

OEA/Ser.L/V/II.168
Doc. 88
21 June 2018
Original: Spanish

REPORT No. 76/18
PETITION 1453-08
REPORT ON ADMISSIBILITY

YANETH VALDERRAMA AND FAMILY
COLOMBIA

Approved by the Commission electronically on June 21, 2018.

Cite as: IACHR, Report No. 76/17, Petition 1453-08. Admissibility. Yaneth Valderrama and family. Colombia. June 21, 2018.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Oscar Conde Ortiz
Alleged victim:	Yaneth Valderrama and family
Respondent State:	Colombia ¹
Rights invoked:	Articles 4 (life), 5 (humane treatment), 17 (protection of the family), 19 (rights of the child), 22 (movement and residence) of the American Convention on Human Rights ² in relation to its Article 1(1); Articles I (life, liberty, security and integrity), VIII (movement and transit), and XI (preservation of health and well-being) of the American Declaration of the Rights and Duties of Man ³ ; and Articles 11 (healthy environment), 15 (formation and protection of the family), and 16 (rights of children) of the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights. ⁴

II. PROCEEDINGS BEFORE THE IACHR⁵

Filing of the petition:	December 15, 2008
Additional information received at the stage of initial review:	May 28, 2010
Notification of the petition to the State:	August 13, 2014
State's first response:	December 19, 2014
Additional observations from the petitioner:	March 13, 2015
Additional observations from the State:	August 14, 2015

III. COMPETENCE

Competence <i>Ratione personae</i>:	Yes
Competence <i>Ratione loci</i>:	Yes
Competence <i>Ratione temporis</i>:	Yes
Competence <i>Ratione materiae</i>:	Yes, American Convention (instrument of ratification deposited 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 <i>res judicata</i>:	No
---	----

¹ As provided for in Article 17(2)(a) of the Commission's Rules of Procedure, Commissioner Luis Ernesto Vargas Silva, of Colombian nationality, did not participate in the deliberations or decision in the instant matter.

² Hereinafter "Convention" or "American Convention."

³ Hereinafter "American Declaration."

⁴ Hereinafter "Protocol of San Salvador."

⁵ The observations submitted by each party were duly transmitted to the opposing party.

Rights declared admissible	Articles 4 (life), 5 (humane treatment), 8 (judicial guarantees), 19 (rights of the child), 22 (movement and residence), 24 (equality before the law), 25 (judicial protection), and 26 (economic, social and cultural rights) of the American Convention, in relation to its Article 1(1) (obligation to respect the rights)
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, in the terms of section VI
Timeliness of the petition:	Yes, in the terms of section VI

V. FACTS ALLEGED

1. The petitioner notes that at the time of the facts, a counter-narcotics strategy was being implemented in Colombia that sought to eradicate illicit crops by applying a plan for aerial spraying using chemical substances. In that context, he notes that the alleged victims, Iván Medina, Yaneth Valderrama, and their daughters Erika and Claudia, who at the time were 8 and 4 years old respectively, lived in a rural area of the municipality of Solitá, department of Caquetá, and were engaged in agriculture, growing crops and raising livestock. He states that on September 28, 1998, three light aircraft and four helicopters of the National Police flew over and sprayed several properties in the region, including the family plot, spraying chemical substances identified by the *campesinos* as chemical herbicide. Petitioner further states that Yaneth Valderrama, who at the time was four months pregnant, was sprayed with the herbicide while washing clothes along a creek situated some 200 meters from her house. He argues that after the spraying, she was taken home and was administered first aid by a village health promoter, who bathed her with water and soap and ordered that she be sent to the city of Florencia for professional medical care.

