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REPORT No. 78/19
PETITION 128-09
REPORT ON ADMISSIBILITY

FANNY YOLANDA ZARABIA MARTÍNEZ AND FAMILY
ECUADOR

Approved electronically by the Commission on May 25, 2019.

Cite as: IACHR, Report No. 78/19. Petition 128-09. Admissibility. Fanny Yolanda Zarabia Martínez and family. Ecuador. May 25, 2019.

I. INFORMATION ABOUT THE PETITION

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| Petitioner: | Fanny Yolanda Zarabia Martínez and Enrique Rojas Franco |
| Alleged victim: | Fanny Yolanda Zarabia Martínez and family |
| Respondent State: | Ecuador |
| Rights invoked: | Article 4 (life), 5 (humane treatment), 8 (fair trial) and 25 (judicial protection) of the American Convention on Human Rights ¹ , and other international treaties ² |

II. PROCEEDINGS BEFORE THE IACHR³

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| Filing of the petition: | February 5, 2009 |
| Additional information received at the stage of initial review: | June 1, 2010; December 10, 2011; December 22, 2014; October 12, 2016 |
| Notification of the petition to the State: | August 10, 2016 |
| State's first response: | December 9, 2016 |
| Additional observations from the petitioner: | November 2, 2016; April 21, 2017 |
| Additional observations from the State: | December 27 and 28, 2016; September 1, 2017; July 26, 2018 |
| Notification of the possible archiving of the petition: | February 5, 2009 |
| Petitioner's response to the notification regarding the possible archiving of the petition: | June 1, 2010; December 10, 2011; December 22, 2014; October 12, 2016 |
| Precautionary measure granted: | August 10, 2016 |

III. COMPETENCE

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| 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 deposited on December 28, 1977) |

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

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| Duplication of procedures and International <i>res judicata</i>: | No |
| Rights declared admissible | Article 5 (humane treatment), 8 (fair trial) and 25 (judicial protection) of the Convention, in connection with its Article 1.1 (obligation to respect rights) |
| Exhaustion of domestic remedies or applicability of an exception to the rule: | Yes, exception applicable under Article 46.2.c of the American Convention |
| Timeliness of the petition: | Yes, under Section VI |

¹ Hereinafter "Convention" or "American Convention."

² Articles 3, 8, and 25 of the Universal Declaration of Human Rights.

³ The observations submitted by each party were duly transmitted to the opposing party.

V. FACTS ALLEGED

1. The petitioners contend that the building of an electric power transmission tower very close to the house of the alleged victim gave rise to risks for her and her family's health and personal integrity. In addition, they allege that there was a failure to abide by a judicial ruling that ordered the adoption of measures for the purpose of preventing the risk.

2. They indicated that, on February 1, 2002, with the authorization of the National Electricity Council (*Consejo Nacional de Electricidad*, hereinafter CONELEC)⁴, activities for building the Rosa-Pomasquí power transmission line started. The National Power Transmission Company (*Compañía Nacional de Transmisión Eléctrica*, hereinafter "Transelectric S.A." or "the company")⁵ was in charge of the construction and the power line started operating on April 1, 2003. The petitioners alleged that Transelectric S.A. unilaterally decided to change the route of the power line and as a result, a power transmission tower was installed a few meters away from the house of the alleged victim, exposing her family and other inhabitants to major health and personal safety risks. They allege that, with the initial layout, no community or person would have been impacted. In addition, they assert that the judicial authorities did not enforce a protection measure granted by the Constitutional Court.

3. The petitioners allege that, on March 13, 2003, the alleged victim⁶ filed an action for protection on constitutional grounds (*amparo*) against the Company, claiming that, as a result of the change in the layout, the high-voltage power transmission towers were located too close to the houses of the sector's inhabitants and were directly impacting their physical and psychological health. The request was dismissed town on April 10, 2003. Nevertheless, on December 4, 2003, the decision was appealed by the alleged victim, among others, and the First Chamber of Ecuador's Constitutional Court partially granted them protection, ruling that the Company had to adopt the necessary preventive measures to ascertain the possible impact that the high-voltage grid would exert and to protect the population from the environmental impacts that it might cause, as provided for in Article 90 of the Political Constitution, and remitted the case to the original judge to oversee enforcement.

