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Consideration of communications under the Optional Protocol to the Covenant

Communication No. 1800/2008

Decision adopted by the Committee on 31 October 2011 103rd session

Submitted by:	R.A.D.B. (represented by counsel, Alberto León Gómez Zuluaga)
Alleged victim:	The author
State party:	Colombia
Date of communication:	19 June 2006 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 31 July 2008 (not issued in document form)
Date of decision:	31 October 2011
Subject matter:	Trade union privileges; arbitrary dismissal, appeal against enforceable judgement
Procedural issues:	Substantiation of complaint; abuse of the right to submit communications
Substantive issues:	Right to a fair and public hearing by a competent, independent and impartial tribunal; right to form and join trade unions for the protection of their interests; right to equal protection of the law without discrimination

* Published by decision of the Human Rights Committee.

Articles of the Optional Protocol: 2 and 3

Articles of the Covenant: 2; 14, paragraphs 1, 2; and 5; 22; and 26

[Annex]

Annex

Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (103rd session)

concerning

Communication No. 1800/2008*

Submitted by:	R.A.D.B. (represented by counsel, Alberto León Gómez Zuluaga)
Alleged victim:	The author
State party:	Colombia
Date of communication:	19 June 2006 (initial submission)

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

Meeting on 31 October 2011,

Adopts the following:

Decision on admissibility

1. The author of the communication is R.A.D.B., a Colombian national. He alleges he is a victim of a violation by Colombia of article 14, read in conjunction with article 2, paragraphs 2 and 3; as well as articles 22 and 26 of the Covenant. The Covenant and its Optional Protocol entered into force for Colombia on 23 March 1976. The author is represented by counsel, Mr. Alberto León Gómez Zuluaga.

The facts as submitted by the author

2.1 The author worked for many years for the State-owned Puertos de Colombia, Terminal Marítimo de Santa Marta (COLPUERTOS),[1] and was also state leader of the Union of Workers of the Terminal Marítimo de Santa Marta (SINTRATERMAR) and President of the Magdalena section of the Confederation of Colombian Workers (CUT). COLPUERTOS was liquidated under Act No. 01/1991 and, as a result, the author was dismissed on 1 January 1994. In order to assist the liquidation process, the aforementioned Act established the Social Liability Fund for the Liquidation of Puertos de Colombia (FONCOLPUERTOS).

* The following Committee members participated in the consideration of this communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Fabián Omar Salvioli, Mr. Krister Thelin and Ms. Margo Waterval.

[1] According to the documents provided by the author, he was employed by COLPUERTOS from 18 July 1979 to 31 December 1993.

2.2 The author contends that as a result of his position as a trade union leader, he was protected by trade union privileges (*fuero sindical*). This means that persons covered by this protection may be dismissed, transferred or demoted only with the prior authorization of a labour judge.

2.3 The author lodged a claim for reinstatement before the First Labour Court against FONCOLPUERTOS, the entity that for all legal purposes had replaced COLPUERTOS. On 7 June 1996, the judge accepted the author's claim and ordered his reinstatement to the post that he had held at the time of his dismissal and the payment of 75,891.83 Colombian pesos for each day between 1 January 1994 and the effective date of reinstatement. The ruling was not appealed and was declared enforceable by the lower court on 19 June 1996.

2.4 Despite repeated requests from the author, FONCOLPUERTOS did not comply with the ruling. On 1 December 2001, five years after the ruling had been issued, the Labour Chamber of the Superior Court of the Judicial District of Santa Marta took cognizance of the case for consultation purposes, and on 11 December 2001, overturned the lower court's ruling. The author points out that the Labour Chamber itself, against the same defendant (FONCOLPUERTOS) had already issued rulings ordering the reinstatement of workers protected by trade union privileges, of which he became aware during the appeals process.

2.5 According to the author, the review procedure for consultation (*grado de consulta*) was not applicable in his case, since the relevant legislation was the Code of Labour Procedure, a special norm which establishes the need for review only in the case of rulings that were totally prejudicial to the employee and were not appealed.

