A CRIMINAL’S PATH TO THE AMERICAN DREAM: EXTRADITION AS A DRUG ENFORCEMENT POLICY TOOL

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This article explores a little-known avenue of immigration to the United States: the path that criminals from other nations embark on when they are extradited to the United States and, through cooperation agreements with law enforcement, are able to obtain immigration benefits and legal status. To illustrate this phenomenon, this article outlines the case of the United States’ war on drugs, which has led to the extradition of hundreds of Colombian drug traffickers and paramilitary leaders to the United States during the past two decades. While many of these extradited individuals have been deported back to Colombia after fulfilling their sentences, others have been able to remain in the United States evading accountability for the crimes against humanity committed in Colombia prior to their extradition. This article outlines the injustice that results from the extradition of Colombian drug traffickers and identifies the limitations of the alternatives to this current practice. In closing, this article stresses the need for further discourse on the viability of extradition as a drug enforcement policy tool and identifies the key issues that should govern this discussion.

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I. INTRODUCTION

For several years, Julio Henríquez, a Colombian environmentalist and human rights defender, organized peasants in the Magdalena region of Colombia to stop growing coca plants by encouraging the farming of legal crops.¹ Upset by these efforts, paramilitaries who controlled coca production in this region kidnapped and disappeared Julio after a community meeting in 2001.² Five years later, paramilitary leader Giraldo Serna confessed to ordering the killing of Julio after demobilizing under the Justice and Peace Law program.³ Despite his confession, on May 13, 2008, Serna and 13 other top paramilitary leaders were extradited to the United States to face drug-trafficking charges.⁴ Soon thereafter, Serna’s case was completely removed from the U.S. public court record and all evidence regarding Julio’s death vanished. Today little is known regarding the status of Serna’s case as well as many of the paramilitary leaders that have been extradited to the United States on drug trafficking charges. “More than anger, I feel powerless,” said Julio’s daughter in an interview with PBS.⁵ “We don’t know what they are negotiating, what conditions they’re living under [or whether any of them will ever return to Colombia].” Given the state of these extraditions, “what guarantee of justice do we have?” Julio’s daughter wondered.⁶

Throughout immigration history Congress has focused on border security by precluding the admission of criminal non-citizens and deporting those who have committed crimes in the

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² Id.
⁴ Colombia Extradites 14 Paramilitary Leaders, WASH POST (May 14, 2008), http://www.nytimes.com/2008/05/14/world/americas/14colombia.html?pagewanted=all&_r=0.
⁵ Supra note 1.
⁶ Id.
United States. Yet, despite public concern about immigrant criminal activity, current U.S. international drug control policy provides an avenue for some criminals like Serna to immigrate legally to the United States. To illustrate this phenomenon, this article will outline the United States’ war on drugs, which has led to the extradition of hundreds of Colombian drug traffickers to the United States during the past decades. While many of these extradited defendants have been deported back to Colombia after fulfilling their sentences, some have been able to remain in the United States and evade accountability for the crimes against humanity committed in Colombia prior to their extradition.7

Extradition from Colombia to the United States has been controversial since 1982, when the treaty between these two nations first entered into effect.8 Originally, the primary purpose of extradition was to serve as a tool for fighting the war on drugs by permitting Colombian drug lords to be sent to the United States to face long sentences. Initially, this purpose was accomplished. The fear of extradition was so eminent during the 1980s that drug lords quickly became known for the popular slogan, “better a grave in Colombia than a jail cell in the United States.”9 Over the years, however, this sentiment changed drastically.

Beginning in the mid 1990’s when the war on drugs was at its peak, the United States, in efforts to dismantle Colombian drug cartels, began negotiating with extradited drug traffickers.10 These arrangements were simple and generally consisted of drug traffickers providing information in exchange for some benefits. Among the benefits obtained from these exchanges

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7 This article is limited by the availability of U.S. and Colombian court documents regarding extradited drug traffickers and paramilitaries. Complete case records for the prosecutions of all defendants are not publicly accessible in the United States. Likewise, complete access to documents related to the demobilization process under the Justice and Peace Law in Colombia are not publicly available. Secondary sources including Colombian and American newspapers have provided insight into these processes.
10 Id.
were reductions in sentences of up to 70% and permission to remain in the United States upon serving the imposed sentence.\textsuperscript{11} Realizing the benefits of facing charges abroad, Colombian drug traffickers became desperate to be tried in the United States. The desperation was such that in October 2007, over 100 prisoners of a maximum-security prison in Colombia demanded their extradition with a hunger strike.\textsuperscript{12}

While the practice of negotiating with Colombian drug traffickers has been controversial, the recent extradition of Colombian paramilitary leaders has been subject to greater scrutiny given the heightened criminal profile of these defendants.\textsuperscript{13} During the past decade, as a result of the affiliation between paramilitary groups and drug traffickers in Colombia, paramilitaries began to be extradited to the United States on drug trafficking charges.\textsuperscript{14} These paramilitary members, in addition to trafficking drugs, are also responsible for committing serious human rights violations in Colombia.\textsuperscript{15} Nevertheless, when these defendants are extradited, priority is given to the drug trafficking offenses while little is done to investigate and sanction the forced massive displacements, massacres and genocides committed by these individuals in Colombia.\textsuperscript{16} Given the increase in the number of extradited paramilitary members over the past decade, concerns have surfaced regarding the possibility of granting impunity to these criminals by allowing them to remain in the United States upon completion of their sentences.

\textsuperscript{11} Id.
\textsuperscript{12} Id.
\textsuperscript{14} The extradited defendants include most of the former AUC, a left-wing guerilla group financed by the drug trade that seek to control territory and drug trafficking routes through violent methods. Boalt Hall School of Law International Human Rights Law Clinic, \textit{Truth Behind Bars} (Feb. 2010), http://www.law.berkeley.edu/files/IHRLC/Truthbehindbars.pdf.
\textsuperscript{16} Fundación Ideas Para La Paz, \textit{The Uses and Abuses of Extradition in the War on Drugs} (April 20, 2009), http://www.ideaspaz.org.
The concern that extradition may become a means for avoiding criminal accountability is not limited to the case of Colombian defendants. Between 2007 and 2012 Mexico extradited to the United States 587 defendants, a majority of them for drug trafficking crimes.17 Among these defendants were members of drug organizations that have engaged in remarkably brutal acts of violence through tactics “including mass killings, the use of torture and dismemberment, and the phenomena of car bombs.”18 As with Colombian defendants, precedence is given to the drug offenses and plea agreements are often offered. Given the violent nature of the drug trafficking enterprise in this era, the future extradition of drug traffickers and the possibility of plea agreements with these defendants merit close attention.19

In evaluating the current use of extradition to fight the war on drugs, this article has four aims. Part II will provide an overview of the extradition process. Part III will outline the historical and political context of the war on drugs. Part IV will address the cost of extradition as a drug enforcement policy tool. Part V will identify the limitations of the proposed alternatives to the current extradition practice. In closing, this article will stress the need for further discourse on the use of extradition as a drug enforcement policy tool and identify the key issues that should govern this discussion.

