D. Communication No. 203/1986, R. T. Muñoz Hermoza v. Peru (Views adopted on 4 November 1988 at the thirty-fourth session)

Submitted by: Rubén Toribio Muñoz Hermoza

Alleged victim: The author

State party concerned: Peru

Date of communication: 13 January 1986 (date of initial letter)

Date of decision on admissibility: 10 July 1987

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 4 November 1988,

Having concluded its consideration of communication No. 203/1986, submitted to the Committee by Rubén Toribio Muñoz Hermoza under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and by the State party concerned,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication (initial letter dated 31 January 1986 and subsequent letters dated 29 November 1986, 10 February 1987, 11 May and 5 October 1988) is Rubén Toribio Muñoz Hermoza, a Peruvian citizen and ex-sargeant of the Guardia Civil (police), currently residing in Cuzco, Peru. He claims to be a victim of violations of his human rights, in particular of discrimination and of denial of justice by Peruvian authorities. He invokes Peruvian Law No. 23,506, article 39 of which provides that a Peruvian citizen who considers that his or her constitutional rights have been violated may appeal to the United Nations Human Rights Committee. Article 40 of the same law provides that the Peruvian Supreme Court will receive the resolutions of the Committee and order their implementation.

2.1 The author alleges that he was "temporarily suspended" (cesación temporal o disponibilidad) from the Guardia Civil on 25 September 1978 by virtue of Directoral Resolution No. 2437-78-GC/DP on false accusations of having insulted a superior. Nevertheless, when he was brought before a judge on 28 September 1978 on the said charge, he was immediately released for lack of evidence. The author cites a number of relevant Peruvian decrees and laws providing, inter alia, that a member of the Guardia Civil "cannot be dismissed except upon a conviction" and that such dismissal can only be imposed by the Supreme Council of Military Justice. By administrative decision No. 0165-84-60, dated 30 January 1984, he was definitively discharged from service under the provisions of article 27 of Decree-Law No. 18081. The author claims that after having served in the Guardia Civil for over 20 years he has been arbitrarily deprived of his livelihood and of his acquired rights, including accrued retirement rights, thus leaving him in a state

of destitution, particularly considering that he has eight children to feed and clothe.

2.2 The author has spent 10 years going through the various domestic administrative and judicial instances; copies of the relevant decisions are enclosed. His request for reinstatement in the Guardia Civil, dated 5 October 1978 and addressed to the Ministry of the Interior, was at first not processed and finally turned down, nearly six years later, on 29 February 1984. His appeal against this administrative decision was dismissed by the Ministry of the Interior on 31 December 1985 on the grounds that he was also pursuing a judicial remedy. This ended the administrative review without any decision on the merits, over seven years after his initial petition for reinstatement. The author explains that he had turned to the courts, basing himself on article 28 of the law on amparo which provides that "the exhaustion of previous procedures shall not be required if such exhaustion could render injury irreparable", and in view of the delay and apparent inaction in processing the administrative review. On 18 March 1985 the Court of First Instance in Cuzco held that the author's action of amparo was well founded and declared his dismissal null and void, ordering that he be reinstated. On appeal, however, the Superior Court of Cuzco rejected the author's action of amparo, stating that the period for lodging such action had expired in March 1983. The case was then examined by the Supreme Court of Peru, which held on 29 October 1985, that the author could not start an action of amparo before the previous administrative review had been completed. Thus, the author claims that, as evidenced by these inconsistent decisions, he has been a victim of denial of justice. As far as the completion of the administrative review, he points out that it is not his fault that said review was kept pending for seven years, and that, in any case, for as long as the review was pending, the period of limitations for an action of amparo could not start running, let alone expire.

3. By its decision of 26 March 1986, the Human Rights Committee transmitted the communication under rule 91 of the provisional rules of procedure, to the State party, requesting information and observations relevant to the question of the admissibility of the communication in so far as it may raise issues under articles 14 (1), 25 and 26 of the International Covenant on Civil and Political Rights. The Committee also requested the State party to explain the reasons for the dismissal of Mr. Muñoz and the reasons for the delays in the administrative proceedings concerning his request for reinstatement, and further to indicate when the administrative proceedings were expected to be concluded and whether the recourse of amparo would still be available to Mr. Muñoz at that time.

