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**REPORT No. 173/24**  
**PETITION 1149-14**  
REPORT ON ADMISSIBILITY

JAVIER JATIVA GARCIA  
COLOMBIA

Approved electronically by the Commission on October 18, 2024.

**Cite as:** IACHR, Report No. 173/24, Petition 1149-14. Admissibility.  
Javier Jativa Garcia. Colombia. October 18, 2024.

**I. INFORMATION ABOUT THE PETITION**

<b>Petitioner:</b>	Javier Jativa Garcia
<b>Alleged victims:</b>	Javier Jativa Garcia
<b>Respondent State:</b>	Colombia <sup>1</sup>
<b>Rights invoked:</b>	Articles 8 (judicial guarantees), and 9 (freedom from ex post facto laws) of the American Convention on Human Rights, <sup>2</sup> in relation to its Article 1 (obligation to respect rights)

**II. PROCEEDINGS BEFORE THE IACHR<sup>3</sup>**

<b>Filing of the petition:</b>	August 17, 2014
<b>Notification of the petition to the State:</b>	May 1, 2019
<b>State's first response:</b>	September 4, 2019
<b>Additional observations from the petitioner:</b>	March 26, 2020; February 2 and March 22, 2022
<b>Additional observations from the State:</b>	February 5, 2021 and May 18, 2022

**III. COMPETENCE**

<b>Competence <i>Ratione personae</i>:</b>	Yes
<b>Competence <i>Ratione loci</i>:</b>	Yes
<b>Competence <i>Ratione temporis</i>:</b>	Yes
<b>Competence <i>Ratione materiae</i>:</b>	Yes, American Convention (deposit of instrument of ratification done July 31, 1973)

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

<b>Duplication of procedures and international <i>res judicata</i>:</b>	No
<b>Rights declared admissible:</b>	Articles 8 (judicial guarantees), 23 (political rights), 24 (equality before the law), 25 (judicial protection) and 26 (right to work) of the American Convention in conjunction with its articles 1(1) (obligation to respect rights) and 2 (obligation to adopt provisions of domestic law)
<b>Exhaustion of domestic remedies or applicability of an exception to the rule:</b>	Yes, in the terms of Section VI
<b>Timeliness of the petition:</b>	Yes, in the terms of Section VI

<sup>1</sup> In keeping with Article 17(2)(a) of the Commission's Rules of Procedure, Commissioner Carlos Bernal Pulido, of Colombian nationality, did not participate in the decision in the instant matter.

<sup>2</sup> Hereinafter "the American Convention" or "the Convention."

<sup>3</sup> Each party's observations were duly forwarded to the other party.

## V. THE PARTIES' POSITIONS

### Petitioner

1. Mr. Javier Jativa Garcia (hereinafter "the petitioner") alleges the international responsibility of the Colombian State for his removal as an agent of the National Police, which, he argues, lacked proper motivation. He argues that the domestic courts, upon ruling on remedies pursued in the contentious-administrative and constitutional jurisdictions, did not respect the guarantees of due process or job stability.

2. He indicates that on January 18, 1993, he entered the National Police, and over the years was promoted to the rank of captain. Nonetheless, by Decree No. 4722 the Ministry of National Defense, in the use of its discretionary power, removed him from active duty.

### *Tutela action*

3. As he did not agree with his removal, he brought a *tutela* action before the Departmental Judicial Council, alleging violation of his right to due process, claiming that the resolution that retired him from the service lacked any motivation. In a judgment of April 1, 2008, the Judicial Disciplinary Chamber of the Departmental Judicial Council for Bolívar protected the petitioner's rights, ruling that the administrative act objected to was not properly motivated and ordering that he be reinstated to a position of equal or greater rank in the National Police.

