries").

9. See *Extraditables Inicieron Huelga de Hambre en Bogota*, El Siglo (Colombia), July 9, 1990, at 1, col. 1; *Bogota Chief Tells of Drug War's Toll*, N.Y. Times, May 27, 1990, at A3, col. 4; *Bogota Mayor Advocates Talks with Traffickers*, Wash. Post, April 24, 1990, at A18, col. 1; *Americans, Colombians Disagree Over Drug War, Survey Shows*, Wash. Post, Feb. 9, 1990, at A18, col. 4.

10. Proponents of this argument cite as justification the killings of Colombian judges and politicians, and other brutal acts against the government and citizens attributed to members of the illegal drug business. They also cite the 1987 release of suspected drug trafficker Jorge Ochoa from detention in a Colombian prison—presumably the result of a kickback. However, these same commentators uniformly fail to give any credence to the fact that Ochoa was released pursuant to an affirmative judicial finding of unlawful detention following his petition for a writ of habeas corpus. See, e.g., S. McDONALD, *DANCING ON A VOLCANO: THE LATIN AMERICAN DRUG TRADE* 41 (1988).

the traffickers. Each of these assumptions is dubious.

While the United States has extradited fourteen Colombian drug trafficking suspects since August, 1989,¹¹ none of the suspects are high level members of the illicit drug business, despite claims to the contrary.¹² Rather, these people are, if anything, low-level actors who cannot afford the political and paramilitary protection paid for by major traffickers.¹³ If these "extraditables" are at all engaged in international

11. August, 1989 marked Colombia's resumption of extradition to the United States of suspected drug traffickers. See *infra* notes 106-126 and accompanying text.

12. A case in point is that of Jose Rafael Abello Silva, a Colombian extradited to the United States in October, 1989. Initially, Abello was reported to be a high ranking member of the Medellin Cartel. See *Medellin Suspect Extradited to the U.S.*, N.Y. Times, Oct. 30, 1989, at A13, col. 1 (high-level operative of Medellin Cartel); *Suspect is Extradited*, Newsday, Oct. 30, 1989, at 12 (Abello said to rank "number four" in the Medellin Cartel); *U.S. Jails Accused Master Drug Smuggler*, L.A. Times, Oct. 30, 1989, at A4, col. 4 (Abello accused of being Medellin Cartel's "master drug smuggler"). Abello was initially indicted in the United States in 1987 with three others on drug trafficking conspiracy charges. *United States v. Palmero*, No. 87-CR-140-B (N.D. Okla. filed Sept. 2, 1987); *United States v. Palmero*, No. 87-CR-140-B (N.D. Okla. filed Oct. 7, 1987) (superseding indictment).

Abello's alleged co-conspirators all pled guilty and agreed to testify against or provide information on him in exchange for light sentences. This led to the filing of a second superseding indictment naming only Abello. See *United States v. Abello Silva*, No. 87-CR-140-B (N.D. Okla. filed Jan. 3, 1990). The only testimony as to Abello's participation in the alleged conspiracy was that of his former co-defendants, persons related to his former co-defendants, other convicts, and Federal Bureau of Investigation Agents. Despite the previous news reports, Abello's position within the Medellin Cartel, if any ever existed, was never established. Ultimately, the jury saw its way clear to convict Abello and Judge Thomas Brett sentenced him to thirty years in prison, the maximum allowable under the existing United States-Colombia extradition regime. See *Extradited Colombian Drug Trafficker Sentenced to Thirty Years*, Reuter Libr. Rep., May 29, 1990; *Jury Convicts Reputed Key Colombian Drug Figure*, L.A. Times, May 20 1990, at A27, col. 1 (Abello reported as "reputed . . . key figure in the Medellin Cartel). Regarding the current United States-Colombia extradition regime, see *infra* notes 106-126 and accompanying text.

13. A case in point here is that of Edward Mitchell, a United States citizen extradited from Colombia in July 1990. Mitchell was indicted in the United States on charges of conspiracy in 1983. The charges stem from his alleged role in a Colombia-Milwaukee, Wisconsin cocaine ring. *United States v. Mitchell*, No. 83-CR-86 (E.D. Wis. filed June 14, 1983). Notably, in light of the news reports which followed the Abello extradition, and the lack of such reports following Mitchell's extradition, one can reasonably deduce that Mitchell was not considered a major suspect. Indeed, it seems that anyone who is considered to be a "drug baron" stands little chance of making it out of Colombia alive. For example, in 1989, alleged Colombian cocaine trafficker Jose Gonsalo Rodriguez Gacha was killed by Colombian police. The last "ma-

drug trafficking, it is clear that they are considered by their superiors to be expendable and are, therefore, easy targets for the Colombian authorities and the United States Drug Enforcement Administration (DEA). Additionally, despite the fact that recreational drug consumption is not a problem in Colombia, the United States has asked Colombian civilians to support a policy which has helped transform their country into a police state. At the same time, the United States has been unwilling to engage in a comprehensive drug demand reduction program. Lastly, it is not clear that all of the violence carried out against the Colombian government and justice system is attributable to the traffickers. To be sure, the traffickers are a dangerous and violent group. However, it must also be recognized that Colombian society has been for many years characterized by violence; it is permeated with various guerilla, paramilitary fascist and rural "self-protection" groups,¹⁴ and government military and police organizations which act with virtual autonomy.¹⁵

There is much more to international drug trafficking than meets the eye, and the current United States policy is unable to meet the challenge. United States' international drug control policy has addressed neither cultural, political, nor socioeconomic underpinnings which have given rise to the major role of Colombia in international drug trafficking.¹⁶ Neither has the United States considered the sensitivity of Latin American nations to outside intervention.¹⁷

The analysis cannot end here, however. While coercion has had much to do with the Colombian government's cooperation with United States international drug control policy, it does not tell the whole story.

job" cocaine trafficker to be brought to the United States was Carlos Lehder-Rivas in 1987.

14. See *infra* notes 42, 46 and accompanying text.

15. See *infra* note 32.

16. For example, many poor Colombians view the drug business as the only viable alternative to climb the economic ladder in the absence of an effective welfare state. See *Medellin Journal: In the Capital of Cocaine, Savagery is the Habit*, N.Y. Times, June 7, 1990, at A3, col. 1. Though largely unreported in the United States, much of the drug-related violence in Colombia is the result of turf wars taking place between private armies commanded by members of the Colombian elite, such as Victor Corraza, who are engaged in cocaine trafficking, and those of nonmembers such as Pablo Escobar, Jorge Ochoa, and, formerly, Jose Gonsalo Rodriguez Gacha.

17. See Charter of the Organization of American States, arts 19, 20, and 21 (declaring nonintervention as a principle). This sensitivity was most recently witnessed in the aftermath of the United States invasion of Panama in December 1989. See *Latics Leery of U.S. Military*, Wash. Post, Jan. 9, 1990, at A1, col. 1.

In Colombia, as in the United States, there are members of government who have used the drug trafficking issue for personal and political advantage. In addition, because many high ranking Colombian politicians have strong familial or commercial ties with the United States and do not want to jeopardize those ties, they lack the political will to diverge from United States policy. While there have been brief periods in Colombia's recent political history where the government has sought to distance itself from the United States,¹⁸ the domination of Colombian politics by members of the small social elite, and the considerable political influence of Colombian police and military organizations, have assured continued official Colombian support for Washington's policies.

The practical effect on Colombian society resulting from the United States international drug control policy and Colombian governmental complicity with that policy has been further detraction of Colombia's ability to govern itself according to the rule of law. The continued extradition of Colombian nationals to the United States, despite adverse rulings on the subject by the Colombian Supreme Court of Justice (SCJ), has caused bitterness among the intensely proud Colombian populace. The government stands accused of pandering to United States interests while Colombian society remains under a system of martial law which only promotes continued violence.¹⁹ The United States does virtually nothing to effectively encourage the Colombian government to abide by the Colombian Constitution and to appropriate funds aimed at strengthening that country's understaffed, underequipped,²⁰ and overburdened judicial system.²¹ Rather, the United States encourages the Colombian Executive to usurp legislative and judicial power and to increase the power of the military and police.

This article examines the steady deterioration of order in Colombian society through an explanation and analysis of the Colombia-United States extradition relationship in historical and political context. The article shows that the Colombian government's current inability to institute and effectuate the rule of law is a result of two destructive forces acting in concert: The first force is that of a United States drug control policy which emphasizes extraterritorial prescription and enforcement of domestic criminal laws - including extradition of Co-

18. See *infra* notes 64-66 and accompanying text.

19. See *infra* note 76 and accompanying text.

20. See Fricker, *A Judiciary Under Fire*, A.B.A.J. 54 (Feb. 1990).

21. See Grossman & Anderson, *Lawyers and the Rule of Law in the Western Hemisphere*, 20 U. MIAMI INTER-AM. L. REV. 115, 124-25 (1988).

Colombian citizens to the United States - rather than assisting Colombia in enforcing its own laws and rebuilding its justice system. The second force is the Colombian elite's desire for political and, therefore, economic self-perpetuation which prevents the nation from effectively "dealigning" itself from United States policy. It is suggested that if the United States is truly interested in reducing illicit drug traffic, and if Colombia is truly interested in creating a more stable social climate, both countries must undertake fundamental changes in thinking and policymaking.

II. THE UNITED STATES-COLOMBIA EXTRADITION RELATIONSHIP IN HISTORICAL AND POLITICAL CONTEXT

A. *The Early Years*

1. The 1888 Convention and 1940 Supplementary Convention

Colombia enacted its current constitution in 1886. Two years later, the initial extradition convention between the United States and Colombia was signed,²² and went into force on January 11, 1891.²³ The 1888 Convention was the typical enumerative type; it listed the crimes for which an accused would be subject to extradition.²⁴ Notably, the 1888 Convention did not provide for extradition on the basis of crimes relating to illicit drug trafficking. Additionally, the 1888 Convention advocated against extradition of United States or Colombian nationals.²⁵

By 1940, it had become apparent to United States officials that Colombia was a source of illicit drugs. Consumption of such substances in the United States was increasing as was the number of crime organizations involved in its importation and distribution. Thus, the United States and Colombia amended the 1888 Convention to include "[c]rimes against the laws for the suppression of the traffic in narcot-

22. Convention for the Reciprocal Extradition of Criminals, May 7, 1888, United States-Colombia, 26 Stat. 1534, T.S. 58 [hereinafter 1888 Convention].

23. *Id.*

24. *Id.* at art. 2. Typically, where an extradition treaty exists, the issue of whether a particular alleged crime subjects an accused to extradition is determined by either listing the specific offenses in the text of, or in the appendix to the treaty, or by establishing the degree of punishment according to which an offense shall be extraditable. Comment, *RICO, CCE, and International Extradition*, 62 TEMPLE L. REV. 1281, 1295 (1989).

