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**MARIA ELENA QUISPE AND MONICA QUISPE**

**(Victims)**

**v.**

**REPUBLIC OF NAIRA**

**(Respondent)**

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**MEMORIAL ON BEHALF OF THE REPRESENTATIVES OF THE VICTIMS**

**2018**

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## **STATEMENT OF FACTS**

### **General Background**

NAIRA is a democratic State which is economically stable, but has been experiencing a political crisis for several years.

### **Situation in Naira**

Between 1970 and 1999, there were numerous acts of violence and confrontations in southern NAIRA, mainly in the provinces of Soncco, Killki, and Warmi, where the armed group “Freedom Brigades” (FB)—which has ties to drug trafficking—began carrying out terrorist actions. The President Juan Antonio Morales declared a state of emergency, suspending guarantees, and establishing Political and Judicial Command Units in the three provinces, which took control of the area by setting up military bases between 1980 and 1999.

### **The Status of Women in Naira**

There are many cases of gender-based violence that occur daily in NAIRA. The Public Ministry has confirmed that there are 10 femicides or attempted femicides in the country every month, and that every two hours a woman is the victim of sexual violence, 3 of every 5 women were assaulted by their partners or ex-partners, 1,300 girls between the ages of 11 and 14 and 3,000 15-year-olds gave birth, 7 of every 10 women between 15 and 35 years of age have been subject to daily sexual street harassment and there has been an uptick in hate crimes against the LGBTI population. The Criminal Code recognizes the offenses of femicide and rape only, and does not define any other kind of sexual violence as a crime.

## **Gender Based Violence in Naira**

*Case of Zuleimy Pareja* showed the dire need for gender laws, where a member of the LGBT community was murdered in cold blood.

*Case of Analía Sarmiento* further established the need for better safety measures for women. Her killer, who raped her before murdering her was twice charged and once convicted of rape, out on probation.

### **The legislative measures after the case of Analía Sarmiento**

The state decided to take specific and immediate measures to address the situation of gender violence. These measures are collectively known as the Zero Tolerance Policy on Gender-Based Violence (ZTPGBV), which had an extraordinary budget allocation and also focused on sensitizing the Government servants towards the needs of women, though this program does not allow for the litigation of cases.

### **Case of Maria Elena Quispe**

Ms. María Elena Quispe, on January 20, 2014, decided to report her husband Jorge Pérez for having disfigured her with a broken bottle. Ms. Quispe went to the police to file a complaint, but, because the only medical examiner in the area was out of town, she could not undergo the respective medical exam. In the absence of a police report, the office of the public prosecutor was unable to bring charges. Four months later, Jorge Pérez intercepted Ms. Quispe on the street, insulting and hitting her in public view. Pérez was arrested and prosecuted. However, he was sentenced to a year of suspended jail time because he had no prior history of violence. Three months later, he sought out Ms. Quispe at her place of employment and beat her again leaving her permanently partially disabled, and therefore was arrested. In the custody battle for their son, the

family court judge ruled in favor of Pérez, on the grounds that the bond between a father and his children cannot be affected by intimate partner violence.

### **The status of women in Warmi during the Military Rule.**

In Warmi, a Special Military Base (SMB) had been established to maintain control over the area and fight crime between 1990 and 1999. During those years, officials from the SMB committed abuses against the population, including constant sexual violence against local women and girls, including Mónica and María Elena. In March 1992, when they were very young, they were held at the SMB on false accusations for a month, and were forced to wash, cook, and clean every day. Both of them were also repeatedly raped by the soldiers. Many of the women were often forced to strip naked in front of the soldiers, who beat and groped them in the cells on the base. After the SMB was suspended, there were a few preliminary investigations undertaken but nothing concrete was done.

### **Conventions Ratified**

NAIRA has ratified all of the international treaties, including the CEDAW, the American Convention on Human Rights, the Inter-American Convention to Prevent and Punish Torture, and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belem do Pará).

NAIRA is a monist state under Article 22 of its constitution.

## LEGAL ANALYSIS

### ADMISSIBILITY

#### 1. STATEMENT OF JURISDICTION

As a member of the ‘Organization of American States’, Naira has been a state party to the American Convention on Human Rights, 1978 (‘ACHR’) since 1992.<sup>1</sup> It has recognized the *contentious jurisdiction*<sup>2</sup> of the Inter-American Court of Human Rights (‘IACHR’ or ‘Court’) in accordance with Article 62(1), ACHR.

The Inter-American Commission (‘Commission’) on Human Rights in accordance with Articles 61(1) and 61(2) of the ACHR, has submitted the present dispute before this Hon’ble Court under Article 63 of the ACHR.

**Further, no similar petition lies in another international proceeding for settlement under Article 46(c) of the ACHR. Therefore, the present Petition is admissible on behalf of the representatives of the victims.**

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<sup>1</sup> Compromis ¶7.

<sup>2</sup> Article 62(3), ACHR, 1978.

## MERITS

### 1. VIOLATION OF ARTICLE 1.1 OF AMERICAN CONVENTION AND ARTICLES IN RELATION TO

#### IT.

The Inter-American Court of Human Rights [Hereinafter, “IACrHR”] in *VelásquezRodríguez v. Honduras*<sup>3</sup>, with reference to state’s obligations under the American Convention on Human Rights [Hereinafter “ACHR”] held that the State’s positive duty extends to safeguarding the free and full enjoyment of rights through governmental apparatus and exercising its jurisdiction over non-state actors.<sup>4</sup>

There exists a Culture of Impunity in the State of NAIRA [Hereinafter, “NAIRA”] where the State has failed to redress the grievances of marginalized victims in the light of widespread violence and impunity leading to feelings of vulnerability.<sup>5</sup> Thus the Counsel humbly submits that all the arguments furthered henceforth are in totality a violation of article 1.1 of the convention read with the violation of the particular article in discussion.

#### *1.A Violation of Article 4 of American Convention of Human Rights all in relation to the obligation to respect and guarantee to those rights under Article 1.1.*

Article 4 r/w Article 1(1) maintainsthat no one shall be deprived of his life arbitrarily and requires the State to adopt all appropriate measures to protect and preserve the right to life.<sup>6</sup> The obligations,

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<sup>3</sup> Velásquez Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, para. 166 ( July 29, 1988).

<sup>4</sup> Id.

<sup>5</sup> Social Analysis: The International Journal of Social and Cultural Practice, Vol. 51, No. 1 (SPRING 2007), pp. 179-197.

<sup>6</sup> IACHR, January 31, 2006, Merits, Reparations and Costs, *Pueblo Bello Massacre v. Colombia*, Series C No. 140, ¶120.



to provide a dignified and decent life are erga omnes,<sup>7</sup> non derogable and a part of jus cogens.<sup>8</sup> The acts of violence against the women in NAIRA, goes against the essence of this right.

The stringent abortion laws in NAIRA, extending to the detriment of the well-being of women, the treatment meted out to Maria Quispe by her husband, to the Quispe sisters by the State forces at the time of the SMB presence in Warimi and the fear in which the women have been continuously living, is violative of Article 4. NAIRA was under a legal duty to carry out a serious investigation of violations committed within its jurisdiction, identify the perpetrators, impose appropriate punishment and ensure the victims adequate compensation<sup>9</sup>.

NAIRA has failed to acknowledge the existence of a real and imminent danger, despite its awareness of this danger.<sup>10</sup> In the case of Maria Quispe, despite repeated attacks by her husband, NAIRA did not take the matter into serious consideration. The medical exam was not conducted on the pretext of the doctor being unavailable.<sup>11</sup> NAIRA by not exercising due diligence to counter the threat has violated its duty under Article 4.<sup>12</sup>

In the case filed by Monica Quispe, there were allegations of rape of multiple women by State actors, in a military rule in Warimi,<sup>13</sup> and the abortion laws of NAIRA do not allow for medical termination of pregnancy even in the case of rape.<sup>14</sup> This draconian law is in a dire need of change

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<sup>7</sup> IACHR, September 2, 2004, Merits, *Juvenile Reeducation Institute v Paraguay*, Series C No. 112, ¶164.

