
IN THE INTER-AMERICAN COURT OF HUMAN RIGHTS

SAN JOSE, COSTA RICA

MARÍA ELENA QUISPE AND MÓNICA QUISPE

Petitioners

v.

THE REPUBLIC OF NAIRA

Respondent

MEMORIAL FOR THE VICTIMS

I. TABLE OF CONTENTS

I.	TABLE OF CONTENTS	1
II.	INDEX OF AUTHORITIES.....	2
III.	STATEMENT OF FACTS	2
IV.	LEGAL ANALYSIS.....	11
A.	ADMISSIBILITY	12
Statement of Jurisdiction.....		12
Jurisdiction <i>ratione temporis</i>		12
B.	MERITS	15
Special Attention to Vulnerable Groups		15
Article 4- Right to Life		17
Article 5 The Right to Humane Treatment		19
Article 6 – Right to Protect Against Slavery		23
Article 7 Right to Personal Liberty		26
Articles 8 & 25 Right to a Fair Trial and Right to Judicial Protection		28
Article 7 of Belém de Pará.....		34
Reparations		39
V.	REQUEST FOR RELIEF	40

II. INDEX OF AUTHORITIES

ARTICLES AND BOOKS

Gulnara Shahinian, Report of the Special Rapporteur on Contemporary forms of Slavery, Including its Causes and Consequences, UN Doc. A/HRC/9/20 (July 28, 2008).....	25
IACHR, <i>Access to Justice for Women Victims of Violence in the Americas</i> , (2007) OEA/Ser. L/V/II. doc.68	38
IACHR, <i>Indigenous Women and Their Human Rights in the Americas</i> , (2017) OEA/Ser.L/V/II.Doc44/17	18
IACHR, <i>Legal Standards Related to Gender Equality and Women's Rights in the Inter American Human Rights System: Development and Application</i> (2015) OEA/Ser.L/V/II. 143 Doc. 60 .	21
Laurence Bugorgue-Larsen <i>Inter-American Court of Human Rights: Case Law and Commentary</i>	30

CASES

CAT, <i>VL v Switzerland</i> (2006) Comm. No. 262/2005 Views adopted 20 November 2006, UN Doc. CAT/C/37/D/262/2005	21
CEDAW (1992), 'General Recommendation No. 19: Violence Against Women', UN Doc. A/47/38, 11 th Session	21
ECtHR, <i>Aydin v Turkey</i> [1997] ECHR 7575	21
ECtHR, <i>Osman v United Kingdom</i> [1998] EHRR 101	18
IACHR, <i>Ana, Beatriz, and Cecilia González Pérez v Mexico</i> , Case 11,565, Report on the Merits No. 53/01, April 2, 2001	21

IACHR, <i>Case of Maria Da Penha Maia Fernandes v. Brazil</i> Report No. 54/01, April 16, 2001	13, 37
IACHR, <i>Mejía v Perú</i> , Case No. 10.970, Report No. 5/96, 1 March 1996	20
IACHR, <i>Paloma Angelica Escobar Ledezma et al. v Mexico</i> , Case 12.551 Report No. 51/13 July 12, 2013	34
IACtHR, <i>Advisory Opinion on Gender Identity, Equality and Non-Discrimination to same sex couples</i> , OC-24/17, November 24, 2017	38
IACtHR, <i>Advisory Opinion on Juridical Condition and Human Rights of the Child</i> , OC- 17/2002, 28 August, 2002	16
IACtHR, <i>Advisory Opinion on Juridical Condition and Rights of the Undocumented Migrants</i> , OC-18/03, 17 September 2003	16
IACtHR, <i>Case of Almonacid Arellano et al v Chile</i> (Preliminary Objections, Merits, Reparations and Costs) Series C No. 4 Judgment of September 26 2006.....	29
IACtHR, <i>Case of Barreto Leiva v. Venezuela</i> (Merits, Reparations and Costs). Series C No 206, Judgment of 17 November, 2009	30, 33
IACtHR, <i>Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador</i> (Preliminary Objections, Merits, Reparations and Costs) Series C No 170, Judgment 21 November, 2007..	26, 27, 28, 31
IACtHR, <i>Case of Fernández Ortega et al. v. Mexico</i> (Preliminary Objections, Merits, Reparations, and Costs) Series C No. 215, 30 Judgment of August, 2010	17, 21, 22, 23
IACtHR, <i>Case of Gelman v. Uruguay</i> (Merits and Reparations) Series C No. 221, Judgment 24 February, 2011	31
IACtHR, <i>Case of Gonzales Lluy et al. v Ecuador</i> (Preliminary Objections, Merits, Reparations and Costs) Series C No. 298, Judgment 1 September, 2015	32

IACtHR, <i>Case of González et al. ("Cotton Field") v. Mexico</i> . (Preliminary Objection, Merits, Reparations, and Costs) Series C No. 205, Judgment 16 November, 2009	14, 15, 26, 40
IACtHR, <i>Case of Heliodoro Portugal v. Panama</i> , (Preliminary Objections, Merits, Reparations and Costs) Series C No. 186, Judgment 12 August, 2008	12
IACtHR, <i>Case of Ivcher-Bronstein v. Peru</i> . (Merits, Reparations and Costs) Series C No. 74 Judgment 6 February, 2001	29, 33
IACtHR, <i>Case of Juan Humberto Sánchez</i> , (Preliminary Objections, Merits, Reparations and Costs) Series C No. 99, 7 Judgment June, 2003	26, 27
IACtHR, <i>Case of Radilla-Pacheco v. Mexico</i> . (Preliminary Objections, Merits, Reparations, and Costs) Series C No. 209, Judgment 23 November, 2009	33, 34
IACtHR, <i>Case of Rosendo Cantú v. Mexico</i> , (Preliminary Objections, Merits, Reparations and Costs), Series C No. 216, Judgment 30 August, 2010	17, 23, 35
IACtHR, <i>Case of the "Las Dos Erres" Massacre v. Guatemala</i> , (Preliminary Objection, Merits, Reparations, and Costs) Series C No 211, Judgment 24 November, 2009	16, 30, 39
IACtHR, <i>Case of the "Street Children" (Villagran-Morales et al.) v. Guatemala</i> , (Merits) Series C No 63, Judgment 19 November 1999	16, 18
IACtHR, <i>Case of the "Juvenile Reeducation Institute" v. Paraguay</i> , (Preliminary Objections, Merits, Reparations and Costs) Series C No. 112 Judgment 2 September, 2004 ...	16, 19, 26, 28
IACtHR, <i>Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala</i> (Reparations and Costs) Series C No. 77, Judgment 26 May, 2001	39
IACtHR, <i>Case of the Gómez-Paquiyaury Brothers v. Peru</i> (Merits, Reparations and Costs) Series C No. 104 Judgment 8 July, 2004	28

IACtHR, <i>Case of the Miguel Castro Castro Prison v. Peru</i> , (Merits, Reparations and Costs)	
Series C No. 160, Judgment 25 November, 2006	14, 20, 21
IACtHR, <i>Case of the Moiwana Community v. Suriname</i> , (Preliminary Objections, Merits,	
Reparations and Costs) Series C No. 124, Judgment 15 June 2005.....	13
IACtHR, <i>Case of the Pueblo Bello Massacre Colombia</i> , (Merits, Reparations and Costs) Series C	
No. 140 Judgment 31 January 2006	17, 18, 30
IACtHR, <i>Case of the Rio Negro Massacres v. Guatemala</i> , (Preliminary Objection, Merits,	
Reparations and Costs) Series C No. 250, Judgment 4 September, 2012.....	31
IACtHR, <i>Case of the Serrano-Cruz Sisters v. El Salvador</i> , Series C No. 118, Judgment 23	
November 2004	12
IACtHR, <i>Case of Ticona-Estrada et al. v. Bolivia</i> .Merits, (Reparations and Costs) Series C No.	
191, Judgment 27 November, 2008	39
IACtHR, <i>Case of Velásquez-Rodríguez v. Honduras</i> (Reparations and Costs) Series C No. 7,	
Judgment 21 July, 1989.....	39
IACtHR, <i>Escué-Zapata v. Colombia</i> , (Merits, Reparations and Costs) 2007 Series C No. 165,	
Judgment 4 July, 2007.....	18
IACtHR, <i>Espinoza Gonzalez v Peru</i> , (Preliminary Objections, Merits, Reparations and Costs),	
Series C No. 289, Judgement 20 November, 2014	22, 36
IACtHR, <i>Hacienda Brasil Verde Workers v. Brazil</i> , (Preliminary Objections, Merits, Reparations	
and Costs) Series C No. 318 Judgment 20 October, 2016	15, 24, 25, 32
IACtHR, <i>In the Case of Tibi v. Ecuador</i> (Preliminary Objections, Merits, Reparations and Costs)	
Series C No. 114, Judgment 7 September, 2004	29

