

DECISION No. 44/1992 (CUBA)

Communication addressed to the Government of Cuba on 8 April 1992.

Concerning: María Elena Cruz Varela on the one hand and the Republic of Cuba on the other.

1. The Working Group on Arbitrary Detention, in accordance with the methods of work adopted by it (E/CN.4/1992/20, chapter II), and in order to carry out its task with discretion, objectivity and independence, forwarded to the Government concerned the above-mentioned communication received by it and found to be admissible, in respect of allegations of arbitrary detention reported to have occurred.

2. The Working Group notes with appreciation the information forwarded by the Government concerned in respect of the case in question within 90 days of the transmittal of the letter by the Working Group. The Working Group also notes with satisfaction the cooperation displayed by the Government of Cuba in the form of the oral explanations given by the Dean of the Law Faculty of Havana University, Dr. Julio Fernández Bultes, during its third session.

3. (See paragraph 3 of Decision No. 1/1992.)

4. In the light of the allegations made, the Working Group welcomes the cooperation of the Government of Cuba. The Working Group believes that it is in a position to take a decision on the facts and circumstances of the case, in the context of the allegations made and the response of the Government thereto.

5. In rendering its decision, the Working Group, in a spirit of cooperation and coordination, has also taken into account the report of the Special Representative of the United Nations Secretary-General, Mr. Rivas Posada, pursuant to Commission on Human Rights resolution 1991/68 (E/CN.4/1992/27). It has also considered the interim report submitted to the United Nations General Assembly by Mr. Carl-Johan Groth, Special Rapporteur on the situation of human rights in Cuba (A/47/625).

6. The Working Group considers that:

(a) According to the allegation, María Elena Cruz Varela, a writer and the President of the dissident group Criterio Alternativo was detained and released on 19 November 1991, and arrested again on 21 November 1991 at her home, during the course of an "act of repudiation", by agents of the National Revolutionary Police. Seven days later, she was sentenced by the Havana Municipal Court and the sentence was upheld by the People's Provincial Court of Havana on 4 December 1991;

(b) According to the allegation, the sentence was handed down in the course of a trial where she was unable to consult any legal counsel. It is further alleged that the detainee is a member of Concertación Democrática Cubana, and that during the days before her detention she had taken part in several peaceful initiatives organized by dissident groups;

(c) According to the allegation, there have been violations of the rights protected by articles 9, 10, 11, 19 and 20 of the Universal Declaration of Human Rights, articles 9, 14, 19 and 21 of the International Covenant on Civil and Political Rights (although the State of Cuba is not a party to the latter instrument, its provisions form an integral part of the Working Group's mandate pursuant to Commission on Human Rights resolution 1991/42, as decided in deliberation 02, adopted by the Group on 23 March 1992, with a view to determining the arbitrariness or otherwise of detention) and principles 11, 18 and 24 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment;

(d) The Government of Cuba has maintained:

(i) As to the facts, that María Elena Cruz Varela "was punished with two years' deprivation of freedom for proven crimes of unlawful association and production of clandestine printed matter in case No. 4180 of 1991. She is currently serving the sentence imposed on her in respect of that case". The reply does not indicate the facts constituting the association characterized as unlawful or those which would constitute the crime of "production of clandestine printed matter". Regarding the trial, the Government maintains that "during each stage of the proceedings, all the procedural guarantees established in the current penal procedural legislation were respected";

(ii) The Government of the Republic of Cuba considers that the mandate of the Working Group on Arbitrary Detention, as is clear both from the mandate of resolution 1991/42 and the background to its establishment, as well as the terms of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, excludes the consideration of any possible arbitrariness in cases of imprisonment, i.e. deprivation of liberty, resulting from an enforceable judgement;