<sup>8</sup> Antkowiak, Thomas M. and Gonza, Isabel Alejandra, Introduction to the American Convention on Human Rights: Essential Rights (May 8, 2017). The American Convention on Human Rights: Essential Rights (Oxford Univ. Press), 2017; Seattle University School of Law Research Paper No. 17-09; University of Washington School of Law Research Paper No. 2017-18. Available at SSRN: <https://ssrn.com/abstract=2964984>

<sup>9</sup> Velásquez Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, para. 174 (July 29, 1988)

<sup>10</sup> Luna López v. Honduras, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 269, para. 124 (Oct. 10, 2013).

<sup>11</sup> □ 23 of Moot Compromis.

<sup>12</sup> Velásquez Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, para. 166 (July 29, 1988) □ 5; Veliz Franco et al. v. Guatemala, Preliminary Objections, Merits, and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 277, paras. 151–158 (May 19, 2014); González et al. (“Cotton Field”) v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, paras. 283–286 (Nov. 16, 2009).

<sup>13</sup> □ 28 of Moot Compromis.

<sup>14</sup> □ 14 of Moot Compromis.

in the State of Naira since a woman impregnated through rape results in two victims, the woman as well as the unborn child. Though the ACHR does not extensively deal with abortive rights, the American Declaration on Human Rights [Hereinafter, “ADHR”] allows for abortion in some circumstances.<sup>15</sup> The scope of Article 4 in the context of pre-natal life though taken up in the *Baby boy’s case* hardly found any elucidation. In a subsequent case,<sup>16</sup> the IACrHR held that the Article contemplates a concept of gradual and incremental protection of life at the prenatal stage. Moreover, in the cases of *B. v El Salvador*<sup>17</sup> and *Mainumby v. Paraguay*<sup>18</sup>, in the event of the States enforcing a blanket ban on abortion, the IACrHR had granted provisional and precautionary measures, to protect individuals seeking abortions when their health was in danger

***1.B Violation of Article 5 and IHL during conflict in Province of Warmi to the detriment of Maria Elena and Monica Quispe.***

It is humbly contended that Article 5 of Inter-American Human Rights Convention has been violated and that the state has not adequately responded to the needs of victims of gender-based violence in NAIRA<sup>19</sup>. Article 5 of Inter-American Human Rights Convention establishes an autonomous right that “Every person has the right to have his physical, mental, and moral integrity respected.”<sup>20</sup> It also establishes that no one shall be subjected to torture or cruel, inhuman or

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<sup>15</sup> *Baby Boy v. United States*, Case 2141, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.54, Doc. 9 rev. 1 (1981), para. 18.

<sup>16</sup> *Artavia Murillo et al. (In-vitro Fertilization) v. Costa Rica*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257, ¶ 163 (Nov. 28, 2012).

<sup>17</sup> *B. v El Salvador*, Provisional Measures, Order of the Court, 2013 Inter-Am. Ct. H.R. (May 29, 2013).

<sup>18</sup> *Mainumby v. Paraguay* (June 8, 2015), available at <http://www.oas.org/es/cidh/decisiones/pdf/2015/MC178-15-ES.pdf>

<sup>19</sup> Refer ¶ 28 of Moot Compromis.

<sup>20</sup> Cecilia Medina, *The American Convention on Human Rights: Crucial Rights and their Theory and Practice* 89 (2014).

degrading punishment or torture.<sup>21</sup> Article 5 of the ACHR prohibits acts that cause unnecessary suffering and thus violate the requirements of humane treatment.<sup>22</sup> Furthermore, this Court is competent to take recourse to ‘other international treaties’ in order to interpret the Convention.<sup>23</sup> The violation of human rights has taken place in the context of Non-International Armed Conflicts<sup>24</sup> (‘NIAC’) within the scope of Common Article (CA) 3 of the GC<sup>25</sup> and Additional Protocol II (AP II). There is no International Armed Conflict (‘IAC’) due to lack of ‘overall’<sup>26</sup> or ‘effective control’<sup>27</sup>. Principles of humanity have to be taken into account without describing IHL as the *lex specialis*.<sup>28</sup>

*1.B.(i) Illegal detention on false Accusation for a month violated Article 5 of Inter-American Human Rights Convention*

The UN Human Rights Committee has stated that the prohibition of arbitrary detention is not only a rule of General International Law, but a Peremptory Norm.<sup>29</sup> The prohibition on torture has attained status as a jus cogens or peremptory norm of general international law, also giving rise to the obligation erga omnes (owed to and by all States) to take action against offenders.<sup>30</sup> Prolonged

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<sup>21</sup> Article 5(2) of IACHR..

