

REPORT No. 62/12¹
PETITION 1471-05
ADMISSIBILITY
YENINA ESTHER MARTÍNEZ ESQUIVIA
COLOMBIA
March 20, 2012

I. SUMMARY

1. On December 22, 2005, the Inter-American Commission on Human Rights (hereinafter “the Commission”) received a petition lodged by Yenina Esther Martinez Esquivia (hereinafter “the Petitioner”) on her own behalf, alleging that the Republic of Colombia (hereinafter “the State,” the Colombian State” or “Colombia”) is responsible for violating several rights recognized by the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”). Specifically, during the admissibility stage, the petitioner alleged that the State had violated the rights set forth in Articles 1, 8, 19, 24, 25, 26 and 29 of the Convention and, while invoking several international instruments for the protection of women’s rights, she contended that the State had not taken into account her condition as a mother and head of household.

2. The petitioner notes that her appointment to office as Deputy Prosecuting Attorney before the Criminal Courts of the Circuit of Cartagena was rendered null and void without any cause or due process. Additionally, she asserts that she was removed from office after participating in an investigation of the crime of abuse of authority against a government official, who granted a permit to construct a sanitary land fill without engaging in prior consultation with the affected communities. In response, the State argues that the claims are inadmissible because the facts alleged in the petition do not tend to establish violations of the American Convention.

3. After analyzing the positions of the parties and whether the requirements provided for in Articles 46 and 47 of the American Convention have been met, the Commission decided to find the claim admissible as to examination of the alleged violation of Articles 8 and 25 in connection with the obligations set forth in Article 1.1 of the American Convention and, decided to declare inadmissible Articles 19, 24 and 26 in connection with Article 1.1 of the American Convention, as well as Article 7 of the Convention of Belem do Para, to serve the parties with a copy of this report and to have it published in its Annual Report to the OAS General Assembly.

II. PROCESSING BY THE COMMISSION

4. On December 22, 2005, the IACHR received a petition, registered it under the number 1471-05 and, after a preliminary review, on April 19, 2010, it proceeded to forward a copy of the relevant portions to the State granting it a period of two months to submit information pursuant to Article 30.3 of the Rules of Procedure. On June 25, 2010, the IACHR received the response of the State, which was forwarded to the petitioner for her observations. On August 10, 2010, the IACHR received the petitioner’s response, which was conveyed to the State. On September 13, 2010, the State submitted its observations, which were then forwarded to the petitioner. On September 30, 2010, the petitioner provided additional information, which was conveyed to the State. On November 17, 2010, the State submitted its final response, which was forwarded to the petitioner for her reference.

III. POSITIONS OF THE PARTIES

A. Position of the petitioner

5. The petitioner states that after serving in several positions as a prosecuting attorney since 1992, on February 8, 2004, she was transferred to the Crimes against Public Administration Unit in

¹ Pursuant to Article 17.2 of the Rules of Procedure of the Commission, Commissioner Rodrigo Escobar Gil, a Colombian national, did not participate in the discussion or the decision-making process on the instant petition

Cartagena being appointed as Sectional Prosecutor No. 16, a career position that she held with temporary status until November 4, 2004, when her appointment was rendered null and void. She asserts that while she served as Sectional Prosecuting Attorney No. 16, she took part in an investigation for the crime of abuse of authority, which was allegedly committed by the Secretary of the local environmental authority the Autonomous Regional Corporation of Canal del Dique (Corporación Autónoma Regional del Canal del Dique or CARDIQUE for its Spanish acronym), who had issued an order granting a trash collection permit to a company in the municipality of Pasacaballo without fulfilling the requirement of prior consultation with the afro-descendant communities living in the area. She indicates that, in the context of her investigations, she received a motion to restore the right [to prior consultation]. The motion was filed by the representative of the communities, who acted as a civil party in the proceeding, and she vacated the aforementioned order.