25. 1888 Convention, *supra* note 22, at art. 10.

ics."²⁶ This Supplementary Convention went into effect on July 6, 1943.²⁷

2. Dark Times in Colombian Politics

Until very recently, Colombian politics was characterized by a two-party system.²⁸ Each of these parties, the Liberals and the Conservatives, was dominated by the nation's small socioeconomic elite.²⁹

26. Supplementary Convention of Extradition, Sept. 9, 1940, United States-Colombia, art. 1, 57 Stat. 824, T.S. 986 [hereinafter 1940 Supplementary Convention].

27. *Id.* At this point it should also be mentioned that there are two relevant multilateral extradition treaties in force. In 1933, as part of the Seventh International Conference of American States in Montivideo, Uruguay, the United States and other American republics signed the Pan American Convention on Extradition, Dec. 26, 1933, 49 Stat. 3111, T.S. 882 [hereinafter Pan American Convention]. The purpose of this convention is to effectuate extradition where there is no existing extradition treaty among the signatories or where an existing treaty lapses. In other words, the Pan American Convention "does not abrogate or modify the bilateral or collective treaties, which at the present date are in force between the signatory States." *Id.* at art. 21. Unlike the bilateral 1888 Convention, *supra* note 22, and 1940 Supplementary Convention, *supra* note 26, which enumerate the particular extraditable offenses, the Pan American Convention simply relies on a conditional reciprocity requirement. Pan American Convention, *supra*, at art. 1. In essence, each of the signatory states promises to surrender an accused to a requesting signatory state based on certain conditions. Each signatory state contracts to surrender to the requesting state a person "who may be in their territory and who [is] accused or under sentence," *id.*, where:

a) [T]he demanding State ha[s] the jurisdiction to try and to punish the delinquency which is attributed to the individual whom it desires to extradite.

b) [T]he act for which extradition is sought constitutes a crime and is punishable under the laws of the demanding and surrendering States with a minimum penalty of imprisonment for one year.

Id. at art. 1(a), (b).

An interesting and innovative aspect of the Pan American Convention is that unlike traditional extradition treaties, the Pan American Convention provides for discretionary delivery of a signatory state's citizens unless such delivery is precluded by the surrendering state's internal legislation or by the "circumstances of the case" as determined by the surrendering state. *Id.* at art. 2.

The second multilateral treaty is of more recent vintage but cannot be applied in extradition situations involving the United States. Despite its formulation under the auspices of the Organization of American States, the Inter-American Convention on Extradition, Feb. 25, 1981, O.A.S., T.S. No. 60 (OEA/Ser. A/36) has not yet been signed by the United States.

28. *See infra* note 42.

29. Findley, *Presidential Intervention in the Economy and the Rule of Law in*

During the 1930's and the first half of the 1940's, national politics was influenced by the Liberal Party.³⁰ In 1946 the Conservative Party took power.³¹ The Conservative government formed the *Departamento Administrativo de Seguridad* (DAS), a police organization with extraordinary investigative and military capability. Although technically a part of the Ministry of Interior, DAS operates with virtual autonomy.³²

In 1948, amid an increasingly violent political atmosphere, the populist, left-leaning Liberal leader, Jorge Eliecer Gaitán, was assassinated.³³ The blame for Gaitán's death was attributed to rightist elements of the Conservative government, and Colombia soon became embroiled in a bloody civil war known as *La Violencia*.³⁴ In 1949, the government declared a state of siege.³⁵ In 1950, another Conservative

Colombia, 28 AM. J. COMP. L. 423, 425 (1980); see generally R. DIX, COLOMBIA: THE POLITICAL DIMENSION OF CHANGE (1967).

30. Bagley & Tokatlian, *Política Exterior de Colombia en los 80*, in CONTINUIDAD Y CAMBIO EN LAS RELACIONES AMERICA LATINA/ESTADOS UNIDOS 151, 176 n.50 (M. Hirst ed. 1987).

31. *Id.*

32. DAS is usually analogized to the United States Department of Justice's Federal Bureau of Investigation (FBI). See *Drug Lord's Base Hurt, Officials Say: Cartel Leader Escobar Fleeing Into Jungle to Escape Dragnet*, Wash. Post, July 14, 1990, at A23. While in many respects DAS resembles the FBI, the former wields much more power. Under the state of siege, see *infra* notes 71-77 and accompanying text, the government grants extraordinary powers to the police and military, allowing them to escape civilian control and oversight. In turn, organizations such as DAS, with sophisticated intelligence and military capability, pursue their own agendas and hold themselves out as defending the state against those allegedly seeking to destroy it. The current head of DAS, General Miguel Maza Marquez, is both praised and criticized in Colombia. He has been praised by conservatives for sustaining a hard line against drug traffickers, and for uncovering corruption within the armed forces. See *Colombian Anti-Drug Hero's Post in Doubt*, *Newsday*, July 5, 1990, at 13. On the other hand, Maza has been criticized for turning a blind eye to serious human rights violations committed by members of DAS. *Id.* Also, Maza himself has been accused of accepting payments from drug traffickers who are members of the established social elite (the Cali and Emerald Cartels). *Id.* In this regard, it has been rumored in Colombia that the 1989 death of reputed cocaine trafficker Jose Gonsalo Rodriguez Gacha at the hands of DAS was actually carried out by Maza at the request of either the Cali or Emerald Cartels or both. It seems that Rodriguez was making inroads into legitimate businesses operated by the Cali and Emerald Cartels and used by them as a front for cocaine trafficking.

33. Bagley & Tokatlian, *supra* note 30.

34. *Id.* See also Findley, *supra* note 29.

35. Findley, *supra* note 29, at 426. For a discussion of the state of siege and its effect on the rule of law in Colombia, see *infra* notes 71-126 and accompanying text.

was elected president when the Liberals refused to nominate a candidate.³⁶ In 1953, the civilian government was overthrown in a military coup led by General Gustavo Rojas Pinilla who then imposed a moratorium on all organized political activity.³⁷ In 1957, Conservative and Liberal leaders forced the ouster of Rojas and called for election of a civilian president. The Constitution was then amended to allow for a Liberal-Conservative coalition government for the next sixteen years.³⁸ Under the plan, known as the National Front, the parties equally divided between themselves seats in all legislative, judicial, and executive bodies.³⁹ The presidency alternated every four years.⁴⁰ Ultimately, there was not a competitive election until the National Front disbanded in 1974.⁴¹

Sixteen years of National Front leadership provided more than enough time for the incubation of militant political groups which were dissatisfied with a status quo favoring the elite. Indeed, it was during the National Front period that various guerilla groups such as the *Fuerzas Armadas Revolucionarias de Colombia* (FARC), *Ejercito de Liberación Nacional* (ELN), and *Ejercito Popular de Liberación* (EPL) formed and became powerful, appealing to Colombia's poor by espousing variations of communist ideology.⁴²

36. Findley, *supra* note 29, at 426.

37. *Id.*

38. *Id.*

39. *Id.*

40. Bagley & Tokatlian, *supra* note 30, at 176 n.50.

41. *Id.*

42. *Id.* at 171 n.40. FARC, a Marxist-Leninist group, actually traces its origins as far back as the period of *La Violencia* and currently is Colombia's most powerful guerilla organization. *Id.* The ELN, which aligns itself more directly with Fidel Castro, and the EPL, which espouses Maoist ideology, commenced their operations in the 1960's. *Id.*

Over the past year, many of Colombia's guerilla groups have begun to lay down their arms and integrate themselves into the political process. In early 1990, the *Movimiento 19 de Abril de 1970* (M-19) organization, a powerful populist guerilla group formed after the 1970 presidential elections, publicly laid down its arms. In the May, 1990 elections, the M-19 presidential candidate, Antonio Navarro Wolff, garnered thirteen percent of the vote despite the unexplained assassination of the organization's initial presidential candidate. See Brooke, *Colombia's Guerillas Break Into Politics*, N.Y. Times, June 3, 1990, at E5, col. 1; Brooke, *Colombia Rebels Shun Arms and Win Votes*, N.Y. Times, May 31, 1990, at A15, col. 1. Subsequently, Navarro was named Minister of Health by President Cesar Gaviria Trujillo. See *Colombian Guerillas Forsake the Gun for Politics*, N.Y. Times, Sept. 2, 1990, at A14, col. 1 (reporting on demobilization of the EPL, the indigenous self-defense group *Quintín Lame*, and the

B. *The Recent Record*

1. Post-National Front Colombian Politics and Relations with the United States

By the mid-1970's, trafficking in and use of illegal drugs had become a major issue within the United States, and it was at this time that the problem began to seriously manifest itself in the relations between Colombia and the United States. In response to the large amounts of marijuana which were being imported into the United States from Colombia, then United States President Jimmy Carter requested of then Colombian President Alfonso Lopez Michelsen, that elimination of marijuana exports be given the highest priority. While Lopez agreed to address the marijuana issue, he refused to adopt the law enforcement measures advocated by Carter.⁴³ As a result, Lopez and Colombia suffered badly in the United States media and relevant halls of the United States federal government.⁴⁴

Lopez' reaction to the Carter Administration's marijuana control policy lends insight in regard to the differing perspectives of Colombia and the United States toward the drug trafficking business. Professor Juan Gabriel Tokatlian, Director of the Center of International Studies at the University of the Andes in Bogota has written that,

during the [1970's] marijuana boom, [Colombian] policy was dominated by a certain socioeconomic rationale, marked by a strong vein of pragmatism. In fact, evidence of this can be found in several manifestations: the creation of the so-called *ventanilla siniestra* ([sinister] window) in the Banco de la Republica, which allowed funds originating from drugs and other activities to enter the country; the debates . . . on legalization of drugs; the acceptance—albeit limited—of the new social sector associated with its cultivation and marketing; and the government attitude . . . that it

Revolutionary Workers Party).

Two powerful guerilla groups, FARC and ELN, continue to refuse to enter into discussions with the government. *Id.* Moreover, throughout the twentieth century Colombia has witnessed the proliferation of rightist, paramilitary "self-defense" groups. See WASHINGTON OFFICE ON LATIN AMERICA, *COLOMBIA BESIEGED: POLITICAL VIOLENCE AND STATE RESPONSIBILITY* 59-83 (1989) [hereinafter WOLA].

43. Tokatlian, *National Security and Drugs: Their Impact on Colombian-U.S. Relations*, 30 J. INTER-AM. STUD. & WORLD AFF. 132, 142 (Spring 1988); see also Bagley, *Colombia and the War on Drugs*, 67 FOREIGN AFF. 70 (Fall 1988).