4. In a further submission, dated 29 November 1986, the author informed the Committee that the Tribunal of Constitutional Guarantees of Peru, by judgement of 20 May 1986, had held that his action of amparo was admissible (procedente) and that it had quashed the judgement of the Supreme Court of Peru of 29 October 1985. However, no action has yet been taken to enforce the judgement of the Civil Court of First Instance of Cuzco of 18 March 1985. The author claims that this delay is indicative of abuse of authority and failure to comply with Peruvian law in matters of human rights (article 36 taken together with article 34 of Law No. 23,506).

5. In its submission under rule 91, dated 20 November 1986, the State party transmitted the complete file forwarded by the Supreme Court of Justice of the Republic concerning Mr. Muñoz Hermoza, stating, inter alia, that "under the law in force, the internal judicial remedies were exhausted when the Tribunal of Constitutional Guarantees handed down its decision". The State party did not provide the other clarifications requested by the Committee.

6. In his comments, dated 10 February 1987, the author refers to the judgement of the Tribunal of Constitutional Guarantees of Peru in his favour and notes that "despite the time that has elapsed, the enforcement of the judgement has not been ordered by the Civil Chamber of the Supreme Court of the Republic of Peru, in disregard of the terms of article 36 of Law No. 23,506".

7.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its provisional rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

7.2 With regard to article 5, paragraph 2 (a), of the Optional Protocol, the Committee observed that the matter complained of by the author was not being examined and had not been examined under another procedure of international investigation or settlement. With regard to article 5, paragraph 2 (b), of the Optional Protocol, the State party has confirmed that the author has exhausted domestic remedies.

8. On 10 July 1987, the Human Rights Committee therefore decided that the communication was admissible, in so far as it raised issues under articles 14, paragraph 1, 25 (c) and 26, in conjunction with article 2, paragraph 3, of the Covenant.

9.1 In a submission dated 11 May 1988 the author describes the further development of the case and reiterates that the decision of the Court of First Instance of Cuzco of 18 March 1985, holding that his action of amparo was well founded and declaring his dismissal null and void, had not been enforced, in spite of the fact that on 24 September 1987 the Cuzco Civil Chamber handed down a similar decision on the merits ordering his reinstatement in his post with all benefits. The author complains that the Civil Chamber subsequently extended the statutory time-limit of three days for appeal (provided for in article 33 of Law No. 23,506), and, instead of ordering the enforcement of its decision, granted ex officio a special appeal for annulment on 24 November 1987 (i.e. 60 days after the decision, purportedly in contravention of article 10 of Law No. 23,506). "Defence of the State" was allegedly adduced as grounds for the decision to grant a special appeal, with reference being made to article 22 of Decree-Law No. 17,537. This decree-law, the author contends, was abrogated by Law No. 23,506, article 45 of which repeals "all provisions which prevent or hinder proceedings for habeas corpus and amparo".

9.2 The Second Civil Chamber of the Supreme Court of the Republic again received the case on 22 December 1987. A hearing took place on 15 April 1988, allegedly without prior notification to the author, who claims not to have received the text of any judgement or order. In this connection he observes that "the only way to avoid restoring my constitutional rights ... is to be bogged down in further proceedings".

9.3 In particular, the author questions the legality of the Government appeal, since all procedural and substantive issues have already been adjudicated, and the Prosecutor General himself, in a written opinion dated 7 March 1988, declared that the decision of the Cuzco Civil Chamber of 24 September 1987 was valid and the author's action of amparo well founded. The author further comments: "the only correct solution would have been to reject the appeal and refer the case back to the Civil Chamber of the Cuzco Court for it to comply with the order to [reinstate him] ...". Moreover, a lower court was venturing to decide in a manner which conflicted with the procedure indicated by the Tribunal of Constitutional

Guarantees, and Decree-Law No. 17,537 is not applicable because it refers to types of ordinary litigation in which the State is a party and not to actions relating to constitutional guarantees, in which the State is under a duty to guarantee full observance of human rights (articles 80 et seq. of the Peruvian Constitution). He further observes:

> "The case has thus been virtually 'shelved' indefinitely by the Second Civil Chamber of the Supreme Court in Lima, without any access allowed for the appellant, and without counsel appointed. I was thus obliged to retain a lawyer, but he was not allowed to see the papers in the case and the outcome of the hearing of 15 April 1988 'because it has not yet been signed by the non-presiding members of the Court'.
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> "In these circumstances, an application was submitted requesting a certified copy of the decision of 15 April 1988, but it has not been entertained on the pretext that a lawyer's signature was missing and that the fees had not been paid. This is a breach of article 13 of Act No. 23,506, on amparo, which contains tacit dispensation from these formalities, pursuant to article 295 of the Peruvian Constitution."

