CRIMINAL LAW AND THE PROTECTION OF HUMAN RIGHTS IN COLOMBIA

J. Vervaele[*]

I. Introduction - political outline

From 2 April to 10 September 1988 Amnesty International is organizing an international action against the serious violation of human rights in Colombia.[1] Nevertheless, until recently Colombia was conspicuous for absence in the international press. The only exception to this was the covering of the cocaine trade and the mafia. The latter indeed has largely left its mark on the international picture of the country.

Like the rest of Latin America, Colombia has only become independent after an armed war of liberation (under the leadership of the legendary Simon Bolivar) against the colonizing - in this case the Spanish - domination. In 1821 Bolivar become president of Greater Colombia, which then comprised the present Colombia, Panamá, Venezuela, and Ecuador. The latter two tore themselves away already in 1830 after an internal military conflict.

The strong groups in the Colombian society, in the first place the large landowners, organized themselves in two political sections, the liberals and the conservatives. In the period 1850 - 1880 the governing liberal party was a zealous advocate of a liberal and internationally orientated economy. When this failed, from 1880 to 1930 the conservative party got the upper hand. In 1886 the country also received a new conservative constitution, in which the

---

* Netherlands Institute for Social en Economic law Research (NISER), Utrecht

1 Cf. also Amnesty International, Colombia, Briefing, AMR 23/14/88/S, 1988, London.

Roman Catholic Church[2] became the protector of the social system. The two parties developed Colombia into a rule-of-law State with a stable, formal-civil democracy, in which the army, with a smaller number of soldiers and very few means, did not play any important role at all.

Colombia was therefore one of the few Latin American States in which the political regime has succeeded in maintaining civil democracy almost permanently. Despite this democratic tradition and the absence of the political role of the military - in this respect the Colombian history is a typical in Latin America- Colombia is a country where the use of violence as a political instrument is a permanent factor. This paradoxical statement has a good deal to do with the weak position of the Colombian state authority. In contrast with other Latin America countries the State has not succeeded in integrating the power of the local feudal lords and of the local economic groups (*e.g.* the gremium of the coffee planters) into a centralistic economical state system. In consequence until the present authority of the State does not exist in more than one half of the inaccessible interior, and where it does exist, it is highly dependent on the local power concentrations, which advocate an extreme economic liberalism.

The use of violence as a political instrument marks Colombian history in a dramatical way: since its independence the country has witnessed several civil wars. The civil war between 1899 and 1902, the war of a Thousand Days, ruined not only the national economy, but also resulted in the first military intervention of the U.S.A., through which Colombia lost Panamá as territory.[3] After the political dominance of the conservatives until in 1930, partly also owing to the international situation, the country got into a politi-

---

2 The Roman Catholic Church developed into a very powerful institution within the Colombian society. It not only has a considerable economic power via its landed property, but also has a position of monopoly in education. Until the present the Roman Catholic Church has an inestimable political power within the Colombian society. In particular in the past the liberal party was anti-clerical. In Latin America the Colombian Roman Catholic Church is one of the most conservative churches.

3 Already at that time the Panamá canal and the control of it was the main issue of the conflict.

co-economic crisis situation. The liberal party came into office, but was confronted with heavy economic and social tensions. Between 1945 and 1947 there were no fewer than four governments. In 1946 the president was forced to resign by his own party. Meanwhile the progressive liberal and populist Gaitán had greatly gained in influence. In 1947 there came a crisis government of national unity, which in actual fact resulted in a politization of the State institutions (particular judiciary and police) with a view to a violent confrontation between the two classic parties. The conservative party in particular organized in the interior para-military police units (mercenary police).[4] After the fall of this government a political vacuum arose, in which Gaitán, who claimed the presidency, was murdered by mercenaries. This was followed in the capital Bogotá by a civil rebellion ('El Bogotazo'), which was suppressed by the army. With the murder of Gaitán and the rebellion the fences were down, and the civil war ('La Violencia') between the two classic parties, which cost the lives of about 250,000 people from 1948 to 1957, definitively broke out.[5]

It is striking that in spite of 'El Bogotazo' and the disuniting civil war the civilian conservative government held its own, and that it was only in 1953, *i.e.* after five years of civil war with a total of 150,000 dead, that the army committed a coup d'état with the support of the bourgeoisie. Not even that coup could prevent the civil war from continuing till 1957. Before the coup the military were already given a number of ministerial portfolios in the civilian government, and during the civil war a great many military men became burgomasters and, by order of the civilian government, exercised mandates of maintenance of public order. When the conservative government had taken power, it also interfered for the first time with the legal systems of the rule-of-law State. The statute of the Supreme Court and of the Council of State was altered and politicized. The jury administration of justice in criminal law was cancelled and the competences of the military

4 Here, too, the army does not yet play any role. As an unimportant organization it can also withdraw from this process.

5 In 1947, i.e. under the government of national unity, as many as 14,000 people were killed by political violence.

courts were substantially enlarged. In contrast with the police[6], the military were not found to be guilty of acts of violence, in consequence of which they could also count on more than sufficient prestige in the political world, including the progressive liberals.

