

[TRANSLATION]

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Case No. 0371-04-RA

THE CONSTITUTIONAL TRIBUNAL

Case No. 0371-04-RA

WHEREAS: Messrs. Magolia Canticuz Pascal, Victoria Ribadeneira Ocampo, Carmelina Cabrera Rodríguez, María Chamba Chamba, and others, in their own rights; Daniel Alarcón, as representative of the Federation of Farming Organizations of the Ecuadorian Border Corridor of Sucumbíos; and, Leonidas Iza, President of the Confederation of Indigenous Nationalities of Ecuador, file this constitutional writ for the protection of fundamental rights before the District Contentious Administrative Tribunal of Quito against the Ecuadorian State, represented by the State Attorney General and the Ministers of Environment, Public Health, Social Wellbeing, Foreign Relations and Agriculture and Livestock, so that, primarily, they order the adoption of necessary measures, to ensure that the fumigations being carried out at the border with the Republic of Colombia are not carried out within a 10 kilometer strip, measured from the line of the border to the interior of said country and that the referenced Ministries perform reparation and preventive actions referenced in the claim.

At a public hearing, held on March 18, 2004, María Auxiliadora Mosquera, Esq. appeared, submitting a power of attorney or approval of the Minister of Foreign Affairs, Ms. Raquel Lovato de Sancho, Esq., submitting a power of attorney or approval for the Ministry of Public Health, Ms. Martha Escobar, Esq. submitting a power of attorney or approval of the State Attorney General; and Mr. Humberto Garcia Esq., submitting a power of attorney or approval for the Ministry of Environment, who presented their oral arguments and filed briefs, approving their interventions, as the record shows.

The First Chamber of the Contentious Administrative Tribunal, Quito District, via resolution dated March 30, 2004, accepted the constitutional request for the writ protecting fundamental rights and ordered the “immediate adoption of measures towards remedying the harm caused and preventing it from being continued, and with this purpose, the sued Ministries and competent bodies of the Executive Function, in their respective scopes of action, shall enforce the necessary measures towards redress, as the actions that they have taken heretofore have not been able to definitively solve, until today, the extremely serious problems that are claimed.” The Ministers of Agriculture and Livestock, Ministry of Public Health, Ministry of Foreign Relations and State Attorney General, challenge the resolution via an appeal filed before the Constitutional Tribunal, which is granted by order dated April 26, 2004.

WHEREAS:

FIRST. – The Constitutional Tribunal has jurisdiction to hear and resolve this case, pursuant to articles 95 and 276, number 3, of the Constitution;

SECOND. – No substantive formality has been omitted that could affect the resolution of the case, thus, its validity is declared;

THIRD. – Based on the constitutional text of article 95 and the specific framework prescribed in the Constitutional Control Act, it is conclusively established that the constitutional writ of protection of fundamental rights applies, when: a) an unlawful act exists, b) that violates a subjective constitutional right, c) threatens or causes serious and imminent danger to the detriment of the petitioner; in other words, for the writ of fundamental rights to apply, these three elements must be simultaneously and unequivocally present;

FOURTH. – That an act becomes unlawful, when it has been issued by an authority that does not have the power to issue it, or where it has not been ordered in accordance with the procedures noted by the legal framework, or its content is contrary to said framework, or it has been issued without any basis to do so or sufficient justification.

FIFTH. – That the constitutional judge has an obligation to ensure the power to hear and resolve a request for issuance of a writ for the protection of fundamental rights, which is precautionary and seeks to protect the subjective rights of persons affected by the unlawful acts of a public authority, or by unlawful acts of persons who provide public services, who provide them via concession or delegation of a public authority, if such acts violated the rights enshrined by the Political Constitution or a valid international treaty or convention; or via the conduct of individual persons, when they violate community, collective or diffuse rights, as specified by articles 83 to 92 of the Fundamental Charter;

SIXTH. – That the writ for the protection of fundamental rights also applies when there is an omission of a public authority that, by express rule, has the obligation to perform an act that can cause or is causing harm to a subjective right;

SEVENTH. – That the Constitutional Tribunal, in case no. 1403-03-RA, primarily, rejecting the request for a writ for the protection of fundamental rights that was filed, regarding the consequences caused to the areas on the border of Ecuador and Colombia, of the fumigations performed in the implementation of Plan Colombia, resolved to “Exhort the National Government to give express compliance to the constitutional provisions that guarantee and protect the fundamental rights of persons and collectivities at border areas,” that was adopted via Resolution No. 140-2003-RA, in session on July 2, 2003;

