

**IN THE INTER-AMERICAN COURT OF HUMAN RIGHTS**

**SAN JOSE, COSTA RICA**

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**CASE OF MARÍA ELENA QUISPE AND MÓNICA QUISPE**

**Petitioners**

**v.**

**THE REPUBLIC OF NAIRA**

**Respondent**

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**MEMORIAL FOR THE PETITIONERS**

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## STATEMENT OF FACTS

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### I. BACKGROUND

The State of Naira (hereinafter “Naira”) is a democratic State with a population of 20 million.<sup>1</sup> Naira is plagued by many cases of gender-based violence. The Public Ministry of Naira has confirmed that 10 Nairan women are murdered or are victims of attempted murder every month, and that a Nairan woman is a victim of sexual violence every two hours.<sup>2</sup> The National Opinion Institute additionally reports that 7 out of every 10 women between 15 and 35 years of age have been subject to daily sexual street harassment throughout their lives.<sup>3</sup>

Despite being in force for nearly four years, Naira’s Zero Tolerance Policy on Gender-Based Violence (“ZTPGBV”)<sup>4</sup> has not shown any success in lowering the rates of femicide and violence against women.<sup>5</sup> While Naira’s regulatory framework includes “Law 25253 on violence against women and the family” and “Law 19198 against street harassment”, the Nairan Criminal Code only recognises the offenses of femicide and rape, and does not define any other kind of sexual violence as a crime.<sup>6</sup> Furthermore, attempts to reform Naira’s education system to include a gender perspective have been entirely unsuccessful.<sup>7</sup>

The current administration, headed by President Gonzalo Benavente of the Democratic Reform Party (“DRP”), campaigned on a platform of promoting inclusion and improving

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<sup>1</sup> Hypothetical, [1].

<sup>2</sup> Hypothetical, [12].

<sup>3</sup> *Ibid.*

<sup>4</sup> Hypothetical, [19].

<sup>5</sup> Clarification 35.

<sup>6</sup> Hypothetical, [14].

<sup>7</sup> Hypothetical, [4].

conditions for vulnerable groups such as women.<sup>8</sup> However, they consistently faced opposition from the Coalition for the Resistance (“the Coalition”), who resist any regulatory reform that is opposed to what they believe to be “traditional values of Nairan society”.<sup>9</sup>

Naira has ratified the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”) in 1981, the American Convention on Human Rights (hereinafter “ACHR”) in 1979, the Inter-American Convention to Prevent and Punish Torture in 1992, and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (hereinafter “the BDP”) in 1996.<sup>10</sup>

## II. INCIDENT OF THE WARMI SPECIAL MILITARY BASE (“SMB”)

From 1970 to 1999, an armed group known as “Freedom Brigades” committed numerous acts of terrorism in the Southern provinces of Warmi, Soncco and Killki, with the aim of taking control of the Southern region of Naira.<sup>11</sup> In response to their activities, Naira declared a state of emergency under Art 27(3) of the ACHR, thereby suspending the guarantee on derogable human rights.<sup>12</sup> Naira then established Political and Judicial Units, which asserted military control over the aforementioned provinces from 1980 to 1999.<sup>13</sup>

The Petitioners of this case, the Quispe sisters, were two girls belonging to an indigenous community in Warmi.<sup>14</sup> In a December 2014 interview, Mónica Quispe alleged that soldiers from

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<sup>8</sup> Hypothetical, [2].

<sup>9</sup> Hypothetical, [4].

<sup>10</sup> Hypothetical, [7].

<sup>11</sup> Hypothetical, [8].

<sup>12</sup> Hypothetical, [9].

<sup>13</sup> Hypothetical, [9].

<sup>14</sup> Clarification 16.

the Warma Special Military Base (SMB) committed multiple human rights abuses against the local women during the period from 1990 to 1999.<sup>15</sup> She revealed that in March 1992, she and María were falsely accused of being accomplices to the Freedom Brigades.<sup>16</sup> Despite being minors<sup>17</sup>, the Quispes were extrajudicially detained for one month. During that month, the Quispes were forced to cook, clean, and do laundry for the soldiers.<sup>18</sup> Furthermore, the soldiers sexually abused the female detainees repeatedly. On multiple occasions, the Quispes were raped and gang raped by the soldiers. It is likely that similar or worse fates befell the other female detainees, as Mónica recalls watching the other women being forced to strip in front of the soldiers. Once they were naked, the women would be groped and physically beaten by the soldiers.<sup>19</sup>

At the time of the abuse, the Quispes did not report these acts because the SMB exercised political, military, and judicial control over Warma until 1999. Furthermore, the military was known to issue death threats against any women who made such reports.<sup>20</sup> While Naira later opened investigations into possible human rights violations, the investigations allegedly found no evidence of these acts.<sup>21</sup>

After Mónica's interview was broadcasted, Killapura conducted a thorough investigation and found Mónica's story to be substantiated by interviews with victims, witnesses and neighbors.<sup>22</sup> Killapura, a non-governmental organisation that litigates cases of gender-based violence, then filed criminal complaints alleging acts of sexual violence against the Quispes.

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<sup>15</sup> Hypothetical, [28].

<sup>16</sup> Clarification 42.

<sup>17</sup> Clarification 69.

<sup>18</sup> Hypothetical, [28].

<sup>19</sup> *Ibid.*

<sup>20</sup> Clarification 43.

<sup>21</sup> *Ibid.*

<sup>22</sup> Hypothetical, [33].

However, the case was thrown out on the grounds that the allegations were time-barred by the expiration of the 15-year limitation period.<sup>23</sup> Killapura then called on the government to take the necessary measures to investigate the Quispes' case, identify the other victims, prosecute these acts, and make reparations for these women and for any children born as a result of those rapes.<sup>24</sup> In response, President Benavente publicly promised to take a number of measures, including the creation of a Truth Commission ("TC"), which undertakes to investigate the facts, and a Special Fund for reparations.<sup>25</sup>

In response to Mónica's interview, authorities in Warmi have issued a public statement denying these allegations.<sup>26</sup>

### III. INCIDENT OF THE ASSAULT ON MARÍA QUISPE BY JORGE PÉREZ

On 20 January 2014, María Elena Quispe was violently disfigured with a broken bottle by her husband, Jorge Pérez ("**First Assault**").<sup>27</sup> When she attempted to report this act, the only medical examiner in the area was out of town on vacation. She was unable to file an official police report because she had not undergone the requisite medical examination.<sup>28</sup> Consequently, María was not entitled to the protective measures granted to women who are victims of violence under Naira's Law 25253.<sup>29</sup>

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<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> Hypothetical, [34].

<sup>26</sup> Hypothetical, [32].

<sup>27</sup> Hypothetical, [23].

<sup>28</sup> Clarification 22.

<sup>29</sup> Clarification 73.

Four months later, Pérez intercepted María on the street and verbally and physically assaulted her, for which he was arrested and prosecuted (“**Second Assault**”).<sup>30</sup> However, his sentence was suspended because he had no prior history of violence, and because the assault only resulted in minor injuries.<sup>31</sup>

Three months later, Pérez assaulted María again, leaving her with right-sided hemiplegia (“**Third Assault**”).<sup>32</sup> This incident permanently limited her physical activities, and left her with a fear of leaving home and going to work.<sup>33</sup> Pérez was arrested immediately, but is currently not in custody.<sup>34</sup>

Subsequently, Jorge Pérez brought custody proceedings, claiming Maria’s health condition rendered her incapable of caring for their son. He was awarded custody on the grounds that “the bond between a father and his children cannot be affected by intimate partner violence.”<sup>35</sup>

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<sup>30</sup> Hypothetical, [25].

<sup>31</sup> *Ibid.*

<sup>32</sup> Clarification 41.

<sup>33</sup> Clarification 51.

<sup>34</sup> Clarification 71.

<sup>35</sup> Hypothetical, [26].