In 1957 a National Front between the two camps was formed. This agreement was based on the bi-party system. Until 1978 each party, irrespective of the results of the elections, received one half of the seats in the parliament, and the presidency by turns. The agreement also contained for the traditional parties in power the monopoly of the higher State functions,[7] and the consequently the monopoly of the State organs and of the exercise of the political authority. Among the agricultural population, the victim of the civil war, armed groups for self-defence had already been formed. That resistance movement at the base developed in the sixties into various guerrilla movements (FARC, ELN, EPL) which are active to this day. It was only in 1974 that a town guerrilla was added (M-19).

Precisely during the formal democracy of the National Front the militarization of Colombian society developed. To begin with, the country was governed almost permanently under the state of emergency, which led to a shifting of powers from the civilian to the military authority. In addition to the increasing powers for the administration of military justice, the military have received the leadership of a great many institutions which are foreign to the army, such as the police, State security, the penitentiaries, the customs, *etc.*

---

6 In Colombia two significant words are used with regard to the police. The word 'chulavitas' stands for police units which are recruited by the government in order to sow murder and terror; this word goes back to the name of an ultra-conservative village which was notorious during the civil war as a recruiting basis. The word 'pajaros' (birds) stands for people committing murders against payment and who are usually led or used by the police.

7 For a great many functions, e.g. the office of a judge, the membership of one of the two-parties is a legal requirement. This bi-partite clientelism has even been included in the constitution.

In 1982 President Betancur (conservative) aimed at a cease-fire with the various guerrilla movements with a view to a 'national dialogue'. In 1984 the guerrilla movements, but for one, signed the agreement. The national dialogue which was to lead to a demilitarization of the country and the introduction of urgent social reforms started in 1985. At the same time amnesty measures were proclaimed for those guerrilleros who were prepared to return to civilian life. In this way people from the FARC guerrilla and from basic movements integrate into a third political party with a communist ideology, the Unión Patriótica (U.P.). The military received the peace process without any entousiasm. They advocate military extirpation of the enemy, and any form of political negotiation in their view gives the enemy both publicity and a gain of time. In reality it appears that the civilian Betancur government cannot fulfil their options. The social reforms (*e.g.* the agricultural reforms) fail to be realized, and the social peace is disturbed by the constantly increasing dirty war. The number of political murders and disappearances, which have been used as political means of violence only since 1981, is considerably growing. A great many sources show that the military, police officers, and para-military death squads are co-responsible for them. Already in 1983 the Attorney-General had made an investigation about the notorious death squad MAS (Death to Kidnappers), whose existence had been denied by the military. After his investigation he published a list of members containing 167 names, 57 of which of military men on active service. In the Betancur period the activity of the death squads increased considerably, again and again people from the army and the police were found to be involved. In particular the new political party, U.P., became the victim of political violence. Leaders of the party and members of parliament were murdered. In connection with the first democratic elections for the municipalities in March 1988 more than 500 candidates lost their lives.

In this political climate the guerrilla felt itself betrayed. In May 1985 the town guerrilla M-19 left the negotiation table and in November 1985 stormed the Palace of Justice in Bogotá, which ended not only in a dreadful carnage, but also gave evidence of the

powerlessness of the civilian government against the military power.[8]

Since in August 1986 the new president Barco (liberal) and his government team took the political helm, the political crisis and the violation of human rights were aggravated considerably. On the one hand the guerrilla, united in a 'Coordinadora Guerrilla', increased its military actions, which led to an increase of confrontations with the army. Owing to the failure of the peace policy of Betancur the confidence in a democratization via negotiations has had to give way again to armed action. It may therefore be assumed that the number of active members of the guerrilla movements is increasing. This process is promoted even further by the alarming growth of the activity of the death squads. In 1987 in Colombia it was estimated that 2,000 people were murdered for political reasons.[9] The murder of the chairman of the U.P. (Jaime Pardo Leal) and of the chairman of the Comité de Defensa de los Derechos Humanos (Dr. Hector Abad Gómez) were the top of the iceberg. In 1988 the activity of the death squads also reached the international press when they committed several massacres[10] in the regio Arabá, where there are serious labour conflicts between the great landowners of the banana plantations and the mainly black workers. The growing judicial pressure on the powerful cocaine maffia also caused a state of political strain. The Attorney-General, who had dared to make an inquiry into the involvement of the 'cuartel de Medellin' (the main seat of the cocaine maffia) and of

---

8 For a comprehensive analysis of this dramatic political event, see **Vervaele**, J., De tragedie in het Paleis van Justitie te Bogotá. Reflekties over de onderzoeksrapporten en de politieke en strafrechtelijke verantwoordelijkheid, Recht en Kritiek, 1987, 143-158 (also published in Panopticon, 1987, 350-365).

9 In 1987 the Colombian parliament officially recognized for the first time the existence of the death squads and published a list of names. In the daily papers, too, a good deal of information appeared about those groups, and black lists were even printed.

10 In the first week of March a death squad caused slaughters at a village festivity, in which thirty people were killed.

the Minister of Justice in the illegal release of super-cocaine trader Ochoa[11] paid for it with his life.