II. THE EXTRADITION PROCESS

A. Overview of Extradition

Extradition is “the formal process by which a person found in one country is surrendered

17 Id.
18 Among the extradited defendants are members of Sinaloa and Los Zetas, the largest and among the most dangerous drug trafficking organizations in Mexico. As of 2013 it was estimated that there had been at least 60,000 homicides related to these and other drug trafficking organizations in Mexico. Id.
19 Though extradition has become a common drug enforcement policy tool in many countries, this article will focus the discussion on the impact of extraditing Colombian defendants to the United States.
to another country for trial or punishment.”

Currently, the United States has extradition treaties with over 100 nations, including Colombia. All U.S. extradition treaties list specific extraditable offenses or feature a “dual criminality rule,” which renders extraditable all crimes that are punishable as a felony in either the requesting or sending state. All U.S. extradition treaties also follow the “rule of specialty,” which holds that a defendant “may only be tried or punished in the requesting State for those crimes for which he was extradited.”

Generally, the extradition process begins with a request submitted to the Department of Justice’s Office of International Affairs by a U.S. federal, state or local prosecutor. Once the Office of International Affairs approves the application for extradition, then the request and supporting documents are forwarded to the State Department’s Law Enforcement and Intelligence Office. After this approval is granted, the documents and formal request for extradition are forwarded to the U.S. embassy in the country from which the extradition is sought. If the foreign government decides to honor the request, the defendant is turned over to U.S. authorities.

The terms of U.S. extradition treaties vary. Most countries, however, generally demand assurances that the extradited defendant will not be sentenced to life in prison and that the sentence imposed does not exceed a specified number of years. Some U.S. treaties also

22 The treaty between Colombia and the United States enumerates a range of drug related activities as extraditable offenses including “offenses against the laws relating to the traffic in, possession, or production or manufacture of, narcotic drugs, cannabis, hallucinogenic drugs, cocaine and its derivatives, and other substances which produce physical or psychological dependence.” Supra note 8.
24 Id.
25 Id.
26 Id.
27 Id.
28 “Under the terms of the to the extradition request, the United States provided assurances to the Government of
explicitly require the return of extradited defendants to the country of origin after fulfillment of their sentence.  

B. The Extradition Treaty Between Colombia and the United States

The extradition treaty between Colombia and the United States was signed in 1979 and became effective in 1982. Shortly after, in 1986, the Colombian Supreme Court declared the treaty unconstitutional in response to a campaign of bombings, assassinations and personal threats by drug traffickers. Following the Supreme Court’s holding, drug cartel leaders formed the extraditable death squad to target judicial and political leaders who continued to support the extradition of drug traffickers to the United States. From 1987 to 1991 the extraditables engaged in a series of violent attacks -- murdering the attorney general, several lawyers, judges and newspaper editors. In an effort to end these violent attacks, an amendment was added to the Colombian Constitution in 1991 permanently banning the extradition of Colombian nationals by birth. Six years later, when the state of emergency subsided, the Colombian government retracted and amended the constitution to allow the extradition of nationals once again.

Since the restatement of extradition in Colombia, extradition has become an increasingly important law enforcement tool for Colombia and the United States. During Alvaro Uribe’s term

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29 The Extradition Treaty with Colombia does not have a provision requiring the return of extradited defendants. 

Supra note 8. 

30 Id. 

31 During the 1980s drug traffickers, fearing the prospect of facing charges abroad, sought to abolish the extradition treaty by engaging in a campaign of violent attacks to pressure the Colombian government to end extraditions. In response to the series of attacks, the Colombian Constitutional Court voted 13-12 to annul the extradition treaty with the U.S. Americas War on Drugs, NPR (April 2, 2007), http://www.npr.org/templates/story/story.php?storyId=9252490. 


33 Id. 

34 Supra note 13. 

35 Id.
as president of Colombia from 2002 to 2010, more than 1,100 Colombians were extradited to the United States.\textsuperscript{36} Under President Santos’ current administration, extradition of drug traffickers and paramilitary members has continued to take place, with over 300 defendants extradited to the United States between 2010 and 2013.\textsuperscript{37} To understand the present use of extradition as an international drug enforcement policy tool, it is important to understand the historical and political context of the war on drugs. The following discussion provides an overview of the United States and Colombia’s war on drugs, which led to the signing of the extradition treaty between these two nations.

\section*{III. \textbf{HISTORICAL AND POLITICAL CONTEXT OF THE WAR ON DRUGS}}

\subsection*{A. \textbf{The United States War on Drugs}}

Since the late 1900s the United States has waged a “war on drugs” by attempting to reduce the supply of illegal drugs at the international level and the demand of illegal drugs at the domestic level.\textsuperscript{38} Beginning in the late 1960s, the recreational use of drugs gained popularity among middle class Americans.\textsuperscript{39} The widespread use of illegal drugs led President Nixon to declare a war on drugs in 1971, labeling drugs “public enemy number one in the United States.”\textsuperscript{40} Nixon’s war on drugs resulted in the creation of the Drug Enforcement Administration (DEA), the lead agency responsible for domestic enforcement of federal drug laws and drug investigations abroad.\textsuperscript{41}

Following Nixon’s presidency, efforts continued to reduce the demand of illicit drugs at

\textsuperscript{36}Record de Extradiciones Firmadas por Uribe, EL TIEMPO (April 28, 2010), http://www.eltiempo.com/archivo/documento/CMS-7681890. Prior to Uribe’s administration only 333 Colombians had been extradited since 1982, when the treaty first came into effect. Id.
\textsuperscript{39}Thirty Years of America’s Drug War, FRONTLINE (last visited Jan. 26, 2014), http://www.pbs.org/wgbh/pages/frontline/shows/drugs/cron/.
\textsuperscript{40}Id.
\textsuperscript{41}Id.
the domestic level. During Reagan’s administration, Nancy Reagan launched the “Just Say No” anti-drug campaign and Congress passed the Anti-Drug Abuse Act of 1986, which created mandatory minimum penalties for drug offenses.\textsuperscript{42} Two years later, the Anti-Drug Abuse Act of 1988 was passed, which established a federal death penalty for drug kingpins and established the White House Office of National Drug Control Policy.\textsuperscript{43}

During Reagan’s administration, greater emphasis on international drug control also began to take place due to the large amount of drugs imported into the United States and the rise of foreign drug trafficking enterprises.\textsuperscript{44} As a measure to enhance international drug control, the United States amended its extradition treaties with various nations, including Colombia, to obtain jurisdiction over the prosecution of foreign drug traffickers.\textsuperscript{45} “By amending the treaties to include, as triable offenses, specific drug related activities, extradition … [became] a principal weapon in combatting the flow of illegal narcotics into the United States.”\textsuperscript{46}

Today, extradition continues to be an important tool for fighting the war on drugs.\textsuperscript{47} According to U.S. Attorney General Eric Holder, “the best way to disrupt and dismantle a criminal organization is to … locate and extradite, when appropriate, cartel leadership to the United States for prosecution.”\textsuperscript{48} As a means to achieve this goal, prosecutors in the United States are encouraged to incentivize extradited defendants to reveal details about their criminal activities.