2.6 The author adds that before and during the liquidation process, cases of corruption came to light in COLPUERTOS, in which employees at different levels of the company were involved. That led to public pressure on the judicial branch, mainly with respect to employees exercising trade union responsibilities. In 2001, several labour judges had been prosecuted by the Prosecutor General's Office for alleged attempts to pervert the course of justice by issuing decisions that favoured FONCOLPUERTOS employees, or for having approved fraudulent settlements. This situation explained the different treatment afforded to similar cases by the Superior Court in 1996 and 2001 without the law having changed.

2.7 The author lodged an application for legal protection (*acción detutela*) against the decision of the Superior Court. This application was rejected by the Labour Cassation Chamber and, on 27 August 2002, on appeal, by the Criminal Cassation Chamber of the Supreme Court.[2]

[2] According to the rulings enclosed by the author, the Labour Cassation Chamber considered that the judge hearing an application for protection is not empowered to interfere in decisions adopted during judicial proceedings, since this would constitute an arbitrary incursion into the domain of an ordinary court. Furthermore, the Criminal Cassation Chamber considered the question of whether, in the author's particular circumstances, it was compulsory to grant court authorization to the employer as a prior condition of his dismissal. In this regard, the Criminal Cassation Chamber reasoned as follows: "In ruling that it was not necessary to fulfil this requirement, the Labour Chamber of the Superior Court of the Judicial District of Santa Marta did not base its decision on repealed or inapplicable standards. Rather, what it did, in the light of the circumstances, was to interpret the precepts that govern the issue in order to find a solution to the dispute. Its decision was not unexpected or capricious. It was based on a number of considerations around the application, in the particular circumstances of R.A.D.B., of article 405 of the Substantive Labour Code and article 10, paragraph 3, of the current Collective Agreement. It thus concluded not only that the liquidation of state-owned entities constituted a lawful cause for the termination of the employment relationship that did not require prior authorization from a judicial authority, but also that reinstatement was 'a physical and legal impossibility', given that the enterprise had ceased to exist and that there was no equal or higher

2.8 The author applied to the Constitutional Court to review the previous ruling, but his case was not selected for review. The author therefore considers that he has exhausted all domestic remedies.

The complaint

3.1 In the author's view, the events described constituted a violation of article 14, read in conjunction with article 2, paragraphs 2 and 3; as well as articles 22 and 26 of the Covenant.

3.2 With respect to article 14, the author contends that he suffered a violation of his right to justice and due process. He asserts that neither his right to a fair and public hearing by a competent, independent and impartial tribunal, nor his right to be tried without undue delay were respected. He submits that the decision by the Court of First Instance declaring the judgement enforceable, combined with the failure to respond of the defendant (FONCOLPUERTOS), created a legitimate expectation that his rights had been recognized and re-established. If the defendant had considered the decision to declare the ruling of the Court of First Instance enforceable to be arbitrary, it would have been obliged to seek a review of the judge's action. The fact that a second instance decision was issued five years after the first instance ruling constitutes a violation. Moreover, the author contends that the Superior Court misapplied national legislation when it failed to uphold a lawful first instance ruling, thereby creating a situation which favoured the State employer. The author therefore argues that the Court acted not as a guarantor of rights, but rather as a protector of the State, which is contrary to the principles of independence and impartiality. He also asserts that, by failing to protect infringed fundamental rights, the Constitutional Court committed a denial of justice.

3.3 With regard to article 22 of the Covenant, the author contends that the failure to protect statutory union rights constitutes a violation by the State of the right to freedom of association, since it was perpetrated by a State entity, FONCOLPUERTOS, established by law, which had replaced COLPUERTOS, itself a State entity. The Superior Court's decision was the result of a political decision by the majority of the Chamber. The national Government had launched a smear campaign against the COLPUERTOS workers, based on skilful generalizations of the numerous acts of corruption that had come to light. That had led to pressure by public opinion on the judiciary.

3.4 Regarding article 26 of the Covenant, the author maintains that without valid reasons, the Superior Court issued a ruling that was at variance with others it had handed down in similar cases. The author makes reference to similar rulings in which the right to trade union privileges was recognized and reinstatement was ordered in cases of dismissal without court authorization. If it changed its jurisprudence, the Court had to give reasons for such a change.