President Barco was reproached that he no longer controlled the situation. His government team has already been renewed several times. He even had to interrupt his latest foreign journey so as to return hastily to Bogotá because of the kidnapping of top-politician and ex-president candidate Gomez Hurtado by the guerrilla movement M-19. The latter demands a new national dialogue. The political world, which is going through the worst crisis after the civil war, is toying with the idea of forming a new 'national front'. It is highly doubtful whether this can avoid a new civil war.

II. Implementation of international human-rights norms

The role of Colombia has always been relatively important in international politics in general (*cf.* its share in Contadora) and with regard to the international protection of human rights in particular. It is therefore logical that it is a party to all important human-rights treaties, such as the International Covenant on Civil and Political Rights and its Optional Protocol, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the American Convention on Human Rights, *etc.*

The implementation of these international human-rights norms in the national legal order is of very current interest in most European countries and raises a great many fascinating questions about the legal character of the international treaties and their provisions and about the way in which these international norms are effectuated in the various national legal orders. This debate was un-

11 The Ochoa family is one of the pillars of the cocaine maffia. One of its members was detained in Spain. Both the USA and Colombia applied for his extradition. After a legal struggle Colombia was given priority. On two occasions Ochoa succeeded in obtaining the cancellation of the arrest via the Colombian court. The Colombian criminal justice was compromised by this as never before.

doubtedly stimulated in Europe by the way in which norms from supranational or international law are effectuated via non-national, binding judicial pronouncements. In this context I am thinking more particularly of the Court of Justice of the EEC (Luxembourg) and of the Commission and the Court of Human Rights (Strasbourg). Still, the implementation debate is not confined to norms from European law. Owing to the supremacy of the international norm over the national one, both in countries with a monistic and those with a dualistic system, the national judiciaries take a position with regard to the legal character of the norm, its direct effect, *etc.* Especially international norms concerning civil and political rights have often been at issue during the last ten years in national courts.

The implementation of international human-rights norms in Latin America takes place in quite a different manner. For this several reasons may be given:

1) Only a number of countries, including Colombia, are members of the American Convention on Human Rights (1969), which was established within the framework of the OAS; the Inter-American Commission and Court of Human Rights which were created to guarantee the observance of this Convention were not organized as independent judicial organs pronouncing legally binding judgments.[12] The reporting system within the framework of the observance International Covenant on Civil and Political Rights is characterized primarily by a formal investigation with respect to the compliance

12 Cf. **Medina Quiroga**, C., The Battle of Human Rights, Gross, Systematic Violations and the Inter-American System, Dordrecht, 1988. Up to now the Inter-American Commission on Human Rights published only one report about Colombia, which is based on an investigation in 1980, i.e. just before the gross human-rights violations started: Organization of American States, Inter-American Commission on Human Rights, Report on the situation of Human Rights in the Republic of Colombia, Washington, D.C., 1981. In the meantime Colombia evolved into the most critical country of South-America as regards the observance of human rights, without a single report yet having appeared.

of national legislation with international legal norms, and thus not always take account of the real human rights situation.[13]

2) In Latin America there is a wide gap between legislation as the giving of rules and social reality, *i.e.* social reality is regulated there much less by the existing legal norms; on the other hand there is a pronounced tendency to judiciarization of the political norms (in which context the latter are not synonymous with social reality);

3) The legal regulation is not adapted there to the nature and the scope of the human-rights violations and the frequent involvement of government officials and/or institutions in those violations; the legal regulation generally interprets the existing balance of power, which greatly impedes the tackling of those violations via legal instruments;

4) The observance of the international basic rights is experienced there as a point of foreign policy, and much less so as a point of internal social welfare; consequently, much more energy is devoted there to the politico-diplomatic presentation of the observance of the international basic rights than to the observance itself.[14]

When one therefore wants to get an insight into the implementation of international basic rights in the national legal order of Latin American countries and the role which criminal law plays in that connection, certainly one cannot confine oneself to a consultation

---

13 In July 1988 Colombia was on the agenda of the Human Rights Committee. See the survey of Ineke Boerefijn on p. 58 of this SIM Newsletter. During the previous meeting the delegate of Colombia had not even appeared.

14 This does not alter the fact that the international pressure on Colombia concerning the observance of human rights continually increases and that the Ministry of Foreign Affairs has decided to institutionalize the cooperation between the Public Prosecutor and Foreign Affairs to a fixed structure, so as to make it possible to formulate in that way an adequate answer to the requests of international organizations. The 'Subsecretaría de Organismos y Conferencias Internacionales' coordinates the meetings. Since 1986 the Public Prosecutor has internally also an attorney-delegate for human rights and a special human-rights commission, in which the Colombian human-rights movement is represented.

of the constitution and the various codes of law. That regulation must be reviewed against legal practice. Here I am not only referring to judgments of civilian and military courts of law, but also to the actual effect of criminal justice in all its sections (police, Public Prosecutor, judiciary, execution of the punishment).[15]

III. Martial law: expanding military criminal justice

Colombia not only has a constitution dealing with the rule-of-law idea, but also has the most modern codes of criminal law and criminal procedure (1980 and 1987 respectively) of the continent, which contain all the fundamental legal principles of criminal law, in which they follow the German and American teachings[16]. Those foundations of the rule-of-law State, however, have to be viewed in the light of the exercise of political authority. During the last thirty years Colombia was ruled almost permanently with emergency decrees on the basis of the state of siege. Consequently the influence of the executive in general and of the military in particular on the exercise of political authority and on criminal justice has become considerable.