4. The petitioners claim that, on various occasions, the courts issued resolutions ordering that Resolution 0312-03 RA be enforced. They indicate that, on January 29, 2004, the Thirteenth Civil Judge ordered the Company to fulfill the terms of the protection resolutions, after a complaint was filed by the alleged victim. On November 18, 2004, the First Chamber indicated that it pertained to the Thirteenth Civil Judge to enforce Resolution 0312-03 RA and, on October 25, 2005, the Constitutional Court requested the Thirteenth Civil Judge of Pichincha to enforce Resolution 0312-03 RA, a request that was reiterated on April 12, 2006. On December 7, 2006, the Thirteenth Civil Judge ordered Transelectric S.A. to adopt, within 30 days, the necessary preventive measures in accordance with Resolution 0312-03 RA. Transelectric S.A. filed an appeal, which was dismissed on May 18, 2007. On October 10, 2007, the First Secretary requested the Thirteenth Civil Judge to report, within 72 hours, on enforcement of said resolution. On that same day, the Thirteenth Civil Judge ordered Transelectric to carry out one of the two alternatives proposed by CONELEC,⁷ either abiding by the original layout established by CONELEC on May 3, 2001 or else lengthening the original route.

5. On January 2, 2008, the Constitutional Court warned the Thirteenth Civil Judge that, if he did not send the report on enforcement of the judgment, his action would be submitted for review to the National Council of the Judicial System. The petitioners indicate that, on January 9, 2008, the Thirteenth Civil Judge reported that his office unsuccessfully resorted to all of the powers within its reach to enforce the resolution, except use of the forces of law and order. The petitioners indicate that, on February 20, 2008, the Thirteenth

⁴ Public, state-owned company and the institution in charge of monitoring electric power activities in Ecuador.

⁵ Public enterprise, with shares and capital stock 100% owned by the Ecuadorian state.

⁶ Along with 7 persons impacted by the building of a power transmission tower close to their houses.

⁷ In an official letter on June 12, 2007, CONELEC addressed the CEO of Transelectric S.A. and urged him to find a solution to the deadlock that emerged because of the route of the Santa Rosa-Pomasquí Power Transmission Line and to immediately implement one of the two alternatives identified in the letter.

Civil Judge ordered that the Attorney General's Office be called to launch criminal prosecution proceedings against the representatives of the company for contempt of court. Finally, they allege that, on March 26, 2008, an onsite inspection was conducted by the judges of the Constitutional Court, as a result of which it was confirmed that the transmission towers were never relocated.

6. Furthermore, the petitioners point out that various government stakeholders adopted resolutions in favor of withdrawing the towers. They allege that, on December 22, 2003, the Prefect of the Government of the Province of Pichincha requested Transelectric S.A to withdraw the tower within 15 days. Likewise, on January 7, 2004, the Commissioner of the Metropolitan District of Quito ordered the company to relocate the high-voltage towers and CONELEC to adopt the necessary measures to prevent impacts, within 60 days.

7. The petitioners allege that, on May 11, 2004, the Area Commissioner filed a complaint with the Prosecution Service because of the failure to relocate the towers. On October 20, 2004, the Government of the Province of Pichincha reported that, the previous day, the Provincial Council of Pichincha authorized legal authorities to prosecute Transelectric S.A. for not having fulfilled the order by the Provincial Council to withdraw the high-voltage. They indicate that, on January 10, 2005, the Ministry of the Environment determined that the company Transelectric S.A. had not abided by what had been planned in the environmental impact study, and therefore it was deemed appropriate to suspend the proceedings for granting the environmental permit until the above-mentioned company carried out the corresponding corrective measures.