44. Tokatlian, *supra* note 43, at 142-43.

not transfer unilaterally the cost of combatting the proliferating consumption to Colombia. Clearly, in the 1970's the Colombian system did not see itself seriously threatened by (1) the political institutional reach of the marijuana business; (2) its negative effect on national security; nor (3) the financial consequences of its production and trade. Thus, Colombia did not accentuate, unilaterally, repressive measures in its attempts to control and eradicate this traffic.⁴⁵

In 1978, Liberal Party candidate Julio Cesar Turbay Ayala was elected president of Colombia. Turbay was a proponent of increased ties to the United States and upon assuming the presidency, he took a number of steps to assure solidification of the Washington-Bogota connection.

Because of the Colombian rural economy's poor state, and the absence of an effective welfare state, indigenous, rural-based "self protection" groups and labor unions such as the *Asociación Nacional de Usuarios Campesinos* (ANUC) and the *Consejo Regional Indígena del Cauca* (CRIC) had become quite active in the 1970s. These and other organizations, including M-19,⁴⁶ soon engaged in violence aimed at the new Turbay Administration which was perceived as dedicated to the preservation of the political status quo. Turbay had run his campaign based on a restoration of "law and order,"⁴⁷ a code-phrase for repression of political opposition. To that end, just over a month after assuming the presidency, Turbay, pursuant to his powers under the then existing state of siege, issued the *Estatuto de Seguridad Nacional* (National Security Statute).⁴⁸ The Statute was similar to legislation adopted by the military dictatorships in Argentina, Chile, and Uruguay, and increased the authority of the president and the role of the

45. *Id.* at 139.

46. *See supra* note 42.

47. Bagley & Tokatlian, *supra* note 30, at 154-176.

48. DECRETO LEGISLATIVO No. 1923 de 1978, No. 35101 *Diario Oficial* 1033 (21 de septiembre de 1978); Bagley & Tokatlian, *supra* note 30, at 171 n.41. The Statute suspended the right to habeas corpus and permitted the armed forces to arrest civilians without formal charges. *Id.* In addition, it provided that civilians accused of crimes against the national security would be tried in front of military tribunals, and it replaced civilian government with military government in several localities throughout the country. *Id.* (citing AMNESTY INTERNATIONAL, REPORT OF AN AMNESTY INTERNATIONAL MISSION TO THE REPUBLIC OF COLOMBIA (1980)); *see also infra* notes 71-83 and accompanying text.

Colombian military in the operation of government.⁴⁹ Turbay used the Statute as a vehicle to establish closer relations with the United States and to obtain arms, military equipment, and military training.⁵⁰

Additionally, in 1979, Nicaragua's Anastasio Somoza Debayle was overthrown by the leftist *Frente Sandinista de Liberación Nacional* (FSLN). The displacement of Somoza, a wealthy landowner whose family had ruled Nicaragua for most of the twentieth century, was taken as a signal by Turbay whose family belonged to Colombia's elite, and who was well aware of the strong leftist and populist guerilla movements in his own country. Also, the new Nicaraguan government disputed the territorial claims of Colombia to the San Andres Archipelago.⁵¹ In response, Turbay requested protection from the United States. In this connection, while the United States initially supported the FSLN, by the time of Turbay's request, United States patience with the new Nicaraguan government had waned because of the FSLN's failure to "moderate" its militaristic, pro-Cuban stance. Thus, in the outgoing Carter Administration and United States Congress, Turbay had found a wealthy anti-Sandinista ally. With the advent of the fervently anti-communist Reagan Administration in 1980, Bogota and Washington would reach even firmer common ground.⁵²

Finally, and most importantly for instant purposes, in 1979 a reluctant Turbay signed the controversial United States-Colombia extradition treaty.⁵³ Because of the consistent flow of marijuana to the United States from Colombia and Colombia's failure to seriously address the problem, the Carter Administration had placed political pressure on Turbay. The purpose of the pressure was to force Turbay to choose between signing the 1979 Treaty or asking the United States for

49. Bagley & Tokatlian, *supra* note 30, at 171.

50. *Id.* While the Carter Administration expressed its willingness to assist Turbay, it also expressed its concern regarding possible human rights abuses under the Statute. *Id.* at 172.

51. Bagley & Tokatlian, *supra* note 30, at 157. The San Andres Archipelago is a group of islands located off of the Nicaraguan coast, near the *Golfo de los Mosquitos*. The largest two islands are San Andres and Providencia.

52. *Id.* at 159-161. For example, in response to Turbay's fears of Nicaraguan "expansionism" into the San Andres, and, more to the point, to gain a stronger military foothold in the area, the United States secretly negotiated with Colombia an agreement to allow the United States to set up a military installation on San Andres. *Id.*; see also *Treaty with Colombia Concerning the Status of Quitasueno, Roncador, and Serrana*, Sept. 14, 1972, United States-Colombia, 33 U.S.T. 4459, T.I.A.S. No. 10316.

53. Treaty of Extradition, Sept. 14, 1979, United States-Colombia, (unnumbered) S. Treaty Doc. 8, 97th Cong., 1st Sess. (1981) [hereinafter 1979 Treaty].

economic and military assistance without an illustration of Colombian cooperation in helping the United States stem the flow of illicit drugs. Just prior to Turbay's presidential victory in 1978, a report known as the "Bourne Memorandum" had leaked from the White House.⁵⁴ The report accused Turbay and others in the upper echelons of Colombian politics of having connections to groups involved in drug trafficking.⁵⁵ Despite an April 1979 report issued by the House Committee on Narcotics Control and Abuse which concluded that Turbay was not involved in drug trafficking,⁵⁶ he was not entirely absolved of the taint of corruption bestowed upon him by the Bourne Memorandum. Thus, to gain political absolution and, therefore, economic and military assistance, Turbay determined that it was in his administration's best interests to sign the 1979 Treaty.

2. The 1979 Treaty and The Palace of Justice Seizure

The 1979 Treaty went into force on March 4, 1982, and is one of several extradition treaties negotiated by the United States between 1978 and 1983.⁵⁷ Although each of the treaties negotiated within that

54. Bagley & Tokatlian, *supra* note 30, at 172 n.41.

55. *Id.*

56. *Id.* at 172 & n.44 (citing SELECT COMMITTEE ON NARCOTICS ABUSE AND CONTROL, UNITED STATES HOUSE OF REPRESENTATIVES, FACT FINDING MISSION TO COLOMBIA AND PUERTO RICO, 96th Cong., 1st Sess. (1979)).

57. *See, e.g.*, Treaty on Extradition, May 4, 1978, United States-Mexico, 31 U.S.T. 5059, T.I.A.S. No. 9656; Treaty on Extradition, June 24, 1980, United States-Netherlands, _____ U.S.T. _____, T.I.A.S. No. 10733; Supplementary Convention on Extradition, March 14, 1983, United States-Sweden, _____ U.S.T. _____, T.I.A.S. No. 10812; Treaty on Extradition, Oct. 13, 1983, United States-Italy, _____ U.S.T. _____, T.I.A.S. No. 10837; Treaty on Extradition, United States-Thailand, Dec. 14, 1983, S. Treaty Doc. No. 16, 98th Cong., 2d Sess. (1984); Treaty on Extradition, United States-Costa Rica, Dec. 4, 1982, S. Treaty Doc. 17, 98th Cong., 2d Sess. (1984); Treaty on Extradition, United States-Jamaica, June 14, 1983, S. Treaty Doc. 18, 98th Cong., 2d Sess. (1984); Treaty on Extradition, United States-Ireland, July 7, 1983, S. Treaty Doc. 19, 98th Cong., 2d Sess. (1984).

These new extradition treaties illustrate important departures from the traditional bilateral extradition treaties. For example, the new treaties expand significantly the scope of the United States jurisdiction to prescribe and enforce its laws, expressly including acts of conspiracy. *See, e.g.*, 1979 Treaty, *supra* note 53, at arts. 1-3. In addition, the treaties pick up on a trend first evidenced in the text of the multilateral 1933 Pan American Convention, *supra* note 27, expressly permitting extradition of the contracting parties' citizens. While certainly unorthodox, the fact that this trend has continued in recently negotiated extradition treaties is not surprising in light of the advent

period allows the extradition of the contracting parties' nationals,⁵⁸ the relevant provision of the 1979 Treaty is notable for its specificity. Article 8 grants the surrendering state's executive discretion in determining whether a citizen of that state will be extradited, while simultaneously requiring that extradition of nationals will be granted where "the offense involves acts taking place in the territory of both States with the intent that the offense be consummated in the Requesting State."⁵⁹ Clearly, this provision is meant to encompass acts by the surrendering state's nationals which, under United States law, constitute conspiracies. Interestingly, the Letter of Submittal accompanying the 1979 Treaty specifically states that this "innovation . . . is especially important in prosecuting exporters of dangerous drugs."⁶⁰

Although the debate on the 1979 Treaty in the United States Congress proceeded smoothly, the same cannot be said of the debate in the Colombian Congress. The focus there was, of course, on article 8, the text of which is considered by many Colombian politicians as an act of submission to the United States and a violation of Colombian sovereignty.⁶¹ Despite the opposition, with the strong support of President Turbay, the treaty bill was approved by both houses of the Colombian Congress on October 14, 1980, and was sent to the President for signature.

On November 3, 1980, Minister of Government Dr. German Zea Hernandez, who had been delegated the exercise of presidential "constitutional functions" by President Turbay while the latter was out of the country on a state visit,⁶² signed the treaty bill and published it as Law 27 of 1980.⁶³ By the time the 1979 Treaty went into effect in

of modern communications technology which facilitates transnational crime, and when read in connection with treaty provisions delineating the long arm of United States criminal law.

58. See *supra* note 57.

59. 1979 Treaty, *supra* note 53, at art. 8(1)(a).

60. Letter of Submittal from State Department to White House, S. Treaty Doc., *supra* note 53, at vi.

61. Kavass, *Introductory Note to Colombia: Supreme Court Decision on Law Concerning the Extradition Treaty Between Colombia and the United States*, 27 I.L.M. 492, 493 (1988).

62. See COLOM. CONST. art. 128.

63. Ley 27 de 1980, No. 35643 *Diario Oficial* 401 (14 de noviembre de 1980). Notably, two other bilateral agreements were signed by the United States and Colombia in 1980. First, through an exchange of diplomatic notes, the two governments agreed to battle illicit traffic in narcotics. *Narcotic Drugs: Cooperation to Curb Illegal Traffic*, July 21, Aug. 6, 1980, United States-Colombia, 32 U.S.T. 2301, T.I.A.S. No.

March, 1982, Colombia was in the midst of a presidential campaign with elections slated for May.