2. He indicates that on September 30, 1998, Yaneth Valderrama was admitted to the Hospital Departamental María Inmaculada of Florencia with spots on her skin, difficulty breathing and walking, and an intense pain in her bones and muscles, among other symptoms. They added that on that day she received care from an obstetrician who performed an obstetric uterine curettage on her for “indeterminate causes” (“*causas indeterminadas*”) that ended in an incomplete abortion. He says that after she was discharged, her health continued to deteriorate, which is why she turned to several health care centers and underwent various exams. He states that on March 3, 1999, she was taken to the emergency room of the health care agency known as the EPS COOMEVA and was referred to the Hospital Departamental María Inmaculada of Florencia, where she was diagnosed with neurotoxicity and right-sided pneumonia. He indicates that in view of her condition, she was sent immediately to the Fundación Clínica Valle del Lili in Cali, department of Valle del Cauca; she was admitted on March 5, 1999. They adduce that her diagnosis on admission was “myopathy under study, polymyositis, dermatomyositis, community-acquired pneumonia (CAP III), and toxicity due to pesticides”; she died on March 23, 1999, with a discharge diagnosis of “multisystem organ failure, septic shock, acute respiratory distress syndrome, community-acquired pneumonia, nosocomial pneumonia, pyramidal and extrapyramidal neurological syndrome, autoimmune disease, and Wegener’s granulomatosis.”

3. Petitioner argues that in light of the facts a complaint was lodged with the Office of the Departmental Procurator (Procuraduría Departamental) of Caquetá on March 29, 1999, which referred the complaint to the Delegate Procurator for the National Police, who in turn forwarded it to the Director of the Antinarcotics Police, for him to handle the matter. He indicates that on April 11, 2001, the Chief of the Area for Eradication of Illicit Crops of the Antinarcotics Police Division of the National Police ordered that the investigation be archived with prejudice. That resolution indicates that glyphosate is “mildly toxic” (“*ligeramente tóxico*”), but that the complaint did not clearly establish the dates on which the facts occurred. Petitioner further notes that at the same time, on March 30, 1999, Iván Medina filed a complaint reporting the facts to the Office of the Attorney General of the Nation (Fiscalía General de la Nación) in Florencia, Caquetá. Petitioner further states that said complaint was referred to the military criminal courts; the matter was assigned to the 53rd Judge of Military Criminal Investigation, who by order of September 13, 2000, ruled to refrain from opening a criminal investigation into the personnel who participated in the aerial spraying.

Petitioner states that in both procedures the participation of the relatives of Yaneth Valderrama was neither promoted nor allowed. He further states that the second procedure was heard before the military courts, in violation of the rights of the alleged victims to justice and truth.

4. In addition, petitioner indicates that the alleged victims filed an action for direct reparation against the Nation-Ministry of National Defense-National Police, which was admitted on August 8, 2000. He says that on August 24, 2007, the Second Administrative Court for the Florencia Circuit issued a judgment denying the relief sought in that action. From the documentation it appears that the claims were not taken up by the court for it is said that the alleged victim died as the result of a degenerative muscular weakness, and that there were not sufficient elements to attribute the abortion to specific causes, thus it was understood that the harm suffered did not result from the aerial spraying. Regarding this judgment, the petitioner notes that on May 22, 2008, the alleged victims appealed to the Administrative Tribunal of Caquetá, which upheld the judgment. He states that on June 12, 2008, the Second Administrative Circuit Judge issued a writ “ordering that the ruling of the tribunal be respected and the archiving of the procedure once that writ is firm,” which petitioner says occurred on June 19, 2008. On this proceeding, petitioner alleges that the decisions handed down were based on the evidence presented by the agency involved, repudiating the evidence produced by the petitioner, such as witness testimony concerning the fact of aerial spraying on the day of the facts, as well as the circumstances of manner and place thereof. He adds that the judges required technical and scientific proof to show the relationship between the police activity and the health condition of the alleged victim, which was not available to them, thereby establishing an imbalance between the parties; and they considered as certain that the substance released into the air was glyphosate, discarding the existence of other components.

5. Petitioner indicates that after the facts, the family unit was negatively impacted, leaving Iván Medina and his daughters in great uncertainty, as they girls had to grow up without their mother. He adds that they had to move to the city of Florencia from the municipality of Solitá, Caquetá, abandoning their lands and animals, because of the fear that the Colombian State caused by its aerial spraying, which “dries up the earth and kills the people.” He states that the facts also negatively impacted the parents and siblings of Yaneth Valderrama.