\textsuperscript{42} Reagan’s Drug War Legacy, ALTER NET, June 18, 2004 (last visited Nov 9, 2013), http://www.alternet.org/story/18990/reagan%27s_drug_war_legacy.
\textsuperscript{43} Id.
\textsuperscript{44} Mark Andrew Sherman, United States International Drug Control Policy, Extradition and the Rule of Law in Colombia, 15 NOVA L. REV. 661 (1991).
\textsuperscript{45} J. Peter Kelley, United States Colombian Extradition Treaty: Efforts to Prosecute Drug Lords, 14 SUFFOLK TRANSNAT’L L.J. 161 (1990). In recommending the Senate’s approval of the extradition treaty between the United States and Colombia, President Reagan wrote: “[T]his treaty is one of a series of modern extradition treaties being negotiated by the United States. It expands the list of extraditable offenses to include narcotics violations, aircraft hijacking, bribery, and obstruction of justice, as well as many other offenses not covered by our existing extradition treaty with Colombia…This treaty will make a significant contribution to international cooperation in law enforcement.” Supra note 8.
\textsuperscript{46} Kelley, supra note 45 at 169.
\textsuperscript{47} Truth Behind Bars, supra note 14.
\textsuperscript{48} Id.
activity, organizational structure, weaponry, finances and government allies. Among the incentives are promises of visas for threatened family members and permission to remain in the United States for the extradited defendants upon completion of their sentences. These practices, according to U.S. officials, have been successful and led to the recognition of the U.S-Colombian relationship as one of the “most successful in the world.”

B. Colombia’s War on Drugs

Colombia is one of the world’s top producers of cocaine, along with Bolivia and Peru. Despite the approximately $600 million a year in aid from the United States to fight drug trafficking and subversive armed groups, Colombia remains the world’s largest producer of cocaine with paramilitaries controlling many of the thriving drug organizations. “According to the State Department’s 2012 International Narcotics Control Strategy Report (INCSR) published in March 2012, Colombia produces about 95% of the cocaine seized in the United States.”

Although it is one of the oldest democracies in South America, Colombia has struggled in maintaining social and political order during the past decades due to internal armed conflicts and narcotrafficking. Aside from drug cartels, the main groups that have contributed to Colombia’s conflict include two leftist guerrilla groups known as the Revolutionary Armed Forces of Colombia (FARC) and the National Liberation Army (ELN), and the right-wing armed group known as United Self Defense Forces of Colombia (AUC). The FARC, ELN and AUC have

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49 Id.
50 Id.
51 Id. Despite U.S. government officials’ praise of the current extradition practice with Colombia, little statistical evidence is available regarding its actual success rate in disrupting cartels in Colombia and reducing the flow of drugs into the United States.
53 Id.
54 Id.
55 The AUC disbanded after its leader Carlos Castaño was extradited to the United States and more than 31,000 of its members demobilized in 2006. Id.
all been accused of engaging in human rights abuses and narcotrafficking activity and are designated by the United States government as Foreign Terrorist Organizations.\textsuperscript{56}

In an effort to reduce Colombia’s internal armed conflict, in 2005, President Uribe enacted the Justice and Peace Law, which grants conditional amnesty to Colombian paramilitary members and drug traffickers that enter into negotiations with the Colombian government.\textsuperscript{57} To qualify for reduced sentences, paramilitary members are required to provide a detailed account of their crimes, forfeit illegally acquired assets to a victims reparation fund and cease all criminal activity.\textsuperscript{58} Under the Justice and Peace Law, the Colombian government also sponsors \textit{versiones libres} or hearings at which paramilitary members confess to the crimes they have committed. Victims are permitted to attend these hearings and assist the prosecutors in the questioning and investigation process.\textsuperscript{59}

As of 2006, more than 31,000 members had demobilized but only 4,153 had fully complied with the requirements of the law.\textsuperscript{60} The lack of compliance under the Justice and Peace Law has been caused, in part, by the extradition of paramilitary members to the United States. When President Uribe authorized the extradition of 14 paramilitary leaders to the United States in 2008, “all of the extradited commanders were participating in the Justice and Peace Law process, revealing details about their atrocities and the identity of their accomplices.”\textsuperscript{61} Following the extraditions, however, many of these defendants withdrew from the program and refused to disclose more information regarding the crimes committed against Colombian

\footnotesize{
56 Id.
57 Ley 975 de 2005, Diario Oficial No. 45.980, known as the Justice and Peace Law. See also, \textit{Correcting Course: Victims and the Justice and Peace Law in Colombia}, INTERNATIONAL CRISIS GROUP LATIN AMERICA (Oct. 30, 2008), \url{http://www.unhcr.org/refworld/country,,ICG,,COL,,490acb5820.html}.
58 Id.
59 As of June 2009, more than 27,000 victims had attended 1,836 hearings, \textit{Truth Behind Bars}, \textit{supra} note 14.
60 Beittel, \textit{supra} note 52.
}
civilians.\textsuperscript{62} As a result, criminal investigations related to these defendants and reparations to Colombian victims were halted.

In 2009, in response to the dissatisfaction with the extradition of paramilitary leaders, the Colombian Constitutional Court banned future extraditions of paramilitaries participating in the Justice and Peace Law process.\textsuperscript{63} Under this new precedent, “the Court considered that the rights of victims of crimes against humanity should have constitutional priority over the interests of prosecution and punishment of minor crimes such as drug trafficking or money laundering.”\textsuperscript{64} Despite this ban, the controversy regarding the extradition of paramilitaries and drug traffickers has not subsided and, as discussed below, the use of extradition as a drug enforcement policy tool continues to come at a high cost.

\textbf{IV. COSTS OF EXTRADITION AS A DRUG ENFORCEMENT POLICY TOOL}

The use of extradition as a drug enforcement policy tool poses problems that are morally and politically troubling but little discussed. Among the most concerning consequences of the extradition process is the promotion of impunity for human rights violators. By allowing defendants to remain in the United States, the extradition process has two additional adverse effects. First, the process adversely impacts criminal investigations in Colombia and delays access to remedies for Colombian victims. Second, the process creates an immigration pathway that results in the admission of foreign criminals to the United States. As the international war on drugs continues, these costs should be fully acknowledged and debated in the public sphere.