## LEGAL ANALYSIS

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### I. ADMISSIBILITY

#### Statement of Jurisdiction

Naira ratified the ACHR in 1979, and therefore accepted the contentious jurisdiction of this Court in relation to ACHR violations.<sup>36</sup> The Inter-American Commission of Human Rights (hereinafter “the Commission”) has referred the matter to this Court<sup>37</sup> because Naira was unwilling to implement any of the recommendations made by the Commission.<sup>38</sup> All the facts being disputed have occurred after the date of ratification. This Court therefore has the jurisdiction to hear the present case pursuant to Art 62(3) of the ACHR.<sup>39</sup>

Naira has ratified the BDP in 1996. Art 12 grants the Commission jurisdiction to consider petitions on Art 7, and forward these petitions to this Court pursuant to the Commission’s Rules of Procedure.<sup>40</sup> All the facts upon which the Art 7 violations are alleged, occurred after the date of ratification. Accordingly, the Court has jurisdiction over this petition.

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<sup>36</sup> Hypothetical, [7].

<sup>37</sup> Inter-American Commission of Human Rights, Rules of Procedure, Art 45(1).

<sup>38</sup> Hypothetical, [42].

<sup>39</sup> American Convention of Human Rights (“ACHR”), Art 62(3).

<sup>40</sup> I/A Court H.R., *González et al. (“Cotton Field”) v. Mexico* (Merits) Inter-Am. C.H.R., Series C No. 205, 2009, [77].

## II. MERITS

### A. AVAILABLE EVIDENCE PROVES THAT THE SMB SOLDIERS SEXUALLY ABUSED FEMALE DETAINEES, DETAINED THE QUISPES WITHOUT TRIAL, AND FORCED THE QUISPES INTO SLAVERY.

Available evidence indicates that on the balance, the soldiers of the Warmi SMB committed the following crimes – (a) the sexual abuse of the female detainees, (b) the detention of the Quispe sisters without trial, and (c) forcing the Quispes into slavery. While the Warmi authorities and the majority of its residents extrajudicially deny Mónica’s allegations,<sup>41</sup> Naira’s answer to the Commission on 10 August 2016 never denied, contested, or provided evidence disproving Mónica’s factual claims regarding the three crimes. Accordingly, under Art 39 of the Rules of Procedure of the Inter-American Court of Human Rights, this Court is entitled to consider the occurrence of the aforementioned crimes conceded and accepted by Naira.<sup>42</sup>

Furthermore, the Quispes’ account of events is also corroborated by circumstantial evidence in the form of testimonies that Killapura has gathered from victims, neighbors and witnesses. This evidence leads to the consistent conclusion that (a) the rights in dispute have been violated, and (b) that the Nairan authorities supported or tolerated these violations.<sup>43</sup> The evidence can therefore be relied on to find that Naira has violated Arts 5, 6, 7, 8 and 25 of the ACHR, and Art 7(b) of the BDP.

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<sup>41</sup> Hypothetical, [32].

<sup>42</sup> Rules of Procedure of the Inter-American Court of Human Rights, Art 39.

<sup>43</sup> I/A Court H.R., *Manuel Cepeda Vargas v. Colombia* (Merits) Inter-Am. C.H.R, Series C No. 213, 2010, [66] – [75].

**B. NAIRA IS IN BREACH OF ITS ACHR OBLIGATIONS TO THE QUISPES UNDER ARTS 5,6, 7, 8 AND 25.**

1. The violations committed by the SMB soldiers can be attributed to Naira.

Firstly, the three aforementioned abuses committed by the SMB soldiers can be attributed to the State of Naira. On the facts, the SMB soldiers are agents of Naira who committed these abuses in their official capacities. As established under international law and recognised by this Court in *Velasquez Rodriguez*, a State is responsible for the acts of its agents undertaken in their official capacity, even if those agents acted outside the sphere of their authority, or violated internal law.<sup>44</sup> Accordingly, the acts of the SMB soldiers can be attributed to Naira.

2. The soldiers violated the ACHR by sexually abusing female detainees, detaining the Quispes without trial, and forcing them into slavery.

As a preliminary point, per the conventionality control doctrine under the ACHR, Naira is bound by this Court's interpretation of its ACHR obligations, regardless of its internal law.<sup>45</sup>

We submit that the SMB soldiers stationed in Warimi violated the Quispes' rights under Arts 5(1), 5(2), 7(1), 7(3), 7(5), 8(1), 8(2), and 25 of the ACHR.

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<sup>44</sup> ARSIWA, Art 4; I/A Court H.R., *Caso Velásquez Rodríguez v. Honduras*, (Merits) Inter-Am. C.H.R., Series C No. 4, 1988 ("*Velásquez Rodríguez*"), [170].

<sup>45</sup> I/A Court H.R., *Case of Almonacid Arellano et al v. Chile*, (Merits) Inter-Am. C.H.R., Series C No. 154, 2006 ("*Almonacid Arellano*"), [124]; I/A Court H.R., *Case of the Dismissed Congressional Employees (Aguado Alfaro et al) v. Peru*, (Merits) Inter-Am. C.H.R., Series C No. 158, 2006, [128].

**1. *Naira violated the Quispes' rights to humane treatment under Art 5 of the ACHR.***

The SMB soldiers committed multiple acts of torture by repeatedly raping and gang raping the Quispes. As an act of torture conducted by state officials, this sexual violence violates Art 5(2) of the ACHR, the Prohibition of Torture, and Cruel, Inhumane or Degrading Treatment. Consequently, the Quispes' right to physical, mental, and moral integrity, under Art 5(1) has also been violated.<sup>46</sup>

Systematic rape, specifically where used to subjugate a population during armed conflict, has been recognised by international tribunals as torture.<sup>47</sup> This Court should do the same. It certainly comports with this Court's definition of torture under Art 5(2) of the ACHR, as consisting “(a) an intentional act; (b) which causes severe physical or mental suffering, (c) committed with a given purpose or aim”.<sup>48</sup> The rape and gang rape of the Quispes clearly fulfill elements (a) and (b), considering the acts were deliberately inflicted, and that rape is a brutalization of one's body that indisputably causes great physical and psychological damage.<sup>49</sup>

With regards to element (c), the jurisprudence of this Court shows that a “given purpose” is found when rape is used as a tool of interrogation and punishment of female suspects.<sup>50</sup> In this case, the purpose of inflicting physical and psychological damage on them via rape was likely to obtain information on the Freedom Brigades' operations. The soldiers' use of rape as an

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<sup>46</sup> Antkowiak, Thomas M, *The American Convention on Human Rights: Essential Rights*, p106.

<sup>47</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08.

<sup>48</sup> I/A Court H.R., *Case of Bueno Alves v. Argentina*, (Merits), Series C No. 164, 2007, [79], citing Art 2 of the Inter-American Convention to Prevent and Punish Torture.

<sup>49</sup> I/A Court H.R., *Raquel Martín de Mejía v. Peru*, Merits Report No. 5/96, 1996.

<sup>50</sup> I/A Court H.R., *Espinoza González v. Peru*, (Merits) Series C No. 295, 2015 (“*Espinoza González*”) ; IACHR, *Ana, Beatriz, and Celia González Pérez v. Mexico*, Merits Report No. 5/96, 1996.

interrogation tactic therefore constitutes torture under Art 5(2), and is a violation of the Quispes' rights under Arts 5(1) and 5(2) of the ACHR.

Even if the aforementioned sexual violence does not constitute torture under Art 5(2), the acts clearly constitute “cruel, inhuman or degrading punishment”, which is also prohibited under Art 5(2). This Court has repeatedly found non-consensual sexual acts to be both physically and emotionally degrading and humiliating,<sup>51</sup> and therefore, a cruel, inhuman or degrading punishment. Accordingly, even if this Court does not find that the SMB soldiers' acts constitute torture, it should still find that Naira violated the Quispes' Arts 5(1) and 5(2) rights.