IACtHR, <i>J v Peru</i> , (Preliminary Objections, Merits, Reparations and Costs) Series C No. 275, Judgment 27 November, 2013	14, 20, 35
IACtHR, <i>Maritza Urrutia v. Guatemala</i> (Merits, Reparations and Costs), Series C No. 103, Judgment of November 27, 2003	19, 26
IACtHR, <i>Sawhoyamaya Indigenous Community v. Paraguay</i> , (Merits, Reparations and Costs) Series C No. 146, Judgment 29 March, 2006.....	17, 18
IACtHR, <i>Velasquez Rodriguez Case</i> , (Merits) Series C No. 4, Judgment of 29 July 1988	27
IACtHR, <i>Veliz Franco et al. v. Guatemala</i> , (Preliminary Objections, Merits, Reparations and Costs) Series C No. 277 Judgment 19 May, 2014	36
IACtHR., <i>Advisory Opinion on Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and (8) American Convention on Human Rights)</i> OC-9/87 Series A No. 9, October 6, 1987	29
IACtHR., <i>Case of Acosta-Calderón v. Ecuador</i> . (Merits, Reparations and Costs) Series C No. 129, Judgment 24 June 24, 2005	29
IACtHR., <i>Case of Velásquez-Rodríguez v. Honduras</i> (Preliminary Objections) Series C No. 1, Judgment 26 June 26, 1987	30
ICJ, <i>Case of the Barcelona Traction, Light and Power Company, Limited</i> Judgment of 5 February 1970, 32	23
ICtHR, <i>Case of the Yakye Axa Indigenous Community v. Paraguay</i> , (Merits, Reparations and Costs) Series C No. 125, Judgment 17 June, 2005	17
ICTY, <i>Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic</i> , No. IT-96-23. 1st Instance Chamber, Judgment of February 22, 2001.....	24

III. STATEMENT OF FACTS

The Republic of Naira is a democratic state with economic stability.¹ Acts of gender-based violence occur frequently in the State where every two hours a woman is subject to sexual violence.² The NGO Killapura has recorded cases of gender based violence since 1980.

Naira is a monist State³ and has ratified all of the international treaties including the American Convention on Human Rights (1979), the Inter-American Convention to Prevent and Punish Torture (1992) and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (1996).⁴ Despite this fact Killapura has continuously held that Naira has been unsatisfactory in responding to instances of this violence and therefore has contributed to the tolerance of discrimination in the state.⁵

The SMB in Warmi

From 1970-1999, an armed group committed numerous acts of violence in the southern provinces of Naira.⁶ This was combated by establishing a state of emergency, suspending guarantees and setting military bases.⁷

From 1990 to 1999 a Special Military Base (SMB) was established in the province of Warmi.⁸ For these nine years, military officials perpetrated abuses against the population. These acts included perpetual sexual violence against the women and girls.⁹ The people of Warmi were

¹ Hypothetical, para 1

² Hypothetical, para 12

³ Hypothetical, para 6

⁴ Hypothetical, para 7

⁵ Hypothetical, para 15

⁶ Hypothetical, para 8

⁷ Hypothetical, para 9

⁸ Hypothetical, para 27

⁹ Hypothetical, para 28

under complete control of the military personnel. The military at the SMB had total political and judicial authority over Warimi and power over every incident that occurred.¹⁰

In 1992, Monica and her little sister María Elena Quispe age of 15 and 12 years respectively,¹¹ who are members of an indigenous community¹² and who live in a situation of poverty¹³ were forcibly detained at SMB for a month.¹⁴ They were detained under false accusations that they were assisting the armed group and the detention was not followed by any relevant proceedings.¹⁵ Monica and María Elena were repeatedly raped and even gang raped by the military officials. Monica also witnessed other women at the SMB being forced to strip in front of soldiers who would then beat and grope them.¹⁶ Monica and María Elena were also forced to cook, clean and wash daily for the soldiers.¹⁷

Eventually, Monica and María Elena were released. However, they were not provided with any explanation of their actions and no other State authority intervened.¹⁸ This situation finally came to an end in 1999 when the SMB was deactivated. Even though the President of the State and the Ministry of Justice and Defense knew of the events that occurred at the military bases,¹⁹ the State failed to conduct an investigation²⁰ and uncover any information.²¹

¹⁰ Clarification Q&A 12

¹¹ Clarification Q&A 69

¹² Clarification Q&A 16

¹³ Clarification Q&A 17

¹⁴ Hypothetical, para 28

¹⁵ Clarification Q&A 27

¹⁶ Hypothetical, para 29

¹⁷ Hypothetical, para 28

¹⁸ Clarification Q&A 14

¹⁹ Clarification Q&A 36

²⁰ Hypothetical, para 30

²¹ Hypothetical, para 10

In December 2014, Monica Quispe was interviewed by the media outlet GTV for information on María Elena. Monica opened up about the conditions that she and her sister were forced to endure at the SMB in 1992.²² On March 10, 2015, Killapura filed criminal complaints of sexual violence against the Quispe sisters. However, they were time-barred by a 15-year statute of limitations.

Gender-based violence in NIARA

There are many cases of gender-based violence that occur daily in Niara and are constantly reported in the media and by civil society organizations.²³ There are 10 femicides or attempted femicides every month and every two hours a woman is the victim of sexual violence. Three of every 5 women were assaulted by their partners or ex-partners in 2016. Thirteen hundred girls between the ages of 11 and 14 and three thousand 15 year olds gave birth in 2015. Further, seven out of ten women between 15 and 35 years of age have been subject to daily street sexual harassment throughout their lives and there has been an increase in hate crimes against the LGBTI population.²⁴ Two such instances include:

Zuleimy Pareja

Zuleimy Pareja is a transgender woman who was a victim of domestic abuse by her partner Angelino Mendoza. Unfortunately, one day in 2010 Zuleimy's life was taken away by Mendoza who buried her lifeless body in a field. The judgment of the court was labelled "crime of passion" and sentenced Mendoza to 15 years imprisonment for the offense of murder but not femicide.

²² Hypothetical, para 27

²³ Hypothetical, para 11

²⁴ Hypothetical, para 12

Analía Sarmiento

Analía was a 19 year old girl who was abducted, raped and murdered on January 7, 2015 by Guillermo Alcázar after she denied his sexual advances.²⁵ Alcázar was previously charged with two accounts of rape but was out on probation despite the statute stating that a habitual offender could not be granted probation.²⁶

María Elena and Jorge Pérez

On January 20, 2014, María Elena Quispe went to the police to file a complaint against her husband, Jorge Pérez for disfiguring her with a bottle. The police failed to report the incident since the only medical examiner was out of town on vacation.²⁷ Consequently, Jorge was not arrested. Four months later, Jorge attacked María Elena while she was simply walking on the street. Jorge was arrested for this incident however was only sentenced to a year of suspended jail time since he had no recorded history of violence. As a result, merely three months later he attacked María Elena while she was at work and permanently disabled her by causing right-sided hemiplegia.²⁸

Monica filed a complaint since Jorge was not charged with attempted femicide and only a misdemeanor.²⁹ This complaint is still pending. Furthermore, the Family Court has granted Jorge custody of their son³⁰ despite the fact that the son had witnessed acts of violence perpetrated by Jorge.³¹

Actions taken by the State

²⁵ Hypothetical, para 18

²⁶ Clarification Q&A 6

²⁷ Hypothetical, para 23 and Clarification Q&A 22

²⁸ Clarification Q&A 41

²⁹ Clarification Q&A 53

³⁰ Hypothetical, para 26

³¹ Clarification Q&A 34

Although the President established the Zero Tolerance Policy on Gender-Based Violence in 2015, these measures have not been fruitful. The Gender-Based Violence Unit and the Administrative Program have still not been implemented and the ZTPGBV has not released any reports.³² The Truth Commission is a measure under the ZTPGBV has not its report which is scheduled to be released in 2019.³³ Consequently, Killapura was disappointed with the measures due to the seriousness of the case of Monica and María Elena and that it could provide an insight into the mass violations that occurred in Warmi.³⁴

Proceedings before the Inter-American Court

Killapura filed a petition with the IACHR on May 10, 2016. They alleged the violation of the rights contained in Articles 4, 5, 6, 7, 8 and 25 in relation to Article 1(1) of ACHR on behalf of the Quispe sisters. Also, they alleged violation of Article 7 of the Convention of Belém do Pará.³⁵ The IACHR admitted the petition for processing on June 15, 2016. The State then replied on August 10, 2016 denying responsibility for the alleged human rights violations and rejecting the idea of a friendly settlement.³⁶ Further, the State refused to implement the recommendations of the IACHR. The IACHR found the case admissible and submitted it to the IACtHR on September 20, 2016.³⁷

IV. LEGAL ANALYSIS

³² Clarification Q&A 35

³³ Clarification Q&A 13

³⁴ Hypothetical, para 36

³⁵ Hypothetical, para 38

³⁶ Hypothetical, para 40

³⁷ Hypothetical, para 42

A. ADMISSIBILITY

Statement of Jurisdiction

The State of Naira (hereinafter “The State” or “Naira”) ratified the American Convention on Human Rights (hereinafter “The Convention” or “ACHR”) in 1979 and accepted the contentious jurisdiction of the Inter-American Court (hereinafter “the Court” or “IACtHR”) since then.³⁸ The State not having found it necessary to implement any of the recommendation in the merits report, the Inter- American Commission on Human Rights (hereinafter “IACHR” or the “the Commission”) referred the matter to the Court for adjudication.³⁹ All facts being disputed have occurred after the date of ratification of the ACHR. Therefore, under Article 62(3) of the ACHR the Court has jurisdiction to hear this case.

