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CASE 12.593

ADMISSIBILITY AND MERITS

VICTOR HENRY MINA CUERO
ECUADOR

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I. SUMMARY

1. On March 11, 2002, the Inter-American Commission on Human Rights (hereinafter the "Inter-American Commission," "Commission," or "IACHR") received a petition filed by Víctor Henry Mina Cuero (hereinafter "the petitioner"),¹ alleging the international responsibility of the Republic of Ecuador (hereinafter "the State of Ecuador," "the State," or "Ecuador") to his detriment.

2. The petitioner alleged a series of due process violations committed by the Disciplinary Tribunal which dismissed him from the police following a confrontation with several policemen who responded to a complaint of an alleged assault against his former live-in partner. Specifically, he said that in the context of the proceeding he did not have a defense lawyer, he was not notified of the charges against him in a timely manner, and he was unable to appeal the punitive decision.

3. The State argued that both the proceedings before the Disciplinary Tribunal and those relating to the application for constitutional relief and the unconstitutionality suit observed the procedural guarantees enshrined in the American Convention on Human Rights (hereinafter "the Convention" or the "American Convention").

4. Based on its determinations as to fact and law, the Inter-American Commission has concluded that the State of Ecuador is responsible for violation of the rights recognized at Articles 8(1) (right to sufficient justification of decisions), 8(2) (right to be presumed innocent), 8(2)(b) (right to prior notification in detail of the charges against him), 8(2)(c) (right to adequate time and means for the preparation of his defense), 8(2)(d) (right to be assisted by legal counsel), 8(2)(h) (right to appeal the judgment), 9 (principle of legality), and 25(1) (right to judicial recourse) of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention"), taken in conjunction with Articles 1(1) and 2 of that instrument, to the detriment of Víctor Henry Mina Cuero. The Commission formulated appropriate recommendations.

II. SUBMISSIONS OF THE PARTIES

A. The Petitioner

5. The petitioner said that on September 11, 2000, while serving as a policeman with the Loja Provincial Command, one of his superiors notified him that his three-month-old daughter was seriously ill. He said that in light of the foregoing, without obtaining permission from his superiors he immediately went to her aid in the town of Quindé, where his former live-in partner and mother of his daughter greeted him with insults.

6. He said that the aunt of his former live-in partner made a complaint to the police, alleging that he had assaulted them and fired several gunshots into the air to frighten them. The petitioner said that, in response, on September 15, 2000, several members of the police went to the address in order to draw up a police report and that on that occasion the police threatened him with submitting a "false report," prompting him to call them "dirty cops."

¹ Subsequently, in a communication dated December 5, 2008, the Ecumenical Commission on Human Rights (CEDHU) joined as co-petitioner.

7. The petitioner said that in response both to the complaints and to his confrontation with the police, on September 18, 2000, the Police Internal Affairs Unit opened a disciplinary investigation against him without notifying him that it was under way. He said that in the context of the investigation, the Judicial Police took a statement from him without a lawyer present and also that in the course of the investigation he was not formally notified of a proceeding against him.

8. He said that on October 24, 2000, while serving in the City of Loja, on the border with Peru, one of his superiors notified him verbally that he was summoned to appear at a hearing before the Disciplinary Tribunal in the city of Esmeraldas, without telling him what the hearing would concern. He said that in order to attend the hearing he had to make an 18-hour trip to Esmeraldas and that because of the improvised nature of the notice, he had to find a lawyer upon arriving at city.

9. He said that he was not informed of the charges against him until he reached the police station where the hearing was to be held, and that the lawyer only had a few minutes to review the file and prepare his defense. He said that his lawyer moved for the hearing to be postponed but his motion was denied. He said that he was charged with having discharged a firearm, assaulting his former live-in partner, and insolence to his superiors.

10. He said that after the hearing, the Disciplinary Tribunal issued a judgment in which it ordered his dismissal from the police under causes 6 and 26 of Article 64 of the Disciplinary Regulations of the National Police. He said that a series of due process violations were committed in the context of the proceeding.

11. He said that he was unable to appeal the judgment because the Disciplinary Regulations of the National Police provided that the decisions of the Disciplinary Tribunal were not open to appeal, nor did he have recourse to the law courts because the Organic Law of Administrative Litigation (*Ley Orgánica de lo Contencioso Administrativo*) prohibited members of the security forces from taking their cases to the Court of Administrative Litigation.

12. The petitioner said that on December 15, 2000, he filed an application for constitutional relief with the Third Civil Court of Esmeraldas. However, that application was denied on January 18, 2001, with the argument that the *amparo* remedy did not apply to decisions of judicial officials. He said that he appealed against the decision, but that his appeal was refused on March 16, 2001, with the argument that he had waived the right to appeal merely for having moved that the hearing be postponed.

13. He said that in April 2001, he filed an unconstitutionality suit with the Constitutional Court against the decision to dismiss him. However, the Constitutional Court refused the suit on August 29, 2001, with the sole argument that the Disciplinary Tribunal was competent to suspend or discharge police personnel.

14. As to the admissibility of the petition, the petitioner says that it was lodged within six months after the final notice putting an end to the proceeding, which was the judgment of the Constitutional Court notified on August 29, 2001, and that that was the remedy that had to be exhausted, since it was the means for challenging the constitutionality of any administrative decisions adopted by a state authority. The petitioner added that he was not seeking to use the IACHR as a fourth instance, as the state claimed, but rather that it verify if the proceedings against him were conducted in accordance with the guarantees recognized by the Convention.

15. As regards legal arguments, he held that the State had violated his **right to a fair trial**. Specifically, he said that his right to a hearing by a competent, independent, and impartial tribunal had been violated because the Disciplinary Tribunal was part of the executive branch and its members were serving officers appointed by high-ranking commanders, which affected the Tribunal's impartiality.

16. He said that the State violated his **rights to prior notification in detail of the charges against him and to adequate time and means for the preparation of his defense**, because he was not notified of the proceeding against him in a timely manner, and when he was notified, his defense counsel did not have enough time to prepare his defense.

17. He added that his **right to be assisted by legal counsel provided by the State** was violated, since he did not have a lawyer present when he gave his statement to the Police Internal Affairs Unit on September 18, 2000.

18. He argued that his **right to appeal the judgment to a higher court** was violated because he did not have recourse to an appeal to challenge the decision that dismissed him from the police and that, therefore, the State had breached its obligation to adopt provisions under domestic law. He added that his **right to judicial protection** was violated because he was not afforded simple, prompt and effective recourse to determine if there had been a violation of due process in the proceeding that culminated in his dismissal.

19. The petitioner argued that the State had violated the **principle of legality** because both the competence of the tribunal and the grounds for his punishment were established in regulations, not in a law.

B. The State

20. The State said that on September 11, 2000, the alleged victim caused a disturbance at the home of his former live-in partner, physically and verbally abusing her and threatening members of her family by discharging a firearm. It said that the aunt of the petitioner's former live-in partner reported the events to the police, with the result that several members of that institution proceeded to write up a report on the petitioner. It added that the alleged victim responded with insolence to the policemen who were handling the complaint by calling them "dirty cops" and threatened to kill them, saying that he did not care about the consequences because he had been discharged before and had always managed to be reinstated.

21. It said that on September 18, 2000, the petitioner gave a statement to the Judicial Police in relation to the alleged events and that in that statement he recognize having called his superiors "crooked cops." The State argued that that statement had had no legal relevance within the proceeding conducted before the Disciplinary Tribunal.

22. It said that that same day, the petitioner was notified that a disciplinary proceeding had been instituted against him and that the hearing was not held until October 25, 2000, which meant that he had had enough time to prepare a defense. It also said that he was represented by a lawyer of his choosing.

23. The State said that on October 25, 2000, the Disciplinary Tribunal returned a duly reasoned judgment in which it punished the petitioner with dismissal or discharge from the National Police; it added that all his rights and guarantees were observed in the proceeding.

24. It said that the petitioner was punished for verbal abuse of his superiors, which is recognized as a class III offense in Article 64 of the Police Disciplinary Regulations, and for assault of his former live-in partner, an offense also recognized in Article 64 of the regulations.

25. It said that the petitioner was not prevented from calling witnesses during the hearing and that in the context of the proceeding the Tribunal considered the notations contained in the alleged victim's police file as aggravating circumstances, since they showed that the petitioner "is a violent person accustomed to physically mistreating and harassing his former live-in partner," and that those notations record the petitioner as having undergone a criminal trial for the killing of a minor in 1993 as well as two judgments of the Disciplinary Tribunal against him, one in 1996 and the other in 2000.

26. The State said that the petitioner had had the option of appealing against the decision of the Disciplinary Tribunal before the relevant Police Council, in accordance with Articles 55 and 67 of the National Police Personnel Law, but that he had not done so.

27. The State argued that the alleged victim filed an application for constitutional relief against the judgment of the disciplinary tribunal, which was denied on January 18, 2001. The State said that the petitioner had filed an appeal which was denied on March 16, 2001, on the grounds that the petitioner had waived that recourse by failing to appear at the hearing to which he was summoned.

28. The State mentioned that the petitioner filed an unconstitutionality suit against the decision of the Disciplinary Tribunal, which the Constitutional Court rejected on August 14, 2001, with the argument that nothing unconstitutional had been proven. It added that the aforementioned proceeding observed all procedural guarantees.

29. As to the admissibility of the petition, the State held that it was not lodged within six months of the final decision in the proceeding. The State counted the time in two different ways to support this submission: At first, it said that the final decision was the judgment of the Constitutional Court rejecting the unconstitutionality suit on August 14, 2001, and that the petition was lodged on March 11, 2002 (the date on which the petition was received at the IACHR); in other words, 25 days after the six-month time limit.

30. Subsequently, the State held that the final decision was the Constitutional Court's judgment of March 16, 2001, by which it dismissed the application for constitutional relief (*amparo*), and that the petition was lodged on February 28, 2002 (the date on which the petitioner sent the petition); in other words, 11 months and 12 days after notice was served. It argued that the appropriate remedy for resolving the petitioner's legal situation was the application for constitutional relief (*amparo*), not the unconstitutionality suit, and therefore, the six-month time limit should be counted from the decision on the application for constitutional relief at last instance.

31. As regards legal arguments, it argued that **it did not violate his right to a fair trial**. Specifically, it said that it had not violated the **right to a hearing by a competent, independent, and impartial tribunal** because the Disciplinary Tribunal was the competent organ under the law to try disciplinary violations committed by members of the police and the latter had acted in an independent and impartial manner.

32. It said that violations of the guarantees envisaged in Article 8(2) of the Convention could not be recognized because they only apply to criminal proceedings. It said that it had not violated the **rights to prior notification in detail of the charges against him and to adequate time and means for the preparation of his defense** because the petitioner was notified of the proceeding before the disciplinary tribunal sufficiently in advance for him to prepare his defense and he was represented by a lawyer during the proceeding.

33. It held that it had not violated the **right to appeal the judgment to a higher court** because the National Police Personnel Law provided an appeal, in spite of which, at no time did the petitioner invoke it and in any case the petitioner obtained a judicial review of the decision to dismiss him through an application for constitutional relief (*amparo*).

34. As regards the alleged violation of the **right to be assisted by legal counsel provided by the State**, the State said that the statement given by the petitioner without a defense lawyer present was not taken into account at any stage of the disciplinary proceeding.

35. As to the **principle of legality**, the State argued that the competence of the Disciplinary Tribunal, the punishable conduct, and the penalties imposed were all recognized in the Disciplinary Regulations of the National Police and in the National Police Personnel Law.

36. Finally, the State contended that there had been no violation of the **right to judicial protection**, since the petitioner had had access to the application for constitutional relief, which was a simple and prompt recourse, and the fact that it was not decided in the petitioner's favor did not mean that he been denied access to it.

III. ANALYSIS OF ADMISSIBILITY

A. Competence of the Commission *Ratione Materiae*, *Ratione Personae*, *Ratione Temporis*, and *Ratione Loci*

Competence <i>ratione personae</i>	Yes
Competence <i>ratione loci</i>	Yes
Competence <i>ratione temporis</i>	Yes
Competence <i>ratione materiae</i>	Yes
Duplication of Proceedings and International <i>Res Judicata</i>	No

B. Exhaustion of Domestic Remedies and Timeliness of the Petition

37. As regards the requirement of exhaustion of domestic remedies, the Commission observes that Mr. Mina Cuero filed an application for constitutional relief and an unconstitutionality suit to challenge the decision of the Disciplinary Tribunal. In both cases, the decision was unfavorable. The IACHR finds that the available remedies under domestic law were exhausted. As regards the State's argument that the unconstitutionality suit was not a suitable remedy, the IACHR notes that the Constitutional Court ruled on its merits, finding that no such unconstitutionality existed. In that sense, the IACHR finds that it was a remedy that offered the possibility of a review and response to the merits of his claims, and therefore, the time limit should be counted from the notification of the final decision in the context of that suit.

38. Therefore, specifically as regards the timeliness of presentation, the Commission finds that the unconstitutionality suit was decided on August 14, 2001, and that notice was given of that decision on August 29, 2001, as the notification contained in the record states. Therefore, in contrast to what the state submits, the presentation time limit should be counted from the latter date, not from the date of the decision on the unconstitutionality suit. As regards the date of receipt, the IACHR finds that the original petition was sent by post on February 28, 2002, and actually received on March 11, 2002. Therefore, the petition was actually received 10 days after the expiration of the six-month time limit counted from August 29, 2001. It has been the practice of the IACHR when the petition is submitted by post, as in this case, to allow a margin of flexibility of up to two weeks on the time limit.

39. Based on the foregoing, the IACHR considers that the requirements relating to exhaustion of domestic remedies and timeliness of the petition established at Articles 46(1) (a) and (b) have been met.

C. Colorable Claim

40. The Commission finds that, if proven, the facts alleged by the petitioner could amount to violations of the right to a fair trial, the principle of legality, and the right to judicial protection recognized in Articles 8, 9, and 25 of the American Convention, in connection with the obligations set forth Articles 1(1) and 2 of said instrument.

IV. FINDINGS OF FACT

A. Victor Henry Mina Cuero

41. As the record shows, the alleged victim served in the National Police of Ecuador from April 1, 1993, until his dismissal in 2000; that is, for more than seven years and seven months.

B. Relevant Legal Framework

42. Article 234 of the Code of Criminal Procedure of the National Civil Police provided:

All disciplinary offenses, except those that are the exclusive jurisdiction of the Disciplinary Tribunal shall be adjudicated and punished summarily with no need for any other formality than the relevant order.

43. In addition, the Disciplinary Regulations of the National Police provided:

Article 17. The Disciplinary Tribunal has exclusive jurisdiction to judge and punish class III offenses, in accordance with the provisions contained in these Regulations.

Article 63. Anyone who commits serious or class III offenses shall be punished with dismissal or discharge, 31 to 60 days of detention or 21 to 30 days of hard labor, or severe punishment. The Disciplinary Tribunal shall have exclusive jurisdiction over class III offenses.

Article 64. The following constitute serious or class III offenses:

[...] 5. Anyone who performs any act that evinces inconsideration or insolence to a superior, whether on duty or off duty;

26. Engaging in manifest acts of violence or indiscipline toward a superior, where the act does not constitute a criminal offense;

Article 30. The following are aggravating factors for the purposes of grading disciplinary penalties:

(c) Where the act is committed in the presence of personnel, such that it may be considered a bad example for maintaining order and discipline;

(d) Repeated commission of offenses in terms of time and seriousness;

(m) Any other circumstance that in the opinion of the superior increases the seriousness of the offense or suggests that the punished individual may be presumed dangerous.

Article 84. Penalties imposed for offenses may be appealed, except when imposed in judgments of the Disciplinary Tribunal or by order of the President of the Republic.

44. Article 10 of the Law on the Litigious Administrative Jurisdiction provides:

Article 10. The Court of Administrative Litigation has the following powers and duties:

(a) To examine and adjudicate at sole instance challenges to the regulations, acts, and decisions of the public administration, of semipublic persons, or of persons governed by private law established for a social or public purpose, and to decide on their legality or illegality;

45. For its part, the National Police Personnel Law provides:

Article 67. Police personnel who consider that they have been unlawfully placed in transitory status or discharged may appeal to the appropriate Council in the manner set forth in Article 55 of this Law within 30 days following the publication of the decree, decision, or resolution in the relevant general order. Councils shall have 30 days to resolve such claims.

Article 55. The resolutions adopted by the respective councils may be appealed. For such purposes, the appellate bodies are the Council of Generals for resolutions of the Superior Council, and the Superior Council for resolutions of the Council of Noncommissioned Officers and Police Constables General and superior officers may lodge appeals for review with the same Council. Appeals shall be lodged within 15 days of notification of the resolution by the appropriate Council, which shall cause it to be final.

46. The implementing regulations for the National Police Personnel Law provide:

Article 79. Discharge is irreversible, regardless of the cause. Officer and police constable candidates shall be subject to the regulations of the relevant training schools.

C. Disciplinary Proceeding

1. The Events That Led to the Disciplinary Proceeding

47. On September 15, 2000, Mrs. Rosa Velasco, the aunt of the petitioner's former live-in partner, made an emergency call to the police alleging that Mr. Mina Cuero was physically and verbally abusing her niece and firing gunshots to frighten them.²

48. That same day, three police corporals responded to the complaint and went to the home of a relative of Mr. Mina Cuero, where he was located. They recorded in a police report that the alleged victim was "under the influence of alcohol" and greeted them with insults, shouting "dirty cops" at them.³

2. The Investigation and Report of the Judicial Police

49. As a result of the events described in the preceding section, the alleged victim was made the subject of an investigation.

50. On September 18, 2000, Víctor Henry Mina Cuero gave a statement to the Judicial Police with a representative of the Public Prosecution Service (*Ministerio Público*) present but without the assistance of legal counsel. That fact was recognized by the State. In his statement, the alleged victim said that when he arrived at the home of his former live-in partner Mrs. Rosa Velasco attacked him, that he had mistreated neither her nor her niece, and that he had not fired gunshots since he was not even carrying his firearm. They specifically asked him if he was disrespectful to the police who went to his domicile in response to the complaint, to which he replied that he had called them "dirty cops," which was an expression used in the police.⁴

51. On September 19, 2000, Cpl. Jacinto Sandro González gave a statement to the Judicial Police in which he said that when they arrived at the alleged victim's domicile, he shouted "dirty cops" at them and told them that he had joined the police before any of them and that he would kill anyone who wrote him up in a report.⁵

52. That same day, the Provincial Commandant of National Police in Esmeraldas requested the Chief of the National Police to open an investigation within 48 hours, in light of the events recorded in the police report submitted on September 15, 2000.

² Annex XX. Incident Report to the Chief of Esmeralda Rural Service No. 14, September 15, 2000. Appended to the State's brief of June 10, 2003; Annex XX. Statement of Rosa Eloisa Velasco Quiñonez of September 20, 2000. Police Report No. 2000-381. Annex 3 to the State's brief of March 12, 2010.

³ Annex XX. Incident Report to the Chief of Esmeralda Rural Service No. 14, September 15, 2000. Appended to the State's brief of June 10, 2003;

⁴ Annex XX. Statement of Victor Henry Mina Cuero of September 18, 2000, Police Report No. 2000-381. Appended to the original petition of February 28, 2002. Annex 1 to the State's brief of March 12, 2010.

⁵ Annex XX. Police Report No. 2000-381. Statement of Gustavo George López Cajamarca of September 19, 2000. Appended to the State's brief of June 10, 2003.

53. On September 20, 2000, Cpl. Jorge Washington Guajan also gave a statement to the Judicial Police in which he said that he had accompanied Corporals Ochoa, González, and Acurio to Avenida 9 de Octubre at 8:25 p.m., where they found the petitioner at the home of a relative of his, that he called them dirty cops, and that he would kill them if they wrote up a report. He added that the petitioner did not have a firearm in his possession.⁶

54. That same day, Corporals Willians Orlando Acurio⁷ and Richard Fredy Ochoa⁸ gave statements to the Judicial Police in which they provided the same version of events as their colleagues.

55. Mrs. Rosa Velasco also gave a statement to the Judicial Police on September 20, 2000, in which she said that the alleged victim and her niece had separated because of the continuous mistreatment that she had suffered at his hands, and that on September 15, 2000, he had turned up and sought to enter her home, insulted her, banged on her door, and threatened to kill her, before she called the police and a relative of his took him away.⁹

56. On September 20, 2000, the Office of the National Director of the Judicial Police issued Report No. 2000-381, which concluded, based on the above statements—including that of the alleged victim—and the police report, that:

[...] Police Constable VÍCTOR HENRY MINA CUERO had caused a disturbance at the home of Mrs. ROSA VELASCO QUIÑONEZ, physically and verbally abusing his former live-in partner MICAELA VELASCO That he had proceeded to verbally attack his superiors when he was warned about his conduct, at whom he had directed epithets unbecoming of a member of the police That he was not off-duty The Police Constable VÍCTOR HENRY MINA CUERO is a repeat offender who has committed disciplinary violations of this type before.¹⁰

3. Proceeding and Dismissal by the Disciplinary Tribunal

57. On October 17, 2000, the General Command of the Police ordered a disciplinary tribunal to be convened in order to "examine, try, and punish the disciplinary offenses attributed to the aforementioned member of the police."¹¹ That decision stated that the tribunal would hold its hearing on October 25, 2000, at 11:00 a.m. in the casino of CP-14.¹²

58. The petitioner said that he was not notified of the above decision and that it was not until October 24, 2000, in the city of Loja that one of his superiors informed him that he was supposed to appear at the hearing of the Disciplinary Tribunal in the city of Esmeraldas, which was a very long way from where he resided. The State provided no evidence of the existence of a formal written notice of the opening of the proceeding, the reasons for it, or the hearing summons.

⁶ Annex XX. Statement of Jorge Washington Guajan Miranda of September 20, 2000. Police Report No. 2000-381. Annex 3 to the State's brief of March 12, 2010.

⁷ Annex XX. Statement of Willians Orlando Acurio Rojas of September 20, 2000. Annex 3 to the State's brief of March 12, 2010.

⁸ Statement of Richard Fredy Ochoa Calle of September 20, 2000. Police Report No. 2000-381. Annex 3 to the State's brief of March 12, 2010.

⁹ Annex XX. Statement of Rosa Eloisa Velazco Quiñonez of September 20, 2000. Police Report No. 2000-381. Annex 3 to the State's brief of March 12, 2010.

¹⁰ Annex XX. Police Report No. 2000-381 to the Provincial Chief of Esmeralda Rural Service No. 14 on an investigation. Annex 3 to the State's brief of March 12, 2010.

¹¹ The record shows that the tribunal comprised Police Staff Colonel José Antonio Vinueza Jarrin, and the Esmeraldas Police Provincial Commandant No. 14; as co-judges, Police Captains Aníbal Sarmiento and Luis Gallardo, according to their seniority; and Gladys Cuenca Velásquez, Third Judge of the First National Police District, as secretary.

¹² Annex XX. Memorandum 2000-1602-CPD-SS of the General Command of the National Police of October 17, 2000. Appended to the State's brief of June 10, 2003.

59. The hearing was held on October 25, 2000.¹³ Mr. Mina Cuero had legal assistance from the lawyers Zoila Nevares Klinger and Milton Quiñonez Quiñonez.¹⁴

60. According to a statement by the lawyer Milton Quiñonez in 2010, the petitioner was never properly notified of the hearing summons or informed of the offenses for which he was being investigated. He said that prior to the hearing he sought a continuance in order to prepare an adequate defense, but that the Disciplinary Tribunal denied his request.

61. The record of the hearing shows that the president of the Disciplinary Tribunal ordered the alleged victim's employment record to be read out, which stated as follows:

VICTOR HENRY MINA CUERO, who joined the institution as a Professional Police Constable on April 1, 1993, has four disciplinary sanctions in his record, with a total of 74 days of detention for failure to abide by Articles 68 and 81 of the Personnel Law in force; he registers a criminal proceeding for homicide, which was provisionally dismissed; he was discharged by judgment of the Disciplinary Tribunal and later reinstated by ruling of the Constitutional Court.¹⁵

62. The Commission notes that prior to the disciplinary proceeding described in the following section, the alleged victim underwent a criminal prosecution and two disciplinary proceedings.

63. As regards the criminal proceeding, the record shows that he was prosecuted for the homicide of a girl. That case was ultimately dismissed on December 9, 1993, by a ruling of the Seventh Criminal Court of Ríos, a decision that was made final by a decision of the Superior Court of Babahoyo on September 23, 1994.¹⁶

64. With respect to the first disciplinary proceeding, the record shows that on September 24, 1996, he was discharged for violating the National Police Criminal Code; however, on August 5, 1998, the Second Division of the Constitutional Court granted his appeal and ordered his reinstatement in the ranks of the police.

65. As regards the second disciplinary proceeding, the record shows that on January 13, 1999, the alleged victim was punished with dismissal; however, on January 24, 2000, the Constitutional Court granted an action for unconstitutionality in favor of the alleged victim and reversed the dismissal.¹⁷

66. At the end of the record it states that the Disciplinary Tribunal adopted a decision punishing Víctor Henry Mina Cuero with "dismissal or discharge from the police ranks."¹⁸

67. The tribunal took the following facts as proven:

On September 15, 2000 the National Police Constable traveled from the Province of Loja to the city of Quinde, as he had received a call from his live-in partner, Ms. Micaela Velasco, who told him that his daughter was sick. He decided to go to her home. However, there, he was greeted by a relative of hers, who allegedly abused him verbally and physically. He decided to withdraw and go home, after which members of the police arrived, in response to which he

¹³ Annex XX. Resolution of the National Police Disciplinary Tribunal, October 25, 2000. Annex 4 to the State's brief of March 12, 2010.

¹⁴ Annex XX. Brief of Victor Henri Mina Cuero to the Disciplinary Tribunal. Annex 2 to the State's brief of March 12, 2010.

¹⁵ Annex XX. Voluntary sworn statement in the presence of a notary by the lawyer Milton Severiano Quiñonez Quiñonez. May 25, 2010. Appended to the petitioner's brief of June 7, 2010.

¹⁶ Annex XX. Judgment of the Superior Court of Babahoyo of September 23, 1994, Criminal Case No. 39-94. Appended to the petitioner's brief of August 7, 2003.

¹⁷ Annex XX. Official Record No. 4 of the Constitutional Court of January 24, 2000, which contains Constitutional Court Ruling 007-2000 accepting the unconstitutionality suit on January 24, 2000, Case 352-99-AA. Appended to the petitioner's brief of August 7, 2003.

¹⁸ Annex XX. Resolution of the National Police Disciplinary Tribunal, October 25, 2000. Annex 4 to the State's brief of March 12, 2010.

chose not to come out of his home and told them that they were dirty cops, all of this according to the statement given at this hearing in the presence of his defense counsel.¹⁹

68. In its considerations, the Tribunal found that:

This Disciplinary Tribunal is of the conviction that the National Police, in light of its status as an institution organized under a disciplined hierarchical system, requires mindful and strict discipline from its members, expressed as faithful performance of duty as well as respect for the hierarchy, and that the relationship between superiors and subordinates be founded on mutual respect. Subordination and respect for discipline shall be observed even when not performing official duties, a precept that in this instance was neither observed nor fulfilled by National Police Constable Víctor Henry Mina Cuero, whose conduct is consistent with the provisions contained in Article 64 (5) and (26) of the institution's disciplinary regulations, in which the aggravating factors mentioned at Article 30 (c), (d), and (m) of the aforementioned law were also present.²⁰

69. Resolution No. 2000-402-G-CG-B of the General Commandant National Police was published in General Order No. 216 on November 10, 2000, in which it was decided:

To discharge from the police ranks, on October 25, 2000, National Police Constable VICTOR HENRY MINA CUERO, with citizenship card No. 080124510-1, by judgment of the Disciplinary Tribunal pursuant to Article 66 (j) of the National Police Personnel Law, who will cease to be a part of the "Loja No. 7" Provincial Police Command.²¹

4. The Application for Constitutional Relief (*Amparo*)

70. On December 15, 2000, the alleged victim filed an application for constitutional relief (*amparo*) with Esmeraldas Civil Court of Esmeraldas, claiming that the decision of the Disciplinary Tribunal of October 25, 2000, published in National Police General Order No. 214, violated several of his constitutional rights.²² The alleged victim argued that his right to a competent judge was infringed, given that the regular courts where the appropriate jurisdiction; that the offenses for which he was punished were never proved; and that he did not have a defense attorney present when he gave his statement to the Judicial Police.