**2. Naira violated the Quispes' rights to freedom from slavery under Art 6 of the ACHR.**

By forcing the Quispes to cook, clean, and do laundry,<sup>52</sup> the SMB soldiers violated the Quispes' Art 6(2) rights to be free from “forced labour”, which this Court has defined as “involuntary work [extracted]... under the menace of penalty”.<sup>53</sup>

In this case, considering the context of the Quispes' imprisonment and the brutal sexual abuse they were subject to, the Quispes did not voluntarily perform the work in question. They were clearly coerced into forced labour by the threat of further physical and sexual violence. Accordingly, Naira has violated the Quispes' freedom from forced labour under Art 6(2) of the ACHR.

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<sup>51</sup> I/A Court H.R., *Case of Miguel Castro Castro Prison v. Peru*, (Merits) Series C No. 160, 2006 (“*Miguel Castro Castro Prison*”), [203]; I/A Court H.R., *García Asto and Ramírez Rojas v. Peru*, (Merits) Series C No. 137, 2005 [97(27)] and [97(56)].

<sup>52</sup> Hypothetical, [28].

<sup>53</sup> I/A Court H.R., *Case of the Ituango Massacres v. Colombia*, (Merits) Series C No. 148, 2006, [159].

3. *Naira violated the Quispes' rights to personal liberty under Art 7 of the ACHR.*

By detaining the Quispes' for one month without evidence of their involvement with the Freedom Brigades, the SMB soldiers violated the Quispe sisters' right to be free from arbitrary detention under Art 7(3) of the ACHR.

A detention is arbitrary if it is “incompatible with respect for the fundamental rights of the individual because... they are unreasonable, unforeseeable or disproportionate”.<sup>54</sup> In this case, the detention of the Quispes was an unreasonable, unforeseeable and disproportionate detention for two reasons. Firstly, the suspicion of the Quispes is indisputably unreasonable considering they were minors of 12 and 15 years old with no known criminal record,<sup>55</sup> and had no reason to aid the terrorist group attacking their home province. Tellingly, Naira has yet to produce any evidence connecting the Quispes to the Freedom Brigades. Secondly, the one-month duration of the detention was disproportionately long despite the lack of reasonable suspicion. We submit that Naira therefore violated Art 7(3) of the ACHR.

Additionally, by failing to provide the Quispes with the opportunity to “appear in person before the competent authority, who [hears] the detainee personally and [assesses] all the explanations he or she provides, in order to decide whether to release him or her or to maintain the deprivation of liberty”,<sup>56</sup> Naira violated the Quispes' rights to promptly be brought before a judge as detainees, to enjoy a trial within a reasonable time under Art 7(5) of the ACHR.

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<sup>54</sup> I/A Court H.R., *Case of Gangaram-Panday v. Suriname*, (Merits) Series C No. 16, 1994, [47].

<sup>55</sup> Clarification 69.

<sup>56</sup> I/A Court H.R., *Case of Tibi v. Ecuador*, (Merits) Series C No. 114, 2004, [118]; *Espinoza Gonzales*, [129].

**4. Naira violated the Quispes' rights to judicial protection with due process under Arts 8 and 25 of the ACHR.**

During their prolonged detention, the Quispes were not given a hearing by a competent and independent tribunal within a reasonable time. Accordingly, their Art 8(1) rights under the ACHR have been violated.

The Petitioners' position is that the Quispes should not have been detained in the first place. Given that they were detained, they should have been given a hearing within a reasonable time, to determine whether the accusations levelled against them were true. Such a determination is based on (i) the complexity of the matter; (ii) the judicial activity of the interested party; (iii) the behaviour of the judicial authorities; and (iv) the seriousness of the consequences of the procedural delay for the party.<sup>57</sup> The fact that the Quispes were not given a hearing for one month was an unreasonable delay considering there was no evidence of the Quispes' involvement with the Freedom Brigades, or of any procedural justifications for the delay. Naira therefore violated the Quispes' Art 8(1) rights.

Furthermore, the undefined and continuous suspicion of the Quispes without the formulation of a judgment establishing blame has violated the principle of presumed innocence under Art 8(2) of the ACHR.<sup>58</sup>

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<sup>57</sup> I/A Court H.R., *Valle Jaramillo et al. v. Colombia*, (Merits), Series C No. 192, 2008, [155]; I/A Court H.R., *Case of Díaz-Peña v. Venezuela*, (Merits) Series C No. 244, 2012, [49].

<sup>58</sup> IACHR, *Jorge A Giménez v. Argentina*, Merits Report No. 12/96, 1996, [113].

Finally, Naira has violated Art 25 of the ACHR by failing to provide the Quispes with effective judicial remedy in line with the rules of due process, despite detaining the Quispes on false accusations.<sup>59</sup>

**C. NAIRA’S DECLARATION OF A STATE OF EMERGENCY IN 1990 DOES NOT EXCUSE THE QUISPES CRIMES.**

Naira’s declaration of an emergency from 1990 to 1999 does not relieve it from culpability for its breaches, since (a) the sexual violence and forced slavery suffered by the Quispes are violations of non-derogable rights,<sup>60</sup> and (b) the month-long detention was not strictly required by the exigencies of the situation.

1. The state of emergency does not excuse the sexual abuse and forced slavery inflicted on the Quispes.

The sexual abuse and forced slavery of the Quispes cannot be excused by a state of emergency. The sexual abuse inflicted on the Quispes violates their Art 5 rights, and the forced slavery violates their Art 6 rights. Under Art 27(2) of the ACHR, Arts 5 and 6 are non-derogable. Any violation of such rights cannot be excused by a state of emergency.<sup>61</sup>

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<sup>59</sup>*Velasquez Rodriguez*, [91]; *Miguel Castro Castro Prison*, [381]; I/A Court H.R., *Albán-Cornejo et al. v. Ecuador*, (Merits) Series C No. 171, 2007 (“*Albán-Cornejo*”), [61].

<sup>60</sup> ACHR, Art 27(2).

<sup>61</sup> *Ibid.*



2. The state of emergency does not excuse the prolonged detention of the Quispes.

The duration of the Quispes' detention exceeded what was "strictly required by the exigencies of the situation",<sup>62</sup> and is therefore a violation of Arts 7, 8 and 25. Considering arguments previously made regarding the prolonged detention of the Quispes in spite of any evidence that would support a reasonable suspicion of wrongdoing,<sup>63</sup> Naira therefore cannot avail itself of Art 27(1)'s protection.

**D. NAIRA IS OBLIGATED TO MAKE REPARATIONS TO THE QUISPES FOR THE AFOREMENTIONED VIOLATIONS.**

1. Naira is obligated to make reparations by investigating and prosecuting the soldiers with due diligence under Arts 1(1), 8 and 25 of the ACHR, and Art 7(b) of the BDP.

State Parties have an obligation to investigate and prosecute all violations of ACHR rights with due diligence, as part of their general obligation to ensure the free and full exercise of Convention rights pursuant to Art 1(1) of the ACHR.<sup>64</sup> Conceptually, this due diligence obligation includes a duty to provide with effective judicial remedies, substantiated in accordance with due process of law under Arts 8 and 25.<sup>65</sup>

Furthermore, since the sexual abuse inflicted on the female detainees is an act of violence against women, Naira is also bound by a parallel obligation to act with due diligence in the

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<sup>62</sup> ACHR, Art 27(1).

<sup>63</sup> See Section B.2.3.

<sup>64</sup> *Velasquez Rodriguez*, [164]-[166]; I/A Court H.R., *Case of the Massacres of El Mozote and Nearby Places v. El Salvador*, (Merits) Series C No. 252, 2012 ("*The Massacres of El Mozote*"), [242]; *Cotton Field*, [236].

<sup>65</sup> *The Massacres of El Mozote*, [242]; *Espinoza Gonzales*, [237]; *Miguel Castro Castro Prison*, [381].

investigation and prosecution of the soldiers per Art 7(b) of the BDP.<sup>66</sup> Under both the ACHR and the BDP, Naira therefore must investigate the Quispes' complaints with due diligence, prosecute persons allegedly responsible for the violations.