Ultimately, the Conservative candidate, Belisario Betancur Cuartas was elected President. Betancur's success marked the first presidential victory for the Conservatives since the demise of the National Front in 1974. Contrary to the political attitude of Turbay, who was willing to push certain controversial domestic measures as a way of currying favor with the United States, Betancur took a populist stance and sought to cool relations between Bogota and Washington.⁶⁴ In so

9838. This agreement comprises an offer and acceptance of \$13,225,000 in United States assistance for,

supplying and maintaining helicopters, patrol vessels, fixed radar equipment, transport vehicles, and fuel, which shall be used exclusively for interdicting drug traffic, for training personnel with respect to the interdiction of drug traffic, and for whatever other purposes the United States Congress may authorize.

Id. at 2302. Second, the two governments entered into a mutual legal assistance treaty. Mutual Legal Assistance Treaty with the Republic of Colombia, Aug. 20, 1980, S. Treaty Doc. 11, 97th Cong., 1st Sess. (1981). Each of these agreements is designed to facilitate the purposes addressed by the 1979 Treaty, *supra* note 53.

In addition, in 1981, the United States Congress amended the Posse Comitatus Act of 1878, 18 U.S.C. § 1385 (1982). The Act governs the use of the United States military in foreign and domestic police actions involving illegal drugs, *see* Comment, *A Proposal for Direct Use of the United States Military in Drug Enforcement Operations Abroad*, 23 TEX. INT'L L.J. 291, 293 (1988) [hereinafter *A Proposal*], and "prohibits use of 'any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws except with authorization by the Constitution or Act of Congress.'" *Id.* at 294. However, the 1981 amendments, codified at 10 U.S.C. §§ 371-78, authorize military officials to furnish information, equipment, facilities, training, and expert advice to civilian law enforcement personnel. *A Proposal, supra*, at 295. Such authorization applies to both domestic and extraterritorial drug-oriented police work and has been relied upon to justify the increasing use of the armed forces in drug interdiction and eradication efforts. *See* *United States v. Roberts*, 779 F.2d 569 (9th Cir.), *cert. denied*, 107 U.S. 142 (1986) (*cited in A Proposal, supra*, at 299 (naval support used and approved of in extraterritorial drug interdiction)); Comment, *The Extraterritorial War on Cocaine: Perspectives from Bolivia and Colombia*, 12 SUFF. TRANSNAT'L L.J. 39, 45-60 (1988) [hereinafter *Bolivia and Colombia*] (discussing use of United States military in extraterritorial coca eradication); Isikoff, *War On Drugs Mobilizes National Guard*, Wash. Post, Aug. 14, 1990, at A1, col. 3 (discussing National Guard's escalating domestic role in assisting local police to identify suspected drug producers and users, respectively); Isikoff, *Interest in Grateful Dead Was Not Musical*, Wash. Post, Aug. 14, 1990, at A4, col. 1 (same).

64. Bagley & Tokatlian, *supra* note 30, at 176-186. For example, Betancur announced his intention to push for Colombia's membership in the Non-Aligned Movement. *Id.* at 177. He also sought to revamp the Inter-American system following the

doing, Betancur intentionally delayed executive action on extraditions under the 1979 Treaty. The case of Colombian Carlos Lehder Rivas is instructive on this point.⁶⁵

Following his indictment in the United States on drug trafficking charges in 1983, Carlos Lehder appealed to the SCJ from a lower court's ruling in favor of his extradition under the 1979 Treaty. On November 29, 1983, the SCJ affirmed the lower court's ruling and forwarded the extradition request to the President for final resolution. Despite the SCJ's favorable ruling, it was not until June, 1984 that President Betancur handed down Resolution No. 101 permitting Lehder's extradition.⁶⁶ It is notable that Betancur's decision to permit Lehder's extradition took place at a time when the Colombian economy was in a shambles because of the worldwide recession of the early 1980's. As a result, Betancur's political "honeymoon" was coming to a close and he actively sought United States economic assistance.⁶⁷

divisive Falklands-Malvinas War. *Id.* at 178. In this regard, he supported the right of Argentina to exercise sovereignty over the Islands. *Id.* Indeed, during a visit to Washington, Betancur's foreign minister criticized the United States for siding with Great Britain and abandoning Latin America at a crucial moment. *Id.*; see Inter-American Treaty of Reciprocal Assistance (Rio Treaty), Sept. 27, 1947, T.I.A.S. No. 1838, 62 Stat. 1681. Finally, Betancur offered to restore relations with Cuba if that country ceased its support of Colombian leftist insurgent groups. Bagley & Tokatlian, *supra* note 30, at 179.

65. United States v. Lehder Rivas, 668 F. Supp. 1623 (M.D. Fla. 1987).

66. *Id.* at 1524-25.

67. Bagley & Tokatlian, *supra* note 30, at 197-99, 202-204. During this period (1984-85), Betancur was forced to adopt economic austerity measures to compensate for Colombia's ever-expanding external debt. In turn, such austerity depended on stabilization help from the United States in its roles as individual lender and member of the International Monetary Fund and other international financial organizations. *Id.*

Other notable events in Colombian politics during this time period included the Uribe truce agreement signed with FARC on March 28, 1984, and approved by Betancur on April 2, and, that same month, the murder of Justice Minister Rodrigo Lara Bonilla, allegedly the work of drug traffickers. Ultimately, after only a two year hiatus, Betancur reintroduced martial law in May based on the Lara assassination and other violence attributed to members of the illicit drug business. See *infra* note 76.

On August 23-24, 1984, new truce agreements were signed between the government, M-19, the Workers' Self-Defense Movement (ADO), and the EPL pending further talks on political reform. The government/M-19 truce was short-lived, lasting less than one year. M-19 justified its return to guerilla activity based on systematic violations committed by the Colombian army under the truce provisions, limitations on amnesty, failure of the government to implement basic political reforms, and the collapse of dialogue. Bagley & Tokatlian, *supra* note 30, at 201 n.103. Similar problems led to the collapse of the government truce with the other guerilla groups.

On November 5, 1985, the Palace of Justice, home of the SCJ, was seized by members of the M-19 guerilla group and a number of hostages were taken, including members of the twenty-four justice SCJ. While the reasons for the seizure are unclear,⁶⁸ rather than at-

Also, during this time period, the Comprehensive Crime Control Act of 1984, Pub. L. 98-473, 98 Stat. 2168, was enacted by the United States Congress. The Crime Control Act marked the first serious attempt by the United States to combat international drug trafficking through penal legislation. In addition to its provisions regarding the stemming of international currency flows connected to the illicit drug business, the Act established the National Drug Enforcement Policy Board, Pub. L. 98-473, § 1302, 98 Stat. 2168. The Board was charged with the duties of development and coordination of a national drug enforcement policy, including international drug control. *Id.*; *Bolivia and Colombia*, *supra* note 63, at 44 n.30. Ultimately, the Board failed in its mandate because it was unable to bring under control the turf battles raging among the myriad federal governmental bureaucracies involved in the anti-drug effort. *Id.*

68. Clearly, the M-19 leadership was angry with the government's perceived failure to act in good faith under the August, 1984 truce agreement. *See supra* note 67. By the 1984-85 period, Betancur had lost any control of government that he may have had at the commencement of his presidency. Although Betancur was amenable to negotiation with the guerilla groups, other factions within the government were not so willing. These factions, bolstered by Betancur's increasing unpopularity and his lame duck status, ultimately prevailed. *See Bagley & Tokatlian, supra* note 30, at 200-201. In light of these events, M-19's frustration with the "formal" political and legal process is understandable and provides one explanation for the takeover of the Palace of Justice.

An alternative explanation for the seizure of the Palace of Justice has been offered: that M-19 was paid by drug traffickers to enter the Palace and destroy the extradition files. This explanation has been given some credence through the writings of commentators. *See, e.g., S. McDonald, supra* note 10, at 37-39; Note, *Nonconsensual Military Action Against the Colombian Drug Lords Under the U.N. Charter*, 68 WASH. U.L.Q. 129, 132 (1990). Despite the absence of any hard evidence as to the truth of the "narcoguerrilla" theory in explaining the Palace of Justice seizure, some may justify the theory's veracity on the basis of an explanation proffered by the United States Department of Justice connecting the Colombian guerilla groups with drug traffickers. *See, e.g., United States Department of Justice, Drug Trafficking and Terrorism*, 12 DRUG ENFORCEMENT 19 (Summer 1985).

The essence of the Justice Department's thesis is that in return for "protection" provided to traffickers and producers by M-19 (formerly) and FARC, the traffickers provide the groups with the means to support their respective causes. *Id.* at 19-21. While the Justice Department theory rings true, it is true only in part. A deeper view into the extent of the alleged trafficker-guerilla symbiosis reveals the weaknesses in the "narcoguerrilla" theory as the reason for M-19's seizure of the Palace of Justice.

The Justice Department theory does not imply that the groups work together or are "friendly" to each other. Each group has its own agenda and will use any avenue available to accomplish its goals. Indeed, according to the Justice Department, Colombian guerilla groups are not "employed" by the traffickers. Rather, the relationship is

tempt to negotiate the release of the hostages, the government decided to send in the military. The November 6th battle resulted in the total destruction of the Palace, and the deaths of the guerillas and eleven justices of the SCJ. Another justice was assassinated on July 31, 1986, following which several others resigned.

Article 148 of the Constitution directs the remaining members of the SCJ to fill vacancies created by death or resignation.⁶⁹ Neither executive nor legislative advice and consent is required or permitted. Ultimately, by the end of 1986, a majority of the SCJ justices were new appointees. Also by that time, Virgilio Barco Vargas had assumed the presidency.⁷⁰

extortionary in nature. *Id.* Interestingly, while there seems to some kind of business relationship between rural-based guerilla groups such as FARC, ELN, and EPL and the traffickers, the existence of an M-19/trafficker relationship is less evident. The reason for this is that production and processing operations in Colombia take place in the rural southeastern parts of the nation, areas controlled by FARC, ELN, and EPL. These groups "share" the territory with the traffickers, levying a "tax" on them for protection of shipments, laboratories, and growing areas. See Select Committee on Narcotics Abuse and Control of the House of Representatives, *Drugs and Latin America: Economic and Political Impact and U.S. Policy Options*, 101st Cong., 1st Sess. (1989) [hereinafter *Drugs and Latin America*]. However, because M-19 was an "urban" guerilla group and controlled no resources precious to the traffickers, there was no reason for the traffickers to pay a "protection" tax. Thus, despite assertions to the contrary by the Justice Department, there exists no evidence as to the existence of a symbiotic relationship between M-19 and the traffickers. See Lee, *The Cocaine Morass in South America*, in *Drugs and Latin America*, *id.* at 119, 122.