\textbf{A. The Practice of Extraditing Colombian Drug Traffickers Promotes Impunity for Human Rights Violators}

Over the years extradition has become a means of avoiding criminal accountability in

\begin{flushleft}
\textsuperscript{62}\textit{Id.}
\textsuperscript{63}\textit{Supra} note 13.
\textsuperscript{64}\textit{Id.}
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Colombia. Today, instead of fearing the prospect of extradition, many drug lords and paramilitary leaders are requesting extradition. The possibility of serving lighter sentences, avoiding criminal charges for non-drug related offenses, and obtaining legal residence in the United States has become more appealing than demobilizing and submitting to the justice system in Colombia.

To date, there are close to 200 drug traffickers and paramilitary members that have successfully entered negotiations with U.S. law enforcement and have been able to remain in the United States upon their release from prison. Among those who have benefited from the negotiations is Carlos Ramón Zapata, a former member of the prominent Medellín Cartel. In exchange for becoming an informant, revealing information about his organization and surrendering his illicit assets, he was able to reduce his sentence from 25 years to 5 years and remain in the United States.

William Rodríguez Abadía, son of Miguel Rodríguez Orejuela (former leader of the Cali Cartel), also managed to obtain a favorable deal. The United States requested Abadía’s extradition in 2002 to face charges in connection to his criminal drug activity with the Cali

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65 El Sueño Americano, supra note 9.
Cartel. Abadía was released from prison after serving only 5 years of his 20-year sentence in South Carolina and presently resides in the United States.

The possibility of drug traffickers and paramilitary leaders remaining the United States upon completion of their sentences remains high. Of the 14 paramilitary leaders extradited in 2008, little is known regarding what will happen upon their release from prison. A particularly troubling case involves paramilitary leader Salvatore Mancuso. Mancuso is responsible for several of Colombia’s bloodiest massacres and for committing over 400 crimes including murders, forced disappearances, forced recruitment of minors and forced displacements of people. As of 2009, Mancuso was being held in Northern Neck Regional Jail in Warsaw, Virginia while undergoing closed sentencing. Currently, limited information is available regarding his proceedings and uncertainty remains as to what his sentence will be and what will happen upon his release from prison. As with Carlos Zapata and William Rodríguez Abadía, the possibility of never returning to Colombia and avoiding criminal accountability for the crimes committed in Colombia exists.

69 El Expediente de William Rodríguez Abadía, EL TIEMPO (June 13, 2004), http://www.eltiempo.com/archivo/documento/MAM-1527083. William Rodríguez Abadía ran various aspects of the Cali cartel including the administration his “father’s portion of the Rodriguez-Orejuela family business enterprises…. Rodriguez-Abadía helped initiate, develop, implement and … manage plans to launder and further conceal the Rodriguez-Orejuelas’ drug profits through a variety of schemes involving these business entities. In addition, … Rodriguez-Abadía was responsible for arranging and ensuring the payment of bribe monies and payoffs to incarcerated cartel employees and their families.” News Release, DEA, Son of Cali Cartel Leader Pleads Guilty and Agrees to Cooperate Against Father and Uncle, DEA (March 9, 2006), http://www.justice.gov/dea/pubs/states/newsrel/mia030906.html.

70 William Rodríguez Abadía Quedó Libre, Pero sus Medios Hermanos Siguen en la Mira, EL TIEMPO (June 8, 2010), http://www.eltiempo.com/archivo/documento/CMS-7745056.

71 All extradited paramilitary leaders extradited engaged in gross human rights violations in addition to drug trafficking. For a list of the human rights violations committed in Colombia see Truth Behind Bars, supra note 14.


As it stands, the current extradition practice is at odds with international norms. Under international principles, victims of human rights violations have the right to criminal investigations and justice. Specifically, UN member states, including Colombia and the United States, have the obligation to take appropriate measures to prevent human rights violations; investigate violations effectively and take action against those responsible; provide victims equal access to justice; and provide remedies to victims, including reparation. Under the current extradition practice, the United States is in breach of this obligation by permitting defendants to remain in the U.S. upon completion of their sentences. By allowing these defendants to relocate in the United States, criminal investigations and reparation processes are halted in Colombia resulting, in some cases, in impunity for these criminals.

Recognizing the injustice of awarding impunity to extradited Colombian defendants, the Inter-American Commission on Human Rights (IACHR) issued the following statement on May 14, 2008:

“[The Extradition of paramilitary members] seriously limits the ability to shed light on grave crimes perpetrated during the armed conflict in Colombia…Extradition affects the Colombian State’s obligation to guarantee victims’ rights to truth, justice, and reparations for the crimes committed by the paramilitary groups. The extradition impedes the investigation and prosecution of such grave crimes through the avenues established by the Justice and Peace Law in Colombia and through the Colombian justice system’s regular criminal procedures. It also closes the door to the possibility that victims can participate directly in the search for truth about crimes committed during the conflict, and limits access to reparations for damages that were caused.”

Echoing the Human Rights Commission’s concern, in March 2013, Colombia's Justice

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76 Press Release N. 21/08, Inter-American Commission on Human Rights, IACHR Expresses Concern About Extradition of Colombian Paramilitaries (May 24, 2008).  
Minister, Juan Carlos Esguerra, indicated that Colombia “may soon alter its reliance on extraditing criminals to the U.S. to stand trial.”

Alarmed by the potential for impunity under the current extradition practice, Esguerra expressed his preference that Colombian drug traffickers face domestic charges first before being sent abroad.

In addition to the moral wrong of granting impunity to human rights abusers and the present violation of international norms, there are more concrete harms to the current extradition practice. The next sections will discuss two of these.

B. The Practice of Extraditing Colombian Drug Traffickers has an Adverse Impact on Criminal Investigations in Colombia and Delays Victims’ Access to Remedies

During the negotiation process with Colombian drug traffickers, it is not uncommon for the United States to seal the criminal records of these defendants to ensure their safety and cooperation. Likewise, it is not uncommon for defendants to withdraw from the Justice and Peace program upon entering negotiations with U.S. law enforcement, as there is no incentive not to do so. While these practices may not interfere with U.S. drug enforcement policy, the sealing of records is contrary to U.S. public policy and negatively impacts criminal investigations and victims in Colombia.