Naira breached its obligation to investigate violations of the ACHR and violence against women with due diligence in two instances – (1) the SMB's failure to investigate contemporaneous complaints of abuse during their operation, and the active suppression of any complaints;<sup>67</sup> and (2) Naira's failure to initiate investigation immediately after the broadcast of Mónica's interview<sup>68</sup>. Furthermore, Naira also breached its obligation to prosecute said acts, since no judicial action was ever taken against the soldiers. While the Quispes' complaint of sexual violence was time barred, the Petitioners contend that under customary international law and under the ACHR, the domestic time bar cannot preclude prosecution.

It is unclear whether the 15-year limitation period applies to the Quispes' complaints of forced slavery and prolonged detention. Absent further clarifications from Naira, the limitation period appears to only apply to the sexual abuse.<sup>69</sup> Accordingly, Naira has no excuse for its failure to investigate and punish the soldiers for the forced slavery and prolonged detention of the Quispes.

Even if the limitation period applies to the Quispes' complaints of forced slavery, this repeated and serious violation of their non-derogable Art 6 rights warrants investigation and prosecution regardless of the lapse of significant time.

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<sup>66</sup> *Miguel Castro Castro Prison*, [378]; *The Massacres of El Mozote*, [243].

<sup>67</sup> Clarification 42.

<sup>68</sup> Hypothetical, [27].

<sup>69</sup> Clarification 85.

If the 15-year limitation period applies to the Quispes' complaint that Naira violated their Arts 7, 8 and 25 rights by detaining them under false pretences for one month, the lapse of the limitation period may preclude prosecution. However, this Court must bear in mind that the detention forms part of the backdrop for our consideration.

2. The lapse of the domestic limitation period does not excuse Naira's failure to investigate and prosecute the soldiers.

1. *The systematic sexual abuse of the female detainees is a crime against humanity and cannot be subject to a statute of limitation.*

The lapse of Naira's domestic limitation period does not preclude the prosecution of the soldiers for the sexual abuse of the female detainees. Customary international law dictates that crimes against humanity, such as this systemic sexual abuse of the female detainees, cannot be subject to any statutes of limitations.

As a preliminary argument, the non-applicability of domestic statutes of limitations to crimes against humanity is a rule of customary international law, in light of state practice and *opinio juris*.<sup>70</sup> This Court acknowledged the existence of this customary rule in *Almonacid Arellano*,<sup>71</sup> and found that the limitation period did not apply to a complaint of extrajudicial execution. Crucially, Chile had not ratified the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.<sup>72</sup>

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<sup>70</sup> *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark & Netherlands)*, [1969] I.C.J. Rep. 3, [77].

<sup>71</sup> *Almonacid Arellano*, [153].

<sup>72</sup> UN General Assembly, *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, 26 November 1968, A/RES/2391(XXIII).

The existence of consistent state practice and *opinio juris* in support of this rule is best demonstrated by the adoption of the aforementioned UN Convention. To date, the UN Convention has 55 signatories including Mexico, Chile and Cuba,<sup>73</sup> evincing significant state practice. Additionally, the adoption of an international instrument drafted specifically to settle the issue of statutory limitations evinces *opinio juris*. This Court should therefore find a customary international law rule that statutes of limitations are inapplicable to crimes against humanity.

Furthermore, we contend that no State in the international community believes that domestic limitation periods should extinguish the culpability for crimes against humanity. Considering the international consensus regarding criminalising crimes against humanity<sup>74</sup>, it would be unreasonable if State agents could commit heinous crimes against humanity, and enjoy impunity as long as the State refuses to bring criminal proceedings within the limitation period.<sup>75</sup> Additionally, in cases where the State is implicated in the wrongdoing, important aspects of the offense may be covered up or not publicly known for some time after the act itself, such that the relevant evidence would only be accessible after a regime change.<sup>76</sup> It would similarly be a mockery of international law if the old regime can enjoy impunity by deliberately concealing evidence of its wrongdoing for a significant time.

In the present case, the widespread and systemic rape directed against the female detainees is a crime against humanity under Art 7(1)(g) of the Rome Statute.<sup>77</sup> Similarly, even if the

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<sup>73</sup> *Ibid.*

<sup>74</sup> See UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6 (“Rome Statute”)

<sup>75</sup> Kok, Ruth, *Statutory Limitations in International Criminal Law*, (The Hague: TMC Asser Press, 2007), p244.

<sup>76</sup> *Ibid.*

<sup>77</sup> Rome Statute, Art 7(1)(g).

systematic rape of multiple female detainees cannot be proven, the totality of the various acts of sexual abuse constitutes widespread and directed torture of the women, and therefore is also a crime against humanity under Art 7(1)(f) of the Rome Statute.<sup>78</sup>

It is trite that a State cannot invoke national law to justify non-compliance with international law set out by treaty or custom.<sup>79</sup> In light of this customary international law rule that crimes against humanity cannot be time-barred, Naira's domestic limitation period cannot excuse its failure to investigate and prosecute complaints of sexual violence from the female detainees.

**2. Naira has breached its due diligence obligation to investigate and prosecute the severe violations of the Quispes' rights.**

Furthermore, under the ACHR, the systematic and severe violations of the Quispes' non-derogable rights to humane treatment and freedom from slavery must be investigated and prosecuted, regardless of the lapse of significant time.

Per this Court in *The Massacres of El Mozote*, in cases of grave violations of non-derogable rights, the State must remove all obstacles that *de jure* and *de facto* impede investigation and prosecution,<sup>80</sup> in order to prevent impunity, or the "total lack of investigation, prosecution, capture, trial and conviction of those responsible".<sup>81</sup> States must therefore prosecute all serious violations of non-derogable rights regardless of conflicting domestic legislation, because the

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<sup>78</sup> *Ibid*, Art 7(1)(f).

<sup>79</sup> United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331 ("VCLT"), Art 27; UN General Assembly, *Responsibility of States for internationally wrongful acts : resolution / adopted by the General Assembly*, 8 January 2008, A/RES/62/61 ("ARSIWA"), Art 3.

<sup>80</sup> *The Massacres of El Mozote*, [249].

<sup>81</sup> I/A Court H.R., *Case of the "White Van" (Paniagua-Morales et al.) v. Guatemala*, (Merits) Series C No. 37, 1998 ("White Van"), [173].

consequences of impunity and the risk of repetition of such atrocities directly contravene the ACHR's aim of ensuring Convention rights.<sup>82</sup>

The sexual abuse of the female detainees and forced slavery of the Quispes are serious violations of non-derogable rights that Naira must investigate and, if necessary, prosecute despite the lapse of the domestic limitation period. Firstly, in relation to other cases where this Court ordered a prosecution in spite of conflicting internal law, the Quispes' case features violations of a similar or greater severity. In *Bulacio*, this Court ordered the prosecution of policemen who violated a teenager's non-derogable right to humane treatment by detaining and torturing him, even though their liability was extinguished under the Argentinean statute of limitations.<sup>83</sup> In *Alban-Cornejo*, this Court ordered the prosecution of a doctor whose malpractice violated the applicant's daughter's non-derogable right to life, even though his liability was similarly extinguished under the Ecuadorian statute of limitations.<sup>84</sup> This Court must bear in mind that the Quispes were taken away from their homes and cruelly detained despite being 12 and 15-year-old children.<sup>85</sup> For one month, their basic and essential human rights were brutally violated by men who repeatedly used them as labour and as targets for their sexual depravity.<sup>86</sup> The same men have enjoyed impunity for their actions for over two decades. Considering the ACHR and BDP duties of investigation and prosecution contemplate domestic criminal law as the mechanism to ensure

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<sup>82</sup> See note 80.

<sup>83</sup> I/A Court H.R., *Case of Bulacio v. Argentina*, (Merits) Series C No. 100, 2003 ("*Bulacio*").

<sup>84</sup> *Alban-Cornejo*.

<sup>85</sup> Clarification 69.

<sup>86</sup> Hypothetical [28].

protection of individual rights and non-repetition,<sup>87</sup> this Court should order the investigation and prosecution of the Quispes' complaints.

Secondly, the obligation to prosecute acquires a particular intensity in cases with state involvement. In *El Mozote*, this Court listed cases of “grave human rights violations forming part of a systematic pattern applied or tolerated by the State” as an instance where the severity of the act requires the removal of all domestic obstacles impeding prosecution.<sup>88</sup> Since the SMB soldiers were state agents acting in their official capacity, Naira effectively implemented or tolerated their violations. Naira's subsequent refusal to prosecute its own agents signals a tolerance towards violence against women. Accordingly, Naira must investigate and prosecute the soldiers in order to condemn such violations, and restore confidence in Naira's judiciary and rule of law.

Thirdly, the State's obligation to protect ACHR rights via investigation and prosecution must take into account the Applicant's “particularities, social and economic characteristics [and]... situation of special vulnerability”.<sup>89</sup> Similarly, under the BDP, Art 9 establishes that States must take special account of factors that expose groups of women to particular risk discrimination when adopting measures for the protection of women under Art 7(b).<sup>90</sup> In this case, considering the Quispes were young indigenous girls living in poverty, Naira has an enhanced obligation to ensure the Quispes had access to legal and administrative assistance to report the abuse that they suffered. Since no such assistance was provided, Naira is consequently in breach of its due diligence obligation to investigate and prosecute.

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<sup>87</sup> ACHR Preamble, BDP Preamble.

<sup>88</sup> *The Massacres of El Mozote*, [242].

<sup>89</sup> I/A Court H.R., *Valentina Rosendo Cantu v. Mexico*, (Merits), Series C No. 216, 2010, [184].

<sup>90</sup> Inter-American Commission of Human Rights, ‘Report on the Situation of Human Rights Defenders in the Americas’ OEA/SER.L/V/II.124 Doc 5 rev 1 (2006).

Finally, any argument re prosecution violating the Defendant soldiers' right to fair trial within a reasonable time under Art 8 of the ACHR should be disregarded, considering any potential prejudice suffered vis-a-vis admitting evidence that may have become unreliable or incomplete due to the passage of time does not violate Art 8. The subparagraphs of Art 8 focus on the "equality of arms" between the parties, in that both parties must be afforded the opportunity to present their cases under conditions that do not place them at a substantial disadvantage.<sup>91</sup> Consequently, the prosecution of the SMB soldiers would not infringe upon the Defendant's Art 8 rights considering the fairness of the trial is still ensured by, *inter alia*, the Art 8 guarantees ensuring an equality of arms, strict enforcement of the burden of proof, and existing rules of evidence that awards less weight to evidence that the court finds unpersuasive. There is therefore no reason to foreclose the possibility of a trying an ACHR violation merely because significant time has lapsed since its commission.

In failing to prosecute the Defendant soldiers, Naira violated its due diligence obligations, and therefore reproduced the conditions of impunity necessary for such brutal acts of violence against women to be repeated. This Court should therefore order the investigation and prosecution of the Quispes' complaints.

**3. *Naira's obligation to investigate and prosecute the soldiers persists even though the Truth Commission is another mode of accountability.***

While Naira has agreed to investigate the Quispes' case via the TC, this does not go far enough to fulfil Naira's obligations to investigate and prosecute the SMB soldiers.

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<sup>91</sup> ACHR, Art 8.



Firstly, notwithstanding the potential contributions of the TC to the knowledge of the facts, the State's existing obligation is to investigate, prosecute, and punish those responsible, where appropriate. This Court has held that the general duty to ensure free and full exercise of ACHR rights requires the prosecution and punishment on those responsible.<sup>92</sup> Similarly, Art 7(b) of the BDP expressly states the need for State Parties to "punish and eradicate" acts of violence against women.<sup>93</sup> Considering the TC has no legal capability to impose criminal punishment on the accused persons, the TC does not fulfil these ACHR and BDP obligations.

Secondly, any argument regarding the unique benefits provided by the TC's investigation should be rejected. While TC's may have significant probative value by revealing certain historical truths,<sup>94</sup> the Quispes have a right to a "judicial truth" obtained via court proceedings.<sup>95</sup> Only judicially determined truths can satisfy the States' obligation of preventing future violence by ensuring perpetrators do not enjoy impunity, and ensuring that victims enjoy access to the truth. While the TC would publicise the result of its investigations, it has no powers to compel testimony or to punish. The SMB soldiers would enjoy impunity despite being perpetrators of crimes against humanity. Furthermore, the people of Warimi would continue disbelieving the Quispes and take refuge in denial because the victims' testimonies have not been tested in a court of law. Without a trial process to confer legitimacy to the victims' otherwise contestable testimony,<sup>96</sup> the historical

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<sup>92</sup> *Miguel Castro Castro Prison*, [256]; *Velasquez Rodriguez*, [174].

<sup>93</sup> BDP, Art 7(b).

<sup>94</sup> *Almonacid-Arellano*, [150].

<sup>95</sup> I/A Court H.R., *Blanco Romero et al. v. Venezuela*, (Merits) Series C No. 138, 2005.; I/A Court H.R., *Pueblo Bello Massacre v. Colombia*, (Merits) Series C No. 140, 2006 ("*The Pueblo Bello Massacre v. Colombia*"), [220].

<sup>96</sup> Michael P. Scharf and Paul R. Williams, *Functions of Justice and Anti-Justice in the Peace-Building Process*, 35 Case W. Res. J. Int'l L. 161 (2003).

truth published by the TC is unlikely to prevent the repetition of such crimes,<sup>97</sup> and therefore is insufficient to fulfil Naira's due diligence obligations to investigate and prosecute.

3. Naira is obligated to make reparations to the Quispes by compensating them for the damages as a consequence of the ACHR violations.

1. *Naira's failure to make financial compensation to the Quispes has violated its ACHR general obligations and s 7(g) of the BDP.*

Naira is obliged to redress the harms suffered by the Quispes as victims of violations of international human rights law. This principle of state responsibility is reflected in Art 63(1) of the ACHR, and has been recognised as a fundamental and customary principle of international law by this Court.<sup>98</sup> Bearing in mind that any person whose basic human rights have been violated experiences suffering,<sup>99</sup> Naira is obligated to recompense the Quispes for the mental anguish and emotional distress.

Any argument regarding the extinguishment of the obligation to make financial compensation due to the statute of limitations must be dismissed, considering the obligation to make financial compensation exists independently from the obligation to investigate and prosecute ACHR violations. Under the ACHR, this separation is evinced by this Court's ability to review the compatibility domestic legislation with the ACHR and consequently order the State to make financial compensation, even though the obligations to investigate and prosecute are not

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<sup>97</sup> *The Massacres of El Mozote*, [242].

<sup>98</sup> *Velasquez Rodriguez*, [25]; I/A Court H.R., *Veliz Franco et al. v. Guatemala*, Series C No. 277, 2014 ("*Veliz Franco*"), [243].

<sup>99</sup> I/A Court H.R., *Reverón Trujillo v. Venezuela*, (Merits), Series C No. 197, 2009,[176]; *Veliz Franco*, [299].

triggered.<sup>100</sup> Under the BDP, this separation is evinced by the fact that the State's obligation to investigate and prosecute acts of violence against women falls under Art 7(b), while the State's obligation to make financial compensation falls under Art 7(g).

Accordingly, regardless of the limitation period, Naira must make financial compensation to the Quispes for their mental suffering and distress.

**2. Naira's proposed measures are inadequate in guaranteeing financial compensation for the Quispes.**

While we recognise that Naira has offered to compensate the Quispes via the Reparation Fund,<sup>101</sup> Naira has given this Court no reason for confidence that the State will pass the necessary legislation to make financial compensation. Considering the Benavente administration is in political deadlock, any regulatory reform departing from "an appropriate concept of family" will fail.<sup>102</sup> Benavente's promise to award reparations to victims of rape and their children is likely to be opposed by the Coalition, as channelling money to single mothers and children born out of wedlock is arguably an attack on traditional family values. A similar problem was seen post-Apartheid, where TCs made a number of recommendations for further payments to be made by perpetrators and beneficiaries of Apartheid, only for the South African Parliament to reject all the recommendations.<sup>103</sup>

Benavente's promise to award compensation to victims of rape will likely be opposed by the Coalition. Naira's proposal of subjecting the Quispes' entitlement to financial compensation

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<sup>100</sup> I/A Court H.R., "*The Last Temptation of Christ*" (*Olmedo Bustos et al.*) v. *Chile*, (Merits), Series C No. 73, 2001; I/A Court H.R., *Case of Castañeda Gutman v. Mexico*, (Merits), Series C No. 184, 2008.