4. The Ministry of National Defense appealed this decision. On May 14, 2008, the Judicial Disciplinary Council of the Superior Judicial Council overturned the judgment of first instance, and dismissed the petitioner's *tutela* action, establishing that the decision contained in the administrative act that was the subject of the claim corresponded to the exercise of the discretionary power provided for at Law 857 of 2003.<sup>4</sup>

5. Accordingly, the petitioner requested a review of the *tutela* judgment before the Constitutional Court. In judgment T-111 of February 20, 2009, the Second Review Chamber of that court overturned the administrative act challenged, establishing as follows: "... *Fourth.- TO GRANT PROTECTION for the fundamental right to due process of Mr. Javier Ignacio Jativa Garcia. Consequently, to set aside Decree No. 4722 of December 2007 and to ORDER the General Directorate of the National Police to reissue the administrative act, which should be motivated and made known to Mr. Jativa Garcia, so that he can challenge it, if he decides to do so.*"

6. In observance of the foregoing, on May 21, 2009, the Ministry of National Defense issued Decree No. 1859, by which it maintained the decision to remove Mr. Jativa, expressly providing as follows:

... as can be observed, the Advisory Board of the Ministry of National Defense for the Police, legally established for that effect, met on October 30, 2007, and by Act No. 007 of the same date recommended: on a discretionary basis, for service-related reasons and by Decision of the National Government, the retirement from active duty from the National Police, among others, of Captain Javier Ignacio Jativa Garcia, identified by citizen ID No. No 79.246.871.

That mindful of the new challenges implicit in the career of an Officer of the National Police, which impose an optimal performance in the exercise of Direction and Command, it was considered that the projection and commitment of Captain Javier Ignacio Jativa are not sufficient for performing the service as established by the constitutional and statutory postulates....

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<sup>4</sup> Article 4. Removal by decision of the Government or the Director General of the National Police. For service-related reasons, and on a discretionary basis, the National Government, in the case of Officers or the Director General, in the case of Non-commissioned officers, may determine the removal thereof with any time of service, after a recommendation by the Advisory Board of the Ministry of National Defense for the National Police, in the case of Officers, or the respective Board of Evaluation and Classification, for Non-commissioned officers.

7. In response, on June 16, 2009, the petitioner filed a motion for reconsideration (*recurso de reposicion*) with the Ministry of National Defense; nonetheless, on July 10, 2009, that government entity denied the motion. Accordingly, on September 9, 2009, he asked the Departmental Judicial Council to process a motion for a finding of contempt (*incidente de desacato*) brought in May 2009 (prior to the issuance of Decree No. 1859), due to the fact that the Ministry of National Defense had not yet carried out the fourth operative provision of *tutela* judgment T-111 of 2009.

8. On November 26, 2009, in connection with the motion for a finding of contempt, the Judicial Disciplinary Chamber of the Departmental Judicial Council considered the proceedings against the Ministry of Defense to have concluded, based on the following: "... for having verified the implementation of what was ordered by the judgment of the Second Review Chamber of the Constitutional Court of February 10, 2009." Subsequently, on June 17, 2010, the Office of the Human Rights Ombudsperson, in representation of the petitioner, asked the Constitutional Court to verify the full implementation of *tutela* judgment T-111 of February 20, 2009, on considering that the respondent entity had partially complied with that ruling.

9. In order No. 321 of September 30, 2010, the First Review Chamber of the Constitutional Court ordered the Ministry of National Defense to comply with the fourth operative provision of the above-referenced *tutela* judgment within 48 hours. By memorial of December 10, 2010, the petitioner filed a motion for a finding of contempt (*incidente de desacato*) with the Constitutional Court. In order No. 024 of February 4, 2011, the First Review Chamber of that Court ordered as follows: "... the request to open a motion for a finding of contempt for failure to comply with the orders handed down in Judgment T-111 of 2009 and in Order 321 of 2010, filed by citizen Javier Ignacio Jativa Garcia against the Ministry of National Defense...."

10. In a ruling of September 30, 2011, the Judicial Disciplinary Chamber of the Departmental Judicial Council of Antioquia considered the motion for a finding of contempt terminated and ordered that it be archived, considering that the Ministry of National Defense and the General Directorate of the National Police did comply, through Decree No. 1859, with the orders given in Judgment T-111 de 2009 and in Order No. 321 of 2010.

11. On October 11, 2011, the petitioner once again requested, before the Constitutional Court, compliance with Judgment T-111 of 2009 and Order No. 321 of 2010, considering that the decision to consider the motion for a finding of contempt had terminated was in error, arguing that both the Ministry of National Defense and the National Police continued violating his fundamental rights. In Order No. 060 of March 15, 2012, the First Review Chamber of that court once again ordered the Ministry of National Defense to carry out the fourth operative section of *tutela* judgment T-111 of 2009 within 48 hours.