In the final analysis, it is difficult to comprehend the stupidity of any group who would pay for seizure of the Palace of Justice in an effort to destroy extradition "files." Copies of such files exist not only at the Palace of Justice, but in the Colombian Foreign Ministry and Justice Ministry as well.

69. COLOM. CONST. art. 148

70. During this period, the United States government enacted the most sweeping narcotics control legislation in United States history. Anti Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986). The Act advocated law enforcement in drug-producing countries, increased interdiction, criminal penalties for money laundering, establishment of grants to state and local enforcement agencies, and increases in funding for treatment and rehabilitation programs. *Id.*; Hogan & Doyle, *supra* note 1, at 12.

Most important for purposes of the present analysis are the provisions of the 1986 Act which provide for the use of United States armed forces in the extraterritorial enforcement of United States anti-drug criminal laws, Pub. L. No. 99-570, § 2012, 100 Stat. 3265-66 (use of Army in Operation Blast Furnace in Bolivia); *id.* at § 3051, 100 Stat. 3274-76 (increased use of military in interdiction), and those which tie foreign assistance to the adequacy of anti-drug efforts taken by producing/trafficking nations, *id.* at §§ 2005, 2008, 100 Stat. 3261-62, 64. These latter provisions are most pertinent

III. THE RULE OF LAW IN COLOMBIA AND THE DELETERIOUS EFFECT OF THE RECENT UNITED STATES-COLOMBIA EXTRADITION RELATIONSHIP

A. *States of Siege and Emergency Under the Colombian Constitution*

To understand the adverse effects of the United States international drug control policy on the administration of justice in Colombia, it is first necessary to understand that Colombia has been governed under martial law almost continuously since *La Violencia*. Under the Constitution, a state of siege or state of emergency may be declared by a Colombian head of state where, with the concurrence of all cabinet members, the head of state decides that "the public order has been disturbed and that the whole or part of the republic is in a state of siege,"⁷¹ or that events have taken place "which disturb or threaten seriously and imminently to disturb the economic or social order of the country or also constitute a serious public disorder."⁷²

to United States-Colombian relations. Essentially, these sections of the Act make foreign aid to drug-producing nations contingent upon certification by the President that those nations are making adequate independent efforts to eradicate production and trafficking or, alternatively, are adequately cooperating with the United States in its eradication and enforcement efforts.

The clear intent of the United States in tying third world foreign aid directly to certification is to force those nations to cooperate with United States drug control policy. However, the problem with such an incentive is its negative, coercive, and inherently paternalistic nature. Indeed, the certification process has caused much consternation among third world governments attempting to cope with huge external debts and guerilla insurgencies. Moreover, the certification process is susceptible to politicization. The clearest case illustrating the politics of certification is that of Panama in the 1980's. Less than one year prior his indictments on charges of drug trafficking General Manuel Antonio Noriega was praised by both then DEA Director Jack Lawn and the United States Embassy in Panama for his efforts in illicit drug interdiction. *See Comment, An Inquiry Regarding the International and Domestic Legal Problems Presented in United States v. Noriega*, 20 U. MIAMI INTER-AM. L. REV. 393, 403 (1989). It appears that the reason Panama was certified was due to its assistance of the United States effort in arming and training the Nicaraguan *contras*. *Id.* at 402; *see also* Bagley, *Narco-Diplomacy: Drug Trafficking and U.S. Latin American Relations*, in *Drugs and Latin America*, *supra* note 68, at 76, 78-79 ("In 1987, . . . U.S. Congressmen proposed to 'decertify' Mexico, Bolivia, Peru, Paraguay, and the Bahamas, in spite of the Reagan Administration's protests that such punitive measures would damage U.S. relations with those countries . . .").

71. COLOM. CONST. art. 121 (state of siege).

72. COLOM. CONST. art. 122 (state of emergency).

State of siege and state of emergency powers allow the President to issue executive decrees that have the same legally binding force as congressional legislation passed under non-state of siege/emergency conditions. Executive decrees issued during the state of siege/emergency can amend laws previously enacted by Congress under the normal constitutional lawmaking regime, or can create entirely new laws. Of course, executive decrees do not require or permit any action on the part of the Congress. While executive decrees issued under the state of siege/emergency are expressly subject to judicial review by the SCJ,⁷³ such review extends only to the procedure by which the executive decree was introduced and does not touch upon its "merits."

73. COLOM. CONST. arts. 121, 122. A word of explanation is in order. Since 1886, the Constitution has accorded the President state of siege powers. Findley, *supra* note 29, at 424. However, the state of emergency was not added to the Constitution until the Constitutional Reform of 1968. *Id.* at 423-30. It seems that article 121 has been resorted to by presidents to deal with disruptions not only in the "public order" (e.g., internal armed conflict) but in the public economic order caused by governmental intransigence and turf battling in economic planning. *Id.* at 423-27. Thus, to reduce executive reliance on the state of siege when Colombia was confronted with economic problems, and thereby increase the role of the Congress and reinstitute democratic decision making, article 122 was formulated. *Id.* at 427-30.

As originally envisioned by some members of the Colombian government, article 122 aimed to separate the concepts of economic disorder from political disorder. *Id.* at 452. The state of emergency, which could last no more than three months, was to be invoked only where Colombia confronted an acute economic crisis (e.g., an abnormal decline in national income due to sudden closing of foreign markets), as opposed to situations where the government faced chronic economic problems (e.g., rural unemployment or even a bloated external debt). *Id.* at 452-53. Despite the laudable intentions of the government in implementing article 122, it soon became clear that the new provision would be subjected to the same abuse as article 121, and that presidents would quickly find non-economic reasons to invoke article 121.

For example, in September, 1974, one month after assuming office following Colombia's first competitive presidential elections in twenty-six years, Alfonso Lopez Michelsen indicated his intention of declaring a state of economic emergency under article 122. *Id.* at 453. Lopez based his decision on a government deficit which threatened to cut off salaries to government employees and suspend public programs. *Id.* After the required nonbinding opinion was issued by the Council of State - Colombia's highest level administrative tribunal - in favor of the declaration, Lopez finalized his decision which limited the state of emergency to forty-five days. *Id.* at 455 n.121 (citing Decreto 1970 of 1974). The legislative decrees issued thereunder imposed a far-reaching general tax reform package. *Id.* at 460-62. In 1976, Lopez declared a state of siege for reasons of internal security. *Id.* at 473. Despite the Constitutional Reform of 1979, this state of siege lasted until lifted by President Turbay in July, 1982. Bagley & Tokatlian, *supra* note 30, at 170 n.38.

Under recent invocations of the state of siege, presidents have issued decrees establishing trial of civilians by military tribunal,⁷⁴ limiting the jurisdiction of civilian courts, and altering basic constitutional rights such as habeas corpus.⁷⁵ During his tenure, under the current state of siege imposed by President Betancur in 1984,⁷⁶ Virgilio Barco increased the power of the military and police in maintaining the public order, diluting any demarkation that may have existed regarding their different roles.⁷⁷ Although Barco issued the decrees based on alleged violence carried out by drug traffickers, much of the additional legal firepower awarded to the military has been used to repress militant political opposition.

B. *Martial Law and The Rule of Law in Colombia*

A strict view of the rule of law is defined by application of "the interrelated notions of neutrality, uniformity, and predictability."⁷⁸ These notions must be promoted and reinforced through "differentiation of the procedures of legislation, administration, and adjudication."⁷⁹ In turn, popular participation in government legitimizes and increases the power of each component because the legal order will "represent a balance struck among competing groups rather than the embodiment of the interests and ideals of a particular faction."⁸⁰ Conversely, the abdication of differentiation and the elimination of the appearance of effective popular participation inevitably result in failure of apparently neutral, uniform, and predictable application of the law

74. See, e.g., DECRETO LEGISLATIVO No. 2260 de 1976, No. 34676 *Diario Oficial* 481 (17 de noviembre de 1976) (military tribunals imposed by President Lopez under state of siege powers); see also DECRETO LEGISLATIVO No. 1923 de 1978, *supra* note 48 (National Security Statute issued by President Turbay imposing military tribunals pursuant to state of siege powers). *But see* Decision of March 5, 1987 (Sala Plena), 16 JURISPRUDENCIA Y DOCTRINA 492 (May 1987). In the March 5th Decision, the SCJ declared unconstitutional the trial of civilians by military courts and restricted presidential powers under martial law. *Id.*

75. See DECRETO LEGISLATIVO No. 1923 de 1978, *supra* note 48; see also WOLA, *supra* note 42, at 87-106.

76. DECRETO NUMERO 1038 de 1984, No. 36608 *Diario Oficial* 673 (14 de mayo de 1984).

77. WOLA, *supra* note 42, at 88, 93-100.

78. R. UNGER, *LAW IN MODERN SOCIETY* 176 (1976).

79. *Id.* at 177.

80. *Id.* at 178.

and, therefore, a breakdown in the rule of law.⁸¹ This is exactly the case in Colombia.

Because of the existence and cavalier invocation of the state of siege/emergency powers, Colombia is a nation governed by executive fiat rather than by democratic law. As a corollary, prevention of the development of democratic practices has promoted violence and lawlessness both within and without the government. Government institutions are unable to assist Colombians in obtaining effective recourse. The constant interference with legislative procedure and judicial independence by Colombian heads of state, combined with close commiseration between the executive branch, armed forces, and police has eliminated respect for the rule of law by delegitimizing popular power.

The most recent invocation of the state of siege by President Betancur in 1984⁸² is based on a number of violent acts allegedly perpetrated by participants in the drug trade. However, the inability of the government to rule effectively under the normal constitutional regime may have less to do with such violence than with the perceived threat to the current political power structure posed by opposition groups, and constraints imposed upon Colombia in its dealings with the United States and the rest of the developed world.⁸³

Regardless of the reasons for its invocation, the current state of siege enabled former President Barco to effectively disable the Colombian judiciary. Despite recent SCJ rulings affecting extradition, the executive ultimately has chosen to go its own way. Thus, redress through the Colombian courts for anyone subject to extradition is no longer an option.

C. *The SCJ Decisions of December 12, 1986 and June 25, 1987*

1. The December 12, 1986 Decision

On December 12, 1986 the SCJ handed down the initial decision

81. I write here of "appearance" because it has been argued effectively, particularly by Legal Realists and adherents to the Critical Legal Studies Movement, that even in societies where differentiation and widespread public participation take place, the transformative effect of such participation is limited, and application of the law in a truly neutral, uniform, and predictable manner is mythical. *See generally* Blum, *Critical Legal Studies and the Rule of Law*, 38 BUFFALO L. REV. 59 (1990).

82. *See* DECRETO NUMERO 1038, *supra* note 76.