<sup>101</sup> Hypothetical, [34].

<sup>102</sup> Hypothetical, [4].

<sup>103</sup> Allais, Lucy, 2012, "Restorative Justice, Retributive Justice, and the South African Truth and Reconciliation Commission," *Philosophy and Public Affairs*, 39(4): 331–363 at p 335.

to the politicking of the legislature is a mockery of its obligation to ensure the Quispes are fairly compensated for their losses.

**E. NAIRA HAS NOT MET ITS OBLIGATION TO IMPLEMENT LEGISLATION THAT PREVENTS VIOLENCE AGAINST WOMEN UNDER ART 7(B) OF THE BDP.**

1. Naira is obligated to remedy social deficiencies conducive to violence against women under Art 7(b) of the BDP.

Naira owes its people an obligation to exert due diligence in preventing repetitions of violence against women. The due diligence standard for preventing violence against women should not just focus on preventing isolated acts of violence, but also focus on transforming patriarchal gender structures and values that perpetrate and entrench violence against women.<sup>104</sup> Accordingly, States should be subject to a general obligation to remedy social deficiencies conducive to violence against women, such as the lack of access to education for women, and patriarchal gender structures in the family and community.<sup>105</sup>

2. Naira failed to cover different manifestations of sexual violence in its Criminal Law.

Naira has breached its obligation to prevent violence against women with due diligence because the Nairan Criminal Code only recognises offences of rape and femicide.<sup>106</sup> Even on the

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<sup>104</sup> UN Commission on Human Rights, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences on the Due Diligence Standard as a Tool for the Elimination of Violence against Women*, 20 January 2006, E/CN.4/2006/61, [15].

<sup>105</sup> *Ibid*, [15].

<sup>106</sup> Hypothetical, [14].

Quispes' factual allegations, there are other manifestations of violence against women, such as molestation and outrage of modesty offences.<sup>107</sup>

Naira is obligated to criminalise a wider range of acts of violence against women. Under Art 7(c) Naira is obligated to include in its domestic legislation penal, civil, administrative, and any other type of provisions that may be needed to prevent, punish and eradicate violence against women. The abovementioned acts are instances of violence against women as well, and should be criminalised under Art 7(c). Furthermore, under its Art 7(b) due diligence obligation to prevent violence against women, Naira must structure its legislation in a manner that creates strong opposition to all such acts, in order to signal zero tolerance for any discrimination against women.<sup>108</sup>

3. Naira failed to include a gender-based approach in its national educational curriculum.

Naira's due diligence obligation to prevent violence against women includes an obligation to design educational campaigns that combat prejudices, customs and other practices based on harmful gender stereotypes. This Court has recognised the importance of education in preventing violence against women in multiple cases, and consequently ordered the implementation of training programs,<sup>109</sup> in order to reverse the social discrimination enabling violence against women. Similarly, in the 1999 UN Special Rapporteur for violence against women report, Special Rapporteur Radhika Coomaraswamy set out a framework for preventing violence against women

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<sup>107</sup> *Ibid.*

<sup>108</sup> *The Massacres of El Mozote*, [242].

<sup>109</sup> *Rosendo Cantu v. Mexico*, [295]; *Espinoza Gonzales*, [327].

that included taking “appropriate measures in the field of education... to raise awareness of violence against women as a human rights violation, and to modify practices that discriminate against women”.<sup>110</sup> Accordingly, the State’s due diligence obligation to prevent violence against women includes raising awareness of women rights in order to eliminate a culture of discrimination and violence against women.

As was advocated by the DRP, including a gender perspective in the national education curriculum would assist in combatting a culture of rampant violence against women.<sup>111</sup> Gender-sensitive education has proven links to combatting violence against women by breaking taboos and the silence surrounding such violence.<sup>112</sup> Accordingly, Naira has an obligation to better protect women via implementation of educational policies, which the ZTPGBV does not cover.

**F. NAIRA VIOLATED ARTS 4, 5, 8, 24 AND 25 OF THE AMERICAN CONVENTION, ALL READ IN CONJUNCTION WITH ART 1(1), AS WELL AS ART 7(B), 7(C), 7(D), 7(F) AND 7(H) OF THE BDP, WITH RESPECT TO MARÍA QUISPE.**

In 2014, María was repeatedly and savagely assaulted by her husband, Jorge Pérez. Despite the extreme nature of the first assault – disfigurement with a broken bottle – no investigation took place because the only medical examiner in the area was on vacation. Furthermore, no protective measures were taken to prevent the subsequent two assaults in May 2014, and August 2014. With respect to the Second Assault, Pérez received a mere slap on the wrist with no effective penalty. The Third Assault’s proceedings are still in the formal charging phase, despite the lapse of nearly

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<sup>110</sup> UN Commission on Human Rights, *Report of the Special Rapporteur on violence against women, its causes and consequences, Radhika Coomaraswamy*, 21 January 1999, E/CN.4/1999/68/Add.3, [121].

<sup>111</sup> Hypothetical, [4].

<sup>112</sup> Note 104, [87].

4 years, and are unlikely to produce an effective result. This is especially since the First Assault, having never been formally investigated into, will not be taken into account by the Court hearing the Third Assault. In stark contrast, when Pérez sought custody of his and María's son on the grounds that her physical condition affected her ability to care for their child, the Family Court heard his case almost immediately and granted him custody.

The foregoing facts constitute multiple violations of Naira's international obligations, and form the backdrop for the analysis to follow.

1. Naira's failure to investigate the First Assault on María Quispe violated Arts 5, 8 and 25 of the ACHR as well as Art 7(b) of the BDP.

As previously contended, Naira owes its people an obligation to investigate all violations of ACHR rights and all instances of violence against women with due diligence.<sup>113</sup> In this case, since Pérez's First Assault on María violates her Art 5 right, pursuant to Art 1(1) of the ACHR and Art 7(b) of the BDP, Naira is obligated to investigate the assault.

Under this obligation to investigate, Naira is required to initiate, *ex officio*, and without delay, a serious, impartial and effective investigation using all available legal means, aimed at determining the truth and the pursuit, capture, prosecution and eventual punishment of Pérez.<sup>114</sup> Since this is an instance of violence against women, the due diligence obligation requires that that investigation is pursued with vigor and impartiality to reassert society's condemnation of such acts of discrimination.<sup>115</sup>

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<sup>113</sup> See part D.1.

<sup>114</sup> *Pueblo Bello Massacre*, [143]; *Valle Jaramillo*, [101].

<sup>115</sup> *Cotton Field*, [293].

The Nairan police's failure to take any investigative actions after the First Assault was reported constitutes a clear violation of its obligation to investigate with due diligence. In the present dispute, the Police did not file an official police report due to the lack of a medical examination, and consequently took no measures to determine the truth of what happened, effectively granting Jorge Pérez impunity for the First Assault. This de facto impunity is precisely the situation that this Court should consider a violation of the State's obligation to ensure the full and free exercise of those rights.<sup>116</sup> Hence, Naira clearly violated its obligation to investigate the First Assault.

Any argument relying on the absence of the medical examiner to excuse the lack of investigation must necessarily fail. The purported mandate for initiating an investigation only upon the conduct of a medical examination is said to be Naira's internal laws regarding police investigation. However, Naira cannot rely on this to excuse their failure to investigate. States may not invoke provisions of its internal law as justification for its failure to perform a treaty.<sup>117</sup> This position is consonant with this Court's holding in *Bulacio* that any domestic legal obstacle that "attempts to impede the investigation and punishment of those responsible for human rights violations is... inadmissible".<sup>118</sup> There the court found that the State had violated its obligation to investigate a breach of the right to humane treatment, even though the domestic investigation was extinguished under a statute of limitations. Therefore, the domestic investigative framework is inadmissible, and thus does not exculpate Naira.

