REVISED DECISION No. 1/1996 (COLOMBIA)

1. In its decision No. 15/1995 concerning Colombia, the Working Group declared the detention of Gerardo Bermúdez Sánchez to be arbitrary, being in contravention of articles 1, 7, 9, 10 and 11.1 of the Universal Declaration of Human Rights and articles 9, 14.1 and 14.3 (b), (d) and (e) of the International Covenant on Civil and Political Rights, and falling within category III of the principles applicable to the consideration of the cases submitted to the Working Group.

2. The communication received by the Working Group alleges that Gerardo Bermúdez Sánchez, a member of the national leadership of the Unión Camilista Ejército de Liberación Nacional (UC-ELN), a politico-military organization, was detained on 3 December 1992 in Bucaramanga by soldiers from the Army's Fifth Brigade and members of the Anti-Kidnapping and Blackmail Unit (UNASE) of the National Police. He was facing charges of rebellion, terrorism, kidnapping for ransom, forgery of an official document and possession of narcotics.

3. The communication alleges that the detention of Gerardo Bermúdez Sánchez was arbitrary since he was: (1) given unequal treatment before the court at the pre-trial stage, on account of the refusal to allow evidence requested by the defence; (2) denied his own choice of counsel, pressure having been brought to bear on the lawyer appointed, forcing her later to leave the country; (3) prevented from engaging in confidential communication with counsel because microphones were installed in his cell; (4) held on military premises; and (5) subjected to torture.

4. The Working Group found the facts indicated in (1), (2), (3) and (4) of paragraph 3 above to have been attended, and considered that the first three constituted violations of the international provisions relating to a fair trial of such gravity as to confer on the detention an arbitrary character, and that during subsequent proceedings the Government should remedy the irregularities committed in order to provide the accused with the guarantees of due process, as required by articles 1, 7, 9, 10 and 11.1 of the Universal Declaration of Human Rights and articles 9, 14.1 and 14.3 (b), (d) and (e) of the International Covenant on Civil and Political Rights.

5. The Government of the Republic of Colombia, in a substantiated and documented submission, requested the Working Group to reconsider the above-mentioned decision.

6. The Working Group agreed to the Government's request for a hearing, which was held on 14 September 1995, at its thirteenth session.

7. The Working Group transmitted the contents of the Government's request to the source, thereby giving it an opportunity to be heard. At its fifteenth session the Group heard in person the individual who had submitted the communication.

8. When it revised its methods of work at its fourteenth session to establish a procedure for dealing with requests for a review, the Working Group decided that:

"Very exceptionally, the Group may, at the request of the Government concerned or the source, reconsider its decisions on the following conditions:

(a) If the facts on which the request is based are considered by the Group to be entirely new and such as would have caused the Group to alter its decision had it been aware of them;

(b) If the facts had not been known or had not been accessible to the party originating the request;

(c) In a case where the request comes from a Government, on condition that the latter has replied within 90 days as stipulated in the Working Group's revised methods of work."

9. Since the request for reconsideration of decision No. 15/1995 was made prior to the adoption of the aforementioned criteria, the Working Group decided, on the basis of the principle of non-retroactivity, that these criteria would be applied only to requests made after their adoption. Accordingly, the Working Group decided to consider the present request as admissible.

First allegation as to the arbitrary nature of the detention: Gerardo Bermúdez Sánchez was given unequal treatment before the court, on account of the refusal to allow evidence requested by the defence.

10. The Government of Colombia contends that the judge hearing the case did not refuse requests to produce evidence, but merely rejected immaterial evidence. The requests said by the source not to have been allowed related to: (a) testimony by the Minister of the Interior on the Government's position regarding political offences and the status of Bermúdez as viewed by the State; (b) an inspection of the premises where Bermúdez was held in order to evaluate his conditions of detention; (c) testimony by the prosecutor who issued the warrant to search the premises on which Bermúdez was present at the time of his arrest; by the official who arrested him; by the forensic physician who actually examined the detainee; and by the official of the Forensic Medicine Institute who should have carried out the medical examination; (d) the annulment of all the proceedings in view of the various irregularities described.

11. The Government's contention regarding the complete irrelevance of the request for it to state its position as to what constitutes a political offence and its opinion of a prisoner is valid. Such a statement represents neither testimony by a witness nor expert testimony, and it has no bearing on the material facts at issue in the proceedings. A witness is required to testify on facts of which he has cognizance and not on opinions.

12. The inspection of the place of detention may be important in order to determine whether any cruel, inhuman or degrading treatment occurred. Under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, any complaint concerning such acts must be investigated; moreover, statements obtained by such unlawful means are completely invalid.

Thus, refusal to conduct the inspection requested in principle constitutes a violation of the Convention. However, it is irrelevant in determining the arbitrary nature of the detention, since the place to have been inspected is not the place where the statements were made but one in which the detainee was held at a later point, when remanded in custody. Consequently, the refusal to allow the evidence in question may not be considered arbitrary.

13. The same does not obtain for the third item of evidence that was requested and denied: the appearance as witnesses of the prosecutor who issued the search warrant and of those who carried it out.

14. The Government itself recognizes that the Regional Prosecutor attached to the Judicial Police Department disregarded the instructions given by his superior, the Attorney-General, and failed to take part in person, as was his duty, in the search. The Regional Prosecutor entrusted the search to a military authority.