71. The hearing on the application for constitutional relief was set for January 12, 2001.²³

72. On February 28, 2001, Esmeraldas Third Civil Court denied the application for constitutional relief. The court found that the alleged victim's punishment was imposed in accordance with all constitutional standards and that no formalities whatever had been omitted. The court also found that under Article 81 of the Organic Law of the National Police and Article 334 of the National Police Criminal Code, dismissal or discharge was a penalty that the Disciplinary Tribunal had the power to impose as a competent organ to do so. The Court also considered that pursuant to Article 95(2) of the Constitution of Ecuador, judicial decisions adopted in the context of a proceeding, such as the one made by the Disciplinary Tribunal in the case under review, were not susceptible to constitutional relief (*amparo*).²⁴

¹⁹ Annex XX. Resolution of the National Police Disciplinary Tribunal, October 25, 2000. Annex 4 to the State's brief of March 12, 2010.

²⁰ Annex XX. Resolution of the National Police Disciplinary Tribunal, October 25, 2000. Annex 4 to the State's brief of March 12, 2010.

²¹ Annex XX. General Order No. 216 of the General Command of the National Police, Friday, November 10, 2000. Appended to the original petition of February 28, 2002.

²² Annex XX. Application for constitutional relief (*amparo*) filed by Víctor Mina Cuero with Esmeraldas Civil Court on December 15, 2000. Annex 8 to the State's brief of March 12, 2010.

²³ Annex XX. Letter from Esmeraldas Third Civil Court of January 9, 2001. Appended to the original petition of February 28, 2002.

²⁴ Annex XX. Judgment of Esmeraldas Third Civil Court on application for constitutional relief No. 12834-2000 filed by Henry Mina Cuero. Appended to the original petition of February 28, 2002.

73. The alleged victim then proceeded to lodge an appeal with the Constitutional Court. On March 16, 2001, that court denied the action for constitutional relief on the grounds that the alleged victim had failed to appear at the hearing scheduled for it by Esmeraldas Third Civil Court and that, although he requested that it be rescheduled, he presented no justification for said rescheduling.²⁵

5. Unconstitutionality Suit

74. On March 29, 2001, the alleged victim requested the Ombudsman for a favorable report in order to bring an unconstitutionality suit against the decision to discharge him from the police. That report was a requirement for the suit to be admitted under Article 277(5) of the Constitution²⁶ and the Office of the Ombudsman issued it on April 27, 2001, referring the suit brought by the petitioner to the Constitutional Court.²⁷

75. On May 3, 2001, the Constitutional Court accepted the suit,²⁸ and on June 18, 2001, informed the General Commandant of the National Police thereof.²⁹

76. On May 16, 2001, Mr. Mina Cuero's former live-in partner gave a statement in the presence of a notary in which she said that she had been neither physically nor verbally abused and that the information contained in the police report was false and based solely on the complaint made by her aunt, which was likewise untrue. The petitioner said that that statement was included in the proceedings before the Constitutional Court, but that the Court had not taken it into consideration. However, the Commission has no information that that statement was formally incorporated in the proceedings. There is nothing to suggest as much in the final decision on that suit.

77. On August 14, 2001, the Constitutional Court decided "to reject the suit presented and order the case archived." The Court found that the alleged victim had ample opportunity to exercise his right of defense during the disciplinary proceeding, given that he was assisted at his hearing by a defense lawyer, and testimony was admitted from policemen who went to the scene of the incident. It found that nothing unconstitutional was proven that might warrant its pronouncement.³⁰

V. ANALYSIS OF LAW

A. Right to a fair trial, principle of legality, and right to judicial protection (Articles 8 and 25 of the American Convention)

78. The Commission recalls that both organs of the inter-American system have held that the guarantees recognized in Article 8 of the American Convention are not confined to criminal proceedings, but apply also to other types of proceedings.³¹ Specifically, where punitive proceedings are concerned, both organs of the system have held that the guarantees for criminal proceedings apply analogously, as they

²⁵ Annex XX. Resolution No. 303-RA-01-RA on the appeal, adopted by the Constitutional Court on March 16, 2001. Appended to the original petition of February 28, 2002.

²⁶ Annex XX. Request to the Ombudsman of March 29, 2001. Appended to the original petition of February 28, 2002.

²⁷ Annex XX. Official letter 01528 from the Office of the Ombudsman, April 27, 2001. Appended to the original petition of February 28, 2002.

²⁸ Annex XX. Order of the Second Division of the Constitutional Court of June 18, 2001, assuming cognizance of the suit. Appended to the original petition of February 28, 2002.

²⁹ Annex XX. Classification order on the unconstitutionality suit issued by the Constitutional Court on May 3, 2001. Appended to the original petition of February 28, 2002.

³⁰ Annex XX. Judgment of Constitutional Court, Case No. 0102001-AA, November 9, 2001. Appended to the original petition of February 28, 2002.

³¹ IACHR, Report No. 65/11, Case 12.600, Merits, Hugo Quintana Coello et al. (Supreme Court of Justice) Ecuador, March 31, 2011, par. 102; I/A Court H.R., Baena Ricardo et al. Case v. Panama, Merits, Reparations and Costs, Judgment of February 2, 2001, Series C No. 72, pars. 126-27; Case of the Constitutional Court v. Peru, Merits, Reparations and Costs, Judgment of January 31, 2001, Series C No. 71, pars. 69-70; and Case of López Mendoza v. Venezuela, Merits, Reparations and Costs, Judgment of September 1, 2011, Series C No. 233, par. 111.

concern the exercise of the State's punitive authority.³² Bearing in mind that in the instant case the alleged victim was punished with dismissal as a member of the National Police, the Commission considers that since it was a punitive proceeding, the guarantees of due process and the principle of legality in accordance with Articles 8(2) and 9 of the American Convention are applicable.