Jurisdiction *ratione temporis*

The IACtHR has the authority to determine the scope of its own competence regarding the principle of *compétence de la compétence*. Also, the Court has held that it cannot leave it to the State to determine what facts are excluded from its jurisdiction.⁴⁰ The principle of non-retroactivity of treaties, contained in Article 28 of the 1969 Vienna Convention on the Law of Treaties, is the only factor the Court must consider. However, in some circumstances the Court is competent to rule on violations that occurred before the date that the State signed onto its jurisdiction. The Court can exercise its competence *ratione temporis* to examine facts that amount to violations of a continuing or permanent nature. This does not impede on the principle of non-retroactivity.⁴¹ Acts

³⁸ Hypothetical, para 7

³⁹ Hypothetical, para 42

⁴⁰ IACtHR, *Case of the Serrano-Cruz Sisters v. El Salvador*, Series C No. 118, Judgment 23 November 2004 para74

⁴¹ IACtHR, *Case of Heliodoro Portugal v. Panama*, Series C No. 186, Judgment 12 August, 2008 para. 25

of a continuous or permanent nature are those that “extend through the entire time period during which the fact continues and the lack of conformity with the international obligation is maintained.”⁴² The failure of a State to investigate, prosecute and punish authors of human rights violations that occurred before the State accepted the Court’s jurisdiction have been held to be of a continuous nature.⁴³

The IACHR has held that the Convention on the Prevention, Punishment and Eradication of Violence Against Women (hereinafter “Convention of Belém do Pará”) can be applied when there is a failure to guarantee due process and a tolerant attitude of the State which has amounted to a continuous denial of justice to the victim. Consequently, when the effects of a violation are still felt because the State allowed a situation of impunity and vulnerability, the Convention of Belém do Pará is applicable.⁴⁴ It is submitted that Naira has maintained a tolerant attitude to the situations at the military bases and this has amounted to a continuous denial of justice to the victims as the State officials failed to conduct effective investigations and has deemed the events as “part of Nairan history.” The effects of the dreadful period from 1970-1999 are still felt by the victims today and therefore can be examined under Article 7 of the Convention of Belém do Pará since the effects are felt after 1996. Additionally, the detention at SMB constitutes grave and systematic violations of international human rights law and thus it would be against the object and purpose of the American Convention if these facts were deemed inadmissible.

Furthermore, Article 7(b) Convention of Belém do Pará requires States to act with due diligence to investigate and punish acts of violence against women. This obligation is also

⁴² Draft Articles on Responsibility of States for Internationally Wrongful Act 2001, Art 14

⁴³ IACtHR, *Case of the Moiwana Community v. Suriname*, (Preliminary Objections, Merits, Reparations and Costs) Series C No. 124, Judgment 15 June 2005, para 43

⁴⁴ IACHR, *Case of Maria Da Penha Maia Fernandes v. Brazil* Report No. 54/01, April 16, 2001

enshrined in Articles 1, 6 and 8 of the Convention to Prevent and Punish Torture.⁴⁵ Naira ratified the Convention to Prevent and Punish Torture on January 1st, 1992, therefore the Court has jurisdiction over the matter in relation to Belém do Pará as it can be read with the Convention to Prevent and Punish Torture. Moreover, even if the violations are not held to be of a continuing nature, the case can still be admissible. In *J v Peru*,⁴⁶ the Court rejected a similar preliminary objection. The Court highlighted that despite the principle of non-retroactivity, the provisions of the Belém do Pará were read in relation to Article 5 of the ACHR over which they had jurisdiction. Article 7 of the Convention of Belém do Pará is therefore applicable since it complements the State's obligations of the rights enshrined in the American Convention⁴⁷ which Naira ratified in 1979, prior to the violations in 1992.

Additionally, it has been held that the Convention of Belém do Pará contributes to the corpus juris in the protection of women.⁴⁸ The Court has held that, “the literal meaning of Article 12 of the Convention of Belém do Pará grants competence to the Court, by not excepting from its application any of the norms and procedures for individual communications.”⁴⁹ Additionally, Article 29 of the ACHR provides the pro persona principle, which is the “cornerstone for the protection of the whole Inter-American System” incorporates the interpretation of Belém do Pará to understand international protection in its entirety. Consequently, the adoption of a restrictive interpretation with regard to the scope of this Court's competence would not only be contrary to

⁴⁵ IACtHR, *Case of the Miguel Castro Castro Prison v. Peru*, (Merits, Reparations and Costs) Series C No. 160, Judgment 25 November, 2006. para 344.

⁴⁶ IACtHR, *J v Peru*, (Preliminary Objections, Merits, Reparations and Costs) Series C No. 275, Judgment 27 November, 2013.

⁴⁷ *Case of the Miguel Castro Castro Prison v. Peru (supra)* para. 379.

⁴⁸ *Case of the Miguel Castro Castro Prison v. Peru (supra)* para. 276.

⁴⁹ IACtHR, *Case of González et al. (“Cotton Field”) v. Mexico*. (Preliminary Objection, Merits, Reparations, and Costs) Series C No. 205, Judgment 16 November, 2009 para 41.

the object and purpose of the ACHR, but would also have an impact on the practical effects of this treaty and on the guarantee of protection that it establishes.

Therefore, the Court has jurisdiction and the Petitioner submits that the Court should dismiss Naira's preliminary objection.

B. MERITS

Special Attention to Vulnerable Groups

It is now an accepted notion in International Human Right Law that although the State has a responsibility to ensure the rights of all citizens, the responsibility of the State is more pronounced regarding vulnerable or powerless groups in their jurisdiction. The Court has adjudicated on a number of 'vulnerable groups' that deserve special protection.

Women

The Court has affirmed the position of Women as a vulnerable group in the '*Cotton Field*' case⁵⁰ where it outlined that that a State that has agreed to and ratified both the ACHR and the Convention of Belém do Pará are required to investigate the facts with due diligence and impartially. It went even further to state that this duty is even more pronounced where the case involves a woman. In these cases an even more vigorous and unbiased investigation is necessary.

Persons in Poverty

The Court has stated that the "economic position" of a person is one cause of discrimination prohibited by Article 1(1) of the American Convention.⁵¹ States have an obligation to implement

⁵⁰ *Cotton Field Case (supra)* para 258

⁵¹ IACtHR, *Hacienda Brasil Verde Workers v. Brazil*, (Preliminary Objections, Merits, Reparations and Costs) Series C No. 318 Judgment 20 October, 2016

measures to change discriminatory situations that cause a detriment to a certain group of people. Hence, States have a special duty to protect these groups and ensure that the actions of third parties do not favour this discriminatory situation.⁵²

Children

Article 19 of the American Convention establishes the protection of children by the State. The Court has held that this article is to be understood as a complementary right for children as they require special protection due to their physical and emotional development.⁵³ Therefore, the State has a special obligation to act with greater care and responsibility regarding the principle of the best interest of the child. The State has an obligation to pay special attention to the needs and rights of children, due to their special condition of vulnerability.⁵⁴ Furthermore, the Court has held that the ACHR and the CRC are part of an international corpus juris for the protection of children. This is used to determine the scope and content of Article 19.⁵⁵ Furthermore, the IACtHR outlined, "The measures that the State must undertake, particularly given the provisions of the Convention on the Rights of the Child, encompass economic, social and cultural aspects that pertain, first and foremost, to the children's right to life and right to humane treatment."⁵⁶ This clearly highlights that the State's role as guarantor of rights obligates the State to prevent situations that might lead, by action or omission, to adverse effects on the right to a dignified life of children.

⁵² IACtHR, *Advisory Opinion on Juridical Condition and Rights of the Undocumented Migrants*, OC-18/03, 17 September, 2003 para 104

⁵³ IACtHR, *Advisory Opinion on Juridical Condition and Human Rights of the Child*, OC-17/2002, 28 August, 2002, para 53,54,60

⁵⁴ IACtHR, *Case of the "Las Dos Erres" Massacre v. Guatemala*, (Preliminary Objection, Merits, Reparations, and Costs) Series C No 211, Judgment 24 November, 2009 para 184

⁵⁵ IACtHR, *Case of the "Street Children" (Villagran-Morales et al.) v. Guatemala*, (Merits) Series C No 63, Judgment 19 November 1999, para 194

⁵⁶ IACtHR, *Case of the "Juvenile Reeducation Institute" v. Paraguay*, (Preliminary Objections, Merits, Reparations and Costs) Series C No. 112 Judgment 2 September, 2004, para. 149.