9.4 The author also indicates that he has spared no effort to try to arrive at a settlement of his case. On 21 February 1988, he wrote to the President of Peru describing the various stages of his 10-year struggle to be reinstated in his post, and adducing procedural irregularities and instances of alleged abuse of authority. The author's petition was passed on to the Deputy Minister of the Interior, who, in turn, communicated it to the Director of the Guardia Civil. Subsequently the Guardia Civil's Legal Adviser "rendered a legal opinion advising that I should be reinstated. But the Subaltern Ranks Investigating Council and the Director of Personnel rejected my petition. There is, however, nothing in writing and the decision was purely verbal".

9.5 In view of the foregoing, the author requests the Committee to endorse the judgements of the Court of the First Instance of Cuzco, dated 18 March 1985, and of the Civil Chamber of the Court of Cuzco, dated 24 September 1987, and to recommend his reinstatement in the Guardia Civil, his promotion to the rank he would have attained had he not been unjustly dismissed, and the granting of ancillary benefits. He further asks the Committee to take into account article 11 of Law No. 23,506 which provides, inter alia, for indemnification.

9.6 By letter of 5 October 1988 the author informs the Committee that the Second Civil Chamber of the Supreme Court rule on 15 April 1988 that his action of amparo was inadmissible because the period for lodging the action had lapsed on 18 March 1983, whereas he had lodged the action on 30 October 1984. The author points out that this issue had already been definitively decided by the Tribunal of Constitutional Guarantees on 20 May 1986, which held that his action of amparo had been timely lodged (see para. 4 above). On 27 May 1988, the author again turned to the Tribunal of Constitutional Guarantees requesting that the Supreme Court's Decision of 15 April 1988 be quashed. The author's newest action is still pending.

10.1 The time-limit for the State party's submission under article 4 (2) of the Optional Protocol expired on 6 February 1988. No submission has been received from the State party, despite a reminder sent on 17 May 1988. The author's further submission of 11 May 1988 was transmitted to the State party on 20 May 1988. The author's subsequent letter of 5 October 1988 was transmitted to the State party on 21 October 1988. No comments from the State party have been received.

10.2 The Committee has taken due note that the author's new appeal before the Tribunal of Constitutional Guarantees is still pending. This fact, however, does not affect the Committee's decision on the admissibility of the communication, because judicial proceedings in this case have been unreasonably prolonged. In this context the Committee also refers to the State party's submission of 20 November 1986 in which it stated that domestic remedies had been exhausted.

11.1 The Human Rights Committee, having considered the present communication in the light of all the information made available to it, as provided in article 5, paragraph 1, of the Optional Protocol, notes that the facts of the case, as submitted by the author, have not been contested by the State party.

11.2 In formulating its views, the Committee takes into account the failure of the State party to furnish certain information and clarifications, in particular with regard to the reasons for Mr. Muñoz' dismissal and for the delays in the proceedings, as requested by the Committee in its rule 91 decision, and with regard to the allegations of unequal treatment of which the author has complained. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities, and to furnish to the Committee all relevant information. In the circumstances, due weight must be given to the author's allegations.