Article 121 of the Constitution provides for the declaration of a state of siege in all or part of the Republic. By such a declaration the Government has, in addition to its normal legal powers, the powers granted by the Constitution in time of war or disturbance of public order. The President, who governs by means of decrees,

---

15 In Latin America itself, too, the relationship criminal law-human rights is almost virgin territory. What has been published about it mainly concerns the formal juridization of the authoritarianism or the constitutional transformation of the military dictatorships in a new legal order (Chile, Argentina); cf. **García Mendez**, E., Recht und Autoritarismus in Lateinamerika. Argentinien, Uruguay and Chile, 1979-1980, Frankfurt, 1985; **Politoff**, S., Dogmática y vida de los derechos humanos en los regímines autoritarios de América Latina, Anales de la Catedra Francisco Suarez, no. 26/27-1986/1987. An exception to this is the brilliant publication under the direction of **Zaffaroni**, E., Sistemas penales y derechos humanos en América Latina, Buenos Aires, 1986, which was made by order of the Inter-American Institute of Human Rights.

16 Historically, Colombian criminal law goes back to the French code Napoléon, but during the last decennia the American and especially the German influence, on (criminal) law has been considerable.

can therefore suspend certain fundamental rights. The application c Art. 121 is subject to the political control of the parliamen (Congress) and to the judicial control of the Supreme Court. I this, however, the 'Congress' is a docile instrument of the Presi dent. In fact, in Colombia there was never any control with regar to the cancellation of the state of siege when the motive on whic it was based disappeared; nor has any control been exercised o the causal relationship between the proclamation of the state o siege and the legal measures that are taken on that basis t restore legal normality. Nevertheless, these are substantial condi tions of the constitutional formulation of Art. 121. The Supreme Court assesses the constitutionality of the emergency decrees. Ir earlier reports about the observance of the International Covenan on Civil and Political Rights before the Human Rights Committee Colombia always defended its legislation and its use of the state o siege. In the last report the Colombian government for the first time utters self-criticism: "In recent decades the country's legal order has been subject to a continuous state of emergency (...) This has caused the prevailing institution of the state of siege to lose credibility and has made us appear to other nations as a police State under a constitutional dictatorship, to the obvious discredit of Colombia and its institutions".[17] For those reasons the government contemplates a revision of the constitution, so that, in addition to the state of siege, a state of alarm and a state of internal strife would also be provided for. It is highly doubtful whether this label trick alters the basis of the matter very much, for the President keeps the right 'to enact measures suspending the exercise of individual freedoms and civil rights'.[18]

Government by means of emergency decrees has had for criminal justice the consequence that many powers have been withdrawn from civil in favour of military judiciary, and that in this transfer the constitutional elements of the penalization and the aspects of criminal procedure have also been tinkered with. The doctrinal debate about the constitutional character of this transfer of power is a legal reflection of the strained relationship between civil and military order within the structure of the Colombian state. In this

17 CCPR/C/37/Add.6/Rev.1, 15. (November 1987)

18 CCPR/C/37/Add.6, Rev.1, 16.

debate norms from the Constitution and from the military code of criminal law and criminal procedure are paraded.[19]

For a proper understanding of the competence of the military judiciary we will make a threefold distinction: 1) the military crimes which by their nature can only be committed by the military (military revolt, desertion, *etc.*); 2) the common crimes that are committed by the military, and 3) the common crimes that are committed by civilians. We will now consider how the Colombian legislator has distributed the competence in this context. The Constitution makes a difference between time of peace or state of siege/time of war. In time of peace the military criminal justice is competent only for crimes committed by the military on active service and in relation to that service (article 170 of the Constitution), *i.e.* for point 1 and point 2, on condition that there is a relationship with the service. In the case of a state of emergency/time of war the above-mentioned article 121 applies, the question being to what extent the President can shift powers from civilian to military criminal justice. In the military code of criminal law and criminal procedure the power is regulated in various articles. Article 307 provides for the competence of the military judiciary in general, *i.e.* in time of peace. The elements of this article which assign competence to the military criminal court over civilians were declared unconstitutional in an important judgment (4 October 1971) of the Supreme Court. Articles 308 and 589 of the same code go into the competence in cases of what is called 'time of war, armed conflict, or disturbance of public order or internal revolt'. The additional paragraph of article 589 in those circumstances gave the government permission to sentence crimes of common criminal law according to the military criminal procedure. This additional paragraph was also declared unconstitutional by the Supreme Court (3 April 1973). In the same circumstances article 308, para 2 confers competence on the military criminal justice to sentence the crimes from common criminal law committed by the

19 This military code of criminal law and criminal procedure has been created via an exceptive decree just after the civil war in 1958, and was confirmed in 1961 by law.