12. Accordingly, on July 18, 2012, the Ministry of National Defense resolved the motion for reconsideration brought by the petitioner against Decree No. 1859 of 2009. Notwithstanding, that state entity did not carry out the decree, on considering the administrative act challenged was not unlawful, and that the challenge should have been brought before the contentious-administrative jurisdiction.

#### *Action for annulment and reestablishment of the right*

13. Based on the information in the record, on March 26, 2008, the petitioner filed an action for annulment and reestablishment of the right with the Administrative Court of the Turbo Circuit against the administrative act that removed him from his position. To comply with the judgment of first instance (handed down in the above-mentioned *tutela* proceeding), the Ministry of National Defense handed down a new decree separating him, and, therefore, in a judgment of May 30, 2011, said administrative court considered that the petitioner should reformulate his action.

14. Subsequently, the petitioner brought a new action for annulment and reestablishment of rights against Decree No. 4722 of December 6, 2007, issued by the Advisory Board of the Ministry of National Defense for the National Police; Decree No. 1859 of 2009; and the resolution of July 18, 2012, by which it was decided not to reconsider the administrative act.

15. In a judgment of February 3, 2017, the Second Chamber for Oral Procedure of the Administrative Court of Antioquia denied petitioner's claims. On February 15, 2017, he filed a motion for appeal; and on May 5, 2017, the Second Section of the Council of State admitted it for processing. Finally, on February 3, 2022, the Contentious-Administrative Chamber, Second Section-Subsection B of the Council of State confirmed the judgment appealed establishing, *inter alia*, as follows:

... The Chamber concludes that due to the aims of the military and police forces under the rule of law, in particular the preservation of public order, its personnel should have the highest aptitude, commitment, trust, and responsibility in the exercise of their public functions, therefore, the national Government has the ability to exercise, discretionally, the power to retire from the service those uniformed personnel who do not meet the standards of good service of the military or police institution.

16. To summarize, the petitioner alleges that the decision that removed him as an agent of the National Police was arbitrary and not properly motivated, failing to recognize his record of more than 14 years in the service. Along those lines, he adduces that the domestic courts, in the context of the contentious-administrative and *tutela* proceedings, did not protect his right to job stability nor did they respect the guarantees of due process, as the legality of the discretionary removal was recognized, violating the rights enshrined in Articles 8 (judicial guarantees) and 9 (freedom from ex post facto laws) of the American Convention. In addition, he alleges delay in the contentious-administrative proceeding followed by the action for annulment and reestablishment of the right, as the appellate judgment was handed down 13 years after it was filed.

### **The Colombian State**

17. Colombia, in turn, confirms the proceedings before the contentious-administrative and constitutional jurisdictions, converging with the resolutions described by the petitioner. In addition, it asks the IACHR to find the instant petition inadmissible based on two considerations: (a) the fourth instance formula, and (b) failure to exhaust domestic remedies.

18. Regarding (a), the State indicates that the judicial actions filed by the petitioner domestically were decided in keeping with the laws in force, with proper motivation, and were handed down by judges with jurisdiction in observance of due process guarantees. Therefore, it considers that the petitioner seeks to have the IACHR once again evaluate the evidentiary material and analyze issues that were already resolved domestically. In this regard, it asks that the petition be found inadmissible in keeping with Article 47(b) of the American Convention.

19. With respect to (b), Colombia replies that the petition is inadmissible for failure to exhaust domestic remedies. In particular, it emphasizes that the petitioner did not question, through a *tutela* action, the ruling on appeal handed down within the contentious-administrative process. In this regard, it argues that the *tutela* action is an adequate and effective remedy for seeking the protection of fundamental rights. Therefore, it asserts that the petition does not meet the requirement established at Article 46(1)(a) of the American Convention.