11.3 With respect to the requirement of a fair hearing as stipulated in article 14, paragraph 1, of the Covenant, the Committee notes that the concept of a fair hearing necessarily entails that justice be rendered without undue delay. In this connection the Committeee observes that the administrative review in the Muñoz case was kept pending for seven years and that it ended with a decision against the author based on the ground that he had started judicial proceedings. A delay of seven years constitutes an unreasonable delay. Furthermore, with respect to the judicial review, the Committee notes that the Tribunal of Constitutional Guarantees decided in favour of the author in 1986 and that the State party has informed the Committee that judicial remedies were exhausted with that decision (para. 5 above). However, the delays in implementation have continued and two and a half years after the judgement of the Tribunal of Constitutional Guarantees, the author has still not been reinstated in his post. This delay, which the State party has not explained, constitutes a further aggravation of the violation of the principle of a fair hearing. The Committee further notes that on 24 September 1987 the Cuzco Civil Chamber, in pursuance of the decision of the Tribunal of Constitutional Guarantees, ordered that the author be reinstated; subsequently, in a written opinion dated 7 March 1988, the Public Prosecutor declared that the decision of the Cuzco Civil Chamber was valid and that the author's action of amparo was well founded. But even after these clear decisions, the Government of Peru has failed to reinstate the author. Instead, yet another special appeal, this time granted ex officio in "Defence of the State" (para. 9.1), has been allowed, which resulted in a contradictory decision by the Supreme Court of Peru on 15 April 1988, declaring that the author's action of amparo had not been lodged timely and was therefore inadmissible. This procedural issue, however, had already been adjudicated by the Tribunal of Constitutional Guarantees in 1986, before which the author's action is again pending. Such seemingly endless sequence of instances and the repeated failure to implement decisions are compatible with the principle of a fair hearing.

12. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the events of this case, in so far as they continued or occurred after 3 January 1981 (the date of entry into force of the Optional Protocol for Peru) disclose a violation of article 14, paragraph 1, of the International Covenant on Civil and Political Rights.

13.1 The Committee accordingly, is of the view that the State party is under an obligation, in accordance with the provisions of article 2 of the Covenant, to take effective measures to remedy the violations suffered by Rubén Toribio Muñoz Hermoza, including payment of adequate compensation for the loss suffered.

13.2 In this connection the Committee welcomes the State party's commitment, expressed in articles 39 and 40 of Law No. 23,506, to co-operate with the Human Rights Committee, and to implement its recommendations.

APPENDIX I

Individual opinion submitted by Messrs. Joseph A. Cooray, Vojin Dimitrijevic and Rajsoomer Lallah pursuant to rule 94, paragraph 3, of the Committee's provisional rules of procedure, concerning the views of the Committee on communication No. 203/1986, Muñoz v. Peru

1. We agree with the conclusion reached by the Committee but also for other reasons.

2. In the absence of any response from the State party under article 4, paragraph 2, of the Optional Protocol, the allegations of the author remain uncontested; and they are, in substance, that:

(a) He had for 20 years been a member of the Guardia Civil of Peru, a post in the public service of his country, access to which is guaranteed under article 25 (c) of the Covenant;

(b) He was, at an initial stage, temporarily suspended from his post and was investigated on a charge of having insulted a superior officer; the case against him was not sustained;

(c) Nevertheless, some five years later he was permanently discharged from the service. There is no indication that he was given a hearing before the administrative decision was taken to suspend him, nor is there any indication that disciplinary proceedings were brought against him after the criminal investigation had been closed. What is certain is that the Ministry of the Interior declined to consider an appeal against the 1978 decision to discharge him. He appears to have all the time been treated as guilty while officially being temporarily suspended. This amounted to a continued violation of his right to be presumed innocent (art. 14, para. 2) and to be treated accordingly until proceedings or, failing that, disciplinary proceedings were concluded against him. These proceedings were apparently not initiated;

(d) Having failed to obtain administrative redress, he continued to seek redress from the courts;

(e) A conflict, which the State party has regrettably not sought to elucidate, appears to have emerged between the decisions of the Tribunal of Constitutional Guarantees, which had ruled in his favour, and of the Civil Chamber of the Supreme Court. Following the decision of the Tribunal of Constitutional Guarantees, the Superior Court of Cuzco decided the merits of the case in the author's favour, ordering his reinstatement, but the Civil Chamber of the Supreme Court reversed this decision on a special appeal, granted ex officio and out of time, and based on a procedural point, which the Tribunal of Constitutional Guarantees had already examined and decided in a different manner;

(f) Quite apart from the baffling conflict between the decisions of the Supreme Court and the Tribunal of Constitutiona Guarantees, there remains also the significant failure of the Supreme Court to grant the author a hearing before reviewing the decision of the Superior Court of Cuzco.