8. They indicate that, on the basis of the resolution of January 11, 2006 and that of February 15, 2006, CONELEC decided to commission a technical study to be delivered within 30 days, before proceeding with the withdrawal of the towers, also within 30 days. Likewise, on May 10, 2006, a report drafted by the Office of the Comptroller General of the State which recommended the withdrawal of the power transmission tower was approved, and on March 7, 2008, the Directorate for Project and Environmental Auditing of the Office of the Comptroller General of the State concluded that the recommendation to withdraw the towers had not as yet been heeded. On June 12, 2007, as well as on October 4, 2007 and November 12, 2007, CONELEC urged Transelectric S.A. to implement one of the two alternatives it had proposed.

9. The petitioners indicate that, although all judicial mechanisms as set forth in the Constitution have been exhausted, at the time of filing their complaint with the Commission, the resolution enacted by the Constitutional Court in 2003 had not been implemented. Furthermore, they allege that the appeal for protection (*amparo*) was suitable because what was being sought was the safeguarding of the rights to health and the enjoyment of a healthy environment, whereas ordinary civil proceedings are seeking economic compensation, and between these two proceedings there is no procedural identity.⁸

10. As for the State, it alleges that the petition does not meet the requirements of Article 46 of the Convention. On the one hand, it alleges that the petition was filed late, because the final decision to be considered is December 4, 2003, whereas the petition was submitted to the IACHR on February 5, 2009. It indicates that, in this decision, the Constitutional Court determined that it was not possible to prove the existence of any harm or unlawful action by the administration, which was the final decision in the proceedings and, according to the petitioners, it was a decision that violated the rights of the alleged victims. Furthermore, the state alleges the failure to exhaust domestic remedies in the context of the action filed for environmental harm. It indicates that the complaint filed on November 17, 2014 by Héctor Hugo Rosero Contreras and Ana del Rocio Rosero Zarabia was dismissed on May 25, 2016, as well as the appeal for clarification filed on June 15, 2016. It indicates that, against this decision, the complainants should have filed a cassation appeal, which they failed to do, and therefore the case was archived on November 16, 2016. Nevertheless, in a subsequent communication and in view of the fact that the petitioner was not a party to the appeal for damages, the state contends that the alleged victim was obliged to exhaust available domestic

⁸ The petitioners pointed out that Hugo Rosero Contreras and Ana Rosero Zarabia, parties to the civil lawsuit for damages referred to by the state during the processing of the petition; do not appear as petitioners or as alleged victims in the present case, or in the appeal for protection.

remedies to secure compensation for the alleged harm, in other words a civil lawsuit for compensation for environmental harm.

11. The state alleges the absence of a colorable claim and the inexistence of the state's international responsibility. It indicates that what was ordered by Resolution 0312-03 RA was the adoption of preventive measures, but at no time was it possible to prove the existence of any harm to the environment or to the health of the sector's inhabitants. To the incidents alleged by the petitioners, the state adds a communication from CONELEC, dated December 31, 2003, ordering Transelectric S.A. to conduct an external environmental audit, in compliance with Resolution 0312-03 RA. The state indicates that the audit was conducted between July and August 2004 and that Transelectric S.A. then informed the Thirteenth Civil Court Judge about the results of said audit, on the basis of which it was possible to conclude that Resolution 0312-03 RA had been fully enforced. In addition, it alleges that, by means of a court ruling on December 3, 2012, the Thirteenth Civil Judge indicated that the request for withdrawing the towers by the alleged victim was not relevant. It claims that, in view of this ruling, the alleged victim filed an appeal for clarification, to which the Thirteenth Civil Judge ruled that the wording of the judgment referred to was sufficiently clear. It adds that, on May 11, 2016, the Ministry of the Environment issued a favorable statement for the ex post environmental impact study of the power line project, because it had met the technical and legal requirements for this purpose, demonstrating that said power line had never proven to be of any risk. Therefore, the state claims that there was no unjustified delay in enforcing the judgment, that the necessary preventive measures were implemented on the basis of the implementation of the feasibility studies and the onsite inspections, among others. It reiterates that said resolution did not establish the existence of any harm nor did it order suspending the construction or withdrawing the high-voltage towers. Thus, this confirms that the Constitutional Court, although it had partially ruled in favor of the complainants with respect to the appeal for protection, it did not accept the claims of the alleged victim, which constitute the object of her petition with the IACHR.