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

20. The petition is focused on the alleged arbitrary removal of Mr. Jativa Garcia as an agent with the National Police. In addition, it alleges excessive delay in the contentious-administrative proceeding that was pursued, through the action for annulment and reestablishment of the right, as it was resolved almost 14 years after it was first brought. The State, for its part, argues failure to exhaust domestic remedies, adducing that the petitioner did not file a *tutela* action against the judgment on appeal handed down in that contentious-administrative proceeding.

21. The Inter-American Commission has established that the suitable remedies to be exhausted in cases in which violations are alleged of procedural guarantees and other human rights in the context of judicial proceedings are, in general, those means provided for in the national procedural legislation that make it possible to attack, in the course of the very proceeding called into question, the proceedings and decisions adopted within it, in particular the regular judicial remedies available, or the special ones if they were pursued by the alleged victims to uphold their rights. In addition, the Commission has set, as a general criterion, that if the petitioner used those subsequent, additional, or special remedies with the reasonable expectation of obtaining a favorable result, then they can be taken into account as remedies validly exhausted for the purposes of meeting the admissibility requirements for a petition. Moreover, the IACHR takes into consideration, as an important indicator of the relevance or procedural admissibility of these remedies, that they have been admitted for processing, and decided by the respective courts, and not dismissed due to inadmissibility on procedural grounds.<sup>5</sup>

22. From the information in the record, one observes that Mr. Jativa pursued a series of remedies with the aim of challenging the administrative act that separated him from his position in the National Police. The operative parts of the decisions in those remedies are summarized in the following table:

Legal/administrative action	Judicial/administrative organ	Ruling	Date of ruling
<b>Tutela process and subsequent remedies</b>			
<i>Tutela</i> action	Departmental Judicial Council of Bolívar	<i>Tutela</i> granted	April 1, 2008
Appellate motion (Ministry of Defense)	Superior Judicial Council	<i>Tutela</i> denied	May 14, 2008
Motion for review	Constitutional Court	<i>Tutela</i> granted	February 20, 2009
Decree No. 1859 (compliance with <i>tutela</i> )	Ministry of National Defense	Removal from service maintained	May 21, 2009
Motion for reconsideration	Ministry of National Defense	Motion denied as inadmissible on procedural grounds	July 10, 2009
Motion for finding of contempt	Departmental Judicial Council	Complies with <i>tutela</i> judgment	November 26, 2009
Verification of compliance with <i>tutela</i>	Constitutional Court	Orders compliance with <i>tutela</i>	September 30, 2010
Motion for finding of contempt	Constitutional Court	Begins to process motion	February 4, 2011
Motion for finding of contempt	Judicial Disciplinary Chamber of the Departmental Judicial Council	Archives motion	September 30, 2011
Request for compliance with judgment	Constitutional Court	Orders compliance with <i>tutela</i>	March 15, 2012
Resolves motion for reconsideration	Ministry of National Defense	Does not reconsider administrative act	July 18, 2012
<b>Contentious-administrative Procedure</b>			
Action for annulment and reestablishment of right	Administrative Court of Turbo Circuit	Reformulation of the action	May 30, 2011
New annulment action	Administrative Court of Antioquia	Dismisses the claims	February 3, 2017
Appeal	Council of State	Affirms judgment appealed	February 3, 2022

<sup>5</sup> IACHR, Report No. 156/17, Petition 585-08. Admissibility. Carlos Alfonso Fonseca Murillo. Ecuador. November 30, 2017, para. 17; and IACHR, Report No. 27/16, Petition 30-04. Inadmissibility. Luis Alexsander Santillán Hermoza. Peru. April 15, 2016, paras. 25 and 26.

23. Mindful of the foregoing, the IACHR considers that domestic remedies were exhausted with the judgment on appeal handed down in the contentious-administrative proceeding, which confirmed the legality of the removal of Mr. Jativa as a member of the National Police. Therefore, the Commission concludes that the requirement at Article 46(1)(a) of the American Convention has been met.

24. With respect to the timeliness of the petition, considering that decision was adopted while this petition was being studied for admissibility, the Commission considers that the instant matter also meets the requirement set forth in Article 46(1)(b) of the American Convention.