3. The principles of a fair hearing, known in some systems as the rules of natural justice, and guaranteed under article 14, paragraph 1 of the Covenant, include the concept of audi alteram partem. Those principles were violated because it would appear that the author was deprived of a hearing both by the administrative authorities, which were responsible for the decisions to suspend him and, later, to discharge him, and by the Supreme Court, when it reversed the earlier decision which had been favourable to him. Furthermore, as observed in paragraph 2 (c) above, the apparent absence of criminal or disciplinary proceedings establishing his guilt ran counter to the presumption of innocence embodied in article 14, paragraph 2, of the Covenant and was equally at variance with the administrative consequences that normally follow from that presumption.

4. It is also clear that, with regard to such a simple matter as that concerning the reinstatement of a public official who had been unjustifiably dismissed, the obligations undertaken by the State party under article 2, paragraph 3 (a) and (c), of the Covenant, were unaccountably violated because neither the administrative nor the judicial authorities of the State party found it possible, over a period spanning a decade, to provide the author with an appropriate remedy and to enforce that remedy.

Joseph A. COORAY
Vojin DIMITRIJEVIC
Rajsoomer LALLAH

APPENDIX II

Individual opinion submitted by Mr. Bertil Wennergren pursuant to rule 94, paragraph 3, of the Committee's provisional rules of procedure, concerning the views of the Committee on communication No. 203/1986, Muñoz v. Peru

1. I concur in the views expressed by the majority of the Committee with regard to the violation of article 14 of the Covenant but want to add the following considerations with regard to article 25 (c) of the Covenant.

2. From the judgement of 20 May 1986 of the Tribunal of Constitutional Guarantees it appears that Mr. Muñoz, by administrative decision No. 2437-78-GC/DP of 25 September 1978, was suspended from service on disciplinary grounds (for the alleged offence of insulting a superior) and placed at the disposal of the Fourth Judicial Zone of the Police. By administrative decision No. 3020-78-GC/DP of 25 November 1978, the Administration of the Peruvian Guardia Civil refused to cancel the suspension order. By decision No. 0165-84-GD of 30 January 1984, Mr. Muñoz was definitively discharged from service under the provisions of article 27 of Decree Law No. 18081.

3. The Court of First Instance of Cuzco, in its decision of 18 March 1985, declared all the aforementioned decisions null and void. In its findings it stated, inter alia, that the investigation ordered by the Supreme Council of Military Justice against Mr. Muñoz on the charge of having insulted a superior did not establish that he had committed any punishable offence. The Court considered in this connection Supreme Decree No. 1056-68-GP, which stipulates that a member of the Guardia Civil "shall be discharged only following a conviction" and noted that Mr. Muñoz had no previous record, neither criminal nor judicial, and that he had shown irreproachable conduct and had obtained sufficient merits, demonstrating discipline and capacity. By decision of 24 September 1987, the Superior Court of Cuzco confirmed the judgement of the Court of First Instance and ordered that Mr. Muñoz should be reinstated in his post with all benefits. None of these Court decisions have become final, but the Supreme Court has not considered them on the merits but reversed them by rejecting Mr. Muñoz's actions of amparo on procedural grounds. There is, however, no reason to believe that the Supreme Court could have arrived at a different conclusion on the merits than that arrived at by the lower courts. On the contrary, it is reasonable to assume that it could not have decided otherwise, particularly considering that the State party has not contested the merits of the decisions, and the Prosecutor General, in a written opinion dated 7 March 1988, has stated that the decision of 24 September 1987 is valid.

4. Thus, in my view, it is evident that the suspension and discharge of Mr. Muñoz from the Peruvian Guardia Civil were not founded upon objective and justifiable grounds. Whatever the ground may have been, whether, for instance, political or merely subjective, it was arbitrary. To suspend and discharge someone arbitrarily from public service and to refuse him reinstatement, just as arbitrarily, constitutes, in my opinion, a violation of his right, under article 25 (c) of the Covenant, to have access on general terms of equality to public service. In this context reference should be made to the Committee's views in case No. 198/1985, where it observed "that Uruguayan public officials dismissed on ideological, political or trade union grounds were victims of violations of article 25 of the Covenant".

5. I am therefore of the view that the events in this case disclose a violation not only of article 14, but also of article 25 (c) of the Covenant.

Bertil WENNERGREN

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