(e) The Special Representative of the United Nations Secretary-General, in the above-mentioned report on the situation of human rights in Cuba, states that, according to his information, Mrs. Cruz is a writer who was expelled from the official artists' and writers' union, namely the Union of Writers and Artists of Cuba, in February 1991. He further states that on the same day that the official newspaper of the Communist Party characterized her as an "inexperienced writer", members of the Committee for the Defence of the Revolution warned her to leave the country. He maintains that she was detained under the circumstances and on the dates indicated in the allegation, that she was tried and accused of unlawful association and that she was reportedly not allowed to appoint a lawyer. The hearing of the case was said

to have lasted approximately four hours and Mrs. Cruz was reportedly sentenced to two years' imprisonment. The report which the Special Rapporteur submitted to the General Assembly at its forty-seventh session refers only in the annex to Mrs. Cruz Varela as having been detained in September 1992;

(f) The Working Group concludes from the foregoing that María Elena Cruz Varela has been deprived of her freedom for having legitimately exercised the right of association in her capacity as a member of the dissident group Criterio Alternativo, which is part of the Concertación Democrática Cubana. This fact is not denied by the report of the Government, which indeed states that one of the grounds for her conviction is her membership of an association which it characterizes as illegal. Furthermore, and for lack of more information, it is to be inferred that the documents mentioned in the allegation which were submitted to the Fourth Congress of the Communist Party and the Declaration of the Cuban Intellectuals referred to in the report of the Special Representative were the facts constituting the offence of "production of clandestine printed matter";

(g) The deprivation of freedom for the legitimate exercise of the rights of association and of freedom of opinion and expression is regarded by the Working Group, in accordance with the principles referred to in paragraph 3 of this decision, and considered and adopted by the Commission on Human Rights, as reflected in resolution 1992/28, as arbitrary detention falling within category II;

(h) The Cuban Government maintains that, during the trial of Mrs. Cruz, all the procedural guarantees established in the current legislation in Cuba were respected, although it makes no mention of the guarantees established in the Universal Declaration of Human Rights and the relevant international legal instruments accepted by States among which, pursuant to deliberation 02 of the Working Group, should be included in the International Covenant on Civil and Political Rights and the Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment. Article 11 of the Universal Declaration of Human Rights demands a public trial with "all the guarantees necessary for his [the accused's] defence", while article 14 of the International Covenant on Civil and Political Rights adds further safeguards, stipulating that "adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing" should be provided to the accused and that he should be informed of the right to have legal assistance and of his right to choose it;

(i) It is an unchallenged fact that only seven days elapsed between the deprivation of freedom and the trial, and consequently both the source and the Special Representative maintain that she would not have been able to consult a lawyer, a fact which is not disputed by the Government;

(j) In any case, because of the lack of more information as to the actual procedure followed in the trial the Working Group cannot be convinced that the shortcomings referred to are "so serious" as to constitute a case of arbitrary deprivation of freedom falling within category III, as mentioned in paragraph 3 of this decision;

(k) It remains to be determined whether the Working Group's mandate is restricted to cases of deprivation of freedom prior to trial (or detention properly speaking, according to the opinion of the Government of Cuba) or whether it also includes those cases of deprivation of freedom which are the result of an enforceable judgement (or imprisonment, according to the Government itself);

(l) As the Government argues, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment does, indeed, make a distinction between the expressions "detention" and "detained person" on the one hand and "imprisonment" and "imprisoned person" on the other, depending on whether the person has already been tried (the second case) or not (the first case). From this distinction, it is to be inferred that the Working Group's mandate is restricted only to determining a possible arbitrariness in respect of persons who have not been tried;

(m) The Working Group, in its deliberation 03, adopted at its third session, and amended at its fifth session, decided - for the reasons given in its texts, which form an integral part of this decision - that its mandate includes all forms of deprivation of freedom, whether administrative, judicial, prior or consequent to a trial;

(n) Furthermore, the expression "detention" (detención) used in resolution 1991/42 which established the Working Group, should also be construed as including arrest without trial, prior to or during the preparatory stage of the trial or else following or consequent to the trial. The same should be said regarding the expression "imprisonment" (prisión). This can be seen from an analysis of the Constitutions of the Latin American countries:

- (i) Reference is made to "prisión" as deprivation of freedom prior to trial in the Constitution of Paraguay of 1992, article 19 of which speaks of "prisión preventiva" (preventive imprisonment); the Constitution of Peru of 1979 which prevents parliamentarians from being "procesados ni presos" (tried or imprisoned) without authorization, an obvious reference to preventive arrest; articles 15 and 17 of the Constitution of Uruguay, which refer to "preso" and "prisión preventiva" (prisoner and preventive imprisonment); articles 6, 9, 10 and 13 of the Constitution of Guatemala of 1985; article 2 (a) and (b) of the Constitution of the Dominican Republic of 1966, which states that any person arrested "se elevará a prisión" (shall be imprisoned) within 48 hours of being brought to trial; articles 92 and 93 of the Constitution of the Republic of Honduras of 1982, which refers to "auto de prisión" (imprisonment order) for a person who is charged; articles 18 and 19 of the Constitution of Mexico of 1917, which refer to "prisión preventiva y auto de prisión" (preventive imprisonment and imprisonment order); article 11 of the Constitution of Bolivia of 1967, which refers to "encargados de las prisiones a la que se lleva a los encausados" (the persons in charge of the prisons to which the accused are taken); article 19, paragraph 7 of the

Constitution of Chile, which refers to "encargados de las prisiones y prisión preventiva" (the persons in charge of the prisons and preventive imprisonment); and the Constitution of Brazil of 1988, which includes a similar reference to imprisonment (arts. 5 LXI, LXII, LXIII, LXIV, LXV, LXVI and LXVII);

- (ii) On the contrary, article 176 of the Constitution of Peru; article 60, paragraph 6 of the Constitution of Venezuela; article 33, paragraphs 2 and 3 of the Constitution of Nicaragua; article 28 of the Constitution of Panama (which refers on three occasions to "los detenidos" (detainees) who are subjected to the prison system); article 18 of the Argentine Constitution of 1853, which provides that "las cárceles serán ... para seguridad y no para el castigo de los detenidos en ellas" (the prisons shall be ... for security and not for the punishment of the detainees held in them) all use the expression "detenido" (detainee) as being synonymous with "penado" (convict);
- (iii) In referring to the same penalty, the deprivation of freedom on account of debt, the Constitutions of Ecuador, Costa Rica and Peru use the expression "prisión por deudas" (imprisonment for debt); the Constitution of Nicaragua refers to "detención por deudas" (detention for debt); other Constitutions speak of arrest for debt; and still others use two or three of these expressions (Honduras, Panama and Colombia);

(o) Lastly, Joaquín Escriche's Diccionario Razonado de Legislación y Jurisprudencia, refers to "arresto" (arrest) as being synonymous with "prisión" (imprisonment) maintaining that "according to the Diccionario de la Lengua Castellana, arresto (arrest) is the same as prisión (imprisonment) and therefore means not only the act of taking, seizing or apprehending a person but also the place in which he is confined or secured"; "prisión" (imprisonment) [is] the act of taking, seizing or apprehending a person, thereby depriving him of his freedom"; and "detención" (detention) is mentioned only in the entry "detención arbitraria: véase arrestar" (arbitrary detention: see "to arrest") - hence the conclusion that there is similarity among the concepts of "arresto", "prisión" and "detención".

7. In the light of the above, the Working Group decides:

The detention of María Elena Cruz Varela is declared to be arbitrary, being in contravention of articles 10, 11, 19 and 20 of the Universal Declaration of Human Rights and articles 9, 14, 19 and 21 of the International Covenant on Civil and Political Rights and falling within category II of the principles applicable in the consideration of the cases submitted to the Working Group.

8. Consequent upon the decision of the Working Group declaring the detention of the above-mentioned person to be arbitrary, the Working Group requests the Government of the Republic of Cuba to take the necessary steps to remedy the situation in order to bring it into conformity with the norms and principles incorporated in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights.