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REPORT No. 285/21
PETITION 58-10

REPORT ON ADMISSIBILITY

JORGE HUMBERTO GÄRTNER LOPEZ AND FAMILY
COLOMBIA

Electronically approved by the Commission on October 26, 2021.

Cite as: IACHR, Report No. 285/21, Petition 58-10. Admissibility. Jorge Humberto Gärtner Lopez and Family. Colombia. October 26, 2021.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Jorge Humberto Gärtner López
Alleged victim:	Jorge Humberto Gärtner López and family[1]
Respondent State:	Colombia
Rights invoked:	Articles 8 (fair trial), 9 (freedom from *ex post facto* laws), 12 (freedom of conscience and religion), 24 (equal protection), 25 (judicial protection), and 26 (economic, social, and cultural rights)[2] of the American Convention on Human Rights[3]

II. PROCEEDINGS BEFORE THE IACHR[4]

Filing of the petition:	January 4, 2010
Additional information received at the stage of initial review:	October 15 2010; October 19, 2010; October 27, 2010; November 10, 2010; May 11, 2012; July 21, 2012; February 14, 2013; February 7, 2014; February 8, 2017; and July 1, 2020
Notification of the petition to the State:	December 2, 2016
State's first response:	March 23, 2018
Additional observations from the petitioner:	June 4, 2018, and May 20, 2020

III. COMPETENCE

Competence *Ratione personae*:	Yes
Competence *Ratione loci*:	Yes
Competence *Ratione temporis*:	Yes
Competence *Ratione materiae*:	Yes, American Convention (instrument of ratification deposited on July 31, 1973)

IV. DUPLICATION OF PROCEDURES AND INTERNATIONAL *RES JUDICATA*, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

Duplication of procedures and international *res judicata*:	No
Rights declared admissible	Articles 5 (humane treatment), 8 (fair trial), 9 (freedom from *ex post facto* laws), 12 (freedom of conscience and religion), 23 (right to participate in government), 24 (equal protection), 25 (judicial protection), and 26 (economic, social, and cultural rights) of the American Convention, in relation to articles 1.1 (obligation to respect rights) and 2 (domestic legal effects) thereof
Exhaustion or exception to the exhaustion of remedies:	Yes, in the terms of Section VI
Timeliness of the petition:	Yes

[1] The petitioner identifies the following persons as next-of-kin of Mr. Jorge Humberto Gärtner Lopez: (1) Dulfay Calderon Betancurt (wife); (2) Jorge Alejandro Gärtner Calderon (son); (3) Laura Victoria Gärtner Calderon (daughter); (4) Juan Pablo Gärtner Calderon (son); (5) Ferran Emilio Gärtner Restrepo (father)—whose decease was subsequently reported by the petitioner—; (5) Otto William Gärtner Lopez (brother); (6) Nancy Emperatriz Gärtner Lopez (sister); (7) Ruby Elena Gärtner Lopez (sister); (8) Mario Emilio Gärtner Lopez (brother); (9) Aide Gärtner Lopez (sister); (10) John Armando Gärtner Lopez (brother).

[2] Although the petitioner does not expressly enunciate these provisions of the Convention, a simple reading of his petition and subsequent communications to the IACHR indicates that these are the rights that he considers violated.

[3] Hereinafter "the American Convention" or "the Convention."

[4] The observations submitted by each party were duly transmitted to the opposing party.

V. ALLEGED FACTS

1. The petitioner alleges the violation of his human rights because he was dismissed from his public post of Judge due to his position as bishop of the Independent Catholic Apostolic Church. He also alleges a lack of independence on the part of the court that adjudicated the amparo action for the protection of constitutional rights (*tutela*) he filed against the dismissal; and claims to have been discriminated because, subsequently, a Catholic priest was appointed as co-Justice of the Constitutional Court.