military on active service and by civilians in the service of the armed forces. This controversial article is still in force.[20]

During all those years the government continued, under the state of siege, to shift powers to the military criminal justice. In the fifties and sixties the Supreme Court connived at a good deal, but since the seventies there was a growing opposition to the systematic use of this technique. In 1984, during the voting about the constitutionality of such a decree there was a tie in the Supreme Court. The Attorney-General had also brought a negative opinion. However, the elected chairman, who determines the final decision in this case, declared the decree constitutional, but the crisis was open. On 5 March 1987 the Supreme Court declared the decree 3671/1986 unconstitutional. In consequence of this decree the military criminal justice had received the competence to sentence all drug offence, and this on the basis of specific military summary proceedings. The similar decree 3664/1986, which had the same content with regard to all crimes in which weapons are involved,[21] was rejected in a judgment of 12 March. Both decrees were deemed not to be directed at restoring the normality, and therefore do not show any causal connection with the situation at the base of the proclamation of the state of emergency. Moreover, according to the Court there is not a single constitutional norm which permits, within the execution of article 121 (state of siege), to shift the civilian jurisdiction to the military criminal justice. The Court qualifies this as a substantial change of the equilibrium within the

---

20 The police system is legally considered as an armed institution of a civilian character. In practice it is directed by and is administratively dependent on the army. Legally, the police system indeed has a forum of its own. All the crimes committed by members of the police in the exercise of their function fall under the competence of the military criminal justice. All their other crimes are sentenced by the ordinary criminal justice, and this both in time of peace and in a state of emergency/time of war.

21 In Colombia the army is competent for permission of bearing weapons and possessing weapons. In practice the permission policy is characterized by corruption and pursuit of gain. Many military men are also active in the illegal sale of weapons. De facto the possession and bearing of weapons is therefore very widespread in Colombia. In consequence of this decree, therefore, all civilians were 'liable' in one way or another for the military criminal justice, and political opponents and guerrilla are automatically removed from the civilian criminal justice.

structure of three powers and a radical change within the judicial practice. These historical principle judgments are not only important because of the cancellation of the competence of the military criminal justice, but also because of the nature of the motivation of these decisions. In fact, the Supreme Court explicitly takes a position about the legal quality of the military criminal justice. In the first place the Court holds that the military criminal justice forms part of the executive, and cannot therefore be considered as independent. In fact, all its members can be discharged by the executive (the president and the minister of justice). Furthermore the military criminal justice is characterized by summary proceedings, a poorly elaborated criminal procedure (especially as regards the right of evidence), and a defective exercise of the right to a defence. Authority and hierarchy are first and foremost.

With these historical judgments not all the problems have been solved. Thus it remains highly controversial in Colombia whether the specific forum of the military criminal justice also applies to the pre-trial phase. Legally, the Public Prosecutor is competent to investigate the matter and to prosecute the offender, and the investigating judge is competent to carry out a judicial examination of all crimes. According to the current view (*cf.* Supreme Court jurisdiction) the judgment then must be pronounced by the respective judicial fora. In practice, however, the military criminal justice has begun to get hold of the preliminary inquiry as soon as there is a suspicion of involvement of a member of the army or of the police. In many cases the commander of a brigade is an investigating judge as well as judge pronouncing the judgment. The 'auditores de guerra' have developed their function as legal assessors of the latter judge into that of a military public prosecutor. Owing to this evolution there are constantly conflicts between the civilian and the military criminal justice. I will confine myself here to two examples.

The office of Public Prosecution (Ministerio Público),[22] who, as the responsible organ for the investigation and prosecution of crimes, finds his action against heavy human-rights violations (with supposed implications of military and/or police officers) break down on the prerogatives of the military justice, was the forum of internal conflicts. In fact, the Public Prosecutor (Procurador General) has a number of delegates. One of the delegates is responsible for the army (in addition to delegates for the police, the administration, human rights, and for the indians *etc.*). Until 1986 he was a high-ranking military man, who moreover had established his service at the ministry of defence and not with the Public Prosecutor. When high-ranking military men were compromised in connection with political murders committed by death squads,[23] the delegate refused to proceed against his military colleagues. After tensions lasting for many days, the man resigned and was replaced by a civilian. Up to the present, however, no military men have been prosecuted.[24]

The second example concerns the creation in 1987 of a special court with exclusive competence for the investigation of crimes against life and personal integrity, affecting social life.[25] After the publication of the decree the reaction of the military lobby was found to be so strong that the government published a supplementary decree, in which it was stated literally that the special court

---

22 In Colombia the office of Public Prosecution is responsible for 1) the functions connected with the exercise of the criminal procedure; 2) disciplinary supervision of the courts; and 3) disciplinary supervision of the civil servants. The Public Prosecutor is nominated for a period of four years by the Chamber on the recommendation of the president. The new code of criminal procedure defines in article 122 the functions of the Public Prosecutor. This article states, inter alia, that the Public Prosecutor must review the observance of human rights in the penitentiary and psychiatric institutions, by the police, and by the courts.