State party's observations on admissibility

4.1 In its note verbale of 6 October 2008, the State party submits that the communication is inadmissible. It denies that the first instance ruling of 7 June 1996, handed down by the First Labour Court, was not subject to review by a higher court (*grado jurisdiccional de consulta*). It was reviewed eventually because the ruling went against the

post available to reinstate him (...). When it reviewed the situation of R.A.D.B. for consultative purposes, the Labour Chamber of the Court of the Judicial District of Santa Marta did not arbitrarily entirely disregard the condition stipulated in article 405 of the Substantive Labour Code. Between the norm and its application, there was a process of interpretation" (*sic*).

State party, which was directly responsible for the labour liabilities of COLPUERTOS and FONCOLPUERTOS.

4.2 It denies that pressure was brought to bear on COLPUERTOS workers and that the rulings handed down by the judicial authorities in this case did not comply with the law. The position assumed by the Superior Court is concordant with the jurisprudence of the Constitutional Court concerning trade union privileges in the event of the restructuring of public entities. On receiving the application for legal protection (*acción de tutela*) submitted by the author, both the Labour Cassation Chamber and the Criminal Cassation Chamber of the Supreme Court of Justice rejected the application on the grounds that the Superior Court had not acted arbitrarily.

4.3 The State party considers that the communication is not sufficiently substantiated for purposes of admissibility, insofar as it relates to a case where the Committee is expected to re-evaluate facts or evidence that have already been examined by national courts. Referring to the jurisprudence of the Committee and that of the inter-American human rights system, the State party recalls that it is not for the Committee to reconsider decisions of domestic courts with respect to the evaluation of facts and evidence. The author has simply expressed his disagreement with the decision handed down by the Superior Court and expects the Committee to act as a court of appeal to deal with matters that were properly addressed at the domestic level. The only reason the Committee would have for considering the current case would be to show that the rulings handed down were arbitrary or that they violated the due process of the applicant, neither of which occurred. The author had access to several remedies and obtained substantive decisions based on the law, with each decision explaining the reasons why his application could not be accepted.

4.4 The author does not give a convincing explanation to justify the delay of four years and six months between the ruling of the Superior Court and the submission of the case to the Committee, and the State party maintains that such a delay constitutes an abuse of the right to submit communications.

State party's observations on the merits

5.1 On 15 July 2008, the State party submitted its observations on the merits.

5.2 According to the State party, Act No. 1/1991, which established the liquidation of the COLPUERTOS enterprise, was declared constitutional by the Constitutional Court in its ruling dated 21 January 1993. Decrees Nos. 035, 036 and 037 of 1992 were issued in order to give effect to the liquidation of the company. In this regard, article 24 of Decree No. 035 of 1992 states that "the liquidation of Puertos de Colombia constitutes just cause for the termination of employment contracts, in accordance with article 5 (e) of Act No. 50 of 1990". The author is currently a pensioner under article 3 of Decree No. 035.[3]

5.3 With respect to article 14 of the Covenant, the State party maintains that the author had a fair trial before an independent and impartial court. He was able to lodge appeals and the court rulings were duly substantiated. The question of review by a higher court was resolved by a competent body and was deemed appropriate by the Constitutional Court in its ruling 962/99 of 1 December 1999. The Court confirmed "the need to review first instance decisions that are partially or totally unfavourable to FONCOLPUERTOS, given

[3] Article 3. The recognition of retirement, disability and old-age pensions, established in existing legislation and in the regulations issued under the special powers contained in Act 1 of 1991, to which public servants are entitled, signifies the termination of their respective employment contracts and legal and established entitlements.

that the payment of recognized claims would be the liability of the Nation, which is directly responsible for the labour-related obligations and liabilities of COLPUERTOS and FONCOLPUERTOS (…). Factors such as the validity of the principle of protection of the Nation's financial resources; the defence of the common good through the duty to provide greater protection in view of the damaging effects of corruption; the duty to promote strict observance of administrative morality; and the obligation to safeguard the intangibility of public resources, are all exceptionally important in the case under examination, since the courts and judges cannot ignore the circumstances, nor can they remain indifferent to the cases of scandalous administrative corruption, such as those which arose in the labour complaints against COLPUERTOS and FONCOLPUERTOS". Furthermore, through a Directive dated 7 November 2002, the Attorney-General (*Procurador General de la Nación*) reiterated the mandatory requirement for review by a higher court in all adverse rulings arising in the affairs of FONCOLPUERTOS.

5.4 The State party also points out that many labour cases were initiated as a result of the liquidation of the enterprise, so that special measures were needed to clear the backlog of the courts involved and, at the same time, avoid unreasonable delays in the settlement of cases. This occurred despite the fact that there is no provision in domestic legislation that limits the time allowed for a review of a ruling by a higher court.

5.5 Since under the rules that govern applications for legal protection, the Constitutional Court is not obliged to review every decision regarding protection, the lack of such a review cannot be deemed to be a denial of justice.

5.6 The State party reiterates that the author is clearly expecting the Committee to act as a court of fourth instance and to reopen the debate on whether or not his dismissal required prior judicial authorization. The fact that the domestic courts did not rule favourably on the appeals lodged by the author does not show a violation of article 14, paragraph 1, of the Covenant.

5.7 With regard to the right to be tried without delay, the State party contends that in the present case the alleged delay did not cause additional harm to the author. Steps were taken to ensure that the time taken to settle internal appeals did not amount to unreasonable delay.

5.8 With respect to article 22 of the Covenant, the State party reiterates that the cancellation of the author's employment contract was the result of the liquidation of COLPUERTOS, which was established under the provisions of Act No. 1/1991, and cannot be understood as a measure aimed at violating freedom of association. The recognition of retirement, as established in Decree No. 035 of 1992, implementing Act. No. 1/1991, meant the termination of the employment contract. Therefore, the dismissal of a person entitled to trade union privileges in the course of a liquidation process cannot be understood as an act of repression against trade union leaders.

5.9 In respect of article 26 of the Covenant, the State party recalls the jurisprudence of the Committee in the sense that not all differences in treatment amount to discrimination, so long as the criteria for such differences are reasonable and objective. It asserts that the Superior Court's decision was in accordance with the interpretative criterion adopted by the Constitutional Court, which, in its decision dated 26 May 2003, ruled that in the case of actual administrative restructuring, it is not necessary to request judicial authorization prior to abolishing the posts of workers with trade union privileges, since the legal consequences related to the employment relation or link are derived from a general legal definition, and because the authority to restructure entities is based on actual constitutional norms and includes among others the elimination of posts.

Author's comments on the State party's observations

6.1 On 10 October 2009, the author submitted comments on the observations made by the State party. He contends that the Constitutional Court has vacillated in its interpretation of the right to trade union privileges. However, since mid-2003, the jurisprudence has consistently held that in processes of restructuring or liquidation of public entities, judicial authorization is required to dismiss public servants who are protected by trade union privileges. For example, in ruling T-235 of 2005, the Constitutional Court decided that when a public entity enters into a process of administrative restructuring or liquidation, it should first consult the labour judge, so that the latter may determine whether such a process may be considered as just cause to dismiss, transfer or demote a worker protected by trade union privileges and if so, grant prior permission for such actions.

6.2 The State party was not unaware that the rules of labour procedure restrict review by a higher court only to rulings that are entirely unfavourable to the worker. However, the effects of that labour rule were annulled by a decision of the Constitutional Court in 1992. The author argues that it is unacceptable that procedural rules should be altered to favour the negligent State.

6.3 The author maintains that violation of due process is justified by:

(a) The fact that more than five years went by without the State, through FONCOLPUERTOS, complying with the ruling of 7 June 1996 ordering the reinstatement of the author. Yet compliance with judicial rulings is a fundamental condition of the rule of law and disregarding judicial decisions constitutes a violation of the rights of due process and access to the administration of justice. The author reiterates that there have been rulings whereby reinstatement has to take place even when the entity against which the ruling is made is in the process of liquidation;

(b) The cognizance of the case assumed by the Superior Court for review five years after the first instance ruling;

(c) The unlawful assumption by the Superior Court that it had the authority to reverse the first instance ruling. According to the law, that ruling was not subject to review. By proceeding to review the ruling, the Court violated the independence of the court of first instance;

(d) The Constitutional Court's failure to rule on the application for legal protection. Although in the Colombian legal system the review of such applications for protection is discretional, the Court has defined certain applicable criteria, including the need to overturn judicial decisions that disregard the constitutional doctrine.

Issues and proceedings before the Committee

Consideration of the admissibility

7.1 Before considering any complaint contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the matter is not being examined under another procedure of international investigation or settlement.

7.3 The Committee notes the argument of the State party that the communication should be considered inadmissible on the grounds that it constitutes an abuse of the right to submit communications, since four years and six months passed between the ruling by the Superior Court and the submission of the communication to the Committee. The Committee

observes that, in accordance with the new rule 96 (c) of the Committee's rules of procedure, applicable to communications received by the Committee starting 1 January 2012, the Committee shall ascertain that the communication does not constitute an abuse of the right of submission. An abuse of the right of submission is not, in principle, a basis of a decision of inadmissibility ratione temporis on grounds of delay in submission. However, a communication may constitute an abuse of the right of submission, when it is submitted after 5 years from the exhaustion of domestic remedies by the author of the communication, or, where applicable, after 3 years from the conclusion of another procedure of international investigation or settlement, unless there are reasons justifying the delay taking into account all the circumstances of the communication. In the mean time, the Committee shall apply its existing jurisprudence, according to which it may be considered that there is abuse in cases where an exceptionally long period of time has elapsed prior to submission of the communication, without sufficient justification.[4] The Committee observes that, following the ruling by the Superior Court, the author submitted an application for legal protection, which was settled on appeal on 27 August 2002. The Committee considers, in the present case, that the period of time elapsed since the exhaustion of domestic remedies does not constitute an abuse of the right to submit a communication under article 3 of the Optional Protocol.

7.4 With regard to the author's complaints concerning the violation of his right to due process as set out in article 14, the Committee observes that these complaints basically relate to the evaluation of the facts and the application of domestic legislation by the courts of the State party. The Committee recalls its jurisprudence according to which it is incumbent on the courts of the State party to review facts and evidence in each case, or the application of domestic legislation, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice.[5] The Committee has studied the material submitted by the parties, including the rulings on applications for legal protection raised in the complaints lodged by the author with the Committee, and notes the disagreement of the author with the interpretation of domestic legislation arrived at by the courts of the State party. Given the circumstances of the case, the Committee considers that the material submitted does not show that the judicial proceedings reflected the above-mentioned flaws. Accordingly, the Committee finds that the author has failed to provide sufficient substantiation of his complaints of a violation of article 14, and that the communication is therefore inadmissible under article 2 of the Optional Protocol.

7.5 With regard to the alleged violations of articles 22 and 26 of the Covenant, the Committee notes the author's allegations to the effect that his dismissal constitutes a violation of the right of association contained in article 22 of the Covenant and that the domestic courts have issued contrary rulings in cases similar to that of the author, which constitutes a violation of article 26 of the Covenant. In this respect, the Committee finds that the author did not sufficiently substantiate, for the purposes of admissibility, to what extent his dismissal was due to his position as trade union leader. Moreover, the rulings that differed from that issued in his case referred to different cases, so that it is not possible to

[4] See, for example, communications Nos. 1233/2003, *Tsarjov v. Estonia*, Views adopted on 26 October 2007, para. 6.3; No. 1434/2005, *Fillacier v. France*, decision of inadmissibility adopted on 27 March 2006, para. 4.3; and No. 787/1997, *Gobin v. Mauritius*, decision of inadmissibility adopted on 16 July 2001, para. 6.3.

[5] See the Committee's general comment No. 32 on article 14: Right to equality before courts and tribunals and to a fair trial (Official Records of the General Assembly. Sixty-second session, Supplement No. 40, vol. I [A/62/40 (vol. I) annex VI], para. 26). See also communication No. 1616/2007, *Manzano v. Colombia*, decision dated 19 March 2010, para. 6.4.

deduce from them reasons for believing that discrimination occurred in any of the forms referred to in article 26 of the Covenant. Therefore, the Committee considers that these complaints are inadmissible as unfounded, by virtue of article 2 of the Optional Protocol.

8. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be transmitted to the State party, to the author and to counsel.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]