2. The petitioner explains that he was ordained as a Presbyter of the Independent Catholic Apostolic Church in December 2001, before taking the office of judge, and that he was consecrated as a Bishop in December 2007—by which date he was already a judge. This Church is an autonomous organization unrelated to the Catholic Church headquartered in the Vatican, which differs from the latter on several doctrinal subjects. The petitioner states that following a competitive selection process, on June 1, 2006, he was sworn in as Third Administrative Judge of Pereira. He held this post until he was transferred, for security reasons, to the city of Bogota in November 2008, where he was appointed Fifth Administrative Judge of Bogota. He argues that he always practiced his religious ministry outside of his working hours. In this regard, he explains that from the moment that he was sworn in as judge he "*was so clear about the fact that there was no incompatibility with my office of judge, that [my religious ministry] was publicized in the local media of Pereira, and there were congratulations expressed through the same media, by organizations like Juriscoop, Asonal Judicial, among others. At that time no one had persecuted or accused me*." He subsequently asserts that:

> together with the fact that I have never failed a performance evaluation, [...] my office of priest in the rank of bishop has at no time represented an abandonment of my duties as a judge of the Republic. This is my faith, and I practice it at the sacramental celebrations and through prayer, which as a human being, my conscience requires. Our ecclesiastic community has no type of jurisdiction [...]. And as to any possible violation of the provisions on conflicts of interest or impartiality, objectivity, public order, etc., even though this was fully established and proven at the trial stage of the disciplinary proceedings, I am pleased to place at the avail of any authority the approximately 1,000 judgments issued by me as a judge since I was sworn in, in each of which, with no exceptions, I always motivate and argue in accordance with the judicial precedents of the High Courts.

3. On July 14, 2008, due to complaints by the 37th and 38th Offices of the Attorney General of Pereira and also to information transmitted by the Administrative Tribunal of Risaralda —concerning Mr. Gärtner's alleged celebration of masses and other catholic rites when he was already a judge of the Republic— , a disciplinary action was initiated against Mr. Gärtner by the Jurisdictional Disciplinary Chamber of the Sectional Council of the Judiciary of Risaralda. On January 28, 2009, the investigation was opened for a possible violation of the rules on incompatibility of officers established in Article 151 of the Statutory Act of the Administration of Justice; and on June 24, 2009, a bill of charges was filed against him for that same disciplinary infraction. At the first-instance trial level, he was acquitted by the the Jurisdictional Disciplinary Chamber of the Sectional Council of the Judiciary of Risaralda, in considering that Mr. Gärtner, while exercising his ecclesiastical ministry, had not in any way affected the proper exercise of the administration of justice; consequently, his presumption of innocence was left unscathed.

4. Following an appeal by the Attorney General's Office, that decision was revoked, and the Superior Council of the Judiciary – Jurisdictional Disciplinary Chamber found him disciplinarily responsible for violating the rules on incompatibility of offices, in a final judgment of June 30, 2010, imposing on him the penalty of dismissal from office and ten years of disqualification from holding public office. In pertinent part, this judgment argued with regard to the objective configuration of the breach, after citing the Constitutional Court's judgment on constitutionality C-037/96, as follows:

> The foregoing leads to the conclusion that, for the configuration of the grounds for incompatibility at issue, it is not necessary to prove an actual impact upon the public service, because, as it may be recalled, under the provisions of Article 5 of Act 734 of 2002, a

> disciplinary breach is unlawful whenever a functional duty is affected without any justification, without there being need for a material affectation of a right; nor is it necessary for the person who incurs in the breach to receive a remuneration for the exercise (in this case) of the religious ministry.

5. In relation to this, Mr. Gärtner explains that the legal provision that was applied to him in this disciplinary action, Article 151 of Act 270 of 1996 (Statutory Act of the Administration of Justice),[5] was declared conditionally constitutional by the Constitutional Court in judgment C-037 of 1996. In this ruling, which is of mandatory application for all the judges of the Republic given its *erga omnes* character, the Constitutional Court ruled as follows:

> Now, the grounds for incompatibility established in the provision under review are constitutional, in the understanding that, as it will be shown later for each case, all of them must seriously compromise the performance of the official functions assigned to each one of the judicial officers. Thus, items 1 and 5, which constitute a development of the provisions of Articles 127 and 128 of the Political Constitution, set forth the exercise of a series of offices that, for obvious reasons of conflict of interest and loss of objectivity, prevent the proper exercise of the administration of justice. [...] The article shall be declared constitutional, solely under the conditions set out in the present judgment.