23 The evidence was collected by Jaime Pardo Real, senator and chairman of the third political fraction (Unión Patriótica) and also confirmed by the president of the Colombian investigating judges. Jaime Pardo Real was murdered by a death squad. The president of the investigating judges was obliged to secrecy, and his plans to develop the judicial police professionally, independently from the army, got no support.

24 When members of the armed forces are compromised, the solidarity among the military men is always found to weigh more heavily than considerations of justice.

25 Decretos 750 and 790 of April 1987.

does not detract from the competence of the specific fora, in other words: that the military criminal justice kept its privileges.[26]

IV. Militarization of the civilian criminal justice

The Colombian criminal proceedings have three distinct phases: the preliminary inquiry ('indagación preliminar'), the assessment of this preliminary inquiry ('sumario'), which may lead to dismissal or settlement, reopening of the investigation or summons, and the accusatorial procedure before the sentencing judge.

It is in the first instance the investigating judges who are responsible for the preliminary inquiry. The investigating judge may delegate certain inquiries to the agents of the judicial police. Article 289 of the old code of criminal procedure, however, provided for a list of 14 points of inquiries which the agents of the judicial police could proceed to make on their own initiative in case of flagrante delicto or semi-flagrante delicto.[27] Even if the investigating judge does not act immediately, the agents of the judicial police themselves may take the initiative. In practice therefore the greater majority of the inquiries (such as the hearing of the accused and witnesses, the examination and putting-away of the dead body, and the arrest warrant) was performed by the agents of the judicial police. For that matter, many arrests warrants are based on the current practice of blank arrest warrants issued by the court. The validity of the evidence collected by them is identical with that of the investigating judge. The investigating judges, who are already working under great pressure on the supplementary examination within the framework of the sumario, thus had only very little control and insight into the judicial preliminary inquiry performed. The new code of criminal procedure tries to realize a 'judiciarization' of the judicial preliminary inquiry. Thus the hearing of the accused becomes an exclusive competence of the investigating judge, who executes this in the

---

26 The special court (Tribunal Especial de Instrucción) was declared unconstitutional by the Supreme Court.

27 In Colombia the presumed construction of people being caught in flagrante delicto as a legal fiction is incorporated into the legislation for the sake of the consequences in the criminal procedure.

presence of a counsel, and must be informed immediately or during the first working hours of the inquiries performed by the agents of the judicial police. It is highly doubtful whether these measures will be adequate to remove the numerous complaints about the way in which the preliminary inquiry was performed by the agents of the judicial police (suppression of evidence, enforced hearings of accused persons and witnesses, *etc.*). In fact, the problem about the judicial preliminary inquiry which is so essential for the functioning of criminal justice is concerned not only with powers laid down in the code of criminal procedure, but also with the actual composition of the body of agents of the judicial police and the possibilities to control their activity.

In Colombia there exist no fewer than six police forces: the national police (defence), the administrative security police (president), the administrative police (defence), the traffic police (local authorities), the military police (defence), and the penitentiary police (justice). The national as well as the administrative security police, both under the leadership of a military officer, have services. The judicial police dates already from 1964, and was subject to the leadership of the Public Prosecutor. That judicial police was composed of specialized police officers of the national police and of the administrative security police. The last attorneys-general succeeded in using the relatively small force efficiently in the fight against gross human-rights violations. It was a problem indeed that members of the national police and the administrative security police who did not form part of the judicial police could yet perform judicial inquiries in case of people caught in flagrante delicto or semi-flagrante delicto.[28] In consequence of the broad use made of these notions the leadership and the control of the majority of the judicial inquiries therefore were withdrawn from the Public Prosecutor, and the persons performing the judicial inquiries were administratively dependent on the executive, in particular on the army. The new code of criminal law (procedure) has transferred the service of the judicial police to the National

28 Even members of the intelligence service of the armed forces can perform judicial inquiries.

Board of Investigating Judges.[29] The intention was to transform the judicial police into an autonomous force, in the service of the investigating judges, and thus administratively and legally independent of the police services and the intelligence services.

The National Board of Investigating Judges according to article 329 of the new code of criminal procedure is responsible for the composition of the new service. It does have to take into account articles 13 and 14 of the decree on the judicial police.[30] In fact, in this decree it is laid down that those who formed part of the service of the judicial police of the Public Prosecutor can be incorporated into the new service, and that those who now exercise functions of the judicial police can be associated, according to their ability and the needs of the service, with the new service of the judicial police. These articles of course keep open the door to the services under military supervision which were involved in the performance of the judicial inquiries. During the first steps which the National Board of Investigating Judges took in order to develop its judicial police autonomously it came into conflict with the military authorities. In practice therefore the dependent exercise of the judicial police by members of militarized police forces and by intelligence services further continues.

The militarization of the civilian criminal justice is not confined to the judicial inquiries. At the level of the sentencing judge and the criminal procedure, too, the influence is perceptible in the form of summary proceedings or special law (which formerly only existed in military criminal law). Already in 1984 'special judges' that were competent for crimes such as kidnapping and terrorism were created. These special judges are both investigating judges (with a national competence) and sentencing judges. The criminal procedure is ad hoc: a short special procedure with limitation of the rights to defence. When the decrees which subjected the crimes with regard

---

29 Although this transfer is legally fairly logical - indeed, in the last instance the investigating judges are responsible for the judicial inquiry - the protests were numerous. The question is whether this transfer is not an indirect sanctioning of the activities which the last public prosecutors developed concerning protection of human rights.