6. The State, for its part, indicates that in the face of the disciplinary complaint filed by Iván Medina for these facts with the Office of the Departmental Procurator of Caquetá, on April 11, 2001, the Chief of the Eradication of Illicit Crops Area of the Antinarcotics Police Division of the National Police ordered that the investigation be archived, considering that there was no evidence of the aerial spraying of illicit crops, and that there was no analysis of water, soil, or crop samples in the surrounding area that would make it possible to establish the cause of death of the crops that were allegedly sprayed. It states that this shows that the State gave impetus to the proceeding into the apparent disciplinary liability and resolved the matter. It adds that in terms of criminal justice, Iván Medina filed a complaint with the Office of the Attorney General of the Nation, and that after it was referred on jurisdictional grounds, on September 13, 2000, the military criminal jurisdiction ruled that there was no relationship of causality between the use of pesticides and the death of Yaneth Valderrama, thus the criminal justice remedy was pursued and decided at law.

7. In addition, as regards the action for direct reparation, the State indicates that on August 24, 2007 the Second Administrative Court of Florencia (Caquetá) denied the relief sought in the action based on a “technical expert report by the Institute of Forensic Medicine and Sciences (Instituto de Medicina Legal y Ciencias Forenses),” which, after analyzing Yaneth Valderrama’s clinical history, concluded that there was no causal relationship between the possible exposure to aerial spraying and the illness that she suffered. It states that as regards the abortion, the expert opinion was based on the analysis of the chemical composition of glyphosate, determining that the chemical does not contain “any organophosphate capable of triggering the tragic illnesses.” The State indicates that the report noted that intoxications by way of the respiratory tract are very rare, and that when they do occur their effects are immediate, noting that in her case the triggers were a possible autoimmune disease of unknown origin, which would have lowered her defenses, which together with a pneumonia that led to a respiratory insufficiency and to the convergence of a septic shock, seriously compromised all the target organs, resulting in her death.

8. The State adds that the decision was upheld on appeal, and it was shown that there were no flyovers with aerial spraying in the time period in which the alleged illness would have occurred, and that it was determined that there was no certainty as to the date on which the supposed accident occurred, for while in the context of the contentious-administrative proceeding the plaintiff adduced that it occurred on September 8, 1998, in the criminal complaint of March 30, 1999, Iván Medina stated under oath that the incident occurred on September 28, 1998, the date that he reiterated the complaint to the Office of the Procurator General. It also states that the court highlighted that upon admission to the Hospital María Inmaculada in Florencia, the alleged victim did not inform the physicians that she was there due to the alleged accident, and she was discharged in good health as per the testimony of one of the physicians. It adds that in light of the principle of the possible shifting of the burden of proof, the party in the best position to show a fact that it is interested in showing has the duty to show it.

9. Finally, the State argues that the petition does not spell out how the decisions handed down in the pursuit of the remedies filed violated the relevant international treaties, thus the claim is aimed at debating decisions handed down by the local courts, and therefore is manifestly groundless.

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

10. The petitioner states that he has exhausted domestic remedies. The State does not put forward arguments in this respect.

11. In the instant matter, the petitioner alleges that the violations that gave rise to the filing of the complaint are the result of the State's actions. The alleged victims filed a complaint with the Office of the Departmental Procurator of Caquetá, which was archived on April 11, 2001, by the Chief of the Eradication of Illicit Crops Area of the Antinarcotics Police Division of the National Police. Petitioner also filed a criminal complaint with the Office of the Attorney General in Florencia, Caquetá; after the matter was referred to the military criminal jurisdiction, on September 13, 2000, the judge decided not to open an investigation. In this respect, the Commission recalls, as it has reiterated on many occasions, the military jurisdiction does not offer an adequate remedy for investigating, prosecuting, or punishing alleged violations of human rights said to have been committed by members of the Armed Forces or National Police. Accordingly, the Commission considers it appropriate to apply the exception set out at Article 46(2)(a) of the American Convention.

12. In addition, in relation to the contentious-administrative process, while the Commission has repeatedly said that said jurisdiction does not offer a suitable remedy when it comes to analyzing the admissibility of a claim of the sort of the claim in the instant matter, since it is not adequate for providing integral reparation and justice to the family members⁶, given that in the instant matter autonomous violations are alleged emanating from that proceeding, the Commission will analyze the requirements of Articles 46(1)(a) and (b) of the Convention in relation to the contentious-administrative proceeding. In this respect, it is adduced that after filing the action for direct reparation, remedies were exhausted with the judgment of May 22, 2008, which became firm on June 19, 2008. In view of the foregoing, domestic remedies have been exhausted on this point.