Indigenous people

With respect to indigenous people, the Court has outlined in the *Yakye Axa*⁵⁷ and *Sawhoyamaxa* Cases⁵⁸ that persons in these communities are particularly vulnerable and the State has an obligation to ensure that their right to a dignified life and humane treatment is protected. This is particularly important where their ancestral lands are being tampered with or occupied by the State as it is integral to their culture, their way of life.⁵⁹ The IACtHR has accepted in *Valentina Rosendo Cantu* and *Ines Fernandez Ortega*⁶⁰ that there is a special need for protection for indigenous women during periods of militarization of their ancestral lands. The Court has shown it is keen to take this militarization into consideration and requires an even higher standard of due diligence when investigating acts of military personnel.

Article 4- Right to Life

Art 4(1), buttressed by Art 1(1) of the Convention, states that: ‘every person has the right to have his life respected’ and that no one shall be arbitrarily deprived of their life.⁶¹ It is a fundamental right of which the enjoyment of all other human rights is contingent upon.⁶² The Court emphasised that the right to life is the most essential of all human rights simply because without life none of the other rights could be enjoyed or exercised.⁶³ Pursuant to Art 27(2) no derogation

⁵⁷ IACtHR, *Case of the Yakye Axa Indigenous Community v. Paraguay*, (Merits, Reparations and Costs) Series C No. 125, Judgment 17 June, 2005 para 63

⁵⁸ IACtHR, *Sawhoyamaxa Indigenous Community v. Paraguay*, (Merits, Reparations and Costs) Series C No. 146, Judgment 29 March, 2006 para 151

⁵⁹ IACHR, *Indigenous Women and Their Human Rights in the Americas*, (2017) OEA/Ser.L/V/II.Doc44/17 para 110

⁶⁰ IACtHR, *Case of Rosendo Cantú v. Mexico*, (Preliminary Objection, Merits, Reparations, and Costs) Series C No. 216, Judgment of 30 August, 2010 paras. 97-98; IACtHR, *Case of Fernández Ortega et al. v. Mexico* (Preliminary Objections, Merits, Reparations, and Costs) Series C No. 215, 30 Judgment of August, 2010, Concurring Opinion of Alejandro Carlos Espinosa para 1(a)(b)&(d).

⁶¹ ACHR Article 4(1)

⁶² IACtHR, *Case of the Pueblo Bello Massacre Colombia*, (Merits, Reparations and Costs) Series C No. 140 Judgment 31 January 2006, para 120

⁶³ *Pueblo Bello Massacre v. Colombia* (supra) 120; *Sawhoyamaxa Indigenous Community v. Paraguay*, (supra), 151

from this right to life is permissible under international law even during times of emergency or threat to the life of the nation. The protection of the right to life also requires State authorities to do everything reasonably required to prevent a real and imminent risk to life when the authorities knew or should have known about such risk.⁶⁴

The Court has interpreted expansively.⁶⁵ Art 4 can also be breached in situations that do not involve a death. The Court has stated that a person's right to life in conjunction with Art 1(1) encompasses the right to live a "dignified life" or a "dignified existence."⁶⁶ The Court has expounded on this concept of a dignified existence and qualified the obligation as one where the State generates, "*living conditions that are at least minimally compatible with the dignity of the human person.*"⁶⁷ States therefore have the obligation to ensure the creation of requisite conditions to prevent violations of the right to life,⁶⁸ and they also have the duty to prevent its agents from violating it.⁶⁹

The State also has a special obligation to take positive, concrete measures geared toward guaranteeing the right to life and a dignified existence, especially to vulnerable and at-risk groups in society which include: persons living in poverty, children⁷⁰ and indigenous persons.⁷¹

The Petitioners submit that the State of Naira has violated Article 4 in conjunction with Art 1(1) thereof in relation to the Quispe sisters who were minors and members of the indigenous

⁶⁴ ECtHR, *Osman v United Kingdom* [1998] EHRR 101, 116

⁶⁵ *The "Street Children" Case (supra)*, Concurring Opinion of A.A. Cancado Trindade and A. Abreu-Burelli para 2

⁶⁶ *Case of the "Street Children" (supra)*, paras 144-146

⁶⁷ *Yakye Axa (supra)* para 162

⁶⁸ *Pueblo Bello Massacre v. Colombia (supra)*, 120; *Sawhoyamaya Indigenous Community v. Paraguay (supra)*, 151

⁶⁹ IACtHR, *Escué-Zapata v. Colombia*, (Merits, Reparations and Costs) 2007 Series C No. 165, Judgment 4 July, 2007, 40

⁷⁰ *Case of the "Street Children" (supra)*, para. 146

⁷¹ *Yakye Axa Indigenous Community (supra)*, 161

community living in poverty. The sisters at the age of 12 and 15 were subjected to both physical and psychological abuse at the hands of military personnel stationed in Warmi to protect them. Physically, there were detained under false accusations, subjected to forced labour and ultimately torture, in the form of repeatedly being raped including gang raped. The psychological effects also cannot be understated. It was reasonable to expect that the State would have monitored the SMB, and it is also reasonable that it would have knowledge of the circumstances that were occurring there. The State knew that there was a real and immediate risk to the lives of the sisters, and they failed to take the necessary reasonable measures within the scope of their authority to prevent or put an end to that risk.

Article 5 The Right to Humane Treatment

Article 5 of the ACHR guarantees that everyone has the right to have his physical, mental and moral integrity respected, the right to humane treatment and provides that no one shall be subjected to torture, cruel or inhumane, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.⁷² The prohibition of torture in all its forms both physical and psychological and cruel and inhuman treatment or punishment carries jus cogens status⁷³ and is a non-derogable right.⁷⁴ It is also codified in other Conventions.⁷⁵

⁷² ACHR, Article 5

⁷³ IACtHR, *Maritza Urrutia v. Guatemala* (Merits, Reparations and Costs), Series C No. 103, Judgment of November 27, 2003, para 92.

⁷⁴ Art 27(2); IACtHR *Case of the "Juvenile Reeducation Institute" v. Paraguay*, (*supra*), para 157.

⁷⁵ United Nations Convention against Torture (CAT) and The Inter-American Convention to Prevent and Punish Torture (IACPPT)

In the case *J v Peru*,⁷⁶ the Court held that Article 5(1) and (2) provides for the State's obligation to prevent and investigate acts of torture or other cruel, inhuman, or degrading treatment. Additionally, the State has an obligation to thoroughly investigate all alleged human rights. This obligation also places a duty on the State to ensure the personal integrity, as well as to "safeguard the health and wellbeing," of any individual which it has deprived of their liberty.

The rape of the Quispe sisters constitutes torture, cruel, inhumane and degrading punishment

There has been significant development in human rights jurisprudence regarding whether rape is to be considered a form of torture. Rape causes a violation of many human rights including the right to personal integrity, private life and signifies an interference with their sexual life, challenging their right to freely adopt personal and intimate decisions.⁷⁷ Due to the deep physical and psychological pain it inflicts on the victim, rape is deeply degrading.⁷⁸

The first recognition of rape of a woman by public officials as amounting to "torture" was by the IACHR in *Mejía v Peru*,⁷⁹ when it held that the rape of a schoolteacher by members of the Peruvian Army violated the prohibition of torture under Article 5 ACHR. In that case the Commission said that a rape would constitute torture if it was: "1) an intentional act through which physical and mental pain and suffering is inflicted on a person; 2) committed with a purpose; and 3) committed by a public official or by a private person acting at the instigation of the former."

⁷⁶ *J v Peru*, (*supra*) para 341

⁷⁷ IACHR, *Legal Standards related to Gender Equality and Women's Rights in the Inter American Human Rights System: Development and Application* (2015) OEA/Ser.L/V/II. 143 Doc. 60 para 26.