## VII. ANALYSIS OF COLORABLE CLAIM

25. First, the Commission reiterates that the criterion for evaluating the admissibility phase is different from that used to rule on the merits of a petition; the IACHR must, in this stage, perform a *prima facie* evaluation to determine whether the petition establishes the basis for finding a possible or potential violation of a right guaranteed by the Convention, but not to establish the existence of a violation of rights. This determination as to the characterization of violations of the American Convention is a primary analysis that does not imply prejudging the merits. For the purposes of admissibility, the Commission must decide whether the facts tend to establish a violation of rights, in the terms of Article 47(b) of the American Convention, or whether the petition is “manifestly groundless” or “obviously out of order,” as per Article 47(c) of the American Convention.

26. As regards the alleged excessive delay in issuing the ruling on appeal that was handed down within the contentious-administrative process, the IACHR notes that the petitioner initially filed that action in 2008. Nonetheless, in a judgment of May 30, 2011, the Administrative Court of the Turbo Circuit determined that the petitioner should reformulate his legal action, considering that the Ministry of National Defense had issued a new decree (No. 1639) pursuant to a judgment handed down in the context of the *tutela* action initiated by Mr. Jativa. Subsequently, in 2007 the petitioner reformulated that action and in a judgment of February 3, 2017, the Second Chamber for Oral Procedures of the Administrative Tribunal of Antioquia dismissed his claims. On February 15, 2017, he filed an appeal; and finally, almost five years later, on February 3, 2022, the Chamber for Contentious-Administrative Matters, Second Section-Subsection B of the Council of State affirmed the judgment that was appealed. Accordingly, in the merits phase the Commission will analyze whether, as regards that ruling, the conduct of the judicial authorities caused an unwarranted delay.

27. With respect to the petitioner’s claim regarding the violation of his rights set forth in the American Convention for his discretionary removal as an agent of the National Police, the IACHR recalls that Article 26 of the American Convention protects the right to work in both the public and private sectors,<sup>6</sup> the guarantee of job stability stems from this right<sup>7</sup> which, in turn implies that when a person is terminated from their position, this must be done based on a properly motivated decision.<sup>8</sup> In the case of persons who hold public-sector positions, the right to job stability must be interpreted in conjunction with the right to accede to and remain in a public-sector position in general conditions of equality, enshrined in Article 23(1)(c) of the American Convention. On this point, the IACHR notes that the domestic courts established that the removal of Mr. Jativa was in line with domestic law, especially the discretionary power granted to administrative entities to remove public officials from their positions.

28. Mindful of these considerations, and following its precedents in similar cases, specifically in its recent Report No. 134/22 regarding Colombia,<sup>9</sup> the arguments referring the lack of motivation for the removal of Mr. Jativa from the Police are not manifestly groundless and require a study on the merits, considering that the facts alleged, if corroborated as true, could tend to establish *prima facie* violations of Articles 8 (judicial guarantees), 23 (political rights), 24 (equality before the law), 25 (judicial protection), and

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<sup>6</sup> IACHR, Report No. No. 169/19. Case 12,396 Merits. Leonidas Bendejú Tuncar. Peru. November 9, 2019, para. 70.

<sup>7</sup> *Id.*, para. 75.

<sup>8</sup> *Id.*, paras. 76 and 77.

<sup>9</sup> IACHR, Report No. 134/22. Petition 1874-12. Admissibility. Fidel Hernando Parra Mesa. Colombia. June 6, 2022.



26 (right to work) of the American Convention, in conjunction with its Articles 1(1) (obligation to respect rights) and 2 (obligation to adopt provisions of domestic law), to the detriment of Javier Jativa Garcia.

29. Finally, the Commission observes, regarding the alleged violations of Article 9 (freedom from ex post facto laws) of the American Convention, that the petitioner does not offer arguments or support for determining, *prima facie*, a possible violation.

#### **VIII. DECISION**

1. To find the instant petition admissible in relation to Articles 8, 23, 24, 25, and 26 of the American Convention, in relation to its Articles 1(1) and 2.

2. To find the instant petition inadmissible as regards Article 9 of the American Convention.

3. To notify the parties of this decision; proceed to analyze the merits issues; and 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 18<sup>th</sup> day of the month of October, 2024. (Signed:) Roberta Clarke, President; José Luis Caballero Ochoa, Second Vice President; Arif Bulkan, and Gloria Monique de Mees, Commissioners.