83. *See* Bagley & Tokatlian, *supra* note 30, at 202-204.

regarding the enforceability of the law containing the 1979 Treaty.⁸⁴ Despite statements in previous Court opinions that it was prevented by the separation of powers doctrine from ruling on the constitutionality of public treaties (i.e., a broad political question doctrine), the Court reversed itself, basing its jurisdiction on article 214(2) of the Colombian Constitution.⁸⁵

A unanimous SCJ held that Law 27 was unconstitutional because the President had not signed it.⁸⁶ The Court reasoned that approval of the law by a cabinet minister acting as president has no legal effect because the delegation of presidential power under which he was acting does not include conducting international relations.⁸⁷ Such activity is of a political nature which requires "the personal use of presidential prerogative as the head of state."⁸⁸ The delegation of presidential power includes only the administrative functions of the office. Thus, without the signature of the head of state, a law containing a treaty between Colombia and another state is unenforceable under the Constitution.

It is notable that the Colombian Constitution contains no provision distinguishing between the "political and administrative responsibilities of the President or requiring the former to be exercised personally by him."⁸⁹ Thus, the SCJ's holding was one of inference derived from the Constitution's text. However, the SCJ decision was reinforced by the concurring opinion of the House of Representatives-appointed Attorney General.⁹⁰

2. The June 25, 1987 Decision

In light of the SCJ's reasoning in its December 12th decision that Law 27 was procedurally defective because of the absence of then Pres-

84. See Kavass, *supra* note 61, at 495 (discussing the Decision of December 12, 1986 (Sala Plena)).

85. COLOM. CONST. art. 214(2) (stating that "the Court shall have the . . . power: [t]o decide definitively on the legality of all laws and decrees issued by the government . . . when they are brought before the Court upon allegation of unconstitutionality by any citizen.").

86. Kavass, *supra* note 61, at 495.

87. *Id.* at 496; see COLOM. CONST. art 128.

88. Kavass, *supra* note 61, at 496.

89. *Id.*

90. Under article 214(2) of the Constitution, the Attorney General is required to render, prior to the Court's review of the case, an opinion in all cases involving challenges to the constitutionality of laws. COLOM. CONST. art. 214(2).

ident Turbay's signature, President Barco attempted to cure the defect by signing the original bill containing the 1979 Treaty, and promulgating it as Law 68 of 1986.⁹¹ Of course, Law 68 was immediately challenged and came before the SCJ in May, 1987.

The basis of the challenge to the new law was that, in signing Law 27 of 1980 and promulgating it as Law 68 of 1986, the President had approved a law that did not exist. The SCJ Decision of December 12, 1986, while based on procedural grounds, invalidated the whole of Law 27 of 1980, therefore requiring the reintroduction of the bill to Congress, and congressional debate on and passage of the new bill. Because these steps had not been accomplished, the President's promulgation of Law 68 had no constitutional basis. The legislative process had been violated.

In the Court's decision, twelve of the twenty-four SCJ justices agreed that the Court's December 12th decision rendered Law 27 completely invalid.⁹² These justices reasoned that the various steps of the legislative process described under the Constitution (i.e., legislative debate, passage, and presidential approval/objection) must be viewed as a single unit.⁹³ While the Court did not specifically allude to separation of powers or "checks and balances," one can discern from its reasoning that such a process was indeed what the Court had in mind. In other words, where the legislature and executive fulfill functions in the lawmaking process, each of their respective functions must be subject to the oversight of the other because of the inherently political nature of both branches. Thus, any flaw in the lawmaking process must be considered fatal if that process is to retain its legitimacy. If one lawmaking branch makes a "mistake" in the process and is then allowed on its own to "fix" its mistake, such an allowance gives the appearance of removal of the oversight "check" of the other lawmaking branch thereby ceding too much power to the former. In this regard, the opinion of the first twelve-justice plurality is an interpretation of the Constitution's text delineating the legislative process, prior cases dealing with the same subject, and scholarly inquiry relevant to the process.⁹⁴

The other twelve SCJ justices disagreed, holding that the SCJ's December 12th decision invalidated Law 27 only insofar as it was not

91. Ley 68 de 1986, No. 37733 *Diario Oficial* 1 (14 de diciembre de 1986).

92. See Kavass, *supra* note 61, at 498 (reprint of Decision of June 25, 1987 (Sala Plena)).

93. See *id.* at 501.

94. See *id.* at 502.

properly approved by the President, and that proper approval of the law would remedy the procedural defect. This twelve-justice plurality reasoned that because the December 12th Court's reasoning in the "grounds" section of the decision was so specific as to why Law 27 was unenforceable, "[t]he Court believed that the bill was consistent with the Constitution as regards the legislative phase and that all that was lacking was the presidential approval so that it could become a law"⁹⁵ In other words, if it was the Court's intention to send the bill back to Congress, it would not have been so specific in the grounds for its decision. Thus, according to the second plurality of justices, the Court stated the legislation's defect and prescribed the cure. The second group of justices went on to give an expansive interpretation of the Constitution's Article 86, arguing that the President can approve and promulgate a bill at any time after expiration of the time periods prescribed for objection.⁹⁶

Alfonso Suarez de Castro, the temporary justice appointed to break the tie, sided with the first plurality.⁹⁷ He noted that under Article 2 of Law 1 of 1873, laws must be numbered consecutively in the year they come through the Congress, and are sent to the President.⁹⁸ In this regard, executive approval is not considered in determining the year that a law was enacted.⁹⁹ Thus, because Congress did not enact Law 68 of 1986, it does not satisfy the requirements of Law 1 of 1873, and satisfies only one requirement of the Constitution's Article 81.¹⁰⁰ Therefore, Law 68 must be unconstitutional.

Justice Suarez then addressed the apparent interpretational conflict among the Court stemming from the December 12th Court's specificity in describing the "grounds" for its decision and the statement in the "operative" portion of the decision declaring Law 27 unenforceable. Justice Suarez stated that the view expressed by the Court in its "grounds" section is relevant only to the extent that it enunciates the basis of the Court's ultimate decision. He reasoned that under the separation of powers doctrine embodied in the Constitution, the Court, like the legislature, is prohibited from making suggestions to public offi-

95. *Id.* at 509.

96. *Id.* at 510-11.

97. Kavass, *supra* note 61, at 505-506 (opinion of temporary Associate Justice Alfonso Suarez de Castro).

98. *Id.* at 506.

99. *Id.*

100. COLOM. CONST. art. 81 (describing legislative process).

cial,¹⁰¹ and that the remaining procedure by the President could not be completed under Article 86 because of the expiration of the constitutional time periods for legally executing them.¹⁰² Therefore, the operative part of the Court's decision was tied to a very specific grounds section is not restrictive because the grounds merely indicate the determining conditions—in essence, the cause or causes—of the unenforceability of Law 27.¹⁰³

Of all the reasons given by temporary Associate Justice Suarez, the first seems the most powerful because it militates against the issuance of advisory opinions. In turn, such reasoning goes hand-in-hand with the first plurality's separation of powers or checks and balances analysis.¹⁰⁴ For the same reason, Justice Suarez's conclusion is also quite strong. While Justice Suarez second reason appears weak because Article 86 of the Constitution prescribes time limitations only for presidential objection to bills,¹⁰⁵ it gains strength when read in conjunction with his interpretation of the law numbering process. The ultimate effect of the SCJ's June 25, 1987 decision was to render the 1979 Treaty unenforceable in Colombia. Suspension of all extraditions under the 1979 Treaty soon followed.

D. Decree Number 1860

Not until August, 1989 would extraditions resume. Why the two year hiatus? It is hard to say specifically, but it is worth noting that the summer of 1987 was not particularly good for the Reagan Administration because it was the summer of the Iran-Contra congressional inquiry. Later, United States Attorney General Edwin Meese resigned and was replaced by Richard Thornburgh. By the time the Thornburgh Justice Department got going, then Vice President George Bush was

101. Kavass, *supra* note 61, at 507 (opinion of temporary Associate Justice Alfonso Suarez de Castro); *see also* COLOM. CONST. art. 78.

102. Kavass, *supra* note 61, at 507.

103. *Id.*

104. *See* COLOM. CONST. art. 78(1) (forbidding Congress to make suggestions to public officials); *accord* H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 66-68 (2d ed. 1973) (discussing the seminal 1793 United States advisory opinion case known as the "Correspondence of the Justices" in which the Supreme Court refused to issue such an opinion to the Washington Administration, reasoning that the doctrines of separation of powers and checks and balances prevented the Court from doing so).

105. COLOM. CONST. art. 86.

hot on the presidential campaign trail, as were a number of members of Congress and Senators. All of this served to push to the rear of the priority list renewed pressure on Colombia to resume extradition of suspected drug traffickers to the United States. However, the advent of the Bush Administration in 1989, with its emphasis on increased law enforcement to reduce international drug trafficking, was all that was needed to bring the extradition issue back to the forefront.¹⁰⁶

A rather reluctant President Barco was left with four options in reviving extradition: His first option was to defy Washington's request. However, in light of his personal ties to the United States and the perceived importance of United States economic and military assistance, that option was simply not viable. His second option was to reintroduce to Congress a bill containing the 1979 Treaty. However, because of the congressional opposition to the 1979 Treaty expressed during the initial debate in 1980 and the hostility toward extradition of Colombian nationals that had developed within the Colombian populace, Barco knew that the odds were against passage of a new bill. As a third option, Barco could have sought either encourage adoption of the Inter-American Treaty on Extradition,¹⁰⁷ or renegotiation of the 1979 Treaty, deleting or restricting the provision allowing for extradition of Colombian nationals. The problem there was that it was precisely that provision which had been so strongly advocated by the United States during the initial negotiations.¹⁰⁸ Thus, there was little chance that the Bush Administration would support a Colombian request to restrict or delete such substantive language. Ultimately, Barco chose his fourth option: issuance under his state of siege powers of a legislative decree mandating "administrative" extradition.

The popular view in some sectors of Colombian society and in the

106. Note that in 1988, the United States passed a sweeping anti-narcotics law known as the Anti-Drug Abuse Act of 1988, Pub. L. 100-690, 102 Stat. 4181 (1988). The law created the Office of National Drug Control Policy (the "Drug Czar") to coordinate all drug control efforts and required the President to formulate and submit to Congress a National Drug Control Strategy. Pub. L. 100-690, §§ 1001, 1005, 102 Stat. 4181, 4185. The Bush Administration, the campaign platform of which included a strong anti-drug crime plank, was quick in its response. The National Drug Control Strategy, emphasizing extraterritorial law enforcement, soon became a major political tool. See THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY 49-63 (1990); see also Perl, *International Aspects of U.S. Drug Control Efforts*, CRS REV. 17 (Nov.-Dec. 1989).