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<sup>116</sup> I/A Court H.R., *Case of Garrido and Baigorria v. Argentina*, (Merits), Series C No. 39, 1998, [73].

<sup>117</sup> VCLT, Art 27.

<sup>118</sup> *Bulacio*, [116].



The failure to investigate the First Assault also violates Arts 8 and 25 of the ACHR with respect to Maria Quispe. The Court has held that investigative procedures can constitute key components to a judicial remedy, such that their omission renders the judicial protection illusory.<sup>119</sup> In the present case, the absence of a police report was fatal to the prosecution of Jorge Perez. First, there was no investigation performed, and no information collected.<sup>120</sup> Thus, there was no official evidence on which to base the proceedings. Secondly, an official police report was a legal requirement to the prosecution bringing a case in Naira.<sup>121</sup> The absence in this case meant no proceedings could be initiated. Hence, the failure to investigate rendered the judicial protection illusory and violated Arts 8 and 25 of the ACHR.

2. Naira's failure to adopt the necessary provisions to enable the investigation of the First Assault violated Art 7(c) of the BDP.

Art 7(c) provides that States must include in their domestic legislation penal, civil, administrative and any other type of provisions that may be needed to prevent, punish and eradicate violence against women and to adopt appropriate administrative measures when necessary. Although the provision does not explicitly require that States adopt the necessary investigative procedures, this requirement is implicit because investigation necessarily precedes punishment.

Naira's failure to investigate the First Assault is indicative that they have not adopted the necessary provisions to enable investigations into incidents of violence against women. Any argument alleging that this particular failure to investigate was an isolated incident must be rejected, as it fails to take into consideration the numerous alternative investigative actions which

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<sup>119</sup> I/A Court H.R., *Myrna Mack Chang v. Guatemala*, (Merits), Series C No. 101, 2003, [167], [217].

<sup>120</sup> Clarification 24.

<sup>121</sup> Hypothetical, [24].

Naira could have taken. The existence of alternative investigative measures is supported by the fact that presumably there are also many crimes which do not result in physical injury, and hence do not require medical examinations. In the Handbook on Effective Police Responses to Violence Against Women, the United Nations Entity for Gender Equality and the Empowerment of Women elucidated a number of guiding for effective police responses to violence against women, including the identification of witnesses, and the discovery of the cause, manner and location of an offence.<sup>122</sup> Although these guidelines are not binding, this court has previously referenced UN documents to determine guiding principles for the investigation of human rights violations.<sup>123</sup> In this case, in the absence of a medical report, an eyewitness testimony could be equally probative for investigating the assault. Under its due diligence obligation, Naira should have taken other investigative measures.

It is apposite to recall that investigations into violence against women must be pursued with vigor. Considering the Naira police could not adopt alternative investigative measures in the absence of a medical examination, the domestic legislation does not permit the authorities to conduct investigations with due diligence, which violates Art 7(c) of the BDP.

3. Naira's failure to prevent the Second and Third Assaults on María Quispe violated Art 5 of the ACHR and Art 7(d) of the BDP.

Naira breached its obligation to prevent further violations of María's Art 5 rights, by failing to take any form of protective measures. The obligation to protect an individual from a violation

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<sup>122</sup> General Assembly resolution 65/228, *Strengthening crime prevention and criminal justice responses to violence against women*, A/RES/65/228 (21 December 2010), available from [undocs.org/A/RES/65/228](http://undocs.org/A/RES/65/228)

<sup>123</sup> I/A Court H.R., *Fernández Ortega v. Mexico*, (Merits), Series C No. 215, 2010, [35].

of the ACHR has been acknowledged in multiple cases, and arises when the State (a) is aware of a situation of real and imminent danger to (b) a specific individual, and (c) had the reasonable opportunity to prevent or avoid that danger.<sup>124</sup>

Pursuant to the aforementioned test, Naira owed María a specific obligation to prevent the violations of her Art 5 rights by Pérez. A parallel can be drawn to *Cotton Field*, where the Court found a real and imminent danger that the victims would be sexually abused, subjected to ill-treatment or killed once they went missing, given the prevalence of violence against women in Ciudad Juarez. Accordingly, the State of Mexico was obligated to take immediate action to locate the victims and prevent these violations.<sup>125</sup> From the time María reported the First Assault, the State should have been aware that she faced a real and imminent danger of future assault by Pérez, bearing in mind the general context of violence against women in Naira. In 2017 alone, emergency service units in Naira reported at least 85,000 instances in which they responded to domestic or sexual violence.<sup>126</sup> However, considering reports indicating that at least 60% of women in Naira were assaulted by their partners in 2016,<sup>127</sup> it is submitted that approximately six million Nairan women are currently subject to domestic abuse.<sup>128</sup> These statistics are indicative of Naira's social climate – one in which violence against women is commonplace, and one where women are afraid to report these crimes to the police. This fear is understandable since domestic violence commonly consists of repeated acts by the same offender, with the victimisation lasting extended periods of time.<sup>129</sup> Given this general context of rampant domestic violence, it would have been clear to any

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<sup>124</sup> *Cotton Field*, [280].

<sup>125</sup> *Ibid*, [6].

<sup>126</sup> Clarification 23.

<sup>127</sup> Hypothetical, [12].

<sup>128</sup> Hypothetical, [1].

<sup>129</sup> Alafair Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 Geo. Wash. L. Rev. 552 (2007), p567.

reasonable policeman that María faced a real and imminent danger of subsequent assault from Pérez the moment she approached the police with a disfigured face. After the second assault took place, there can be no excuse. Nairan authorities should have been aware that that María was in real and imminent danger at the very latest before the Third Assault took place.

Under limb (c), Nairan authorities had the reasonable opportunity to prevent the Second and Third Assaults. Under Law 25253, Art 39 empowers Naira to take “appropriate protective measures” for the safety and wellbeing of victims of domestic violence, such as protective measures to safeguard claims involving support, visitation, custody, the suspension or termination of parental authority.<sup>130</sup> However, despite the wide selection of measures Naira could have taken to protect María, no protective measures were taken at all. Given the State’s failure to apply Law 25253 after the first two assaults, Naira has clearly failed to take reasonable measures to prevent the assault and protect Maria Quispe.

Since limbs (a), (b) and (c) are fulfilled in this case, Naira was under a specific obligation to prevent further assaults on Maria Quispe after the First Assault. In failing to take any preventive or protective measures, Naira has violated this obligation.

4. Naira’s failure to guarantee the conditions required to for María Quispe to work violated Art 4 of the ACHR.

Naira’s failure to prevent the Second and Third Assault is a violation of María’s right to a dignified life under Art 4 of the ACHR. According to the jurisprudence of the Court, the Art 4 right to life includes the right to the minimum living conditions compatible with human dignity,

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<sup>130</sup> Clarification 73.

which the UN High Commissioner for Human Rights has defined as “basic necessities [such as] work, food, housing, healthcare, education and culture”.<sup>131</sup> As such, the State has the duty to take positive measures to ensure that all persons can attain these conditions. While the duty should not be interpreted to impose an impossible burden on the State, academics have stressed that where the applicant belongs to a vulnerable group, special care must be taken.<sup>132</sup>

As preliminary point, María, as a young indigenous woman living as victim of repeated domestic violence, should be considered a member of a vulnerable group according to this Court’s jurisprudence. Considering this Court has previously found prisoners,<sup>133</sup> the aged,<sup>134</sup> and indigenous persons who have lost their ancestral lands,<sup>135</sup> to be vulnerable groups within jurisprudence on the right to dignified life. These victims are unable to fulfil their own basic needs through their own efforts, and for that reason are vulnerable. Victims of repeated domestic abuse generally display characteristics and live under conditions similar to other vulnerable groups. María, as a victim of repeated domestic abuse, should be entitled to similar protections.