EIGHTH. – The Hon. National Congress, invoking the constitutional framework, articles 86 and 91 of the Fundamental Charter, substantively, articles 19 of the Environmental Management Law and 3 of the Convention on Biological Diversity, ratified by Ecuador and Colombia and citing the various Verification Missions that have confirmed the impacts caused by fumigations, even the scientific study that was approved by the Ombudsman of Ecuador, showing that the population that lives on

the border and was subject to the fumigations was subject to material genetic harm, resolved on March 11, 2004: “1. To exhort the Constitutional President of the Republic, Engineer Lucio Gutiérrez Borbúa, so that he requests and obtains a commitment, via signature of the respecting agreement by his Colombian counterpart, to ensure that, in the event that new fumigations are carried out, that they be carried out in Colombia from a minimum distance of 10 Km from the border with Ecuador, as assurance to avoid cross-border contamination. 2. – Request the Constitutional president of the Republic of Ecuador, to prioritize environmental health as well as investment and development programs at border areas that have been affected by fumigations. 3. – Exhort the Constitutional President of the Republic of Ecuador, to obtain from his Colombian counterpart, compensation for farmers of the Ecuadorian border, affected by fumigations, for the loss of their crops, death of their animals and harm to the health of their families and contamination of the rivers.”;

That, in this case, given the diplomatic efforts of the Government of Ecuador, and the approval of the Constitutional Tribunal as well as the Hon. National Congress of the actions of the Bi-national Commission, in charge of assessing the effects of chemical substances, used by the Government of Colombia in the air fumigation operations, these have not served as ideal means to preserve and protect the environment, necessary to ensure the collective rights of co-nationals at the border and, on the contrary, the Interagency Committee against Fumigations, composed of human rights organizations, ecologists, legal and academic scholars, have performed tests at the Ecuadorian border area, and have filed their respective reports, separately, scientifically and technically justifying the effects of such fumigations, at pages 29 to 62 and 219 to 225 of the record, and that as a result, the First Adjunct Defender of the Human Rights Ombudsman filed his opinion, via Resolution dated March 5, 2004, which was adopted in its entirety by the Hon. National Congress. Moreover, the Contentious Administrative Tribunal of Cundinamarca – Colombia, via a justified resolution, ordered the Government of Colombia, regarding its co-nationals, to cease the air fumigations with glyphosate in the national territory, until the Environmental Management Plan were imposed by the Ministry of Environment and exhorted the Government, so that it defined the necessary procedures towards immediately compensating the communities affected by fumigations in Putumayo. It also ordered the Human Rights Ombudsman to file the applicable judicial action to effectively protect the rights of the indigenous communities of Putumayo that have been affected by fumigation and to achieve their respective redress for harm; in other words, the main agent causing fumigations, the Colombian government, has been warned of the failure to comply with constitutional and legal provisions and this has not occurred, by action or omission, in the case of the Ecuadorian state.

In light of the foregoing,

#### RESOLVES:

1. – To confirm the resolution of the Tribunal that textually orders the: “immediate adoption of meetings towards remedying the harm caused and preventing it from being continued, and with this purpose, the sued Ministries and competent bodies of the Executive Function, in their respective scopes of action, shall enforce the necessary measures towards redress, as the actions that they have taken heretofore have not been able to definitively solve, until

today, the extremely serious problems that are claimed”; and, as a result, grant the writ for protection of fundamental rights.

2. Remand the record to the lower Tribunal, for fulfillment of legal purposes.
3. Publish this resolution in the Official Register. Service is hereby ordered.”

s./ Hon. EstuardoGualle Bonilla, President.

Certification: I hereby certify that the above resolution was approved by the Constitutional Tribunal with eight votes in favor that correspond to Messrs. Carlos Julio Arosemena Peet, Milton Burbano Bohórquez, Genaro Eguiguren Valdivieso, Hernán Rivadeneira Játiva, Víctor Hugo Sicouret Olvera, Carlos Soria Zeas, Lenín Rosero Cisneros and Estuardo Gualle Bonilla, and the dissenting vote of René de la Torre Alcívar, in session on Tuesday, March fifteenth of two thousand and five. – I hereby certify.

s. / Vicente Dávila García, Secretary General

DISSENTING OPINION OF RENÉ DE LA TORRE ALCÍVAR