107. See *supra* note 27.

108. See 1979 Treaty, *supra* note 53.

United States was that President Barco issued Decree Number 1860 of 1989,¹⁰⁹ providing for summary administrative extradition of those accused of drug trafficking, in response to the August 14 assassination of Liberal presidential candidate Carlos Luis Galán. Of course, Galán's murder was alleged to have been committed by agents of drug traffickers. According to the conventional wisdom, the Decree would be a sign from the Barco Administration that it was serious about dealing with those involved in the drug trade, and that it would not tolerate mass bloodshed allegedly perpetrated by traffickers.

The problem here is that there are other well-informed and well-connected members of Colombian society who relate a much different story underlying the promulgation of D.N. 1860, a story much less altruistic and far more disturbing than the "official" version. The Bush Administration's strong emphasis of a law enforcement-oriented international drug control policy makes such an alternative view plausible.

Faced with the fact that the Colombian Congress was not about to approve a new bill containing the 1979 Treaty, in late spring or early summer of 1989 members of the Colombian Executive Cabinet, in consultation with members of the United States Department of Justice and the foreign ministries of certain European nations, devised the language that was to become the text of D.N. 1860. However, because of the then strong, anti-extradition feeling within Colombia, a pretext for issuance of the Decree was necessary—a pretext that would sufficiently shock the Colombian people into backing extradition of Colombian nationals. The death of Galán, a vocal critic of drug traffickers, provided such a pretext. His murder remains a mystery and Colombian authorities have yet to uncover any evidence that it was carried out by *sicarios* (professional assassins) in the traffickers' employ.

Certainly, in light of the alleged business acumen and complexity of those involved in the illicit drug business, the lack of evidence does not, in itself, mean that the drug trade had nothing to do with the Galán assassination. However, the official story simply does not comport with the strong Colombian popular feeling against extradition of nationals in effect at the time of Galán's death. It makes absolutely no sense that members of the illicit drug business would commit such a poorly timed assassination of a popular leader. Indeed, if drug traffick-

109. DECRETO NUMERO 1860 de 1989, No. 38945 *Diario Oficial* 5 (18 de agosto de 1989) [hereinafter D.N. 1860 or "the Decree"]; see also DECRETO NUMERO 2105 de 1989, No. 38981 *Diario Oficial* 4 (14 de setiembre de 1989) (providing for personal appearance of defendant during extradition proceedings).

ers are considered to be sophisticated business people, how could they have been foolish enough to kill a popular politician when things were so much in their favor? They must have known that killing Galán would have resulted in a Colombian change of heart and a government-led crackdown. If nothing else, such a move would be "bad for business."

In any event, D.N. 1860 was in force. Although disturbed by the new administrative summary extradition procedure, the majority of the Colombian populace was caught sufficiently off-guard by the Galán assassination and the official story to deter a major political backlash.

D.N. 1860 is a severe measure. It was enacted by President Barco pursuant to the state of siege that his predecessor had invoked in 1984.¹¹⁰ D.N. 1860 is designed to provide for summary administrative extradition of those who participate in the narcotics business.¹¹¹ Article 1 suspends subsection 2, Article 17 of the Penal Code "with regard to everything related to narcotics trafficking and related crimes . . ."¹¹² Subsection 2 of Article 17 of the Penal Code provides that extradition of Colombians "shall be subject to the provisions of public treaties."¹¹³ While the legislative intent of this provision is difficult to discern, one can deduce that its wording provides a safeguard against the extradition of Colombian nationals by pure executive fiat. In other words, because extradition of Colombian citizens is to take place only within the ambit of duly negotiated public treaties, and because all public treaties are subject to congressional legislation, the executive is prevented from extraditing nationals without congressional consultation.¹¹⁴

110. See *supra* note 76.

111. D.N. 1860, *supra* note 109, at Preamble.

112. *Id.* at art. 1.

113. CODIGO PENAL DE COLOMBIA art. 17, § 2, reprinted in REGIMEN PENAL COLOMBIANO (loose-leaf 1990).

114. A review of the history of Colombia's policy on extradition of its own citizens reinforces this point. From the year of the nation's independence until 1936, extradition of nationals was, at least, not expressly prohibited by law. However, note that such extradition was discouraged under the 1888 extradition convention with the United States. See 1888 Convention, *supra* note 22, at art. 10. In 1936, Law 95 was enacted as part of the Penal Code, and expressly forbade extradition of citizens. It was only in 1980, during the war on marijuana by the United States, and during the Washington-oriented Turbay Administration, that extradition of nationals was expressly permitted. In that year, President Turbay issued Decree Number 100, amending the Penal Code to its current form allowing for extradition of Colombian nationals, but only where such extradition is made pursuant to public treaties. Clearly, this decree was a response to the newly negotiated 1979 Treaty, *supra* note 53, which called for extradi-

Article 2 of D.N. 1860 eliminates the requirement of a "prior ruling by the Criminal Appeals Division of the Supreme Court of Justice" in the granting of extradition requests for Colombian citizens and foreign nationals.¹¹⁵ Under prior practice, requests for extradition were subject to judicial review to assure that such requests were being made in accordance with Colombian law.

Article 3 places those persons "held or arrested and subject to extradition" at the disposal of the Justice Ministry.¹¹⁶ Article 5 provides that an extradition request will preempt any conviction for another crime of the requested person already obtained in Colombia prior to the receipt of the extradition request.¹¹⁷ In other words, if a requested person is already serving jail time in Colombia pursuant to a prior conviction, the Government may still "order the immediate delivery of th[at] person . . . to the requesting State . . ." for trial in that state on the charges upon which the extradition is based.¹¹⁸

Article 6 provides that "any person may be extradited, although the person may have been tried in Colombia for the same crime for which he is requested, as long as sentence has not been rendered."¹¹⁹ Thus, it is possible for a person to be tried twice for the same crime, albeit in different jurisdictions. Article 7 denies both the right to release on bail and the ability to obtain a suspended sentence to requested persons against whom "other proceedings" are in progress in Colombia.¹²⁰

Article 8 is very important, because it outlines the requirements for the granting of an extradition request. Section A requires the requesting state to guarantee that the death penalty will not be imposed upon the person extradited.¹²¹ Section B states that "[t]he extradition of a citizen shall not be granted in any case where the requesting State does not fully guarantee that it shall not impose a term of imprisonment of more than thirty (30) years."¹²² Section C provides that the requesting State shall "guarantee that the human rights of the person extradited shall be respected . . . in a manner that is non-discrimina-

tion of the contracting parties' nationals.

115. D.N. 1860, *supra* note 109, at art. 2.

116. *Id.* at art. 3.

117. *Id.* at art. 5.

118. *Id.*

119. *Id.* at art. 6.

120. D.N. 1860, *supra* note 109, at art. 7.

121. *Id.* at art 8, § A.

122. *Id.* at art. 8, § B.

tory with regard to those convicted in its own country."¹²³ Section D provides that all costs of extradition (i.e., translation of documents and transportation of the person extradited) shall be borne by the requesting state.¹²⁴

Article 9 provides that the Government may issue a resolution in favor of extradition in absentia.¹²⁵ In other words, the person requested does not have to be "the object of detention or arrest" for a favorable extradition resolution to be issued.¹²⁶ However, in such a case, the Government is required to issue a "summons" to the person requested so that the person may prepare a defense.

Ultimately, the promulgation of D.N. 1860 not only bypassed the constitutional legislative process, but proscribed any kind of independent judicial due process. By providing for extradition proceedings to be carried out exclusively by the executive branch, D.N. 1860 leaves much leeway for abuse of the requested person's civil rights. Essentially, under the Decree, Colombia can extradite anyone it wants as long as there is some type of illegal drug-related charge pending against that person in the requesting state.

E. *The SCJ Decision of October 3, 1989*

The question of the constitutionality of D.N. 1860 came before the SCJ in September, 1989, and the Court rendered its opinion on October 3.¹²⁷ It began its opinion on the subject matter of D.N. 1860 by recognizing the power of the President, under his state of siege power, to amend the law when he believes that the public order is threatened. Thus, the Court agreed that, on its face, Article 1 of the Decree, suspending the section of the Penal Code restricting extradition of Colombians to duly negotiated public treaties, was constitutional.

The SCJ then examined the Decree in the context of previous decisions dealing with international extradition and international agreements on extradition to which Colombia is a party and which are currently in force. The Court seemed particularly concerned with that part of the Penal Code which D.N. 1860 left intact, to wit: that extradition

123. *Id.* at art. 8, § C.

124. *Id.* at art. 8, § D.

125. D.N. 1860, *supra* note 109, at art. 9.

126. *Id.*

127. Decision of October 3, 1989 (Sala Plena) (unofficial translation; on file at the offices of the *Nova Law Review*).

shall be granted, requested, or offered in accordance with public treaties. The SCJ stated:

[T]he circumstance that the extradition of nationals for drug trafficking and kindred crimes is now possible, even in the absence of a public treaty authorizing it, does not in any way imply that if such international instruments exist they should not be observed, inasmuch as, quite the contrary, it is imperative for both concerned states that they be performed with exactness, for the bona fides required of them is at stake. This conclusion, which goes hand in hand with a literal as well as a systematic construction of the rules, is unescapable [sic].¹²⁸

Looking to its previous decisions both en banc and in its Criminal Appeals Division, the Court held that under basic principles of international law, despite the presence of conflicting domestic legislation, Colombia remains bound by its international obligations.¹²⁹ This is the rule in the United States as well.¹³⁰

The SCJ attempted to draw distinctions among what it characterized as two of the three classes of international treaties: "contract" treaties and "law" or "normative" treaties. According to the Court, a contract treaty,

creates reciprocal rights and obligations between the parties which are, therefore, the reason for mutual performance by the very states that execute them; in this regard, they are subjective acts or the source of legal relations of that nature; they settle different, albeit not always contradictory or opposing, interests of the parties, and their common will leads to the resolution of each such interest. By contrast, law treaties or normative treaties regulate issues of concurrent or shared interest and determine, not the behavior of each state vis-à-vis the other's rights and obligations, but rather the behavior that each state must observe in a certain matter, thus giving rise to objective law.¹³¹

128. *Id.* at 9.

129. *Id.* at 10; see also VIENNA CONVENTION ON THE LAW OF TREATIES, Nov. 22, 1971, S. Exec. Doc., 92d Cong., 1st sess., art. 27 (1971); Kearney & Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495 (1970).

130. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(1)(b), comments (a), (b) (1987).