6. She contends that in July 2004, she was entitled to vacation time and during her absence, the person substituting for her, revoked her decision reinstating the right of the communities settled in the area to be consulted, and closed the investigation. She states that when she went back to work, the representative of the Judicial Oversight Ministry (*Ministerio Público*, as it is called in Colombia) assisted in filing the motion for revocation of the decisions issued by the replacement Prosecuting Attorney during her absence. She claims that she was called by the Director of the Office of the Prosecuting Attorney, who told her that she should not intervene in administrative proceedings; however, the petitioner indicates that her proceeding was related to a criminal matter.

7. She affirms that as a consequence of her investigation, the alleged victim overturned the proceeding conducted by the prosecutor who replaced her during her vacation. She contends that on October 20, 2004, she communicated her decision to the director of the Office of the Prosecuting Attorney and that very same day she was denied permission to attend a symposium in Bogota.

8. She claims that on October 29, 2004, two decisions were issued against her. One decision was to transfer her to Providencia Island and was made by the Director of the Office of the Prosecuting Attorney. The other decision rendered null and void her appointment as Sectional Prosecutor No. 16 of Cartagena and was signed by the Attorney General of the Nation. She notes that she was notified of the first decision on November 3, 2004, and it was dated effective as of the day before the notification. She affirms that she was notified of the second decision on November 4, 2004, and it was effective as of that same day. She asserts that the Attorney General was unaware that she had accepted the office of Sectional Prosecutor on Providencia Island, when he removed her from her office as Sectional Prosecutor No. 16 of Cartagena.

9. She argues that after her removal from office, the case relating to the alleged crime of abuse of authority was transferred to the Office of the Attorney General of Bogota and that the company ultimately obtained the environmental permit. She affirms that the representative of the communities affected by the sanitary landfill, who acted as a civil party to the case, was murdered in unclear circumstances.

10. She indicates that she has filed several different appeals to be reinstated in her position. She further indicates that she brought a *tutela* suit, a special action for constitutional protection, before the Superior Court of the Judicial District of Cartagena in order to assert her right of association, to work and to a living minimum wage, in connection with the right to health, life of her children and the protection required in her capacity as a woman head of household. She claims that on February 25, 2005, the *tutela* was denied to her, inasmuch as the judge held that *tutela* was a subsidiary mechanism and that a regular proceeding was available for her to pursue her claims. The petitioner challenged this ruling; the judgment was upheld by the Labor Chamber of the Supreme Court of Justice and the ruling was not chosen to be reviewed by the Constitutional Court.

11. She alleges that she also brought an "action to vacate an administrative act and restore the right" before the Administrative Court of Cartagena which, on October 14, 2005, found the case groundless, since it was brought on July 12, 2005, beyond the legal period of four months following the act that rendered the right null and void. She contends that this was because the attorney who was

representing her did not file the case on time, and she was not able to deal with these legal procedures, as she was engaged in working to try to support her own family.

12. She argues that, at the time of the events, she was elected for a position in the Directive of the National Association of Officials and Employees of the Judiciary (ASONAL Judicial) and, therefore, she filed a trade union immunity action before the Seventh Labor Court of Cartagena, that is, she asserted her right to not be fired or transferred because she was holding a position of union leadership. She claims that the trial court ruled against her and, in the course of the appeals process, there were several unwarranted delays that prevented the celebration of the hearing. Ultimately, on September 22, 2010, the Labor Chamber of the Superior Court of Bolivar upheld the trial court judgment, which found that the legal requirements for her to be granted trade union immunity had not been met.

13. She affirms that she then filed a second special action for constitutional relief (*tutela*) with the Sectional Council of the Judiciary of Bolivar seeking protection of her rights to due process, equal protection, family and to a living minimum wage. She claims that the Council decided to grant her protection of her rights and reinstate her in the Department of Magdalena. However, she states that the Office of the Prosecuting Attorney appealed the decision and the Superior Council of the Judiciary of Bogota, on September 7, 2005, overturned the *tutela* on the grounds that the moving party had been reinstated for the same rights that she had attempted to protect before the Superior Court of Justice and, therefore, the Superior Council considered her action irresponsible and ordered her to be investigated for allegedly committing the crime of false testimony.

14. Lastly, the petitioner claims that she has sent letters to the Attorney General of the Nation, who responded that it is not a matter within his competence. Additionally, she notes that her children sent a letter to the President of the Republic bringing the situation of her being a mother, who is head of household to his attention, and the Office of the President replied that the matter was not within its competence.

15. As for the allegations of law, she contends that the State violated Article 8 of the Convention because due process was not followed in removing her from office and, even though it was her career, the decision rendering her appointment null and void was not grounded in any reason, and her special status and of her family were not taken into account. Regarding Article 19, she argues that as a consequence of the loss of her job, her daughter asked the university for a discount in the cost of tuition and her daughter had to work to afford to study. With regard to Article 24, she claims that the State did not recognize her right to reinstatement in the *tutela* actions, even though in other analogous cases, it was applicable. As to Article 25, she contends that she was denied the right to a simple and prompt remedy as relief against acts that infringe her rights.

16. Regarding Article 26, she claims that it was violated in light of the economic, social and cultural rights set forth in the "Protocol of San Salvador," which recognizes the right to have a dignified job that is commensurate with her individual, family and life condition; to food for herself, her children and her mother, as well as the rights of her youngest daughter, as a child, and of her elderly mother, who passed away in September 2005. As for Article 29 of the Convention, she argues that the State has interpreted in a restrictive way the rights recognized in the Convention during the proceedings that gave rise to the petition. Citing several international instruments and conferences for the protection of women's rights, the petitioner contends that her condition as a women was not taken into account by the State in any proceeding.

17. She claims that her matter goes beyond strictly property issues and involves judgments of domestic courts, which were issued outside the bounds of due process, and other decisions that violate rights protected in the Convention. Additionally, she contends that there was unwarranted delay in the labor jurisdiction, since the appellate court ruling was postponed six times.

B. Position of the State

18. The State's account of the facts is similar to petitioner's statement with regard to the administrative rulings that led to her dismissal and the results of the different court proceedings. It claims that the relief sought by the petitioner conformed to due process protections and that the fact that the rulings did not favor the petitioner does not constitute a violation of the American Convention.

19. It contends that the "action to vacate an administrative act and restore the right" has been proven to be a suitable to request reinstatement in situations that were virtually the same as the petitioner's; nonetheless, her complaint was filed eight months after notification of the ruling, twice as long as the four-month period of time permitted by law.

20. As for the *tutela* actions, it argues that this was not the proper mechanism for the protection of the petitioner's rights, since such appeals are of a special and subsidiary nature. Moreover, it notes that there are effective mechanisms in place within the State to restore the rights of the petitioner, which were allegedly infringed: firstly, the administrative procedure, to seek to get the resolution vacated and, consequently, restore the right; and secondly, the labor procedure, to seek to protect the right of freedom of association in union matters.

21. As to the labor proceedings pertaining to immunity of union officers, the State contends that all rights were respected throughout this proceeding. It also argues that there was no violation of the reasonable time period pursuant to the standards of the Inter-American system, even though the Court failed to rule on the appeal within the statutory time period, because of the high number of matters that it has to process. It claims that the finding of the labor court judge was that, because, at the time of the removal from office of the petitioner, she did not have immunity of union officers against dismissal or transfer. It notes that even though legal remedies available in the State were exhausted with the ruling of the appeals court on the labor matter, if the petitioner considers that this was the case of an arbitrary and unlawful procedure, she still has *tutela* relief available to her.

22. The State contends that even though the petitioner listed several international instruments for the protection of women's rights, she has not cited concrete violations stemming from her condition as a women; however, it argues that the IACHR would only be competent to hear cases of alleged violations of Article 7 of the Convention of Belém do Pará. Lastly, it affirmed that the facts stated in the petition do not tend to establish the violation of rights protected in the Convention and requested that it be found inadmissible pursuant to Article 47.b. of the aforementioned instrument.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

A. Competence

23. The petitioner has standing, in principle, under Article 44 of the American Convention, to file petitions before the Commission. The petition identifies as alleged victims individuals, for whom the State of Colombia committed to respect and ensure the rights enshrined in the American Declaration. As to the State, the Commission notes that Colombia has been a State party to the American Convention since July 31, 1973, when it deposited the instrument of ratification and, therefore, the Commission is competent *ratione personae* to entertain the petition.

24. Additionally, the Commission is competent *ratione loci* to examine the petition, inasmuch as violations of rights protected in the American Convention are alleged to have taken place within the territory of Colombia, a State party to said convention. The Commission is competent *ratione temporis*, being that the obligation to respect and ensure the rights protected in the American Convention was already in effect for the State on the date when the facts alleged in the petition presumably occurred. Lastly, the Commission is competent *ratione materiae*, because the petition charges potential violations of human rights protected by the American Convention, as well as international instruments for the protection of women cited by the petitioner; the IACHR is competent to rule on alleged violations of Article 7 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará), as Colombia has been a party to this instrument since November 15, 1996.

B. Admissibility requirements

1. Exhaustion of domestic remedies

25. Article 46.1.a of the American Convention requires the prior exhaustion of available domestic remedies, in accordance with generally recognized principles of international law, as a requirement for the admission of claims on an alleged violation of the Convention.

26. Article 46.2 of Convention provides that the requirement of prior exhaustion of domestic remedies is not applicable when (a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; (b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or (c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

27. Pursuant to Article 31.3 of the Rules of Procedure of the Commission and rulings of the Inter-American Court, when a State alleges the failure of a petitioner to exhaust domestic remedies, it bears the burden of proving that the remedies that have not been exhausted are “adequate” to correct the alleged violation, i.e. that the function of those remedies within the domestic legal system is suitable to protect against the infringement of a legal right.²

28. First, is necessary to clarify which of the domestic remedies must be exhausted in a case such as this one, in light of the legal precedents of the Inter-American system. Concretely, the Commission notes that the petitioner’s claim involves her alleged unwarranted removal from office, as Sectional Prosecutor No. 16 of Cartagena, without due process and legal reasoning.

29. The Commission notes that in order to be reinstated to her office, the petitioner pursued three avenues, which are available in the State: the labor, administrative and constitutional procedures. The Commission shall assess hereafter whether the aforementioned procedures were adequate in light of the claims, and whether, for the purposes of admissibility, they were properly exhausted.

30. Regarding the action for executive privilege of union officers against removal or transfer, that was adjudicated in the labor courts, the Commission notes that there is no dispute between the parties as it is a suitable remedy for someone who claims to have been wrongfully removed from office and meets the statutory requirements for being granted the privilege. Also there is no dispute with regard that the petitioner properly exhausted this remedy.³ The Commission notes that on September 22, 2010, the alleged victim exhausted this remedy as for her claim to reinstatement because she believed that she was protected by trade union immunity at the time of her dismissal.

31. As regards the administrative procedure, the Commission notes that according to the argument of the State, the “action to vacate an administrative act and restore the right” is a suitable remedy to overturn an unlawful administrative act and to successfully restore the affected person’s right. Additionally, the Commission notes that there is no dispute between the parties as to the petitioner filing her complaint before this court after the statutory time period had expired. Next, the IACHR will assess whether this procedure offered an adequate remedy in light of the petitioner’s claims.

² Article 31.3 of the Rules of Procedure of the Commission. Also see I/A Court H.R., *Case of Velásquez Rodríguez vs. Honduras*. Judgment of July 29, 1988. Series C No. 4, para. 64.

³ In its initial submissions, the State alleged that the claim did not fulfill the prior exhaustion of domestic remedies requirement, set forth in Article 46.1 of the American Convention, because the judgment was pending on appeal before the labor court at the time that the IACHR received the petition. Once this judgment was handed down, while admissibility was being processed in this case, the State indicated that the legal remedies available to the petitioner in the domestic arena were exhausted.

32. The IACHR notes that, according to the Constitutional Court of Colombia, an action to vacate a decision is a suitable remedy to enable an administrative judge to determine whether an administrative act, which removes a person from a temporary career position, is legal or not, after an extensive period of examination of evidence.⁴ Accordingly, the IACHR notes that this remedy was suitable to satisfy the claims of the alleged victim with regard to control of the legality of the administrative act of dismissal, such as the claim regarding whether the effective date of the dismissal was prior or subsequent to the decision ordering her transfer. Based on the foregoing, the IACHR finds that the petitioner did not exhaust the remedy available in the State with regard to this point of her complaint.

33. Additionally, the Commission notes that one of the petitioner's claims before the Inter-American system is that she had been dismissed in retaliation for her decisions and had not been afforded due process. The petitioner further contended that while serving in a career post on a temporary basis, she was dismissed by a decision devoid of any legal reasoning and without taking into account her special circumstances.

34. As to whether the administrative procedure is suitable to offer an adequate remedy for the claim relating to the lack of due process and legal reasoning, the Commission notes that, as of 2003, the Council of State, the highest adjudicatory body for disputes arising from "actions to vacate an administrative act and restore a right", reaffirmed its legal precedent wherein it established that "employees appointed on a temporary basis are not protected by any privilege of stability, and consequently, they may be removed, without any legal reasoning."⁵

35. Consequently, the Commission notes, for purposes of this admissibility, that even though the "action to vacate an administrative act and restore the right" constitutes a remedy to exercise control over the legality of the dismissal, based on the doctrine of the Council of State, this action does not constitute a suitable remedy to obtain the legal reasoning for the dismissal. As to the suitability of the administrative procedure to obtain said reasoning, the Constitutional Court of Colombia has found that:

"there is no alternative mechanism of judicial defense aimed at getting the Administration to produce the legal reasoning which, as precedent says, is indispensable to establish whether there has been harm to fundamental rights. Therefore, *tutela* in this case is the final mechanism [...]"⁶.

36. Taking into consideration that the doctrine of the Council of State has consistently held that it is not necessary to provide legal reasoning for a decision on a dismissal, and that the Constitutional Court has upheld that the procedure to obtain the reasoning for the act of dismissal is not through the administrative procedure,⁷ the Commission considers that the State has not provided sufficient information to prove that the remedy of the "action to vacate an administrative act and restore the right" offers any reasonable prospects of success for the claims of the petitioner relating to the lack of reasoning of the act of dismissal.⁸

⁴ Judgment T-884 of 2002.

⁵ Council of State, Second Section, case file 76001-23-31-000-1998-1834-01(4972-01), Judgment of March 13, 2003. As determined by the Constitutional Court of Colombia, based on said decision, "this has been the position of the Council of State and based on it, it has refrained from vacating administrative acts of this type when actions to vacate and restore a right have been used." See Constitutional Court of Colombia, Judgment SU-917 of 2010.

⁶ Judgment T-1240 of 2004. Also see Judgment SU-917 of 2010.

⁷ In Judgment SU-917 of 2010, the Constitutional Court of Colombia entertained a total of 20 appellants, who had filed an action to vacate and restore the right through an administrative procedure and whose claims were denied by the Council of State, under the argument that acts of dismissal from temporary career positions do not require any grounds at all.

⁸ In its jurisprudence, the Commission has shared the opinion of the European Court of Human Rights that the petitioner can be exempted from exhausting domestic remedies with respect to a petition when it is clear in the case proceedings that no action would have reasonable prospects of success in light of the jurisprudence of the highest judicial body of the State. See, for example, IACHR, 1271-04, Report 42/08, Karen Atala and daughters v. Chile (Admissibility), para. 52; IACHR, Petition 1490-05, Report 52/07, Jessica González v. United States (Admissibility), Annual Report of the IACHR 2008, para. 50; IACHR, Case 11.193, Report 51/00, Gary Graham v. United States (Admissibility), Annual Report of the IACHR 2000, para. 60, wherein it cites *inter alia*

37. As for the constitutional procedure, the Commission notes that the Constitutional Court of Colombia has found that legal reasoning for removal from office of temporary career officials “responds to the guarantee of the principles of legality and public disclosure and respect for due process, inasmuch as said reasoning make it possible to exercise the right to defense.”⁹ Therefore, the Constitutional Court has considered that the right to a reason for the act of dismissal “has in these instances, autonomous constitutional existence.”¹⁰

38. With respect to whether *tutela* is the appropriate procedure vis-à-vis acts of dismissal of temporary career officials, the Constitutional Court has held that

With regard to situations of an absence of legal reasoning for the act of dismissal, it has been considered appropriate to grant the protection sought and direct the respondent entity to provide a reason for the administrative act of dismissal, following the criteria set by constitutional jurisprudence to dispute such a determination, with the caveat that if the respondent entity does not abide by the order, it should reinstate him in the same position or an equivalent one.¹¹

39. Taking into account several precedents of the Constitutional Court in which it has ordered that the act be justified in order to protect the due process rights of the requesting party,¹² the IACHR considers, for purposes of admissibility, that an action for *tutela* (special appeal for constitutional relief) constituted one procedure that could offer an adequate remedy to obtain the legal reasoning for the act of dismissal and allow for the petitioner’s defense in an administrative proceeding.¹³

40. In this case, the Commission notes that the alleged victim contended that there was a violation of due process in a *tutela* suit brought before the Sectional Council of the Courts of Bolivar. Said *tutela* was settled on July 26, 2005 and an order was issued for her reinstatement in a similar position to the one she had held. After this ruling was appealed, on September 7, 2005, the Superior Council of the Judiciary issued its ruling and overturned the trial court decision, in considering that the rights alleged by the petitioner as violated, had been analyzed in a *tutela* proceeding previously brought before the Superior Court of the Judicial District of Cartagena.

41. Based on the information in the case file, the petitioner alleged a violation of due process, first in the *tutela* case brought before the Sectional Council of the Judiciary of Bolivar;¹⁴ therefore, the

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the European Court of Human Rights, Case of De Wilde, Oomas and Versyp. June 10, 1971, Publ. E.C.H.R. Ser. A Vol. 12, p. 34, paras. 37 and 62.

⁹ Judgment SU-917 of 2010.

¹⁰ Judgment T-1240 of 2004.

¹¹ Judgment T-087 of 2009.

¹² In Judgment SU-917 of 2010, the Constitutional Court cites, *inter alia*, judgments T-1206 of 2004, T-031 of 2005, T-161 of 2005, T-222 of 2005, T-267 of 2005, T-392 of 2005, T-648 of 2005, T-660 of 2005, T-804 of 2005, T-1159 of 2005, T-1162 of 2005, T-1310 of 2005, T-1316 of 2005, T-1323 of 2005, T-081 of 2006, T-156 of 2006, T-653 of 2006, where it entertained requests for *tutela* in which the moving parties claimed that they were serving in their career position on a temporary basis in the Office of the Attorney General of the Nation and that they had been removed from the entity by means of an administrative act without cause, on the grounds that it was at the discretion of the appointing official. In all of these instances, the Court has protected the right to due process and equality of the requesting party, when it has verified the existence of a temporary appointment and of a dismissal without any cause.

¹³ In the words of the Constitutional court of Colombia: “In deed, the protection order, in the event that it is appropriate, would be aimed at getting the Administration to state a cause for the act of dismissal, if there is any reason for it, in which case the door would be open for the affected party, should he or she deem it necessary, to file an administrative suit.” See Judgment T-1240 of 2004.

¹⁴ As is noted in the judgment of the Superior Court of the Judicial District of Cartagena (Labor Chamber), the petitioner filed the first *tutela*, alleging violation of the following rights “work, living minimum wage in connection with the right to health and the life of her children, dependents and the right to special protection of a woman head of household.” In contrast, in the second *tutela* brought before the Sectional Council of the Judiciary, the alleged rights were “equality, due process, living minimum wage and family.” See respectively, Superior Tribunal of the Judicial District of Cartagena, Labor Chamber of Decisions. Record No. 0014,

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Commission notes that the State had the opportunity to know the claims relating to the alleged violation of this right and, as appropriate, offer an effective remedy. The Commission notes that the ruling of the Superior Council of the Judiciary was not chosen for review by the Constitutional Court and, therefore, this remedy was properly exhausted.

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Case File No. 00024, February 25, 2005, pg. 4 and Sectional Council of the Judiciary of Bolivar, Case No- T037-2005, July 26, 2005, pg. 2.

2. Timeliness

42. Article 46.1.b of the Convention establishes that for a petition to be admissible before the Commission, it must be lodged within a time limit of six months from the date on which the party alleging the violation of rights was notified of the final decision. Given that the Council of the Judiciary of Bolivar handed down its decision on September 7, 2005 and the petition was lodged with the IACHR on December 22, 2005, the Commission finds that the time period set forth in the aforementioned provision of the Convention has been respected. As for the labor proceeding, the Commission notes that, at the time the petition was lodged, the appeal was being heard in the Superior Court of Cartagena and was adjudicated on September 22, 2010. Accordingly, the Commission considers that the petition was lodged within the time period established by the Convention.

3. Duplication of Proceedings and International *Res Judicata*

43. There is no indication in the case record that the subject of this petition is pending in another proceeding before an international adjudicatory body, or that it reproduces a petition that has already been examined by this or another international body. Therefore, it is deemed that the exceptions set forth in Articles 46.1(d) and 47 (d) of the Convention are not applicable.

4. Colorable Claim

44. For purposes of admissibility, the Commission must decide whether the facts laid out in the petition could tend to establish a violation, as stipulated in Article 47.b of the American Convention, whether the petition is “manifestly groundless” or it is “obviously out of order,” as provided in subparagraph “c” of this same article. The standard for evaluating these factual requirements is different from the requirement for deciding on the merits of a petition. The Commission must conduct a *prima facie* evaluation to determine whether the petition establishes grounds for the apparent or potential violation of a right protected by the Convention, but not to establish the existence of a violation. This evaluation is of a summary nature and does not entail any prejudgment or advance opinion on the merits.

45. In the instant case, the Commission shall examine during the merits stage whether the lack of cause for dismissal from a temporary career position meets the requirements to prevent abuses of power, which jeopardize the rights protected in the Convention. Furthermore, the Commission shall assess *inter alia*, in light of the Convention, whether in the specific case the act of dismissal, as an alleged result of the decisions of the prosecutor, should be settled through due process and whether prosecutors should have a certain amount of stability to ensure access to justice of the persons on whose behalf they prosecute cases. The IACHR finds that the foregoing considerations could tend to establish a violation of Article 8 of the Convention in connection with Article 1.1 of the Convention.

46. As to the alleged violation of the right to a simple and prompt remedy to protect the alleged victim against acts violating her rights, the IACHR notes that the petitioner pursued *tutela*, i.e. special protection of her constitutional rights, on two occasions. The first time, it was sought from the Superior Court of Cartagena (Chamber for Labor Matters) and the second time, from the Sectional Council of the Judiciary. The reason why the Superior Council of the Judiciary, the highest body in the procedure for constitutional protection, denied the *tutela* is that it considered that the claims, parties and facts were identical to the prior proceeding before the Superior Court of Cartagena which had denied the first *tutela* claim, and therefore it was an irresponsible action for the alleged victim to pursue.