However, Mr. Gärtner asserts that the Superior Council of the Judiciary abstained from abiding by this constitutionality judgment, and failed to verify in concrete terms whether his ministry as a bishop in the Independent Catholic Apostolic Church had interfered with his performance of his duties as judge. On the contrary, as seen in the above-cited excerpt of the dismissal ruling, the petitioner was dismissed from his judicial office for the mere objective circumstance of having an ecclesiastical ministry. Concerning this, the petitioner himself argues as follows:

> [a]ccording to the dismissal decisions, the terms on which the [Superior Council of the Judiciary] based itself, as set forth in the motivation part of the judgment, were the words *"that for obvious reasons"* which the Constitutional Court used in reference to conflicts of interest and the loss of impartiality. However, as the trial-level authority concluded in my initial acquittal, at no moment was it demonstrated that the undersigned actually incurred in those conditionings set forth by the Constitutional Court. No one can be convicted '...for obvious reasons...,' without a prior specification of what those obvious reasons are; that is, without a specification of which conduct was incurred by the petitioner so as to configure a conflict of interest or a loss of objectivity.

In this regard, the petitioner cites the caselaw of the Constitutional Court according to which the unlawfulness of conducts that constitute disciplinary infractions must be determined on the grounds of a material non-complicance with the functional duties, and not on purely formal reasons. The petitioner alleges that having failed to apply a mandatory constitutionality judgment, the judges who ordered his dismissal violated the principles of legality, strict adherence to punitive legal descriptions, and substantive illegality of the punishable conduct.

6. In connection to this, Mr. Gärtner asserts that the authorities disregarded the principle of favorability in the application of punitive disciplinary law, enshrined in Article 14 of Colombia's Uniform Disciplinary Code, as follows: "*In disciplinary matters, permissive or favorable legislation, even when it is subsequently promulgated, shall be preferrably applied over restrictive or unfavorable legislation".* The petitioner states that in Colombia there is another Statutory Act, Act 133 of 1994, which regulates the right to freedom of religion and worship enshrined in article 19 of the Constitution, Article 6 of which establishes that this right comprises, *inter alia*, every person's right to "*not to be prevented by reasons of religion from accessing any civil*

[5] This provision establishes: "Article 151. Offices incompatible with holding public office in the Judicial Branch. In addition to the provisions of the Political Constitution, holding an office in the Judicial Branch is incompatible with: (...) 5. The exercise of a ministry any religious worship."

work or activity, from exercising said work or activity, or from holding public office or functions." Given the failure to apply this rule to him, which he deems more favorable than the Administration of Justice Statutory Act under which he was dismissed, Mr. Gärtner alleges a violation of the fundamental principle of favorability and, consequently, a violation of his right to due process.

7. Mr. Gärtner claims that the initiation and development of the disciplinary proceedings against him were actually due to the decisions he adopted as administrative judge, in relation to the privatization process of the Pereira Electricity Company: "*from that moment on, a persecution began, denouncing me for my position as bishop, and transferring my judgments to disciplinary authorities, but without specifying the reason. This was done by the Attorney General's Office itself represented by Marco Marín Vélez, delegate prosecutor before the same tribunal. It was also done by the (Administrative) Tribunal (of Risaralda)*." Likewise, he believes that it was his decisions as judge, in that case and other proceedings heard by him, which caused the serious threats he began to receive as he carried out his public office in Pereira, and which motivated the assignment of a security detail for his protection, and his eventual transfer to Bogota. He claims that this situation of persecution resulted in the fragmentation of his family unity, because due to a health condition of one of his children, who was then seven years old, his wife and children had to return from Bogota to Pereira, being forced to live separated from their father for a long period of time, until after his dismissal as a judge. —Mr. Gärtner does not formulate specific claims in relation to this situation of persecution he describes, nor does he report to have exhausted domestic remedies in relation to it, presenting it solely as a contextualization for the assessment of his main claim, which refers to his dismissal by reason of his religious affiliation—.

8. Against the appelate-level decision that ordered his dismissal, which was not liable to be contested through any ordinary judicial remedies, Mr. Gärtner filed a *tutela* action on July 8, 2010. This was denied in first instance by the Jurisdictional Disciplinary Chamber of the Sectional Council of the Judiciary of Cundinamarca on August 19, 2010. On appeal, this denial was confirmed by the Jurisdictional Disciplinary Chamber of the Superior Council of the Judiciary in a judgment of November 30, 2010. The Constitutional Court decided not to select the casefile for review, through an award of February 11, 2011.