To succeed in proving a violation of the right to dignified life, Applicants must show (1) the lack of basic necessities of life, (2) the State’s awareness of the situation jeopardising the right to life within its jurisdiction, and (3) a casual relationship must exist between the State’s actions or inaction and the deplorable living conditions of the alleged victims. In María’s case, she currently suffers severe physical and psychological disabilities. Due to her hemiplegia, Maria’s

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<sup>131</sup> *The committee on Economic Social and Cultural Rights*, Office of the High Commissioner for Human Rights, July 1991.

<sup>132</sup> I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*, (Merits), Series C No. 125, 2005, [162]; Jo Pasqualucci, *The Right to a Dignified Life (Vida Digna): The Integration of Social and Economic Rights with Civil and Political Rights in the Inter-American Human Rights System*, 31 *Hastings International and Comparative Law Review* 1 (2008).

<sup>133</sup> I/A Court H.R., *Case of the “Juvenile Reeducation Institute” v. Paraguay*, (Merits), Series C No. 112, 2004.

<sup>134</sup> See note 132.

<sup>135</sup> *Ibid.*

employment prospects are limited. Furthermore, the psychological effect of the abuses Pérez inflicted on her has led María to develop a phobia of leaving the house and going to work. Considering Naira was aware of the constant danger of assault suffered by María, it is submitted that María's inability to work directly resulted from Naira's failure to prevent the impunity experienced by Jorge Pérez. Consequently, Naira has violated her right to a dignified life under Art 4 of the ACHR, read with Art 1(1).

5. Naira's failure to process Jorge Pérez's attempted femicide case in a timely manner has breached Arts 8 and 25 of the ACHR, as well as Art 7(f) of the BDP.

Naira's failure to provide María with a judicial remedy even though four years have elapsed since the Third Assault is an inexcusable violation of her right to judicial guarantees under Arts 8 and 25 of the ACHR. Taken together, Arts 8 and 25 places an obligation on the State to provide, effective judicial recourse to the victims of human rights violations, in conformity with due process of law.<sup>136</sup> A parallel obligation is established under Art 7(f) of the BDP, which requires the State to establish fair and effective legal procedures, which can be accessed in a timely and effective manner.<sup>137</sup>

Two common features of these obligations are that the judicial recourse must be "effective",<sup>138</sup> and must be provided "within a reasonable time".<sup>139</sup> "Effectiveness" refers to whether the remedy is "capable of producing the result for which it was designed."<sup>140</sup> Proceedings

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<sup>136</sup> *Cotton Field*; I/A Court H.R., *Ivcher Bronstein v. Peru*, (Merits), Series C No. 74, 2001.

<sup>137</sup> BDP, Art 7(f).

<sup>138</sup> ACHR, Art 25(1).

<sup>139</sup> ACHR, Art 8(1).

<sup>140</sup> *Velasquez Rodriguez*, [66].

that have been unjustifiably delayed are considered ineffective.<sup>141</sup> As was previously established<sup>142</sup>, whether the hearing is within a “reasonable time” is determined based on: (i) complexity of the matter; (ii) judicial activity of the parties; (iii) behaviour of the judicial authorities; and (iv) seriousness of the consequences of the procedural delay for the party. In *Juan Humberto Sanchez*, the Court held that there was no justification for a case with no complexity to be stuck at preliminary proceedings for ten years when the usual time was three months.<sup>143</sup> In the present case, the lapse of four years is similarly unreasonable. María’s case is of low complexity – there are only two parties involved, there is clear evidence that Pérez committed the Third Assault, and neither side is relying on any difficult expert witness reports.<sup>144</sup> While the delay in proceedings are not yet at the high watermark of ten years, taking into account the serious consequences of the delay – that María lives in constant fear of her assailant who still roams free<sup>145</sup> – the lapse of four years is manifestly unreasonable under Art 8 of the ACHR. It is further submitted that the unjustifiable delay effectively renders judicial remedy ineffective, and constitutes a violation of Arts 8 and 25 of the ACHR, and Art 7(f) of the BDP.

6. In awarding custody of María’s son to Jorge Pérez, Naira discriminated against her, and violated Arts 1 and 24 of the ACHR, as well as Art 7(h) of the BDP.

In treating María and Jorge Pérez unfairly and unequally in determining the custody of their child, Naira has violated Arts 1 and 24 of the ACHR, which protect the right to non-discrimination and to equal protection of the law. This right is especially important in the context

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<sup>141</sup> Advisory Opinion OC-9/87, *Judicial Guarantees in States of Emergency*, 1987,[24].

<sup>142</sup> See part B.2.4.

<sup>143</sup> I/A Court H.R., *Case of Juan Humberto Sánchez v. Honduras*, (Merits), Series C No. 99, 2003, [130].

<sup>144</sup> I/A Court H.R., *Case of Furlan and Family v. Argentina*, (Merits), Series C No. 246, 2012, [156].

<sup>145</sup> Clarification 48 and 51.

of gender discrimination, and is reinforced by Art 6 of the BDP, which enshrines women's rights to be free from all forms of discrimination. Art 6 is enforceable by virtue of Art 7(h), which requires the state to adopt such measures as may be necessary to give effect to the convention.

Naira is obligated under the ACHR and BDP to ensure that María and Jorge Pérez are awarded the same rights and standing when fighting for custody of their son. Per Art 1 of CEDAW, discrimination against women is defined as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise... of human rights.”<sup>146</sup> Specifically in issues of marriage, Art 16(1)(d) of CEDAW provides that men and women should have the same rights and responsibilities as parents in matters relating to their children.<sup>147</sup>

CEDAW should be taken into account in the interpretation of Art 24 of the ACHR and Art 6 of the BDP on the grounds that the CEDAW forms part of the relevant rules of international law applicable in the present case, pursuant to Art 31(3)(c) of the VCLT.<sup>148</sup> Considering all the States party to the ACHR<sup>149</sup> and BDP,<sup>150</sup> Naira included, are also party to CEDAW,<sup>151</sup> and considering CEDAW and BDP have similar subject matters – the rights of women – which overlaps substantially with the ACHR's protection of the right to equal treatment under Art 24, CEDAW

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<sup>146</sup> CEDAW, Art 1.

<sup>147</sup> CEDAW, Art 16(1)(d).

<sup>148</sup> VCLT, Art 31(3)(c).

<sup>149</sup> “State Parties to the American Convention on Human Rights.” [www.oas.org/dil/treaties\\_b-32\\_american\\_convention\\_on\\_human\\_rights\\_sign.html](http://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights_sign.html).

<sup>150</sup> “State Parties to the Convention of Belem Do Para.” [www.oas.org/juridico/english/treaties/a-61.html](http://www.oas.org/juridico/english/treaties/a-61.html).

<sup>151</sup> “State Parties to Convention on the Elimination of All Forms of Discrimination against Women.” [www.treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](http://www.treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en).



should be considered both “applicable” and “relevant” under the VCLT, and therefore used to interpret the meaning of the term “discrimination” in the ACHR and BDP.

The fact that the Nairan Court awarded custody of the child to Jorge Pérez on the grounds that the bond between a father and his children cannot be affected by intimate partner violence is grossly discriminatory, and completely fails to take into account María’s bond with the child. This is especially telling since the court clearly recognised Jorge Pérez to be a perpetrator of “intimate partner violence” and chose to ward custody to him in spite of that fact.<sup>152</sup> Accordingly, the award of custody to Pérez is inherently discriminatory, and hence a violation of Art 24 of the ACHR and Art 7(h) of the BDP.

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<sup>152</sup> Hypothetical, [26].

### **III. PRAYER FOR RELIEF**

Based on the aforementioned submissions, the Petitioners respectfully request that the Honourable Court:

1. **DECLARE** that Naira should prosecute the accused persons,
2. **DECLARE** that Naira must award compensation to the Quispes for the trauma suffered due to the soldiers' abuses, and due to state's failure to promptly investigate and prosecute after Monica Quispe's GTV interview
3. **DECLARE** that Naira must award compensation to Maria Quispe for the multiple violations of her ACHR and BDP rights.
4. **ORDER** the implementation of laws necessary for the State of Naira to exert due diligence to prevent repetitions of such rights violations by creating a holistic and sustained model of prevention, protection, punishment and reparations.