15. Furthermore, there were irregularities in the search proceedings and in the official report of significance for the determination of at least one offence, that of the possession of drugs. The search report makes no mention of the fact, which the detainee denies, that three tubes of cocaine were found in his possession. As the Government itself observes, this irregularity is all the more important since it was precisely an officer of the Second Army Division who was entrusted with conducting the medical tests which gave positive results for cocaine and marijuana. It is still more suspicious that, even before the results of the examination were known, the Commander of the Fifth Brigade stated that at the time of his arrest Bermúdez was under the influence of drugs, and that the examination in question was carried out not by the Forensic Medicine Institute but by a doctor who was on holiday and who is a lieutenant in the army reserve.

16. In view of the above, the refusal to take statements from the prosecutor, the commander who carried out the search and the doctor who performed the drug tests constitutes a denial of justice. Article 14.2 of the International Covenant on Civil and Political Rights sets forth the right of everyone charged with a criminal offence to examine, or have examined, the witnesses against him, in full equality.

17. The fourth request by Bermúdez's defence was for the proceedings to be declared null and void on account of various irregularities. The fact of not granting this request does not, of course, imply a denial of justice or a lack of equality between the parties.

<u>Second allegation</u>: Gerardo Bermúdez Sánchez was denied his own choice of counsel, pressure having been brought to bear on the lawyer appointed, forcing her later to leave the country.

18. The Government contends that is had not been informed of the pressure and threats to which the lawyer Lourdes Castro Mendoza alleges she was subjected, forcing her to abandon Bermúdez's defence and leave the country, and that there are therefore no effective grounds for the complaint that he was denied counsel of his own choosing.

19. It appears from the information provided by the two parties that:

(a) The report by the Representative for Human Rights on his visit to Bermúdez on 3 or 4 December 1992 (the Government's report does not give the date) states that the detainee expressed his concern to have access to a lawyer experienced in defending political prisoners; on 5 December, when informed of the next period of questioning, “the detainee expressed the wish to communicate with the Political Prisoners' Solidarity Committee in order to ask for a lawyer to be present for the questioning” (report dated 5 December 1992);

(b) Nevertheless, the questioning took place in the presence not of a lawyer chosen by the accused, but of assigned counsel;

(c) It was only on 14 December 1992 that “the collective secretariat of the unit specialized in trials on charges of terrorism approved Eduardo Umaña Mendoza to act as counsel appointed by Gerardo Bermúdez Sánchez”, thereby authorizing him to take up the defence; on 8 February 1993 Mr. Umaña designated Lourdes Castro as his substitute, under his responsibility; as of 8 November, after Mr. Umaña had abandoned the case, Lourdes Castro was sole counsel; on 11 February 1994 Lourdes abandoned the case leaving Bermúdez without counsel until 21 April 1994, when he appointed the lawyer Valencia Rivera to defend him.

(d) Thus, between 11 February and 21 April 1994 the prisoner was without counsel. The Government's assertion that the lawyer was notified in person of a decision on 5 May (page 30 of the relevant paper) is thus inexact.

20. The lawyer gave up the case on account of the threats she received, which forced her to leave the country two days later. The threats took the form of suspicious surveillance of her office, telephone tapping, threatening messages via her paging system, in addition to earlier incidents such as the accusation made against her by the commander of the battalion where Bermúdez was held that her eagerness to defend him suggested that she was a guerilla and not just a lawyer.

21. The Government contends with reason that these facts were not brought to its attention at the appropriate time. Nevertheless, the facts were broadly publicized through other channels. For example, the International Working Group, a Colombian NGO, organized a large-scale solidarity campaign and Amnesty International took urgent action on behalf of the lawyer. Furthermore, one year previously, in February 1993, lawyers belonging to the Ombudsman's Office had assisted her in legal proceedings relating to the case.

22. The Government's claim that the failure of the lawyer to participate in her client's defence did not leave Bermúdez without counsel, as he had four lawyers, is unacceptable: under article 144 of the Code of Penal Procedure, an accused person is entitled to only one lawyer, who may designate an alternate under his responsibility. In actual fact, Bermúdez was without counsel for more than two months during the crucial phase of the completion of the investigation and the bringing of formal charges.

<u>Third allegation</u>: Gerardo Bermúdez Sánchez was prevented from engaging in confidential communication with counsel because microphones were installed in his cell.

23. According to the communication, Bermúdez disconnected microphones installed in his cell - which was where he initially consulted his lawyer. The consultations subsequently took place in the visiting room, thus enabling the military personnel responsible for the regiment where he was being held to listen to the conversations and Bermúdez complained about this in due time. Decision No. 15 found that this circumstance constituted a ground for declaring his detention to be arbitrary. In its request for a review, the Government contends that the allegation has not been proved and that, on the contrary, such practices are prohibited by Colombian legislation. Nevertheless, the Working Group is convinced by the fact that on 13 January 1994 the lawyer lodged a written complaint about the matter with the Special Investigations Department of the Attorney-General's Office and that the matter was also reported by the Congressional Peace-Coordinator on 17 January 1994.

24. In the opinion of the Working Group, the irregularities referred to in paragraphs 13 to 16 and 19 to 23 constitute violations of the rules of due process which are of such gravity as to confer on the deprivation of liberty an arbitrary character and therefore decides that it cannot grant the request for reconsideration submitted by the Government of Colombia.

Adopted on 22 May 1996.