9. The petitioner asserts that in deciding on this *tutela* action, his right to an independent tribunal was violated because the Jurisdictional Disciplinary Chamber of the Superior Council of the Judiciary, which had dismissed him, was also the judge that decided on the *tutela* action filed against said dismissal, thus acting as a judge and party to the proceedings. —Based on the documents on the casefile, the IACHR notes that out of the seven justices in the Disciplinary Chamber, all except one (Justice Pedro Alonso Sanabria) disqualified themselves from ruling on the *tutela* action precisely because they had participated in the decision to dismiss Mr. Gärtner, and that on November 30, 2010, the Chamber accepted their impediments; it is also noted that the aforementioned Justice Sanabria did not sign the dismissal judgment because, as the signatures sheet shows, he did not participate in the Chamber that day—. In Mr. Gärtner's view, the Disciplinary Chamber was still partial because justice Pedro Alonso Sanabria did not disqualify himself, and in fact he decided on the other Chamber members' impediments, then proceeding to adopt, as Presiding Justice, the *tutela* judgment that denied the protection Mr. Gärtner had requested.

10. In a brief of February 2014, Mr. Gärtner informed the IACHR that the Constitutional Court had appointed catholic Jesuit priest Luis Fernando Álvarez as co-Justice to rule on a constitutionality case. Since priest Alvarez effectively was sworn in before that high court and validly participated in the corresponding constitutionality judgment, Mr. Gärtner considers that he was a victim of discrimination, because on account of his being in an identical legal position, he was actually dismissed from his post as judge.

11. Faced with this circumstance, on March 1, 2013, Mr. Gärtner filed a new *tutela* action against the Disciplinary Chamber of the Superior Council of the Judiciary, in which he included as a "new fact" priest Alvarez's participation in the decision of the Constitutional Court and the consequent configuration of a discriminatory treatment against Mr. Gärtner. At the trial level, the Council of State – Second Section – Subsection "A" denied the *tutela* in a judgment of May 20, 2013, in considering that the requirement of immediacy in the filing of the action had not been met, because two years and seven months had elapsed since the notification of the judgment on the initial *tutela* action, without the applicant's having provided a reasonable and proportionate justification for this delay. Despite this decision, the Council of State also

examined the situation of priest Alvarez and transmitted its judgment to the Accusations Commission of the House of Representatives, in order for the latter to "*investigate and evaluate the conduct of Mr. Luis Fernando Alvarez Londoño while exercising a religious ministry and a judicial office in a simultaneous manner*." On appeal, the Fourth Section of the Council of State confirmed this judgment in a decision dated August 1, 2013, but for different reasons: it considered that Mr. Gärtner had incurred in temerity in filing a *tutela* action for the second time based on the same facts that motivated his initial *tutela* claim.

12. For the above-stated reasons, Mr. Gärtner claims that he was the victim of discrimination on religious grounds, in that he was unduly dismissed from his public post as judge, and also that he was the victim of discrimination given the differentiated treatment he received, as opposed to that given to the catholic priest who was indeed able to exercise the functions of co-justice at the Constitutional Court. He claims the violation of his rights to a fair trial and judicial protection because, in the *tutela* action, his right to an independent court was not respected, nor were the principles of legality or favorability in the dismissal proceedings. He also holds that, in a consequential manner, his and his family's rights to work and to a dignified standard of living have been disregarded, because, due to his dismissal, he has no source of income to provide for his family. On this point, in his initial petition, Mr. Gärtner explained:

> I have been a judge for 4 years and 4 months. At present, I am unemployed, in addition to the fact that the decision, apart from dismissing me, also disqualified me from holding public office for 10 years, and the undersigned usually provided advise to public entities because I specialize in administrative law. Likewise, when I was transferred to Bogota, I resigned from the professorships I had. Therefore, I do not have any resources to cover the basic needs of myself or my family; not to mention that we have no social security coverage.

13. In connection with this, the petitioner explains that the situation of subjection to disciplinary proceedings and dismissal, together with his security risks and his transfer to Bogota, caused him serious mental health problems. In this connection, he has annexed to his petition several medical certificates, where the IACHR observes that he was diagnosed with different mental conditions, as well as prescribed psychiatric treatment and medicine. He asserts that this situation of stress also had an impact on the psychological stability and integrity of his family members, including his wife, children, and siblings. Mr. Gärtner reported to the IACHR that eventually, on February 29, 2016, he was granted a disability pension on account of the psychiatric damage caused by his exposure to the stress and tensions he underwent during the years that he worked as a judge of the Republic.

14. In its response, the State requests the IACHR to declare this petition inadmissible since, in its opinion, (i) it resorts to the inter-American system as an international appeals court or a "court of fourth instance"; (ii) it does not characterize violations of the American Convention in the terms of Article 47(b) thereof; and (iii) it contains claims which are manifestly groundless in the terms of Article 47(c) of the Convention.