Under the common law, courts have recognized a presumed right of access to court proceedings and records in criminal and civil cases. This presumption may be overcome by showing “an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” Only after this showing has been made,
can a court close a historically open process where public access plays a significant role and restrict the right of the public to access records of criminal proceedings.\(^{83}\)

The case of drug trafficker Nicholas Bergonzoli illustrates the implications of sealing records in cases involving extradited Colombian defendants.\(^{84}\) Nicholas Bergonzoli worked for Helmer Herrera (fourth in command in the Cali Cartel) and for drug trafficker and paramilitary leader Carlos Castaño before joining the AUC.\(^{85}\) In 2000, Bergonzoli was extradited to the United States to face drug smuggling charges.\(^{86}\) Sometime after, he was sentenced in total secrecy with no public record of any court proceedings.\(^{87}\) The public court docket contained no facts, case number, or names of the judges or attorneys involved in the case.\(^{88}\) According to news reports, Bergonzoli was released after serving approximately 24 months in a jail in Pennsylvania.\(^{89}\)

A few years later, the sealing of Bergonzoli’s records was contested when Colombian drug trafficker, Fabio Ochoa Vázquez, appealed his criminal convictions to the Eleventh Circuit.\(^{90}\) In his appeal, Ochoa claimed that the United States District Court for the Southern District of Florida unconstitutionally sealed docket sheets in cases involving his codefendants. Ochoa argued that he had planned to call some of his codefendants, including Bergonzoli, as witnesses at his trial but could not locate him or his court records because his case had disappeared from the federal court's public docket.\(^{91}\) Finding in favor of Ochoa, the Eleventh

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83 United States v. Valenti, 987 F.2d 708, 713 (11th Cir. 1993).
84 Id.
85 El Sueño Americano, supra note 9.
86 Id.
88 Id.
89 Following his release he was granted permanent residence in the United States and set up a fast food chain in Florida where he currently resides. El Sueño Americano, supra note 9.
90 United States v. Ochoa-Vasquez, 428 F.3d 1015, 1029-30 (11th Cir. 2005).
91 Id. See also Meliah Thomas, The First Amendment Right of Access to Docket Sheets, 94 CAL. L. REV. 1537
Circuit Court emphasized that the First Amendment right to attend criminal proceedings extends to the right of access to the proceedings' docket sheets.\(^\text{92}\) Although before a final decision was entered the District Court voluntarily unsealed the dockets at issue, the Eleventh Circuit ultimately held that the District Court's sealing of dockets was unconstitutional.\(^\text{93}\)

Notwithstanding the policy discouraging the sealing of court records, in 2010, “U.S. District Judge Reggie Walton blocked public access to seven of the [14] paramilitary leaders’ cases erasing virtually every trace of their existence.”\(^\text{94}\) Among the cases sealed was that of Giraldo Serna who ordered the execution of human rights defender, Julio Henríquez, discussed at the onset of this article.\(^\text{95}\) As result of the practice of sealing records, Julio’s family, like many others, have been unable to determine whether the individuals responsible for killing their loved ones will ever return to Colombia to be prosecuted.

In addition to the practice of sealing records, it is common for Colombian defendants to withdraw from the Justice and Peace program upon entering negotiations with U.S. law enforcement. Under the current extradition treaty defendants have little incentive to participate in the Justice and Peace process because the threat of extradition and the promise of receiving reduced sentences in Colombia is no longer relevant.\(^\text{96}\) Testimony by defendants regarding the crimes committed in Colombia is, therefore, lost severely hampering ongoing criminal investigations in Colombia. Likewise, access to information regarding victims’ whereabouts is lost.\(^\text{97}\) As a result, Colombian officials and victims’ families are left with no access to evidence

\(^{92}\) Supra note 90.
\(^{93}\) Id.
\(^{94}\) Supra note 74.
\(^{95}\) Id.
\(^{96}\) Truth Behind Bars, supra note 14.
\(^{97}\) Many victims of drug trafficking and paramilitary violence disappear without a trace. Often victims are killed and their whereabouts remain unknown until paramilitary members come forward and disclose the location of the bodies.
or information pertaining to the crimes committed by these defendants. Perhaps most troubling, victims are left with no assurance of defendants’ return to Colombia upon completion of their sentences in the United States.

Lastly, under the current extradition agreement, access to remedies for Colombian victims is significantly delayed. Under the Justice and Peace Law, demobilized paramilitary leaders are required to turn over all illegal assets to a victims reparation fund.98 Due to the extradition of defendants, however, transfer of paramilitary assets by U.S. authorities to the reparation fund is often delayed.99 Such delay has resulted in the inability to provide redress to numerous victims in Colombia. In 2010, for example, the fund contained “under $4 million in paramilitary assets to satisfy the claims of more than 200,000 victims.”100

C. The Practice of Extraditing Colombian Drug Traffickers Creates an Immigration Pathway that Leads to the Admission of Criminals to the United States

Given the criminal background of Colombian drug traffickers and paramilitary leaders, plea deals that include immigration benefits results in the admission of foreign criminals to the United States. While generally the commission of certain crimes, including crimes involving moral turpitude,101 bar non-citizens from obtaining visas and admission to the United States,102 these and other criminal grounds of inadmissibility are waived in cases involving extradited Colombian drug traffickers and paramilitary leaders.

98 Truth Behind Bars, supra note 14.
99 As of February 2010, the United States had identified assets of twenty-one of thirty Colombian extradited defendants, however, U.S. officials had not transferred any of these resources to Colombian victims. Id.
100 Id.
101 In determining whether a crime involves moral turpitude, the elements of the crime as defined by the criminal statute are considered, not the defendant’s actual conduct. A conviction under a statute in which theft, fraud, or intent to commit bodily harm is an essential element involves moral turpitude (i.e. murder). The determination of whether a crime involves moral turpitude is thus dependent on the elements of the offense and not the name or designation of the offense. Marciano v. INA, 450 F.2d 1022 (1971).
102 “Any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—(I) a crime involving moral turpitude … or an attempt or conspiracy to commit such a crime” is inadmissible and ineligible to receive visas and to be admitted to the United States. For a full list of criminal and related grounds of inadmissibility see 8 U.S.C. §1182 (2000).
Currently, there is great uncertainty regarding what type of immigration status is granted to paramilitaries and drug traffickers given the secrecy surrounding plea agreements. However, it is highly probable that those obtaining immigration benefits in exchange for providing information are receiving informant or S visas.\(^{103}\) If this is the case, the number of individuals entering through this immigration route is limited given that only 250 S visas may be granted to criminal and terrorist informants per year.\(^{104}\) Nevertheless, the immigration pathway created raises significant questions of public safety, given that many of these extradited defendants have committed numerous human rights violations in Colombia in addition to the drug trafficking offenses for which they are supplying information.\(^{105}\)

The immigration pathway created for Colombian defendants is also flawed in that it promotes impunity. Under current immigration policy, which emphasizes the inadmissibility and deportability of criminals, it is difficult to justify the admission of these individuals on the

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\(^{103}\) “In 2003, Bernal-Madrigal pled guilty, pursuant to a written plea agreement, to one count of engaging in a continuing criminal enterprise, involving importation of over 9,000 kilograms of cocaine into the country…. The written plea agreement stated, among other things, that…[I]f the defendant requests, and in the judgment of the United States the request is reasonable, the United States will make application with the Immigration and Naturalization Service (INS) for an S visa on behalf of the defendant. It is understood the United States has authority only to apply for and recommend an S visa, and that the final decision to issue the visa rests with the INS.” United States v. Bernal-Madrigal, 346 F. App’x 397 (11th Cir. 2009).

\(^{104}\) “Following the 1993 bombing of the World Trade Center in New York City, Congress amended the Immigration and Nationality Act (INA) to establish the new “S” nonimmigrant visa category for alien witnesses and informants as part of the Violent Crime Control Act of 1994.” Karma Ester, Immigration: S Visas for Criminal and Terrorist Informants, CRS REPORT FOR CONGRESS (May 2006), http://www.hdl.org/?view&did=463833. Under 8 U.S.C. § 1101(a)(15)(S) a foreign national who supplies critical reliable information necessary to the successful investigation or prosecution of a criminal or terrorist organization can be admitted to the United States in temporary nonimmigrant status for three years. Spouses, married or unmarried sons and daughters and parents may accompany or follow to join with approval by the Secretary of State. Once admitted, S visa holders are eligible to adjust their status to permanent residency if the information provided by the S visa holder substantially contributed to the successful investigation or prosecution of a crime or the information provided by the S visa holder substantially contributed to the prevention of an act of terrorism. The request for adjustment of status, like the original application for S visa status, must be made by a U.S. law enforcement agency.

\(^{105}\) At the time of request, pursuant to §1101(a)(15)(S), a U.S. Law Enforcement Agency commits to collecting quarterly reports detailing the alien’s whereabouts and activities and to forward required information to the Criminal Division. The Agency further commits to immediately reporting to U.S. Immigration and Customs Enforcement and DHS if the alien fails to report quarterly or fails to comply with the terms and conditions of admission or if the alien commits any removable activity after the date of admission. Despite the strict monitoring restrictions for S visa holders, foreigners awarded S visas are not investigated or prosecuted at any time for any crimes committed abroad prior to entering the United States.
ground that they supply valuable information to the United States regarding the drug enterprise operating in Colombia. While Congress may have contemplated the admission of a select group of individuals willing to supply critical information regarding criminal organizations under the S visa category, impunity for criminals accused of mass human rights violations could not have been intended.106 The value of information pertaining to drug operations cannot justify the impunity granted to these individuals by allowing them to reside in the United States.

V. ALTERNATIVE AVENUES AND LIMITATIONS

In defining alternative avenues to the current extradition practice it is necessary to balance the competing interests of dismantling drug cartels in Colombia, protecting informants, granting justice to Colombian victims and regulating the immigration pathway to the United States. During this ongoing war on drugs, scholars have proposed multiple alternatives that consider these interests. However, as discussed below, significant limitations to these policies lend them unlikely to be enforced.

The United Nations Convention Against Torture (hereinafter Convention) is the parting point of all discussions regarding alternate policies to the current extradition practice. Under the Convention, the United States has a general duty to extradite or prosecute persons who commit gross violations of human rights.107 Under the terms of the Convention, the United States has a duty to cooperate with Colombia to ensure justice when dealing with extradited Colombian drug

106 On October 1, 2001, Senate Bill 1424 amended the Immigration and Nationality Act to permanently provide for the administration of the “S” visa, which was scheduled to expire on September 13, 2001. “S. 1424 passed … by unanimous consent … on September 15, 2001. Members of Congress stated that it was very important to pass this legislation to aid federal, state, and local law enforcement agencies in their investigation of the terrorist attacks of September 11, 2001.” Ester, supra note 103.
107 United Nations, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, part I. Gross human rights violations include torture and other cruel, inhuman or degrading treatment or punishment. Id. Pursuant to Article 5, “each State Party shall … take such measures as may be necessary to establish its jurisdiction over … offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him.”
traffickers that have committed gross human rights violations in Colombia. Specifically, the United States must collaborate in applying domestic or international laws to prosecute human rights violators. Thus, in instances where human right violators are located within the jurisdiction of the United States, the United States has a general duty to extradite or prosecute these individuals. This duty to extradite or prosecute, however, must coexist with the Convention’s Article 3 duty not to “extradite a person to another state where there are substantial grounds for believing that [such person] would be in danger of being subjected to torture.”

A. Extradition of Defendants to Colombia Upon Completion of Sentences

A proposed alternative to the current extradition practice is to return all extradited defendants to Colombia upon completion of their sentence. By strictly enforcing the extradition of defendants back to Colombia, this approach would eliminate the immigration pathway that has been created by the current extradition process and arguably promote criminal accountability. Though at first instance this poses a relatively easy solution, the extradition of defendants back to Colombia has several drawbacks.

First, the extradition of defendants to Colombia poses significant leverage problems for the United States. From a strategic standpoint, the United States would lose a valuable bargaining chip by denying immigration benefits to Colombian defendants. During negotiations with U.S. law enforcement, Colombian defendants will no doubt be less inclined to provide valuable information regarding their illicit operations in Colombia if no protections are offered to their families. Defendants will also be less enticed to disclose information if they are not offered the opportunity to relocate in the United States themselves, given the safety risks they would

108 Id.
109 “For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.” Id. at art. 3.
encounter upon their return to Colombia.

Second, the return of defendants to Colombia raises humanitarian concerns. Primarily that by denying immigration benefits to Colombian defendants, these individuals would be forced to return to Colombia where their lives would be in danger. Given the violent nature of paramilitary groups and drug cartels, extradited defendants would run a high risk of being tortured or killed upon their return to Colombia in retaliation for having disclosed information to U.S. law enforcement. Even if these defendants were sent back to serve sentences in Colombian jails, the security measures within these institutions would not necessarily guarantee their protection. Thus, by denying immigration status to these defendants, the United States would be in violation of the Convention Against Torture, which also limits a nation’s ability to return a noncitizen likely to suffer torture to his native country.

Finally, the return of defendants to Colombia may not necessarily alleviate the impunity problem given the vulnerability of Colombia’s judicial system to political pressures. Since 2005, Colombia’s efforts to investigate and prosecute crimes involving paramilitaries and drug traffickers have been under close monitoring by the International Criminal Court (ICC). In response to the investigations, the Colombian government claims that it is making genuine efforts to end the armed conflict through the Justice and Peace Law process. Preliminary research by the ICC indicates that proceedings have in fact been initiated and convictions have

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110 El Sueño Americano, supra note 9. In 2008, a prisoner held at a maximum-security prison in Cómbita, Boyacá was stabbed to death. Id.
111 Supra note 107 at art.3.
112 In 2002, the ICC was established to investigate, prosecute and try individuals accused of committing genocide, crimes against humanity, war crimes and crimes of aggression. The ICC has jurisdiction over cases that are either referred by a state party, the Security Council acting under the powers of the UN Charter or by ICC prosecutor Luis Moreno-Ocampo. The Office of the Prosecutor, INTERNATIONAL CRIMINAL COURT SITUATION IN COLOMBIA INTERIM REPORT (Nov. 2012) [hereinafter SITUATION IN COLOMBIA REPORT], http://www.icc-cpi.int/NR/rdonlyres/3D3055BD-16E2-4C83-BA85-35BCFD2A7922/285102/OTPCOLOMBIAPublicInterimReportNovember2012.pdf.
113 Id.
been issued against paramilitary and guerilla armed groups, army officials, and politicians with alleged links to paramilitary groups. Yet it is argued by scholars that upon careful examination of the politics of justice in Colombia, it appears as though the passage of the Justice and Peace Law was “merely an attempt to shield human rights abusers from criminal liability and evade ICC intervention.” The ICC is likewise suspicious of Colombia’s efforts, and in its 2012 interim report determined that:

“Although the information analyzed indicates that the Colombian authorities have carried out and are still conducting a large number of proceedings relevant to the preliminary examination against different actors for conduct that constitutes crimes within the jurisdiction of the Court… at this stage, the Prosecutor has determined that preliminary examination should continue in relation to the complementarity requirement.”

It is evident by the ICC’s recent investigations that the Colombian judicial system may not properly investigate and prosecute the human rights violations committed by drug traffickers and paramilitary leaders in Colombia. Unfortunately, despite international efforts to intervene in Colombia, it is unlikely that cases involving these drug traffickers will make it before the ICC. To date the ICC has not prosecuted a single case and no effort has been made by Colombia or Prosecutor Ocampo to refer these cases to the ICC. The return of defendants to Colombia, therefore, may not necessarily guarantee criminal accountability absent a heightened

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114 Id.
115 Jennifer S. Easterday, Deciding the Fate of Complementarity: A Colombian Case Study, 26 ARIZ. J. INT’L & COMP. L. 49 (2009). Under the complimentary requirement, a case is admissible before the ICC if a national court system is not willing and able to hear it. Thus, the ICC will not act if a case is being investigated or prosecuted by a national judicial system unless the national proceedings are found to be not genuine. SITUATION IN COLOMBIA REPORT, supra note 112.
116 SITUATION IN COLOMBIA REPORT, supra note 112.
117 Colombia, as a signatory to the ICC, may request the Prosecutor to carry out an investigation or refer a case and accept the jurisdiction of the ICC with respect to crimes committed in its territory by one of its nationals. Id.
118 “20 cases in 8 situations have been brought before the International Criminal Court…To date, four States Parties to the Rome Statute – Uganda, the Democratic Republic of the Congo, the Central African Republic and Mali – have referred situations occurring on their territories to the Court.” See International Criminal Court website available at http://www.icc-cpi.int/en_menus/icc/Pages/default.aspx.
commitment by the Colombian government to investigate and prosecute the crimes committed by these defendants.

**B. Extradition of Defendants to a Third Country Upon Completion of Sentences**

A second proposed alternative to the current practice is to extradite defendants to a third country where their safety could be guaranteed. However obtaining admission into another country may be problematic given the criminal history of these defendants.\(^{119}\) Furthermore, while this approach would eliminate the concern of creating an immigration pathway for criminals to the United States, the extradition of defendant’s to a third country would nonetheless result in defendants avoiding prosecution for the crimes committed in Colombia. Additionally, the United States would be acting selfishly by sending an undesirable individual to another nation that has no interest or stake in the matter. This could, in turn, negatively affect the United States standing within the international community.

**C. Implementation of a Comprehensive Reform**

A third proposed alternative to the current extradition process is to implement a comprehensive reform that is consistent with immigration policy and that promotes justice and criminal accountability. In February 2010, the International Human Rights Law Clinic (IHRLC) at UC Berkeley issued a report that set forth such policy.\(^{120}\) The proposed changes focused on (1) creating an effective and efficient procedure for judicial cooperation, (2) incentivizing extradited paramilitary leaders to disclose details about the crimes committed in Colombia and the identities of their accomplices, and (3) initiating investigations for the acts of torture committed by these defendants in Colombia. Despite IHRLC’s efforts to address the limitations

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\(^{119}\) El Narco Victor Patiño Fómeque Tramita su Envío a Otro País Confirma su Abogado, Robert Feitel, EL TIEMPO (June 27, 2010), http://www.eltiempo.com/archivo/documento/CMS-7776801. Drug trafficker Patiño Fómeque attempted to seek refuge in a third country in 2010 upon his release from prison in the United States but was unable to find a country that would accept him.

\(^{120}\) Truth Behind Bars, supra note 14.
of the current extradition practice, the proposed solutions remain difficult to implement.

1. Defendant’s Participation in the Peace Law Process

Under IHRLC’s model, the United States should incentivize defendants’ continued participation in the Justice and Peace Law process while facing drug charges in the United States.\(^{121}\) Although the effectiveness of the Justice and Peace Law has been questioned, to date, over 4,000 individuals have demobilized and confessed to crimes under this law.\(^{122}\) To encourage continued participation in the Justice and Peace Law process, IHRLC suggests that the United States add this as a condition to the terms of plea agreements, set up videoconferences between defendants and Colombian prosecutors and victims, and permit the direct questioning of defendants by Colombian prosecutors.\(^{123}\) By promoting extradited defendants’ continued participation in the Colombian amnesty program, IHRLC argues that the United States would improve accountability, assist Colombia in its judicial process and grant Colombian victims and prosecutors access to valuable information.

Unfortunately, in practice, despite policies promoting the continued participation of Colombian defendants in the Justice and Peace law program, the results have not been very promising. Testimony of paramilitaries that testify from the United States, are imperfect at best, given the logistical problems posed by international confessions.\(^{124}\) Likewise, few incentives continue to exist for defendants to offer testimony to U.S. or Colombian authorities regarding the crimes committed in Colombia. Generally, agreements with extradited defendants explicitly indicate that “cooperation in the justice and peace law [does] not lead to a reduction in their

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\(^{121}\) Id.
\(^{122}\) SITUATION IN COLOMBIA REPORT, supra note 112.
\(^{123}\) Truth Behind Bars, supra note 14.
\(^{124}\) Supra note 16.
sentences.”\textsuperscript{125} Similarly, assurance of protection for defendant’s family members in Colombia remains an issue of uncertainty, often discouraging defendants from providing detailed testimonies regarding the identities of the people who aided or ordered the commission of the crimes.\textsuperscript{126}

2. Victims’ Participation in Criminal Proceedings

A second recommendation by IHRLC is that United States should secure opportunities for Colombian victims to participate in the criminal proceedings against top drug lords and paramilitary commanders.\textsuperscript{127} Victims’ participation, IHRLC contends, could be promoted by making publicly available all court documents related to the criminal proceedings involving these defendants.\textsuperscript{128} The availability of these records, IHRLC argues, would promote judicial transparency and grant victims in Colombia access to information regarding the agreements made with these defendants. While IHRLC’s proposal is in line with U.S public policy, the unsealing of records remains problematic. As discussed above, despite public policy discouraging the sealing or court records, judges continue to seal case dockets pertaining to extradited Colombian defendants.

IHRLC further argues that victim’s participation may be promoted under the Crime Victims Rights Act of 2004 (CVRA).\textsuperscript{129} The CVRA guarantees victims of federal crimes the right to be heard in any public proceeding, to confer with prosecutors and to be notified of all public court proceedings.\textsuperscript{130} Under the CVRA, a crime victim is defined as “a person directly and proximately harmed as a result of the commission of a federal offense.”\textsuperscript{131} Though

\begin{footnotes}
\item Id.
\item Id.
\item Truth Behind Bars, supra note 14.
\item Id.
\item Id.
\item Id.
\end{footnotes}
Colombian defendants are extradited on drug trafficking charges, given the interconnection of drug trafficking and other criminal activity (i.e. murder), IHRLC argues that Colombian victims could qualify as “victims” under the CVRA if they can establish that they were directly harmed as a direct result of the drug trafficking activity. However, because the determination of whether a Colombian victim was directly and proximately harmed by drug activity is made on a case-by-case basis and generally requires a very strict showing, it will remain difficult for Colombian victims to be able to qualify as victims under the CVRA absent very strong evidence of direct harm due to drug trafficking.

3. Criminal Accountability to Avoid Impunity

Lastly, IHRLC recommends that the United States initiate investigations and proceedings to hold extradited paramilitary leaders and drug traffickers accountable for the human right violations committed in Colombia. To achieve this goal, IHRLC argues that extradited Colombian defendants could undergo criminal proceedings for offenses committed in Colombia by applying United States federal law. Though current federal law does not grant the United States jurisdiction to prosecute all crimes against humanity, the United States does have jurisdiction to prosecute federal crimes of terrorism and certain crimes of torture.

Under 18 U.S.C. § 2332b(g)(5)(A), a federal crime of terrorism is defined as “an offense

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132 In re Rendon Galvis, 564 F.3d 170, 174 (2d Cir. 2009).
133 In 2009 a mother sought recognition as a crime victim under the Crime Victims Rights Act for the killing of her son by drug lord and AUC leader Murillo-Barjano. After hearing the case, the court held that while it was undisputed that Murillo-Berjano was to some extent responsible for her son’s death, the mother failed to establish the relationship between the AUC’s drug trafficking and its terrorist operations with the abduction and murder of her son. Ultimately, because there was insufficient evidence of a nexus between Vargas’s death and Murillo-Bejarano’s participation in the charged conspiracy to import cocaine, the mother did not qualify as victim under the CVRA. Id.
134 Truth Behind Bars, supra note 14.
135 Id.
137 Prosecuting Colombian drug traffickers for torture remains unlikely given the requirement of governmental involvement in the torture. Under 18 U.S.C. § 2340A, the United States may prosecute Colombian nationals for crimes of torture committed in Colombia only if they fall within the definition of torture. To fall within this definition, the defendant must have acted “under the color of law” which implies a close nexus to the state so that the action of the wrongdoer is treated as having been made by the state.
that is calculated to influence or affect the conduct of government by intimidation or coercion, or
to retaliate against government conduct." The word “government” as used in 18 U.S.C. §
2332b(g)(5)(A) is not limited to the government of the United States and thus includes foreign
governments. Accordingly, defendants who engage in federal crimes of terrorism against a
foreign government can be prosecuted in the United States. Given that many extradited
Colombians are active members and leaders of groups in Colombia that have been identified as
Foreign Terrorist Organizations by the United States, arguably prosecution of these defendants
for acts of terrorism may be possible under this federal law.

However, notwithstanding jurisdiction to prosecute federal crimes of terrorism, enforcing
a policy that focuses on initiating investigations and proceedings against defendants accused of
human rights abuses remains problematic. At least in the near future, it is unlikely that the
United States will use its resources in prosecuting Colombian defendants for non-drug related
crimes committed abroad. Of the 14 paramilitary leaders extradited in 2008, none have been
prosecuted for the human rights abuses committed in Colombia under either federal law. To
the contrary, the U.S government has shifted all attention to the drug trafficking charges and has
refused to open any cases regarding the human rights violations committed in Colombia. Defense attorneys, likewise, see little benefit from encouraging clients to testify to other crimes committed in Colombia. As a result, exclusive focus is given to clarifying defendants’ role with respect to the drug trafficking offenses and not with respect to the human rights violations or crimes against humanity committed in Colombia.

138 Supra note 136.
140 Id.
142 Id. 
143 Supra note 16.
VI. CONCLUSION

The inadequacy of the alternatives proposed by scholars stress the need for further discourse on the extradition practice between Colombia and the United States. As it stands, the reliance on extradition as a law enforcement tool gives priority to U.S. drug policy goals while serving as a shield to human rights violators. Bilateral concessions must, thus, be made to reach an agreement that is in accordance with international norms and the judicial principles of both countries.

Fortunately, discussions regarding the current extradition process have begun to take place. In March 2013, Colombian Senator Juan Manuel Galan called for a “profound and serious debate” on the extradition process between Colombia and the United States.144 Galan referred to the practice of shortening sentences and granting permanent residence in the United States to extradited drug traffickers as “ridiculous and insulting” to the victims of drug traffickers in Colombia.145 Senator Galan demanded the Colombian government explain, “how they see the evolution of the extradition of Colombians to the United States.”146

In moving forward with this discussion and in the advent of future extradition agreements with other countries,147 the lessons learned from the U.S.-Colombian extradition treaty must not be forgotten. Most importantly, the investigation and prosecution for human rights violations must remain a priority, whether achieved by domestic law or international cooperation efforts. It is evident by the ICC’s recent investigations that Colombia has yet to become an efficient

145 Id.
146 Id.
147 In June 2012 the Colombian government announced its intent to sign extradition agreements with Russia, Panama, Argentina, Costa Rica and France. Colombia está negociando seis nuevos tratados de extradición, EL TIEMPO (June 14, 2012), http://www.eltiempo.com/politica/ARTICULO-WEB-NEW_NOTA_INTERIOR-11946243.html.
judicial system capable of withstanding corruption and effectively combating drug trafficking and its associated crimes. Yet, notwithstanding Colombia’s fragile system, the United States’ international drug policy must be modified so that enforcement of such policy can be successful without the infringement on human rights.

As it stands, the extradition process results in the admission of criminal defendants to the United States and impunity for Colombian criminals. By failing to actively condemn the human rights violations committed by extradited drug traffickers, the United States is indirectly suggesting that a sacrifice of human rights may necessary for the enforcement of drug control policy. To avoid such conclusion, the United States must cooperate with Colombian investigators to improve accountability and combat impunity for extradited defendants.

Given the many competing interests involved in the extradition process of Colombian defendants to the United States, it is difficult to determine a policy that will best meet all of these objectives. What is just inevitably will vary among justice systems, nations and individual people. Yet, it is universally accepted that impunity for human rights violations must not be condoned. Accordingly, the use of extradition as a tool for fighting the war on drugs must be carefully evaluated. Inevitably the war on drugs will continue and counter efforts must persist. The question remains, however, as to how this war should be fought and at what expense.