47. The Commission notes that, unlike the first *tutela*, the alleged victim first raised the argument of a due process violation in the *tutela* before the Sectional Council. Furthermore, the appellate court found that the legal issue to be settled was the lack of legal reasoning,¹⁵ concluding that in the

¹⁵ The Sectional Council of the Judiciary considered that the legal issue to be settled involved determining “whether the Office of the Attorney General of the Nation is obligated to give a cause for resolution No. 05213 of October 29, 2004 whereby it vacated the appointment.”

absence of such cause, the right to due process had been violated.¹⁶ Notwithstanding, in the Council's final ruling it considered that the claims alleged by the petitioner were the same as those brought before the Superior Court of Justice.

48. Because of the foregoing and in view of the evidence introduced by the parties and the nature of the matter before it, the Commission finds that the disputed aspects of the case under consideration should be addressed during the merits stage of the matter, in order to establish whether these aspects constitute violations of the right to judicial protection, which could tend to establish potential violations of Article 25 of the American Convention, in connection with Article 1.1 thereof. Specifically, the IACHR finds that the alleged lack of judicial protection that will be examined at the merits stage, is tied to the determination as to whether, in light of the rights protected by the Convention, due process for dismissing a judicial official who holds a career position on a temporary basis is an enforceable obligation, and whether it is necessary to provide legal reasoning for said act.

49. The Commission finds that the petitioner has not put forth any arguments that tend to establish a violation of Articles 19 and 26 of the American Convention or of Article 7 of the Convention of Belém do Pará. Based on the circumstances of this case, the Commission does not have sufficient information to allow it to establish a potential violation of Article 24 of the Convention; therefore, the arguments relating to the violation of this right shall be examined as part of potential violations of Articles 8 and 25 of the Convention.

50. With regard to the labor proceeding, the IACHR shall examine whether the period of time it took to conduct this case was a violation of the guarantees enshrined in Articles 8 and 25 of the Convention in connection with Article 1 of said instrument.

51. Lastly, in light of the petitioner's arguments, it must be noted that Article 29 of the Convention shall be used, in its entirety, in this matter as well as all matters, as a guideline for the interpretation of States' obligations under the Convention.

V. CONCLUSIONS

52. The Commission concludes that it is competent to examine the claims lodged by the petitioner on the alleged violation of Articles 8.1 and 25 in connection with Article 1.1 and that these claims are admissible pursuant to the requirements set forth in Articles 46 and 47 of the American Convention. It also concludes that it must find inadmissible the claim regarding the alleged violation of the Articles 19, 24 and 26 in connection with Article 1.1 of the American Convention, as well as Article 7 of the Convention of Belém do Pará.

53. Based on the foregoing arguments of fact and law and without prejudice to the merits of the matter,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To find the instant case admissible with regard to Articles 8 and 25 in connection with Article 1.1 of the American Convention.
2. To notify the State of Colombia and the petitioner of the decision.

¹⁶ The Council held that "with the existing evidence in the case file, the Court finds that the respondent entity –the Office of the Attorney General of the Nation- violated the fundamental right to due administrative process of Prosecuting Attorney Yenina Martínez Esquivia, because it is proven that the moving party had been serving in a career position with temporary status, and her appointment was rendered null and void under resolution No. 001048 of October 29, 2004, an administrative act without cause, and as of this date the Office of the Attorney General of the Nation has not provided sufficient reason for the dismissal of the aforementioned official." Sectional Council of the Judiciary of Bolívar, case file number T037-2005, July 26, 2005.

3. To continue with the analysis of the merits of the matter.
4. To publish this decision and include it in its Annual Report to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 20th day of the month of March 2012.
(Signed): José de Jesús Orozco Henríquez, President; Tracy Robinson, First Vice-President; Felipe González, Second Vice-President; Dinah Shelton, Rosa María Ortiz, and Rose-Marie Belle Antoine, members of the Commission.