15. As for point (i), Colombia claims that the petitioner has brought to the Commission's attention matters already settled through final resolutions adopted by domestic courts acting within their scope of jurisdiction, with full respect for the right to due process, and without violating human rights. Specifically, regarding the judgment of June 30, 2010, through which the Jurisdictional Disciplinary Chamber of the Superior Council of the Judiciary dismissed and disqualified Mr. Gärtner from public office, the State indicates that "*the punitive resolution [...] was based on a reasoned interpretation of Judgment C-037-1997. Therefore, the alleged victim's claims regarding this point are groundless. This is so because they are solely based on his disagreement with the legal reasoning that justified a decision contrary to his interests, without anything to demonstrate arbitrariness or contradiction in it.*" The State stresses that the grounds for this judgment were motivated and sufficient under the domestic law, which, it believes, was confirmed by the decisions of the *tutela* judges who denied Mr. Gärtner's request for protection.

16. The State also argues that Mr. Gärtner's allegation of the violation of his right to equal protection as already raised in his second *tutela* action, which domestic judges denied in the first and the

second instances of jurisdiction, through judgments that Colombia considers cannot be challenged at the inter-American level.

17. Based on identical reasons, the State asserts that, regarding point (ii), the court rulings issued to dismiss Mr. Gärtner do not characteriza potential violations of the American Convention because they were well-founded on Colombia's law and in line with the inter-American standards.

18. Concerning point (iii), the State claims that the petitioner did not provide sufficient allegations to support either his complaint about the violation of the principle of freedom from *ex post facto* laws, or his schematic statements —raised in his domestic *tutela* claims and submitted to the IACHR as attachments to the petition—regarding the violation of his rights to compensation and to the protection of his honor and dignity.

VI. ANALYSIS OF EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

19. For the analysis of the requirement of exhaustion of domestic remedies in this matter, the IACHR recalls that, in accordance with its consolidated and reiterated practice, in order to identify the adequate remedies that petitioners should have exhausted before resorting to the inter-American system, the first methodological step of the analysis is that of separating the different claims formulated in the corresponding petition, in order to proceed with their individual assessment. In this line, in the present proceedings the IACHR notes that the petitioner's claims are essentially three: (i) a violation of his religious freedom because he was removed from the office of judge of the Republic on account of his objective condition of bishop of the Independent Catholic Apostolic Church, without there having been a concrete examination of whether his conduct undermined the service of administration of justice; a judicial decision that -he claims- also violated the principles of favorability and legality of punitive law; (ii) a violation of his right to an independent tribunal because the *tutela* action he brought against his dismissal was decided by the Jurisdictional Disciplinary Chamber of the Superior Council of the Judiciary, the same body that had issued the dismissal that was being challenged through the *tutela* claim; and (iii) a violation of his right to equality because a catholic priest was actually allowed to validly act as co-Justice of the Constitutional Court whereas the petitioner was removed from office for being in an identical legal situation.

20. In relation to claim (i), the IACHR notes that the removal of Mr. Gärtner was ordered through a judgment which was not liable to be challenged through any ordinary remedies, as per Article 111 of Act 270 of 1996 (Statutory Act of the Administration of Justice).[6] Despite this, Mr. Gärtner freely decided to challenge that penalty through the presentation of a *tutela* claim. According to the case law of the Constitutional Court, a *tutela* action only proceeds in an exceptional and extraordinary manner against judicial decisions, whenever the latter incur in what the Constitutional Court has called "*de facto* decisions" (*vías de hecho*), that is to say, specific and restrictive grounds for the admission of a *tutela* claim. This is, thereby, a constitutional remedy of an extraordinary nature provided by the Colombian legal system. The *tutela* action filed by Mr. Gärtner was rejected in the first and the second instances of jurisdiction by the Jurisdictional Disciplinary Chamber of the Sectional Council of the Judiciary of Cundinamarca on August 19, 2010, and by the Jurisdictional Disciplinary Chamber of the Superior Council of the Judiciary in a judgment of November 30, 2010, respectively. In an award of February 11, 2011, the Constitutional Court decided not to select the case for a review.

21. The IACHR considers that with this last decision, the domestic remedies filed by the petitioner regarding this first claim were effectively exhausted, in the terms of Article 46.1(a) of the American Convention. In addition, taking into account that the petition was received by the IACHR in 2010, it meets the requirement of timeliness established in Article 46.1(b) of the same instrument.