1. Rights to prior notification in detail of charges,³³ to adequate time and means for the preparation of one's defense,³⁴ and to be assisted by legal counsel of one's own choosing³⁵

79. The Commission recalls that the right of defense implies that anyone on trial, including in an administrative proceeding, will be able to defend their interests or rights effectively and on "equal procedural terms ... and be fully informed of the charges against them."³⁶

80. For its part, the Inter-American Court has held that in order to satisfy that guarantee "the State must notify the accused not only of the charges against him, that is, the crimes or offenses he is charged with, but also of the reasons for them, and the evidence for such charges and the legal definition of the facts. The defendant has the right to know, through a clear, detailed and precise description, all the information of the facts in order to fully exercise his right to defense and prove to the judge his version of the facts. [This right] applies even before the 'charges,' in a strict sense, are filed. For this right to fully operate and satisfy its inherent aims, it is necessary for said notification to take place before the accused renders his first statement before any public authority."³⁷

81. As regards the right to adequate time and means for the preparation of one's defense, the Commission has referred to the need to ensure that persons are able to "prepare their defense, present arguments, and offer pertinent evidence," which guarantees are impossible to exercise when the time provided by state authorities is "unreasonably short."

82. As to the right to technical defense, the Inter-American Court has found that the right to defense arises as of the moment in which an investigation into an individual is ordered, who must have access to defense counsel from the moment they give their statement, since to deny them that possibility is "to strictly limit the right to defense, which leads to a procedural imbalance and leaves the individual unprotected before the punishing authority." Furthermore, in the case of *Vélez Looz v. Panama*, the Court stated that "if the right to defense arises as from the moment the investigation begins or the authority in charge orders or executes actions entailing an infringement of rights,³⁸ the person subjected to a sanctioning administrative proceeding must have access to procedural representation from that moment onwards."³⁹

83. In first place, in the instant case the alleged victim said that he received no formal notice that he was being placed under investigation, stating the charges with which he was accused or the legal nature

³² IACHR, Access to Justice as a Guarantee of Economic, Social, and Cultural Rights. A Review of the Standards Adopted by the Inter-American System of Human Rights. OEA/Ser.L/V/II.129, September 7, 2007, pars. 98-123; and Case No. 12.828, Report 112/12, Marcel Granier et al., Venezuela, Merits, November 9, 2012, par. 188; IACHR, Report No. 42/14. Case 12.453, Merits, Olga Yolanda Maldonado Ordoñez, Guatemala, July 17, 2014. par. 69; I/A Court H.R., *Baena Ricardo et al. Case v. Panama, Merits, Reparations and Costs. Judgment of February 2, 2001, Series C No. 72*, pars. 126-127.

³³ Article 8(2)(b) of the American Convention recognizes the judicial guarantee of "prior notification in detail to the accused of the charges against him."

³⁴ Article 8(2)(c) of the American Convention establishes the guarantee of "adequate time and means for the preparation of his defense."

³⁵ Article 8(2)(d) of the American Convention establishes the "right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel."

³⁶ I/A Court H.R., Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, par. 117.

³⁷ I/A Court H.R. Case of Barreto Leiva v. Venezuela, Merits, Reparations and Costs, Judgment of November 17, 2009, Series C No. 206, pars. 28 and 30.

³⁸ I/A Court H.R., Case of Vélez Looz v. Panama, Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2010, Series C. No. 218, par. 132.

³⁹ I/A Court H.R., Case of Vélez Looz v. Panama, Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2010, Series C. No. 218, par. 132.

thereof. The state has not succeeded in refuting that assertion by providing a written notice meeting the above-cited parameters.⁴⁰ In that regard, the State has not demonstrated that Mr. Mina Cuero was given clear and detailed information about the institution of a proceeding against him and its factual and legal grounds, either before he gave his statement on September 17, 2000, or prior to the hearing held on October 25, 2000.

84. In second place, the Commission notes that the statement given to the Judicial Police on September 18, 2000, was done without legal counsel present. In relation to the State's contention regarding the lack of "legal relevance" of that statement, the IACHR underscores that fair trial guarantees, particularly as regards strict compliance with the right of defense at all stages of a punitive proceeding, are standalone rights that are not contingent on subjective judgments as to whether or not a particular procedure was "legally relevant."

85. In third place, according to the proven facts, on October 17, 2000, the General Command of the Police ordered a disciplinary tribunal to be convened in order to examine the disciplinary offenses attributed to the alleged victim and it called a public hearing for October 25, 2000. As was mentioned, there is no record of the victim having been given formal notice of that proceeding. In that regard, the State has not managed to refute the alleged victim's claim that he was verbally informed on October 24, 2000, that a hearing on his case would be held the following day in the city of Esmeraldas, an 18-hour bus journey from the province where he was situated, which meant that he had travel all night and find two lawyers to prepare his defense just hours before the hearing was held. The Commission recalls that one of the lawyers requested a continuance of the hearing in order to prepare an adequate defense, but the Disciplinary Tribunal denied his request.

86. The IACHR highlights that the hearing addressed the petitioner's offenses in a general manner and that there was also no clarity at that stage as to the deeds and disciplinary violations that the alleged victim had committed. The Commission notes as a constant throughout the disciplinary proceeding that there was a lack of clarity as to whether the proceeding was instituted because of Mr. Mina Cuero's alleged assault of his former live-in partner, or because his insolence to his superiors, or both, an aspect that was only elucidated when the Disciplinary Tribunal issued its punitive decision.

87. Based on the foregoing, the IACHR concludes that the State violated Víctor Henry Mina Cuero's right of defense recognized at Articles 8(2)(b), (c), and (d) of the American Convention, taken in conjunction with Article 1(1) of the same instrument.

2. The principle of presumption of innocence⁴¹ in relation to the reliance on the criminal record in the dismissal decision

88. The presumption of innocence implies that the accused is legally innocent or not guilty until a decision is made on their criminal responsibility, and therefore the State's treatment of them should be consistent with their status as a person who has not been convicted.⁴² The Court has held that this means that the defendant does not have to prove that he did not commit the offense with which he is charged, because the onus probandi is on those making the accusation.⁴³ Thus, the convincing demonstration of guilt is an essential requirement for a criminal sanction, so that the burden of proof falls on the prosecutor and not on the accused.⁴⁴

⁴⁰ With respect to the rules on the burden of proof in response to similar submissions, see I/A Court H.R. *Case of Chaparro Álvarez and Lapo Ñíiguez v. Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Judgment of November 21, 2007, Series C No. 170, par. 73.

⁴¹ Article 8(2) of the American Convention provides: Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law.

⁴² I/A Court H.R., *Case of Ruano Torres et al. v. El Salvador*, Merits, Reparations and Costs, Judgment of October 5, 2015, Series C No. 303, par. 126.

⁴³ I/A Court H.R., *Case of Ricardo Canese v. Paraguay*, Judgment of August 31, 2004. Series C No. 111, par. 154.

⁴⁴ IACHR, Report No. 82/13, Case 12.679, Merits, José Agapito Ruano Torres and Family, El Salvador, November 4, 2013, par. 118.

89. At the same time, the principle of presumption of innocence means that the judge should not initiate the proceeding with a preconceived notion that the defendant has committed the offense with which they are charged. The IACHR has stated that the application of a penalty may only be founded upon the court's certainty regarding the existence of a punishable act attributable to the accused.⁴⁵ The Commission has also held that to impose a disciplinary penalty on someone based purely on the existence of a criminal charge against violates the principle of presumption of innocence because it implies considering *a priori* that the accused is guilty as charged.