⁷⁸ *Case of the Miguel Castro Castro Prison* (*supra*) para. 271

⁷⁹ IACHR, *Mejía v Perú*, Case No. 10.970, Report No. 5/96, 1 March 1996

This was followed in the Case of *Ana, Beatriz and Celia González Pérez* where the Commission also held that acts of rape committed by soldiers of the three sisters also constituted torture.⁸⁰

The European Court of Human Rights held that the rape of a minor by a state official was “*an especially grave and abhorrent form of ill-treatment*” and amounted to torture,⁸¹ The Committee Against Torture, held that “*sexual abuse by the police ... constitutes torture even though it was perpetrated outside formal detention facilities*”⁸² and so too the Committee on the Elimination of Discrimination Against Women (CEDAW).⁸³ The IACtHR in *Case of Fernández Ortega et al. v. Mexico* held that rape is indeed a form of torture even when it only consists of one act or when it occurs outside of state installations.⁸⁴ The Court held that rape would constitute torture when it is: i) intentional; ii) causes severe physical or mental suffering, and iii) is committed with any objective or purpose.⁸⁵ The Court recognized that rape is an extremely traumatic experience that can have severe consequences and cause significant physical and psychological damage that leaves the victim “physically and emotionally humiliated.” This is difficult to overcome with time, contrary to other traumatic experiences.⁸⁶

Furthermore, the Court has also determined that the integrity of a victim and their right to humane treatment is violated once the physical or psychological harm suffered satisfies the threshold of cruel, inhumane and degrading treatment.⁸⁷ It is clear that the degrading act of rape

⁸⁰ IACHR, *Ana, Beatriz, and Cecilia González Pérez v Mexico*, Case 11,565, Report on the Merits No. 53/01, April 2, 2001, paras. 47-49.

⁸¹ ECtHR, *Aydin v Turkey* [1997] ECHR 7575 paras. 83-85.

⁸² CAT, *VL v Switzerland* (2006) Comm. No. 262/2005 Views adopted 20 November 2006, UN Doc. CAT/C/37/D/262/2005 para. 8.10.

⁸³ CEDAW (1992), 'General Recommendation No. 19: Violence Against Women', UN Doc. A/47/38, 11th Session at para 7.

⁸⁴ *Fernández Ortega et al. v. Mexico*. (*supra*), para 128

⁸⁵ *Fernández Ortega et al. v. Mexico* (*supra*) para 120

⁸⁶ *Fernández Ortega et al. v. Mexico* (*supra*) para 124

⁸⁷ *Case of the Miguel Castro Castro* (*supra*) para 271.

satisfies this threshold and constitutes for the very least cruel and inhumane treatment or punishment.

Therefore, it is submitted that the State has violated Article 5 in conjunction Article 1(1) in relation to Monica and Maria Elena. The sisters were subject to an act of sexual violence and physical control by the military personnel who penetrated them intentionally. The sisters experienced severe suffering, inherent in rape. This situation was worsened as, this was a regular occurrence and included gang rape. The acts had the objective of intimidating, degrading, humiliating, punishing, or controlling the sisters and therefore, it is submitted the rape constituted torture or cruel and inhuman punishment and a gross violation of Article 5 the ACHR.

Duty to investigate and prevent acts of torture or acts that are sufficiently cruel or inhumane

In *Fernández Ortega et al. v. Mexico*⁸⁸ the IACtHR held that it is key for the authorities in charge of an investigation regarding rape to pursue it with determination and efficacy. This flows from the duty of society to reject all violence against women, and the obligations of the State to eradicate it and to bring trust to the victims in the state institutions that are in charge of their protection. The Court also held that the investigation in cases of sexual violence should prevent the revictimization and the reliving of the profound traumatic experience of the victim;⁸⁹ and that the declaration of the victim about an act of sexual violence is key in the investigation, judgment and sanction of these acts.

The Court has outlined that the ratification of the ACHR and the Convention of Belém do Pará gives rise to an obligation of States to investigate violations with due diligence and

⁸⁸ *Fernández Ortega et al. v. Mexico (supra)* para 193,228

⁸⁹ IACtHR, *Espinoza Gonzalez v Peru*, (Preliminary Objections, Merits, Reparations and Costs), Series C No. 289, Judgement 20 November, 2014, para 256.

impartiality.⁹⁰ In addition to the heightened standard of due diligence to be employed when investigating violations of rights in relation to persons from vulnerable groups the IACtHR has outlined that there is need for special measures to be put in place for indigenous women during periods of militarization of their ancestral lands amounts to an even higher standard of due diligence when investigating these acts.⁹¹

The Petitioners submit that there has been a violation of Article 5 of the ACHR in conjunction with Art 1(1) as there were no measures put in place to protect the Quispe sisters or any of the women in Warimi due to the station of the SMB. The military controlled all aspects of life in Warimi and so the sisters were unable to prevent any violations perpetrated by military personnel. Moreover, both the President at the time and the Minister of Defence were aware⁹² and had the opportunity to investigate the allegations but chose to ignore it. Therefore, the State did not comply with its basic responsibility to investigate these violations as outlined in Art 5, and moreover did not satisfy the elevated responsibility to be applied to particularly vulnerable groups.

Article 6 – Right to Protect Against Slavery

The prohibition against forced labour is enshrined in Article 6(2) of the ACHR, which establishes that “*No one shall be required to perform forced or compulsory labour.*” It is also enshrined in several international instruments⁹³ and is considered an international *erga omnes* derived “from the principles and rules concerning the basic rights of the human person”⁹⁴ and is

⁹⁰ “*Cotton field*” (*supra*)

⁹¹ IACtHR, *Case of Rosendo Cantú v. Mexico*, (Preliminary Objections, Merits, Reparations and Costs), Series C No. 216, Judgment 30 August, 2010, paras. 97-98; *Case of Fernández Ortega (supra)* para

⁹² Clarification Q & A No. 36

⁹³ United Nations Declaration on the Rights of Indigenous People of 2007, Art 17; International Covenant on Civil and Political Rights, Art 8(3)(a); and The Universal Declaration of Human Rights, Art 4

⁹⁴ ICJ, *Case of the Barcelona Traction, Light and Power Company, Limited* Judgment of 5 February 1970, 32, paras 33-34.

non-derogable.⁹⁵ It is also considered a crime against humanity.⁹⁶ Slavery includes the elements of treating a person as property, an element of control over a person that involves violence or the threat of violence which causes the inability to sell freely his or her own labour. Thus, slavery may have the following three fundamental dimensions: control by another person, the appropriation of labour power, and the use or threat of use of violence.⁹⁷ The IACtHR further established that Article 6(1) must be interpreted as "*the obligation to perform work for others, imposed by means of coercion, and the obligation to live on the property of another person, without the possibility of changing that condition.*"⁹⁸

The IACtHR has held criterion for contemporary slavery which is consistent with the decision of *Prosecution Case v. Kunarac*.⁹⁹ This criterion being: restriction or control of individual autonomy, loss or restriction of the freedom of movement of a person, obtaining a profit from the perpetrator, the absence of consent or free will of the victim, or his impossibility or irrelevance due to the threat of use of violence or other forms of coercion, fear of violence, deceit or false promises, the use of physical or psychological violence, the position of vulnerability of the victim, detention or captivity and exploitation.¹⁰⁰

The Court has also established that the definition of slavery is comprehensive and evolutionary in accordance with the pro person principle.¹⁰¹ Consequently, it was held the prohibition of "*the slave trade and trafficking in women*" contained in Article 6(1) refers to: i) the

⁹⁵ Art 27.2 ACHR

⁹⁶ Art 7(1) Rome Statute

⁹⁷ Report of the Special Rapporteur on Contemporary forms of Slavery, Including its Causes and Consequences, Gulnara Shahinian, UN Doc. A/HRC/9/20 (July 28, 2008), para. 9.

⁹⁸ *Hacienda Brasil Verde Workers* (*supra*) para. 280

⁹⁹ ICTY, *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, No. IT-96-23. 1st Instance Chamber, Judgment of February 22, 2001, para. 542

¹⁰⁰ *Hacienda Brasil Verde Workers* (*supra*), para 272

¹⁰¹ *Hacienda Brasil Verde Workers* (*supra*) para. 289

recruitment, transport, transfer, or reception of people; ii) resorting to the threat or use of force or other forms of coercion, abduction, fraud, deceit, abuse of power or of a situation of vulnerability; iii) with any purpose of exploitation.¹⁰²

States must also adopt measures to prevent trafficking or slavery in situations where it is clear that there are certain groups of vulnerable people who can fall victim. This obligation is reinforced with the mandatory rule of international law of the prohibition of slavery due to the seriousness and intensity of the violation of rights by this act.¹⁰³ As it relates to minors this obligation is further contained in Article 35 of the CRC and likewise, Article 7 of the Inter-American Convention on International Traffic in Minors. Therefore, the Petitioner submits that Naira had a duty to ensure that the women in Warimi and children would not become victims of slavery nor trafficking at the SMB.

The Petitioner submits that the conditions that the Quispe sisters were subjected to at SMB satisfies various aspects of slavery. The Quispe sisters were subject to forced labour and were subject to human trafficking since they were recruited to the SMB under false accusations, they were held there under the use of force by the military and were exploited physically and sexually. The Petitioner further submits that Naira is responsible for the violations of Art 6 in relation to Article 1(1) since they State failed to act with the heightened standard of due diligence required since the Quispe sisters were indigenous children living in poverty. Additionally, the State failed in its international obligation of *jus cogens* status to investigate, prosecute and punish incidents of

¹⁰² *Hacienda Brasil Verde Workers* (supra) para. 290

¹⁰³ *Hacienda Brasil Verde Workers* (supra) para. 320

slavery as there were reports of human rights violations at the SMB known to the President and the Ministry but these failed to be investigated.