[6] According to this article: "Article 111. Scope. (...) Judicial decisions on disciplinary matters adopted in relation to judicial officers are jurisdictional acts not liable to be challenged through contentious-administrative actions. Any disciplinary resolution on the merits of a case and against which no remedy is admissible, is protected by the *res judicata* effect." In judgment C-037/96, the Constitutional Court declared this provision constitutional, in the understanding that in cases of violations of fundamental rights through disciplinary judicial resolutions which incur in *de facto* decisions, a *tutela* action would eventually be admissible.

22. Regarding claim (ii), as it has decided in prior pronouncements,[7] the IACHR considers that the adequate remedies to be exhausted in cases regarding claims of violations of procedural guarantees and other human rights in the course of judicial proceedings, are as a general rule those means provided by the domestic procedural legislation which enable persons to challenge, in the course of the same judicial process which is being called into question, the acts and decisions adopted during its development; in particular, any available ordinary judicial remedies, or any extraordinary judicial remedies that the alleged victims decide to file in order to seek the protection of their rights.

23. In this line, the IACHR notes that it has not been proven in the casefile that Mr. Gärtner disputed the impartiality of the judges that composed the Jurisdictional Disciplinary Chamber of the Superior Council of the Judiciary at any time within the *tutela* proceedings, despite having the procedural means to do so; nor did he question their impartiality after these tutela proceedings, since according to the petition casefile, the new *tutela* action he brought against the judgment denying him protection did not include that claim. For this reason, the IACHR concludes that the domestic remedies concerning allegation (ii) were not exhausted; thus, the obligation of Article 46.1(a) of the American Convention has not been met. Consequently, the allegation of a violation of the right to an independent tribunal shall not be admitted.

24. Regarding claim (iii), the IACHR recalls that insofar as the *tutela* action is a form of *amparo* remedy, it has been considered by the IACHR in the past as an adequate remedy under the Colombian legal system to achieve the purpose of protecting violated fundamental rights.[8] Once he had been informed through public sources of the appointment of Jesuit priest Luis Fernando Alvarez as co-Justice at the Constitutional Court, in February 2013, Mr. Gärtner filed a *tutela* action claiming the violation of his right to equality. However, this *tutela* action was denied in the first instance of jurisdiction by Section Two-Sub-section A of the Council of State on May 20, 2013, and on appeal, by the Fourth Section of the Council of State on August 1, 2013.

25. The IACHR notes that although both judgments denying the *tutela* were based on reasons of a procedural nature to deny the amparo —namely, untimeliness, in the decision by the first-instance judge, and alleged temerity in filing two *tutela* proceedings for identical facts, in the decision of the appelate judge—, a detailed analysis of these judgments indicates that it is not evident that Mr. Gärtner activated this domestic remedy in a procedurally incorrect manner. Indeed, the public information obtained by the petitioner about the appointment of priest Alvarez as a constitutional co-Justice preceded only by a few weeks his filing of the *tutela* lawsuit, with which the first-instance judge's argument of untimeliness loses its factual grounds; and the *tutela* action Mr. Gärtner filed for violation of his right to equality was not identical to the initial *tutela* action he filed against the dismissal judgment, for which reason the argument of temerity and identity of subject-matter espoused by the appellate judge also loses its factual grounds.

26. Bearing in mind these considerations, the IACHR concludes that Mr. Gärtner did pursue and exhaust the adequate domestic remedies to raise his claim about discrimination before the Colombian courts. Likewise, given that these denial rulings were issued after the petition was filed with the IACHR in 2010, the Commission deems that, regarding this element of the claims, the petition does meet the requirements set out in Article 46.1, letters (a) and (b), of the Convention.

27. In this case, the State has not disputed the petitioner's pursuit and exhaustion of domestic remedies in compliance with the duty established in Article 46.1(a) of the American Convention. The IACHR

[7] See for instance: IACHR, Report No. 92/14, Petition P-1196-03. Admissibility. Daniel Omar Camusso and Son. Argentina. November 4, 2014, pars. 68 *et seq*.; IACHR, Report on Admissibility No. 104/13, Petition 643-00. Admissibility. Hebe Sánchez Améndola and Daughters. Argentina. November 5, 2013, pars. 24 *et seq*.; and IACHR, Report No. 85/12, Petition 381-03. Admissibility. S. *et al*., Ecuador. November 8, 2012, pars. 23 *et seq*.