13. The petition before the Commission was received December 15, 2008, and the alleged facts that are the subject matter of the claim are said to have taken place beginning in 1998; some of their effects are said to extend to the present day. In view of the context and characteristics of arguments presented in this report, the Commission considers that the petition was filed within a reasonable time and that one should consider that the admissibility requirement regarding timely filing, in relation to the criminal aspects entailed should be deemed to have been satisfied. As regards the proceeding in the contentious-administrative jurisdiction, the Commission considers that it was filed within the deadline set out in Article 46(1)(b) of the Convention, considering that the decision became firm on June 19, 2008.

⁶ IACHR, Report No. 110/17. Petition 802-07. Admissibility. Leonardo Vanegas and family. Colombia. September 7, 2017, para. 10.

VII. ANALYSIS OF COLORABLE CLAIM

14. In view of the elements of fact and law set forth by the parties and the nature of the matter put before it, the Commission considers that if the arguments regarding harm to the health and the subsequent death of Yaneth Valderrama as a result of the aerial spraying of herbicides by the state agents are proved, as well as the alleged denial of justice in the criminal and administrative jurisdictions, the facts alleged tend to establish possible violations of Articles 4, 5, 8, 25, and 26 of the Convention, in relation to its Article 1(1). Moreover, as regards the alleged violations with respect to her family members, associated with the purported denial of justice, as well as their displacement, the facts tend to establish possible violations of Articles 5, 8, 22, and 25 of the Convention, in relation to its Article 1(1). The facts, if proven, also tend to establish violations of Article 19 of the Convention in relation to the two girls. Given that the arguments referring to the impact on the family members of the alleged victim will be analyzed in the context of Article 5, the Commission observes that the petitioner has not offered any information that would make it possible to identify, *prima facie*, any specific or autonomous content so as to consider a possible violation of Article 17 of the Convention.

15. With respect to the alleged violations of Articles 11, 15, and 16 of the Protocol of San Salvador, the Commission notes that it lacks the competence to establish violations of said Articles. However, according to Article 19(6) of the American Convention, the Commission may take into account the provisions of said protocol and other applicable instruments to interpret and apply the American Convention.

16. In addition, the Commission has previously established that once the American Convention comes into force in relation to a given State, it and not the American Declaration of the Rights and Duties of Man becomes the primary source of law applicable by the Commission, so long as the petition alleges violations of substantially identical rights in both instruments. In particular, given the general reference to economic, social and cultural rights of Article 26 of the American Convention, which must be determined in connection with the Charter of the OAS and applicable instruments, in cases where a specific violation of the Declaration related to the general content of Article 26 of the Convention is alleged, the analysis of its correspondence and identity should be done at the merits stage. In this regard, in the instant case the Commission notes that the rights enshrined in Articles I (life, liberty and security) and VII (residency and transit) of the American Declaration alleged by the petitioner are specifically and expressly protected by the Convention, thus the Commission will analyze those facts under said treaty. As regards Article XI on the right to preserve health, given that it is not specifically protected by the Convention, the Commission will analyze its possible violation in the merits stage.

17. In addition, with respect to the State's arguments regarding the fourth instance formula, the Commission recognizes that it is not competent to review the judgments handed down by domestic courts acting within their jurisdiction and applying due process and judicial guarantees. Nonetheless, it reiterates that within its mandate it is competent to declare a petition admissible and rule on the merits when it refers to domestic proceedings that may be in violation of rights guaranteed by the American Convention.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles 4, 5, 8, 19, 22, 24, 25 and 26 of the American Convention, in relation to the obligations contained in Article 1(1) of that instrument, and Article XI of the American Declaration;

2. To find the instant petition inadmissible in relation to Article 17 of the American Convention;
and

3. 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.

Done and signed on the 21st day of the month of June, 2018. (Signed): Margarete May Macaulay, President; Esmeralda E. Arosemena Bernal de Troitiño, First Vice President; Francisco José Eguiguren Praeli, Joel Hernández García, Antonia Urrejola, and Flávia Piovesan, Commissioners.