Article 7 Right to Personal Liberty

The IACtHR has stated that “the essence of Art 7 of the American Convention is the protection of the liberty of the individual from arbitrary or unlawful interference by the State and the guarantee of the detained individual’s right of defense.”¹⁰⁴ In relation to Art 7(1) the Court has stated that, in general, it embodies the right to personal liberty and security, and that the other paragraphs of Article 7 recognize different guarantees that must be given when depriving someone of their liberty. Therefore, liberty is always the rule and the limitation or restriction is always the exception.¹⁰⁵ Consequently, the State must prevent the liberty of the individual being violated by the actions of public officials and private third parties, and must also investigate and punish acts that violate this right.¹⁰⁶

Article 7(2) of the ACHR recognizes that the main guarantee of the right to physical liberty is the legal exception. This exception must include the legal definition of the offense which requires the States to establish beforehand, the reasons and conditions for the deprivation of physical liberty. Accordingly, any requirement established in domestic law that is not complied with when depriving a person of his liberty will cause this deprivation to be unlawful and contrary to the ACHR.¹⁰⁷ The Court has also established to restrict the right to personal liberty using

¹⁰⁴ *Case of the "Juvenile Reeducation Institute"*, (*supra*), para. 223; IACtHR, *Case of Maritza Urrutia*, (*supra*) para. 66; IACtHR., *Case of Bulacio*, Series C No. 100, Judgment of September 18, 2003, para. 129; and IACtHR, *Case of Juan Humberto Sánchez*, (Preliminary Objections, Merits, Reparations and Costs) Series C No. 99, 7 Judgment June, 2003, paras. 82-83.

¹⁰⁵ IACtHR, *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador* (Preliminary Objections, Merits, Reparations and Costs) Series C No 170, Judgment 21 November, 2007 para. 53.

¹⁰⁶ *Cotton Field Case* (*supra*) para 247

¹⁰⁷ *Case of Chaparro Álvarez and Lapo Íñiguez v Ecuador* (*supra*) paras. 55-57.

measures such as remand in custody, there must be sufficient evidence to show reasonable grounds that the person detained has taken part in the criminal offense under investigation.¹⁰⁸ Therefore, the Petitioner submits that the State breached Articles 7(2) and 7(3) since the facts do not indicate that the detention of the Quispe sisters followed domestic legislation and was not preceded by sufficient evidence for the reasonable suspicion of their involvement with the armed group.

“Subparagraphs 4, 5 and 6 of Article 7 of the American Convention establish positive duties that impose specific requirements both on the agents of the State and on third parties acting with its tolerance or acquiescence and who are responsible for the detention.”¹⁰⁹

Under Article 7(4) the Court established that the information on the motives for the arrest must be given when the arrest occurs since this “*constitutes a mechanism to avoid unlawful or arbitrary arrests as of the very moment of the deprivation of liberty and, also, guarantees the individual’s right of defense.*”¹¹⁰ Further, the right to be informed of the reasons for the arrest allows the detained person the chance to contest its lawfulness by having access to the legal mechanisms offered by the State according to Article 7(6). In instances of human rights violations, the Court has held that, “*the defense of the State cannot be based on the impossibility of the plaintiff to provide evidence that, in many cases, cannot be obtained without the cooperation of the State.*”¹¹¹ The burden of proof is on the State to prove the arrest was lawful.¹¹² The facts do not indicate that the Quispe sisters were informed of the reasons of their arrest.

¹⁰⁸ *Case of Chaparro Álvarez and Lapo Ñíñez. v Ecuador (supra)* para. 103.

¹⁰⁹ *Case of Juan Humberto Sánchez,(supra)* para. 81

¹¹⁰ *Case of Juan Humberto Sánchez,(supra)* para. 82.

¹¹¹ IACtHR, *Velasquez Rodríguez Case*, (Merits) Series C No. 4, Judgment of 29 July 1988, para. 135

¹¹² *Case of Chaparro Álvarez and Lapo Ñíñez v Ecuador (supra)* para 73

Article 7(5) provides a person's detention must promptly undergo judicial review, as a suitable means of control to avoid arbitrary and unlawful captures. He who is deprived of his liberty without judicial control must be released or immediately brought before a Judge.¹¹³ Preventive detention is a precautionary rather than a punitive measure. Further, it is the most severe measure that may be applied to the person accused of a crime. Therefore, its application must be exceptional¹¹⁴ and is limited by the principle of proportionality.¹¹⁵ The facts of the instant case indicate that the Quispe sisters were detained for a month on false accusations and subject to grave conditions such as rape, torture and forced labour. The State therefore is responsible for the violation of Article 7(5) and 1(1) since the detention clearly exceeded the reasonable and proportionate elements as a severe method should not have been exercised in relation to two young girls.

Article 7(6) of the Convention establishes that the authority who declares the lawfulness of the detention must be a judge or court. This ensures that the control of the deprivation of liberty is of a judicial nature. The Court in *Chaparro Alavarez*,¹¹⁶ held that even though a mayor was granted competence by law, he was not a judicial authority. Thus, in the instant case the military personnel in the Political and Judicial Command Units are not considered competent judicial bodies so the detention of the Quipse sisters was not lawful even if the military was given the authority by domestic legislation due to the State of Emergency.

Articles 8 & 25 Right to a Fair Trial and Right to Judicial Protection

¹¹³ IACtHR, *Case of the Gómez-Paquiyaauri Brothers v. Peru* (Merits, Reparations and Costs) Series C No. 104 Judgment 8 July, 2004

¹¹⁴ *Case of Chaparro Álvarez and Lapo Ñíñez v Ecuador (supra)* para. 67.

¹¹⁵ *Case of "Juvenile Reeducation Institute" v Paraguay (supra)* para. 228

¹¹⁶ *Case of Chaparro Álvarez and Lapo Ñíñez v Ecuador (supra)* para. 128

While Articles 8 and 25 confer separate and independent rights, the Court has accepted that they may be considered in conjunction with one another.¹¹⁷ Article 25 constitutes a fundamental pillar of the ACHR and an inherent feature of the rule of law in democratic societies.¹¹⁸ Article 25(1) mandates that State Parties provide simple, prompt and effective recourse of a judicial nature. This provision essentially enshrines the right to an effective remedy (writs of habeas corpus and *amparo*) against any acts which violate a person's fundamental rights recognized by the Constitution, domestic laws, or the American Convention.¹¹⁹ Furthermore, for the State to comply with the provisions of Article 25(1) of the Convention, the remedies must be effective, not merely a formal existence of one. Thus, an individual must have access to an effective, simple and prompt remedy that enables the attainment of the required judicial protection.¹²⁰

Article 8 provides for the right to be heard before a tribunal while Article 25 provides for the ability to bring violations of fundamental rights before a tribunal. Additionally, the right to a fair trial in Article 8(1) ACHR includes the concept of “due process of law” which refers to the prerequisites necessary for the adequate protection of those persons whose rights or obligations are pending judicial determination¹²¹ and applies to all judicial guarantees contained in the ACHR.¹²² The remedies guaranteed under Article 25 must be “substantiated in conformity with

¹¹⁷ IACtHR, *Case of Almonacid Arellano et al v Chile* (Preliminary Objections, Merits, Reparations and Costs) Series C No. 4 Judgment of September 26 2006, Separate Opinion of Judge A.A. Trinidad, para 24

¹¹⁸ IACtHR, *Case of Ivcher-Bronstein v. Peru*. (Merits, Reparations and Costs) Series C No. 74 Judgment 6 February, 2001, para 135;

¹¹⁹ Laurence Bugorgue-Larsen *Inter-American Court of Human Rights: Case Law and Commentary*, p. 681; IACtHR., *Case of Acosta-Calderón v. Ecuador*. (Merits, Reparations and Costs) Series C No. 129, Judgment 24 June 24, 2005 para 92

¹²⁰ IACtHR, *In the Case of Tibi v. Ecuador* (Preliminary Objections, Merits, Reparations and Costs) Series C No. 114, Judgment 7 September, 2004, para. 131.

¹²¹ IACtHR., *Advisory Opinion on Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and (8) American Convention on Human Rights) OC-9/87 Series A No. 9, October 6, 1987, para. 28.