[8] IACHR, Report No. 126/19. Admissibility. Eduardo Enrique Dávila Armenta. Colombia. August 2, 2019, par. 13; Report No. 108/19. Petition 81-09. Admissibility. Anael Fidel Sanjuanelo Polo and Family. Colombia. July 28, 2019, pars. 11, 14; Report No. 121/17. Petition 70-07. Admissibility. José Fernando Montoro Alvarado. Peru. September 7, 2017, par. 10.

has repeatedly considered that whenever this allegation is not made to the Commission in due course, the State loses its opportunity to resort to this means of defense in the subsequent stages of the procedure.[9]

VII. ANALYSIS OF COLORABLE CLAIM

28. The IACHR takes note of the claim by the State that Mr. Gärtner has resorted to the IACHR as an international court of appeals or a "court of fourth instance", given that in the State's view, the domestic judicial authorities have already resolved in a final manner the different claims, remedies, and petitions made by the petitioner, with proper regard for due process and other human rights, and acting within the sphere of their competence. In relation to this point, the IACHR has adopted a uniform and consistent position, in the sense that it is indeed competent to declare a petition admissible and decide on its subject-matter in cases concerning domestic proceedings that may have violated the rights protected by the American Convention. The IACHR observes *prima facie* that the petitioner has raised several reasons why the domestic decisions adopted on his case might have violated rights enshrined in the American Convention, including the following, which shall be examined in the merits stage of the present procedure given their complexity and substantive merits:

(i) the possible violation of his right to religious freedom, in connection with the principles of legality and favorability applicable to punitive disciplinary law, insofar as he was punished with the sanction of removal from his post as judge of the Republic on account of his objective condition of bishop of a Church, without there having been a determination that, in concrete terms, his conduct undermined the public service of administration of justice, as was required in a preceding and mandatory constitutionality judgment by the Constitutional Court;

(ii) the possible violation of the right to religious freedom in connection with the State's duty to adopt domestic legal provisions to adapt its legal system to the obligations derived from the American Convention, by virtue of the existence, in the domestic legislation, of a disciplinary grounds for removal of public officials from the judicial branch consisting of their occupying any ministerial position within a religious church or worship; and

(iii) the possible violation of Mr. Gärtner's right to equality, and the provision of discriminatory treatment against him, because Mr. Gärtner was in a legal situation which was substantially identical to that of the catholic priest who was appointed as a co-Judge in a constitutionality case heard by the Constitutional Court; despite which, the petitioner was dismissed and disqualified for public office, whereas the catholic priest was not imposed any of these disciplinary penalties.

29. In view of these considerations and following a careful analysis of the factual and legal elements presented by the parties, the Commission deems that the alleged facts are not manifestly unfounded, and require an analysis at the merits stage; because if corroborated, they may characterize violations of Articles 5 (humane treatment), 8 (fair trial), 9 (freedom from *ex post facto* laws), 12 (freedom of conscience and religion), 23 (right to participate in government), 24 (equal protection), 25 (judicial protection), and 26 (economic, social, and cultural rights) of the American Convention, in connection with Articles 1.1 (obligation to respect rights) and 2 (domestic legal effects) thereof, to the detriment of Mr. Jorge Humberto Gärtner López and his family, in the terms of the present report.

VIII. DECISION

1. To declare the instant petition admissible in relation to Articles 5, 8, 9, 12, 23, 24, 25, and 26 of the American Convention, in connection with Articles 1.1 and 2 thereof;

[9] I/A Court of H.R., Case of Reverón Trujillo v. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 30, 2009. Series C No. 197, par. 21. Cfr. Case of Velásquez Rodríguez v. Honduras. Preliminary Objections. Judgment of June 26, 1987. Series C No. 1, par. 88; Case of Heliodoro Portugal v. Panama. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 12, 2008. Series C No. 186, par. 14, and Case of Bayari v. Argentina. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 30, 2008. Series C No. 187, par. 16.

2. To notify the parties of this decision; to continue with the analysis on the merits, and to publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 26th day of the month of October, 2021. (Signed): Antonia Urrejola, President; Julissa Mantilla Falcón, First Vice-President; Flavia Piovesan, Second Vice-President; Margarette May Macaulay; Esmeralda E. Arosemena Bernal de Troitiño; Joel Hernández García and Edgar Stuardo Ralón Orellana, Members of the Commission.