30 Decreto 54/1987.

to drug and weapons to the competence of the military criminal justice were declared unconstitutional, the government entrusted these two subjects by decrees[31] to these special judges. For these subjects the suspended sentence or the release on parole were excluded. The last report of Colombia before the Human Rights Committee therefore states explicitly:

> "As rulings of the Supreme Court of Justice have affirmed, these decrees may not grant military criminal justice competence to try civilians. They may, however, establish and organize a special, temporary two-tiered jurisdiction, with prompt procedures, intended exclusively to investigate and try the offences specified in the decrees, whether they result in or are committed on the occasion of the breach of the peace. This power is necessary for the prompt re-establishment of public order".[32]

Another highly controversial novelty in the criminal procedure which has gained force of law upon the introduction of the new code of criminal procedure is the abbreviated procedure (procedimiento abreviado). When the investigating judge considers that a crime or a flagrant offence is involved, or that a confession is present, the whole criminal procedure may be completed in less than twenty days.

The Colombian government has also introduced by an emergency decree[33] a bounty which goes very far indeed. The penalty of the penitent person who cooperates with the court may be reduced to one half.[34] Persons who provide useful information for tracing criminals may also be given a pecuniary recompense, and if necessary, may get a new identity and financial means for settling, if desired, abroad.[35]

---

31 Decretos 468/1987 and 565/1987 respectively.

32 CCPR/C/37/Add. 6/Rev. 1, 17.

33 Decreto 3673/1986.

34 So far this concept may be compared with provisions in some European anti-terrorism legislations; **cf. il pentito** in Italy.

35 Oppositional circles qualified this decree as an indirect financing of the death squads.

In 1987, by decree,[36] the public order court (Juzgados de Orden Público) was established. In 1988 the latter also received an appeal department.[37] This special court is competent for judging torture, illegal detention, injuries, kidnapping of certain persons such as judges, politicians, professors, journalists *etc.* It will resume responsibility both for judicial inquiries and for trial, and will use for this the criminal procedure of the 'special judges' (1984). This public order court also becomes responsible for terrorist crimes created by a special anti-terrorism decree in 1988.[38] In this decree the terrorist crimes which are liable to heavy punishment are defined in very vague terms. Here there is question not only of 'Vorfeldkriminalisierung' (incrimination of preparatory acts) and apology, but even of the penalization of those who omit to inform the authorities of terrorist activities of which they are aware. The membership in itself of a terrorist organization is already punished with ten to fifteen years' imprisonment. Further, in this decree the terrorist activities connected with the personal integrity (kidnapping) and the economic patrimony are defined. Thus, voluntary blows and injuries for terrorist purposes become a separate crime. It is also striking in this decree that it goes specifically into the exercise of the judicial police. In principle specialized teams are established within the service of the judicial police. Still, in cases of emergency and when the circumstances require it, members of the armed forces, the national police, and the administrative security police who do not form part of that service may perform a number of acts not provided for in the code of criminal procedure, such as detention without an arrest warrant, searchings *etc.* In addition the time within which they have to inform the judge of their activities may be extended to 10 days. In practice therefore the intelligence services under the leadership of the armed forces are ten days at liberty to adjust at will the judicial inquiry in this very broadly defined arsenal of crimes.

---

36 Decreto 1631/1987.

37 Decreto 181/1988.

38 Decreto 180/1988. An additional decree 182/1988 provides for a special and more stringent habeas corpus procedure if a person suspected of a terrorist crime applies for release.

V. Conclusion

In this article it has been indicated that because of transformation of the present internal balance of power into judicial norms, the suppression of violations of human rights by the way of penal sanctions is very difficult and thus the implementation of international human rights norms very problematic. Therefore if one want to verify this implementation it is far from sufficient to take the Constitution into consideration. Rather it should be the examination of the practice of the national rules.

The tension between the civilian and the military state is so openly present in Colombia that the former Attorney-General Jiménez Gómez even spoke of a country with two constitutions, one for the civilians and one for the military.[39] The protection by criminal law of the observance of human-rights norms is in the middle of the line of fire in such a situation. In spite of the civil democratic character of Colombia, violence as a political instrument is used frequently in the exercise of power. This phenomenon led to a militarization of the society, which raises far reaching consequences for the issue discussed here. On the one hand, because of the constant state of emergency there is a big shift of power within the executive (from civil to military) which also has consequences for the administration of justice. The last two decades the competences of the military courts has been extended, which led to a considerable change of aspects of criminal procedures. As soon as a policeman or a military person is suspected of a criminal offence, the milary court has the exclusive competence, which leads in the case of human rights violations to immunity of punishment. Furthermore the civilian criminal justice finds its activities being hampered by the specific military forum. As soon as military men are involved in criminal cases the criminal cases are taken off its hands. In military criminal justice the military solidarity plays a more important role than the interest of justice. Until the present, in spite of the numerous signs that military men and police officers are co-responsible for gross human-rights violations, none of them have yet been convicted under criminal law.