90. In the instant case, the Commission notes that, according to the record of the public hearing, the president of the Disciplinary Tribunal ordered the alleged victim's employment record to be read out, revealing that he had four disciplinary sanctions on his professional record, that he undergone criminal prosecution for homicide, the case for which was provisionally dismissed, and that he had been discharged by judgment of the Disciplinary Tribunal, but reinstated based on a ruling of the Constitutional Court. In addition, the punitive decision stated that the aggravating factors contained in Article 30 (c), (d), and (m) of the Disciplinary Regulations of the National Police were also present. Specifically, paragraphs (d) and (m) refer to "repeated commission of offenses in terms of time and seriousness" and "any other circumstance that in the opinion of the superior increases the seriousness of the offense or suggests that the punished individual may be presumed dangerous."

91. It is to be surmised from the foregoing that in imposing punishment on the alleged victim, the Disciplinary Tribunal took into account his criminal prosecution for homicide, which was ultimately dismissed by the Superior Court of Babahoyo. It also took into account two discharges with which the alleged victim was punished in 1996 and 1998, which were reversed by the Constitutional Court when it found that the alleged victim's procedural guarantees were violated in those proceedings. That means, that the mere fact of having undergone disciplinary or criminal proceedings—notwithstanding that they did not culminate in punishment—was a factor introduced in the disciplinary proceeding with which this case is concerned and considered by the Disciplinary Tribunal as evidence of recidivism and, therefore, an aggravating circumstance. The foregoing violates the principle of presumption of innocence.

92. Based on the foregoing, the Commission concludes that the Ecuadorian State violated Article 8(2) of the American Convention, taken in conjunction with Article 1(1) thereof, to the detriment of Víctor Henry Mina Cuero.

3. The principle of legality⁴⁶ and the right to sufficient justification of decisions

93. The principle of legality contained in Article 9 of the American Convention governs the actions of State organs in the exercise of their punitive power.⁴⁷ As mentioned above, that principle applies to disciplinary processes, which are "an expression of the punitive powers of the State" given that they entail an impairment or alteration of the rights of individuals as a consequence of illicit conduct.⁴⁸

94. In particular, the law must give detailed guidance on the infractions by judges that trigger disciplinary measures, including the gravity of the infraction which determines the kind of disciplinary measure to be applied in the case at hand. In that regard, in *Maestri v. Italy*, the European Court wrote that the principle of legality requires not only that the impugned measure should have some basis in domestic law, but also refer to the quality of the law in question. The law should be accessible to the persons concerned and

⁴⁵ IACHR, Report on the Use of Pretrial Detention in the Americas, OEA/Ser.L/V/II.Doc.46/13, December 30, 2013, par. 132.

⁴⁶ Article 9 of the American provides: "No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed." A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.

⁴⁷ IACHR, Criminalization of the Work of Human Rights Defenders, OEA/Ser.L/V/Doc.49/15, December 31, 2015, par. 253.

⁴⁸ I/A Court H.R., *Case of López Lone et al. v. Honduras*, Preliminary Objection, Merits, Reparations and Costs, Judgment of October 5, 2015, Series C No. 302, par. 257, and *Case of Maldonado Ordoñez v. Guatemala*, Preliminary Objection, Merits, Reparations and Costs, Judgment of May 3, 2016, Series C No. 311, par. 89. I/A Court H.R. *Baena Ricardo et al. Case v. Panama*, Merits, Reparations and Costs, Judgment of February 2, 2001, Series C No. 72, paras. 106 and 108.

formulated with sufficient precision to enable them—if need be, with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

95. In the Case of López Lone, the Inter-American Court stated that “it is impossible to codify all assumptions” in disciplinary matters, so that “ultimately, there must always be a relatively open clause concerning professional duties. However, in these assumptions and when open or indeterminate disciplinary offenses are used, it is fundamental to provide a statement of reasons when applying them, because it is incumbent on the disciplinary court to interpret these norms respecting the principle of legality and observing the greatest rigor when verifying the existence of punishable conduct.”⁴⁹

96. As regards, the obligation to justify decisions, the jurisprudence of the inter-American system has stated that it translates as the “reasoned justification” that allows the judge to arrive at a conclusion.⁵⁰ That guarantee is closely related to the principle of legality since on the premise that the disciplinary grounds must be established in the State’s legal framework in accordance with the above-describe standards, the justification for a ruling and certain administrative decisions should disclose “the facts, reasons and standards on which the authority for the decision was based.”⁵¹ In that regard, the justification for the punitive decision is what discloses how the facts supporting the proceeding align with or fall within the scope of the grounds invoked. On this point, in *Cruz Flores v. Peru*, the Court stressed the need that in all punitive decisions there be a link between the conduct of which the person is accused and the provision on which the decision is based.⁵²

97. As is described in the section on proven facts, in this case the Disciplinary Tribunal ordered the alleged victim to be discharged from the police for the causes envisaged at paragraphs 5 and 26 of Article 64 of the Disciplinary Regulations of the National Police with the aggravating factors recognized at paragraphs (c), (d), and (m) of Article 30 of those same regulations.

98. Paragraphs 5 and 26 of Article 64 recognizes as serious or class III offenses “any act that evinces inconsideration or insolence to a superior, whether on duty or off duty” and “engaging in manifest acts of violence or indiscipline toward a superior, where the act does not constitute a criminal offense.” The Commission notes that those causes are somewhat broad. Therefore, the punishing authority should have provided more detailed justification that linked the specific deeds of which Mr. Mina Cuero was accused with the causes that were invoked against him and the penalty to be imposed. Such justification was especially important in this case, bearing in mind the ambiguity and lack of clarity as to whether the proceeding concerned what happened at the home of Mr. Mina Cuero’s former live-in partner or what occurred at the place where the police went afterwards. As the record of the hearing shows, both circumstances were addressed in the context of the same hearing. In spite of that, the justification provided by the Disciplinary Tribunal does not indicate how the events were consistent with the aforesaid causes. In addition, no reasoning was offered with regard to the imposition of the most severe penalty; that is, dismissal.

99. The Commission understands that discipline is important in the security forces. It also understands that is the State has a duty of response to a complaint of possible domestic violence. However, the State’s actions must adhere to due process and the principle of legality, which did not occur in this case as the preceding considerations show.

⁴⁹I/A Court H.R., *Case of López Lone et al. v. Honduras*, Preliminary Objection, Merits, Reparations and Costs, Judgment of October 5, 2015, Series C No. 302, par. 271. Mutatis, mutandis, also relevant is what the Inter-American Court found in the case of Mohamed: “being an offense of negligence, whose criminal definition is open and must be completed by the judge upon analyzing the legal definition of the crime, what is important is that the judgment identify the corresponding duty of care infringed by the defendant’s active behavior (imprudence) or omission (negligence).” See I/A Court H.R., *Case of Mohamed v. Argentina*, Preliminary Objection, Merits, Reparations and Costs, Judgment of November 24, 2012, Series C No. 255, par. 136.

⁵⁰I/A Court H.R., *Case of Maldonado Ordoñez v. Guatemala*, Preliminary Objection, Merits, Reparations and Costs. Judgment of May 3, 2016. Series C No. 311, par. 87.