131. Decision of October 3, *supra* note 127, at 10-11.

Extradition treaties fall under the former category because such treaties involve regulation of “a [contracting] state vis-à-vis another in terms of mutual performance and on the international field,”¹³² while treaties governing, say, intellectual property, fall under the latter category because such treaties “determine the internal conduct of the [contracting] states in transnational matters (international private law)”¹³³ Because contract treaties, such as those involving extradition, govern relations purely between states acting as legal persons, “the[ir] prevalence . . . cannot even be doubted”¹³⁴ Thus, in the presence of an extradition treaty, the contracting parties may not accord preferential application to internal legislation on the same subject. Ultimately, the 1979 Treaty, while dormant under Colombian law because of the SCJ’s 1987 decision, is still in force under international law until it is denounced. Therefore, the 1979 Treaty takes precedence over D.N. 1860.¹³⁵

Despite the October 3, 1989 decision by the SCJ, the Colombian government, with the approval of the United States, has continued to extradite both its nationals and noncitizens under D.N. 1860. There has been no formal denunciation of the 1979 Treaty either by Colombia or the United States as provided in Article 21 of the 1979 Treaty, and by the rules under article 54 of the Vienna Convention on the Law of Treaties: a convention to which both nations are signatories. Thus, under both countries’ laws, the legal status of the 1979 Treaty, and the extraditions which have taken place pursuant to D.N. 1860, have yet to be resolved.

More poignantly, the Colombian government’s refusal to abide by the SCJ’s declaration of D.N. 1860’s subordination to the 1979 Treaty is indicative of its low regard for the authority of Colombia’s highest court and the pointlessness of SCJ decisions issued during a state of siege. Equally disconcerting is the role that the United States has played. Rather than implementing a policy focused on institution building which aims to reinforce the rule of law in Colombia, the United States’ policy contributes to its deterioration by actively promoting debilitation of an independent Colombian judiciary and disrespect for the Constitution.

It is quite clear that current administration of justice in Colombia

132. *Id.* at 11.

133. *Id.*

134. *Id.* at 11-12.

135. *Id.* at 13.

is carried out not by the judicial system pursuant to its constitutional mandate, but solely by executive discretion. Thus, despite both the "free and fair" presidential elections of 1990 - the campaign which saw the assassination of three candidates - and the absence of direct military rule, Colombian democracy, governed according to the rule of law, remains a fiction.

IV. CONCLUSION

If the United States and Colombia are serious about reducing the volume of international drug trafficking emanating from Colombia and restoring order in that country, they must endeavor to make the business less attractive. The current international drug control policy of the United States, and active participation in that policy by the Colombian government, verges on the perpetration of fraud¹³⁶ and has solidified Colombia's status as a police state. Rather than addressing some of the causes of Colombia's role as a base for drug trafficking: extreme poverty in that country; corruption in the highest echelons of Colombian society and government; and high demand for illicit drugs in the developed world, to name three, the current policy has only increased the level of violence in an already violent society. To defuse the situation, and this can occur only gradually, the rule of law must be established in Colombia, thereby giving Colombians some sort of recourse other than violence. That process can be initiated through a number of steps.

First, Colombia must amend its constitution to eliminate the state of siege/emergency powers of the President. These powers have been abused by Colombian heads of state who seem to prefer armed repression of political opposition to true competition, negotiation, and problem solving. The Colombian President's invocation of the state of siege/emergency powers robs the rule of law of all meaning.¹³⁷ If the state of siege/emergency powers are not eliminated, all other efforts to restore

136. *See supra* notes 12, 13.

137. *See supra* notes 78-83 and accompanying text. Indeed, the practical effect of the state of siege regarding the independence of the judiciary, is to reduce considerably the judiciary's sphere of action in protecting constitutional rights from governmental abuse. Consequently, long-term usage of the state of siege or its functional equivalents has substantially hindered judicial independence in many Latin American countries by making protection of constitutional rights impossible.

Rosenn, *Judicial Independence in Latin America*, 19 U. MIAMI INTER-AM. L. REV. 1, 34 (1987).

the rule of law will be for naught. In this regard, Colombia must break with its authoritarian past.¹³⁸ The government must exhibit the political will to allow the judicial system to carry out its function as an inviolable branch of government with the power to overrule actions taken by the Executive and Congress when either of those two branches over-

138. In light of Latin American political history in general, this appears to be a tall order. Indeed, some knowledgeable commentators on Latin American law have indicated that the trend toward authoritarian government in Latin America is a culturally natural and "not accidental" phenomenon, reflecting "the Roman law tradition of granting autocratic powers to the emperors and *paterfamilias*, the corporativism and patrimonialism of colonial rule, and the hierarchical structure of the Catholic Church." Rosenn, *supra* note 137, at 34 (citing Wiarda, *Toward a Framework for the Study of Political Change in the Iberic-Latin Tradition: The Corporate Model*, 25 *WORLD POL.* 206, 210-12 (1973); Wiarda, *Law and Political Development in Latin America*, 19 *AM. J. COMP. L.* 434, 438-47 (1971)).

Unwilling to accept such analysis as the final word on democratic evolution in Latin America, other specialists have attempted to provide an answer. For example, Carlos Santiago Nino, Professor of Law at the University of Buenos Aires, writes that, [a]s for the alleged Hispanic preference for strong leaders, this tendency should be institutionally counteracted rather than promoted. In fact, the postulation is rather dubious, given the easy adaptation of countries like Spain to a parliamentary system (after forty years of a caudillo's rule), and the adoption of strong leaders by non-Hispanic nations.

Nino, *Transition to Democracy, Corporatism and Constitutional Reform in Latin America*, 44 *U. MIAMI L. REV.* 129, 155 (1989). Professor Nino's attempt to dispel the culturally linked Latin American authoritarian governmental model is laudable but unsatisfying. It is laudable because it refutes a stereotype often bestowed upon Hispanic culture. However, it is unsatisfying for three reasons. First Professor Nino fails to acknowledge the differences among continental Spanish and Latin American cultures which may have influenced Spain's transition from military rule to parliamentary democracy and which may prevent many Latin American nations from doing so, including the influence of other democratic European nations on Spain because of geographic proximity, Spain's membership in the European Community, and her membership in the North Atlantic Treaty Organization. Second, Professor Nino fails to admit that even Spain experiences problems similar, albeit to a much lesser extent, to those of many Latin American nations, to wit: difficulty in controlling the police in some parts of the country, occasional coup attempts by the military, and the existence of separatist insurgent groups such as the Basques.

Finally, Professor Nino's argument that non-Hispanic nations have adopted strong leaders does not in itself effectively counter the cultural linkage argument. Rather, such an argument merely indicates that culture is not the only reason underpinning the rise of authoritarianism. Perhaps this strand of Professor Nino's reasoning can be strengthened by comparing the seemingly similar problems of post-colonial Latin America and post-colonial Africa and Asia. See *Africa's Cities*, *THE ECONOMIST* 25 (Sept. 15, 1990); Crosette, *In Pakistan, The Judiciary Tries to Keep an Even Keel*, *N.Y. Times*, Oct. 21, 1990, at D4, col. 1.

steps its constitutional mandate.

Second, the United States and Colombia should immediately cease all extraditions taking place under D.N. 1860, and the Colombian government should either reintroduce the 1979 Treaty to Congress, denounce it, and enter into new bilateral negotiations, or denounce it and insist on adoption of the Inter-American Treaty on Extradition.¹³⁹ New bilateral extradition treaty negotiations must take into account Colombia's sensitivity in protecting its sovereignty and culture, and must reinforce other aspects of a Colombian program to institute and effectuate the rule of law. In this regard, if a new treaty is negotiated, prosecution and incarceration of Colombian citizens accused of drug-related crimes should take place in Colombia. Extradition of Colombians to the United States should occur, if ever, only in certain clearly defined and closely monitored cases.¹⁴⁰

Third, the United States must refrain from using negative incentives in determining whether Colombia will receive economic assistance.¹⁴¹ Rather, the United States, the European Community, and Japan, under the auspices of international organizations, must positively assist Colombia economically, and in reforming and rebuilding its judicial system.¹⁴² Military and economic assistance should be made contingent on a Colombian commitment to such reformation and reconstruction.¹⁴³ The developed nations might even earmark aid for specific projects. For example, the United States, the European Community, or

139. See *supra* note 27.

140. Currently, this is not the case under D.N. 1860, *supra* note 109. See *supra* notes 106-126 and accompanying text.

141. See *supra* notes 67, 70.

142. A primary form of economic assistance should, of course, consist of trade credits and preferences negotiated under the General Agreement of Tariffs and Trade. Such credits and preferences should be targeted at Colombia's three most attractive exports: Coffee, fossil fuels, and cut flowers. With regard to coffee, by far the nation's largest export, the International Coffee Agreement, Dec. 3, 1975. 28 U.S.T. 6403, T.I.A.S. No. 8683, which collapsed in July, 1989, should be renegotiated. See OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 1990 TRADE POLICY AGENDA AND 1989 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM 66-70 (1990).

143. Whether or not the new government of Cesar Gaviria Trujillo is prepared to make such a commitment remains to be seen. However, there is some indication that effective judicial reform is possible. See "Urge Reforma de la Justicia," *Pinzon Lopez*, *El Espectador* (Colombia), July 13, 1990 at 6A, col. 1 (testimony of former SCJ Justice and Labor Minister Jaime Pinzon Lopez regarding necessity of judicial reform to restore order in Colombia).

Japan could donate computer systems to be used by the Colombian courts, and could train Colombian court personnel in the use of such systems. In response, Colombia would agree to dedicate a substantial amount of its budget to appropriations aimed at hiring and training more judicial personnel, raising the desperately low salaries of judges and rank and file police and corrections personnel, and purchasing modern equipment for the courts. The Colombian government would also agree to effectively separate the duties of the military from those of the police.

Fourth, Colombia must seek to implement a social safety net that provides realistic upward opportunities for its large, poor population. Under the current system, such opportunities are non-existent, and "rank" in society is determined at birth.¹⁴⁴ By changing the caste system, Colombia will increase the alternatives available to the urban and rural poor, thereby decreasing the attractiveness of the drug business.

Finally, the United States, Western European states, and Japan must increase their emphasis on drug demand reduction. By engaging in demand reduction, these nations, the largest consumers of cocaine, will eliminate the economic incentive involved in the international drug trafficking business.

The author recognizes that these suggestions challenge certain Colombian cultural norms, as well as a United States policymaking process which gives great weight to short term results reflected in opinion polls. Long term policymaking obtains results which can be measured only over a substantial period of time. However, only through such fundamental changes in thinking can the rule of law be implemented in Colombia, and international drug trafficking be reduced significantly without civil and human rights sacrificed and lives lost.

144. *See generally* INT'L BANK FOR RECONSTRUCTION AND DEV., COLOMBIA: SOCIAL PROGRAMS FOR THE ALLEVIATION OF POVERTY (1990).