12. Finally, the state claims that the Commission does not have jurisdiction in the case because the matter relates to the right to health and a healthy environment, indicating that, according to Article 19.6 of the Protocol of San Salvador, the submittal of petitions to the IACHR regarding alleged violations of these rights is not allowed.

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

13. The Commission observes that the alleged victim filed an action for protection on March 13, 2003. On December 4, 2003, the First Chamber of the Constitutional Court ruled that the appeal was partially admissible and that the Company had to adopt the necessary preventive measures to protect the life of the impacted population. The Commission also observes that the petitioners allege that, since then, they have resorted to various mechanisms for the purpose of ensuring enforcement of the protection measure ordered by the Constitutional Court and, on the day of the submittal of the petition, the remedy had not been enforced. The state objects by alleging the failure to exhaust domestic remedies and to observe the time-limits for the submittal of the petition. Nevertheless, the Commission observes that, according to what was exposed by the petitioners, Resolution 0312-03 RA has not yet been satisfactorily enforced. Therefore, the Commission considers that the exception to the requirement of exhaustion as provided for in Article 46.2.c of the American Convention is applicable. Furthermore, the Commission observes that the main object of the petition is the failure to enforce a court judgment that ordered preventive measures to be taken, not the compensation for damages, and therefore the suitable remedy is not the civil lawsuit for damages.

14. Furthermore, the Inter-American Commission takes note of the state's claim about what it describes or qualifies as untimely in forwarding the petition. The IACHR points out that, regarding this, neither the American Convention nor the Rules of Procedure establish a deadline for notifying a state of a petition, measured from the time it was received, and that the times allowed in the Rules of Procedure and in the Convention for other processing stages are not applicable by analogy.

15. Likewise, the Commission observes that the petition was received on February 5, 2009, and the facts reported in the petition had taken place as of February 2002. The First Chamber of the Constitutional Court ruled in favor of the alleged victim on December 4, 2003 and such ruling would not have been enforced to this date, as a result of which the Commission deems that the petition was submitted within a reasonable period of time according to the terms of Article 32.2 of IACHR's Rules of Procedure.

VII. ANALYSIS OF COLORABLE CLAIM

16. Based on the elements of fact and law submitted by the parties and the nature of the matter brought before it, the Commission finds that, if proven, the alleged unjustified inactivity and delay in enforcing the decision of the Constitutional Court, as well as its possible impacts on the health of the alleged victims, could establish possible violations of Article 5 (humane treatment), 8 (fair trial) and 25 (judicial protection) of the American Convention, in connection with its Article 1.1 (obligation to respect rights). As for the claim about the alleged violation of Article 4 (life) of the American Convention, the Commission observes that the petitioners have not provided any allegations or sufficient evidence that would make it possible to consider *prima facie* its possible violation.

17. As for the allegations relative to the Commission's competence *ratione materiae* on the violations of the Protocol of San Salvador, the IACHR notes that the competence provided for in the terms of Article 19.6 of said treaty to establish violations in the context of an individual case is confined to Articles 8 and 13. Regarding the other articles, according to Article 29 of the American Convention, the Commission can take them into account to interpret and enforce the American Convention and other applicable instruments. Furthermore, in regard to the Universal Declaration of Human Rights, the Commission does not have the jurisdiction to establish violations of the standards of said treaty, without detriment to the fact that it can take them into account as part of its exercise of interpreting the standards of the American Convention in the merits stage of the present case, according to the terms of Article 29 of the American Convention.

VIII. DECISION

1. To declare the present petition admissible regarding Articles 5, 8 y 25 of the American Convention, in connection with its Article 1.1.
2. To declare the present petition inadmissible regarding Article 4 of the American Convention.
3. To notify the parties of the present decision; to continue to examine the merits of the case; and to publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 25th day of the month of May, 2019. (Signed): Esmeralda E. Arosemena Bernal de Troitiño, President; Joel Hernández García, First Vice President; Antonia Urrejola, Second Vice President; Margarete May Macaulay, Francisco José Eguiguren Praeli, Luis Ernesto Vargas Silva, and Flávia Piovesan, Commissioners.