¹²² IACtHR., *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and (8) American Convention on Human Rights), *supra* note 127, para. 29

the rules of due process of law.”¹²³ As such, Article 25 and Article 8(1) are ineluctably intertwined, and must also be considered in light of the State’s positive obligation to guarantee ACHR rights under Article 1(1).¹²⁴

The Detention of the Quispe sisters at SMB

The Court has held that Article 25(1) also institutes the obligation of the States to provide an effective judicial remedy for violations of fundamental rights to all persons within their jurisdiction. Additionally, it provides for the application of the guarantees recognized by the Convention as well as the Constitution or laws. Moreover, the judicial protection provided by Article 25 of the Convention applies to the rights not subject to derogation contained in Art 27(2) in a state of emergency.¹²⁵ These include Articles 7(6) and 25(1), considered within the framework and the principles of Article 8 and those needed for the preservation of the rule of law.¹²⁶ To comply with Article 8(2)(b) of the Convention, the State must notify the accused of the charges against him and the reasons for the charges. Also, the evidence for the charges and the legal definition of the facts must be stated to the accused. The accused has the right to know all the information of the facts to allow his ability to exercise his right to defence.¹²⁷ The military personnel detained the Quispe sisters at SMB on the false accusations and the girls were never informed of the nature of the charges.

¹²³ IACtHR, *Case of the Pueblo Bello Massacre v. Colombia* (*supra*) paras 28-29

¹²⁴ IACtHR., *Case of Velásquez-Rodríguez v. Honduras* (Preliminary Objections) Series C No. 1, Judgment 26 June 26, 1987 para. 91; *Case of the “Las Dos Erres” Massacre v. Guatemala*. (*supra*) para. 104.

¹²⁵ *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and 8 of the American Convention on Human Rights) (*supra*), para. 23.

¹²⁶ *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and 8 of the American Convention on Human Rights) (*supra*) para. 38.

¹²⁷ IACtHR, *Case of Barreto Leiva v. Venezuela* (Merits, Reparations and Costs). Series C No 206, Judgment of 17 November, 2009 para 28.

The Court has declared that an order to remand victims in custody would be arbitrary if it does not contain reasoned and objective legal grounds regarding its merits and this constitutes a violation to the right of presumption of innocence.¹²⁸ Thus, the Petitioner submits that the detention of the Quispe sisters for a month on false accusations was a breach of this principle.

In the *Rio Negro Massacre case*,¹²⁹ the investigations into the violations were done 10 years after the facts occurred only because the victims had filed complaints, rather than the State's initiative. Thus, the Court held that the State was responsible for violating the rights recognized in Article 8(1) and 25(1) of the ACHR, in relation to Article 1(1) thereof. Since the violations at SMB were never investigated by Naira on its own initiative despite the President and the Ministry of Justice and Defense being aware of the conditions, it can be asserted that the momentum of the investigation was left to the victims. Additionally, the promises of President Benavente to implement measures for justice were only made after the complaints of Maria Elena and Monica received public attention from the GTV interview. Therefore, the Petitioner submits that the State is liable for violating Arts 8(1) and 25(1) in relation to Article 1(1).

In cases that involve massive, systematic and grave human rights violations, the State must apply "legal mechanisms that are appropriate for the analysis of the case, the criminal categories corresponding to the acts investigated, and a satisfactory investigation capable of truly guaranteeing the human rights involved."¹³⁰ The facts of the instant case also include massive, grave and systematic human rights violations and the State should have conducted a satisfactory

¹²⁸ *Case of Chaparro Álvarez v. Ecuador*, (*supra*) note 58, para. 141.

¹²⁹ IACtHR, *Case of the Rio Negro Massacres v. Guatemala*, (Preliminary Objection, Merits, Reparations and Costs) Series C No. 250, Judgment 4 September, 2012, para. 198.

¹³⁰ IACtHR, *Case of Gelman v. Uruguay* (Merits and Reparations) Series C No. 221, Judgment 24 February, 2011 para. 234.

investigation and failed to do so even though the State knew but did not intervene. Consequently, the Petitioner submits that the State is responsible for the violation of the rights recognized in Articles 8(1) and 25(1) of the ACHR, in relation to Article 1(1).

In the case of *Gonzales Lluy et al. v Ecuador*, the Court held that the repeated lack of due diligence on behalf of the state in cases, has resulted to the statute of limitations being applied on multiple occasions of criminal proceedings. It was held that this negligence in criminal proceedings results in a denial of justice in the context of the proceedings, preventing the effective investigation of those responsible.¹³¹ Thus, the Petitioner submits that Naira was negligent and denied justice to the victims at the military bases since there was a reasonable belief of human rights violations. Furthermore, the State was in a position to know of the events and had the authority to act but chose not to.

Furthermore, the Court has held that the statute of limitations on crimes of slavery is incompatible with the obligation of States to ensure its internal regulations follow international standards.¹³² In *Hacienda Brasil Verde Workers* the application of the statute of limitations constituted an obstacle to the investigation of the facts, the punishment of those responsible and reparation of the victims, despite the heinous nature of the crime. Thus, the Petitioner submits the time bar of fifteen years for the criminal proceedings brought before the domestic courts did not provide adequate judicial protection

The Zero Tolerance Policy on Gender Based Violence and the Political and Judicial Units did not constitute a remedy under Article 25

¹³¹ IACtHR, *Case of Gonzales Lluy et al. v Ecuador* (Preliminary Objections, Merits, Reparations and Costs) Series C No. 298, Judgment 1 September, 2015, para 308

¹³² *Hacienda Brasil Verde Workers v. Brazil*, (supra) note 48, para. 413

The jurisdiction of a competent tribunal stems from the law and only the Legislature has the authority to regulate the jurisdiction of courts.¹³³ Not only must the remedies exist, but they must be deemed effective and as such an ineffective remedy is considered a violation of the Convention by the State Party.¹³⁴ A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective. That could be the case, for example, when practice has shown its ineffectiveness: when the Judicial power lacks the necessary independence to render impartial decisions or the means to carry out its judgments; or in any other situation that constitutes a denial of justice, as when there is an unjustified delay in the decision; or when, for any reason, the alleged victim is denied access to a judicial remedy.¹³⁵ The Petitioner submits that the Gender-Based Violence Unit is not a judicial remedy under Article 25 since it cannot be independent due to the breach of the separation of powers doctrine since it is in the public prosecutor's office.

The Court has also held that military criminal jurisdiction is not competent to investigate and prosecute authors of violations of human rights. This responsibility can only be carried out by an ordinary court. In this vein, the military jurisdiction violates the right to a fair trial and hence due process when it assumes competence for a case of human rights violations.¹³⁶ It is submitted that the Judicial Command Units at SMB are not competent to investigate the grievous human rights violations. Therefore, Naira has violated the rights to judicial guarantees and to judicial protection established in Articles 8(1) and 25(1). Furthermore, where the Court has found that the

¹³³ *Case of Barreto Leiva v. Venezuela*, (*supra*) note 72, para. 76.

¹³⁴ *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and 8 para 24

¹³⁵ *Case of Ivcher-Bronstein v. Peru* (*supra*) para 137

¹³⁶ IACtHR, *Case of Radilla-Pacheco v. Mexico*. (Preliminary Objections, Merits, Reparations, and Costs) Series C No. 209, Judgment 23 November, 2009, para. 273.

military criminal jurisdiction is not competent, it is not necessary to rule on the independence and impartiality of the system.¹³⁷

Article 7 of Belém de Pará

The Convention of Belém do Pará, establishes that violence against women is “a manifestation of the historically unequal power relations between women and men” and recognizes that the right of every woman to a life free from violence includes the right to be free from all forms of discrimination. That Convention reflects the uniform concern throughout the hemisphere as to the seriousness of the problem of violence against women, its relationship to discrimination historically suffered and the need to adopt comprehensive strategies to prevent, punish, and eradicate it. It also affirms that the obligation to act with due diligence takes on a special connotation in cases of violence against women.¹³⁸

Article 7 of the ‘Belém do Pará’ states: “The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence.” This includes the: (a) duty to refrain from acts of violence, (b) duty to investigate acts of violence; and (c) the duty to adopt administrative measures to prevent, punish and eradicate violence. Each of these duties assigned to States are binding and the IACtHR can be petitioned to by persons alleging a breach of these duties. This standing of the court is outlined within the Convention under Article 12.

The State violated its duty to refrain from acts of violence

¹³⁷ *Radilla-Pacheco v. Mexico*, (*supra*), para. 274

¹³⁸ IACHR, *Paloma Angelica Escobar Ledezma et al. v Mexico*, Case12.551 Report No. 51/13 July 12, 2013. para 117.

The State, through its actors, has a duty to refrain from acts of violence including sexual violence against women in the society. The case *Rosendo Cantu v Mexico* held that rape constitutes a breach of Article 7(a) of Belém do Pará since, “rape is a paradigmatic form of violence against women.”¹³⁹ Therefore, the Petitioner submits that the State has breached its duty to refrain from acts of violence under Article 7 of the Belém do Pará as the military personnel committed mass acts of sexual violence against the women of Warimi which includes the Maria Elena and Monica Quispe.

The State has breached its duty to investigate acts of violence

The State has a duty to ensure that any violence against women is properly investigated with due diligence to ensure that the victims receive justice and ensure the prosecution and punishment of the perpetrators of these atrocious acts. As aforementioned, the ACHR and the Belém do Pará are inter-related and the duty to properly investigate these crimes has an important correlation with Articles 8 and 25 which speak to due process and access to justice.