⁵¹IACHR, Report No. 103/13, Case 12.816, Report on Merits, Adan Guillermo Lopez Lone *et al.*, Honduras, par. 145.

⁵²I/A Court H.R., *Case of De la Cruz Flores v. Peru. Merits, Reparations and Costs*, Judgment of November 18, 2004. Series C No. 115, par. 84.

100. Based on the foregoing, the Commission concludes that the Ecuadorian State is responsible for violation of the rights recognized in Articles 8(1) and 9 of the American Convention, taken in conjunction with Article 1(1) of the same instrument, to the detriment of Víctor Henry Mina Cuero.

4. The right to appeal the judgment⁵³ and the right to judicial protection⁵⁴

101. The right to appeal a judgment is part of due process of law in a disciplinary proceeding,⁵⁵ as well as a fundamental guarantee whose purpose is to avoid a miscarriage of justice from becoming *res judicata*.⁵⁶ As regards the scope of the right of appeal, both the IACHR and the Court have stated that it entails an examination of both factual and legal aspects of the appealed decision by a different judge or tribunal of higher rank.⁵⁷ It must be guaranteed before the judgment becomes *res judicata*, it must be resolved within a reasonable time, and it must be timely and effective, in other words, it must provide results or responses consistent with its intended purpose. It must also be accessible, without requiring any great formalities that might render the right illusory.⁵⁸

102. The IACHR recalls that the State has a general obligation to provide effective judicial remedies to persons who claim to be victims of human rights violations (Article 25), which must be substantiated in accordance with the rules of due process of law (Article 8(1)). Therefore, for an effective remedy to exist, it is not sufficient that it be provided for in law but, rather, it must be truly effective in establishing whether there has been a violation of human rights and in providing redress.⁵⁹

103. The IACHR recalls that the State argued that it did not violate the right to appeal the judgment to a higher judge or court because the alleged victim had recourse to the appeal envisaged at Article 67 of the National Police Personnel Law to challenge the decision to dismiss him, which he refrained from using. It added that, in any event, Mr. Mina Cuero obtained a judicial review of his dismissal via the application for constitutional relief (*amparo*).

104. The IACHR finds that Article 67 of the National Police Personnel Law does indeed provide that “[p]olice personnel who consider that they have been unlawfully placed in transitory status or discharged may appeal to the appropriate Council in the manner set forth in Article 55 of this Law.” Furthermore, Article 55 of that law provides that “resolutions adopted by the respective councils may be appealed”

105. In addition, Article 84 of the Disciplinary Regulations of the National Police provides: “Penalties imposed for offenses may be appealed, except when imposed in judgments of the Disciplinary Tribunal or by order of the President of the Republic.” Faced with this apparent contradiction, the State offered no explanation as to how Mr. Mina Cuero had recourse to appeal when the more specific rule that established the jurisdiction of the Disciplinary Tribunal—on which basis the punitive proceeding against him was conducted—precisely excluded the possibility of challenging the penalties imposed by the tribunal.

106. At the same time, the Commission notes that Esmeraldas Civil Court, upon rejecting the *amparo* application filed by the alleged victim on December 15, 2000, merely indicated that the penalty had

⁵³ Article 8(2)(h) recognizes the “right to appeal the judgment to a higher court.”

⁵⁴ Article 25(1) of the Convention states: Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

⁵⁵ IACHR, Guarantees for the Independence of Justice Operators: Towards Strengthening Access to Justice and the Rule of Law in the Americas, OEA/Ser.L/V/II.Doc.44, December 5, 2013, par. 235; I/A Court H.R., *Case of Vélez Loor v. Panama*, Preliminary Objections, Merits, Reparations and Costs, Judgment of November 23, 2010, Series C No. 218. par. 179.

⁵⁶ IACHR, Report No. 33/14, Case 12.820, Manfred Amrhein et al., Costa Rica, April 4, 2014, par. 186.

⁵⁷ IACHR, Report No. 33/14, Case 12.820, Manfred Amrhein et al., Costa Rica, April 4, 2014, par. 186.

⁵⁸ IACHR, Report No. 33/14, Case 12.820, Manfred Amrhein et al., Costa Rica, April 4, 2014, pars. 186 and ff.

⁵⁹ I/A Court H.R., *Case of the Dismissed Congressional Employees (Aguado-Alfaro et al.)*, Preliminary Objections, Merits, Reparations and Costs, Judgment of November 24, 2006, Series C No. 158, par. 125; I/A Court H.R., *Case of the Yakye Axa Indigenous Community*, Judgment of June 17, 2005, Series C No. 125. par. 61; I/A Court H.R., *Case of the “Five Pensioners,”* Judgment of February 28, 2003. Series C No. 98, par. 136.

been imposed in accordance with all constitutional standards, that no formalities whatever had been omitted, and that the decision of the Disciplinary Tribunal could not be challenged via the *amparo* remedy. Likewise, the Constitutional Court, in throwing out the unconstitutionality suit brought by the petitioner, merely said that the alleged victim had ample opportunity to exercise his right of defense during his disciplinary proceeding, given that he was assisted at his hearing by a defense lawyer and testimony was admitted from policemen who went to the scene of the incident, and that nothing unconstitutional was proven that might warrant its pronouncement.

107. In that connection, the IACHR considers that the contents of both decisions suggest that the competent bodies did not make a comprehensive examination of the factual and legal aspects related to the decision to dismiss the alleged victim, nor offered judicial protection against the various violations of the right of defense, the right to be presumed innocent, the principle of legality, and the right to reasoned decisions in the terms analyzed in this report.

108. Based on the foregoing, the Commission concludes that the Ecuadorian State is responsible for violation of the rights recognized in Articles 8(2)(h) and 25(1) of the American Convention, taken in conjunction with Articles 1(1) and 2 of the same instrument, to the detriment of Víctor Henry Mina Cuero.

VI. CONCLUSIONS

109. The Commission concludes that the State of Ecuador is responsible for violation of the right to a fair trial, the principle of legality, and the right to judicial protection recognized in Articles 8(1), 8(2)(b), 8(2)(c), 8(2)(d), 8(2)(h), 9 and 25(1) of the American Convention, taken in conjunction with the obligations established in Articles 1(1) and 2 of that instrument, to the detriment of Victor Henry Mina Cuero.

VII. RECOMMENDATIONS

110. Based on the above conclusions,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS RECOMMENDS THAT THE ECUADORIAN STATE:

1. Reinstate Victor Henry Mina Cuero, if he so wishes, in a position similar to the one he held in the police, with the same pay, welfare benefits and rank as he would enjoy at present had he not been dismissed. If for justified reasons his reinstatement is not possible, pay him an alternative indemnity.

2. Provide full reparation for the rights violations found in the instant report, including both material and nonpecuniary dimensions.

3. Revise the domestic laws to ensure that disciplinary proceedings against members of the National Police of Ecuador are consistent with all due process guarantees and the principle of legality. In particular, take steps to ensure that proceedings guarantee the right to prior notification in detail of charges, the right to adequate time to prepare a defense, the right to be presumed innocent, and the right to judicial recourse. In addition, ensure that the causes invoked in disciplinary sanctions and their respective aggravating circumstances conform to the principle of legality.