---

39 Jiménez Gómez, C., Una procuraduría de opinión, Bogotá, 1986.

On the other hand, the influence has not been limited to the military criminal justice as such. The militarization has also penetrated in the regular administration of justice, which has to rely on a militarized police (including the judicial police) and increases the use of to make an appeal to criminal summary proceedings, whereby the principles of fair-trial and due-process are undermined.

The criminal justice is confronted with a number of severe problems at the level of political criminality and human rights violations, which have to be seen in the light of a wider crisis of the administration of justice in the country. The criminal law justice in Colombia has been developed technically and organizationally in a very weak way, the corruption there is frequent, and its legal structures are very bureaucratic *etc.* Only three per cent of all criminal cases are brought before the court.[40] The other cases remain unsolved in one way or another, or they get bogged down in the preliminary inquiries and are precluded by the lapse of time.

From that point of view it is not astonishing that the civilians have lost every confidence in the effect of justice. Moreover, anyone who is prepared to act as a witness will systematically pay for this with his life. The few magistrates who were bold enough to investigate some cases thoroughly have also been confronted with their future murders.

It is against this background that the important judgments of the Supreme Court must be viewed. It is only to be feared that these judgments have come too late, and that the evolution of the past thirty years of militarization and the past five years of the dirty war will lead inevitably to a new civil war. The exodus from Colombia therefore is also wholesale. In Europe there are certain omens, such as the recognition of Colombians as political refugees, showing that we are realizing, at last, though much too late, the seriousness of the situation.

---

40 **Giraldo**, J.B., **Reyes**, A.A., and **Acevedo**, J.B., Reforma de la Justicia en Colombia, Bogotá, 1987.

BIBLIOGRAPHY

Americas Watch, Colombia, as President Barco Begins, USA, 1986.

Amnesty International, Recomendaciones al gobierno colombiano de una misión (amnistia internacional al la república de Colombia, AMR 23/04/80 ,London, 1980.

Amnesty International, Colombia, Briefing, AMR 23/14/88/S, 1988, London.

Bergalli, R., Memoria colectiva y derechos humanos, Anales de la Catedra Francis(Suarez, n° 26/27, 1986/1987.

Comisión de estudios sobre la violencia, Colombia : violencia y democracia. Inform presentado al Ministerio de Gobierno, Universidad Nacional de Colombia, Bogotá, 1987.

Esteban Carranza, M., Fuerzas Armadas y estado de excepción en América Latina, 197 Mexico.

Gallón Giraldo, G., Quince años de Estado de Sitio en Colombia, Bogotá, 1979.

García Mendez, E., Recht und Autoritarismus in Lateinamerika. Argentinien, Uruguay un Chile, 1970-1980, Frankfurt, 1985.

Giraldo, J.B., **Reyes**, A.A. and **Acevedo**, J.B., Reforma de la Justicia en Colombia, Bogot 1987.

Gómez Aristizábal, H., Normas básicas de procedimiento penal, Bogotá, 1987.

Internationale Beobachterkommission für Kolumbien, Zürich, 1987.

Jiménez Gómez, C, Una procuraduría de opinión, Bogotá, 1986.

Lechner, R., La crisis del estado en América Latina, Caracas, s.d.

Medina Quiroga, C., The Battle of Human Rights. Gross, Systematic Violations and th Inter-American System, Dordrecht, 1988.

Olivar Bonilla, L., Derecho procesal penal militar, Bogotá, 1977.

Organization of American States, Inter-American Commission on Human Rights, Repor on the situation of Human Rights in the Republic of Colombia, Washington, D.C., 1981.

Pécaut, D., Orden y violencia : Colombia 1930-1954,Bogotá, 1987.

Politoff, S., Dogmática y vida de los derechos humanos en los regímines autoritarios d América Latina, Anales de la Catedra Francisco Suarez, n° 26/27, 1986/1987.

Procuraduría General de la Nación, Disposiciones legales y reglamentarias. Estructura, organización, funcionamiento y competencias, Bogotá, s.d.

Procuraduría General de la Nación, El Palacio de Justicia y el Derecho de Gentes, Bogotá, 1986.

Sandoval Huerta, E., Sistema penal y criminología critica, Bogotá, 1985.

Themanummer Kolumbien, EPN, das dritte Welt-Magazin, nr. 14, 1986, Wien.

Velásquez, F.V., **Valle**, J.J., **León Londoño**, H.B., **Jaime Posada**, J.O., Regulación sobre armas y estupefacientes. Comentarios a los decretos de estado de sitio, Medellin, 1987.

Vervaele, J., De tragedie in het Paleis van Justitie te Bogotá. Reflekties over de onder- zoeksrapporten en de politieke en strafrechtelijke verantwoordelijkheid, Panopticon, 1987, 350-365.

Zaffaroni, E., Sistemas penales y derechos humanos en América Latina, Buenos Aires, 1986.