This duty was dealt with extensively in the case of *J v Peru*¹⁴⁰ where the Court held, “the decision to open and conduct an investigation is not a discretionary power, but rather the duty to investigate constitutes a peremptory State obligation that arises from international law.” Further, this duty involves immediate and effective investigation once a state authority becomes aware of the issue. The Court has also outlined that to discharge the duty imposed on them by the Convention they must ensure: (i) that the investigation is documented properly and that there is due diligence in the handling the evidence, (ii) that the victim is provided with medical and

¹³⁹ *Case of Rosendo Cantú v. Mexico*, (*supra*) para 109.

¹⁴⁰ *J v Peru* (*supra*), para 358.

psychological healthcare, (iii) that a complete medical and psychological examination is performed immediately after by trained personnel; and (iv) that there is access to free legal assistance throughout the entire process.¹⁴¹

Accordingly, the Petitioner submits that Naira is responsible for violating Article 7 of the Belém do Pará by the failure to launch a diligent investigation of the sexual violence perpetrated against the Quispe sisters and the women of Warimi. Furthermore, the report by the Truth Commission regarding this investigation is scheduled to be published in 2019 further delaying the justice that the Quispe sisters and women in Warimi need.

The State has failed its duty to adopt administrative measure to prevent, punish and eradicate violence

The Convention of Belém do Pará also places a duty on the State to prevent violence against women. This duty ensures that the State adopts legislation which seek to address the issue and protect this vulnerable group. This duty to prevent was succinctly outlined in *Veliz Franco v Guatemala*¹⁴² where it was held that the State had a positive obligation to protect once there is an imminently dangerous situation for an individual or group of individuals. It is important for the State to ensure that there are procedures and protocols in place for potential and actual victims of these acts to comply with to either avoid this violence or to follow in the unfortunate event they occur.

Therefore, the Petitioner submits that this was not the situation in the case of Quispe sisters and the women of Warimi. Naira did not adopt any legislation or measures to protect the women

¹⁴¹ *Espinoza Gonzalez v Peru (supra)*.

¹⁴² IACtHR, *Veliz Franco et al. v. Guatemala*, (Preliminary Objections, Merits, Reparations and Costs) Series C No. 277 Judgment 19 May, 2014 para 137

from the violations at SMB. The military exercised total control and consequently the victims had no one to report to since their protectors were also their abusers thereby breaching its duty under Article 7 of the Belém do Pará.

Discrimination and Impunity of violence against women

It is broadly recognized by international human rights instruments that there is a close relationship between discrimination and violence against women. It is accepted that violence against women is a form of discrimination itself that seriously impedes the protection of women's rights.¹⁴³ In the case of *Maria Penha*, the IACHR has declared that in addition to a State's obligation to investigate, prosecute, and punish those responsible for violence against women, they are also under an obligation to 'prevent these degrading practices.'¹⁴⁴ This additional obligation is of great importance as it portrays to the society that the State is seeking to establish and uphold a certain standard of protection to be meted out to its women. On the other hand, if this obligation goes unfulfilled it may have the effect of fostering and perpetuating an environment of impunity that facilitates both violence and discrimination against women since, "society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts."¹⁴⁵

To prevent this impunity the State must investigate every situation involving the violation of any rights with impartiality and due diligence and seek to have the offenders punished and the victims restored as soon as possible. This duty continues to persist despite the perpetrators being

¹⁴³ IACHR, *Access to Justice for Women Victims of Violence in the Americas*, (2007) OEA/Ser. L/V/II. doc.68, para. 65

¹⁴⁴ IACHR, *María Da Penha Fernandes v Brazil*, (*supra*) para. 56.

¹⁴⁵ IACHR, *María Da Penha Fernandes v Brazil* (*supra*) para. 56.

private non-state actors.¹⁴⁶ To investigate whether the State has tolerated a situation of impunity and defencelessness, there must be deep analysis of the circumstances within, and the attitude of, the State.

The petitioners submit that the State has failed to discharge this duty and thus have violated Article 7 of Belém do Pará in relation to the Quispe sisters and the women of Naira. This position is supported by the approach taken by the State towards the violation of rights at the SMB in Warmi, as well as numerous other accounts of violations against women in the State. It is clear that the situation at the SMB in Warmi is not an isolated incident but rather a pattern of discriminatory and violent behaviour against women that plagues the country. Furthermore even when State actors were not always the ones perpetrating the crimes, there has been a failure through state apparatus to curb the issue.

This impunity can be seen in relation to incidents faced by Maria Elena Quispe, Zuleymi and Analía. Subsequent to the traumatic experience endured at the SMB in Warmi, Maria Elena had had to endure further discrimination and violence, this time at the hands of her husband. Further, the case of Zuleymi, a transgendered woman, who was prevented from giving recognition to her gender identity and was the victim of judicial stereotyping and deeply ingrained judicial biases which prevented her from receiving the justice. The aforementioned rule of non-discrimination is one of the core pillars of the American Convention and should prevent discrimination on any grounds. This should include discrimination against transgender persons such as Zuleimy Parejo.¹⁴⁷ Analía Sarmiento was raped and killed by Guillermo Alcazar, a male

¹⁴⁶ IACHR, *María Da Penha Fernandes v Brazil* (*supra*) para. 43, citing IACtHR., *Case of Velásquez Rodríguez*. (*supra*) para. 176 and IACtHR., *Case of Godínez Cruz*. Series C No. 5 Judgment of January 20, 1989., para. 175.

¹⁴⁷ IACtHR, *Advisory Opinion on Gender Identity, Equality and Non-Discrimination to same sex couples*, OC-24/17, November 24, 2017.

who was twice charged and convicted of rape but was out on probation pursuant to law that was not in keeping with the States own internal laws.

It is clear that there is a well-established pattern of impunity for perpetrators of violence against women in the State of Naira that it allows to fester and develop. Although the newly implemented measures in the State to combat this societal issue are commended, a great deal more must be done. It is submitted that the Court take the approach taken in the cases of *Escobar Penha* and rule that the State violated its duty under the ACHR and Belém do Pará.

Reparations

The Court has interpreted Article 63(1) of the ACHR to provide that every violation of an international obligation that has caused harm requires the duty to make appropriate reparations.¹⁴⁸ This duty is a customary rule that “constitutes one of the fundamental principles of contemporary International Law regarding the responsibility of a State.”¹⁴⁹ Reparations should have a causal nexus to the facts of the case, the violations, the harm, and the measures requested to redress the respective damages. Additionally, the Court should consider these factors simultaneously to execute a proper decision.¹⁵⁰ Furthermore, the Court has seen the necessity to order different reparations due to the seriousness of the harm caused.¹⁵¹ These measures of satisfaction, restitution, rehabilitation and guarantees of non-repetition are in addition to compensation. The Court has used a gender perspective when granting reparations. This is especially seen when there

¹⁴⁸ IACtHR, *Case of Velásquez-Rodríguez v. Honduras* (Reparations and Costs) Series C No. 7, Judgment 21 July, 1989 para. 25.

¹⁴⁹ IACtHR, *Case of the “Street Children” (Villagrán-Morales et al.) v. Guatemala* (Reparations and Costs) Series C No. 77, Judgment 26 May, 2001, para. 62

¹⁵⁰ IACtHR, *Case of Ticona-Estrada et al. v. Bolivia*. Merits, (Reparations and Costs) Series C No. 191 Judgment 27 November, 2008, para 110

¹⁵¹ *Case of the “Las Dos Erres” Massacre v. Guatemala. (supra)*, para 396

is a context of structural discrimination thus the reparations are intended to change the circumstances so that rectification is also possible.¹⁵²

It is submitted that the measures the State has promised to implement are not adequate remedies to the harm suffered. The Gender-Based Violence Unit and Administrative Program on Reparations and Gender are yet to be implemented and the mandatory training requirement is yet to be enforced. Additionally, The High Level Committee and the Truth Commission have not issued any reports on the matter and will not do so until 2019. Also, even though the ZTPGBV was implemented in 2015, the State has not issued any reports on the results of its implementation.

V. REQUEST FOR RELIEF

Based on the aforementioned submissions, the Victims respectfully requests that the Honourable Court declare and adjudge that the petition is admissible.

And that:

(i) The Republic of Naira violated Articles 4, 5, 6, 7, 8, 19, 24, 25 in conjunction with Article 1 (1);

(ii) That the Republic of Naira breached Article 7 of the Convention of Belém do Pará

(ii) That the Republic of Naira has not fulfilled its responsibility in accordance with the American Convention of Human Rights; and

(iii) That the Respondent pay the cost of the proceedings.

¹⁵² *Case of González et al. ("Cotton Field") v. Mexico.* (*supra*) para. 450