<sup>22</sup> Yoram Dinstein, *Non-International Armed Conflicts in International Law*, at 205 (2015).

<sup>23</sup> IACHR Advisory Opinion, September 24 1982, ‘Other Treaties’ Subject to the consultative Jurisdiction of the Court (Art. 64 ACHR), Series A No. 1.

<sup>24</sup> Michael N. Schmitt, Charles H.B. Garraway and Yoram Dinstein,, *The Manual on the Law of Non-International Armed Conflict with Commentary 2* (2006).

<sup>25</sup> ICTY, October 2, 1995, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadic*, IT-94-1-A,¶70.

<sup>26</sup> Ibid.

<sup>27</sup> ICJ, June 27, 1986, Merits, *Nicaragua v. United States*, ICJ Reports 1986.

<sup>28</sup> ICJ, December 19, 2005, *Democratic Republic of the Congo v. Uganda*,¶216.

<sup>29</sup> ‘General Comment no. 29: State of Emergency (article 4)’ (2001), UN Doc. HRI/GEN/1/Rev.9 (Vol. 1) (2008), ¶¶11, 13(a) and (b).

<sup>30</sup> Erika de Wet, The Prohibition of Torture as an International Norm of jus cogens and its Implications for National and Customary Law, 15 EJIL (2004).

solitary confinement is “strictly prohibited,” because the detainee is placed in a “particularly vulnerable position” and endures severe psychological consequences.<sup>31</sup>

This Court observed that “a person who is unlawfully detained is in an exacerbated situation of vulnerability creating a real risk that his other rights, such as the right to humane treatment will be violated.”<sup>32</sup> The Court has indicated that if an unlawful detention has occurred, even for a “short time,” it will result in “a violation of mental and moral integrity.”<sup>33</sup>

The American Convention establishes “all persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.”<sup>34</sup> The Court has emphasized that States must “safeguard the health and well- being of those deprived of liberty, and ensure that the manner and method of deprivation of liberty does not exceed the inevitable level of suffering inherent in detention.”<sup>35</sup> In *Maritza Urrutia v. Guatemala*, Maritza Urrutia was unlawfully and arbitrarily detained. The Court considered that these acts were “prepared and inflicted deliberately to obliterate the victim’s personality and demoralize her” and constituted “mental torture.”<sup>36</sup> In the present case, both the sisters were held at SMB (Special Military Base) on false Accusations for a

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<sup>31</sup> *Bámaca Velásquez v. Guatemala*, Merits, Judgment, Inter- Am. Ct. H.R. (ser. C) No. 70, para. 150 (Nov. 25, 2000). See also *Espinoza Gonzáles v. Peru*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter- Am. Ct. H.R. (ser. C) No. 289, para. 186 (Nov. 20, 2014) (“starting with its first judgments, the Inter- American Court has considered that prolonged isolation and incommunicado [sic] represent, in themselves, forms of cruel and inhuman treatment, that are harmful to the mental and moral integrity of the individual”).

<sup>32</sup> *Tibi v. Ecuador*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter- Am. Ct. H.R. (ser. C) No. 114, para. 147 (Sept. 7, 2004).; *Sánchez v. Honduras*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter- Am. Ct. H.R. (ser. C) No. 99, para. 96 (June 7, 2003).

<sup>33</sup> *Espinoza Gonzáles v. Peru*, Preliminary Objections, Merits, Reparations, Costs, Judgment, Inter- Am. Ct. H.R. (ser. C) No. 289, para. 187 (Nov. 20, 2014); *Sánchez v. Honduras*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter- Am. Ct. H.R. (ser. C) No. 99, para. 98 (Nov. 26, 2003).

<sup>34</sup> *Supra* 30.

<sup>35</sup> *Landaeta Mejjias Brothers et al. v. Venezuela*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter- Am. Ct. H.R. (ser. C) No. 281, para. 198 (Aug. 27, 2014); “Juvenile Reeducation Institute” v. Paraguay, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter- Am. Ct. H.R. (ser. C) No. 112, para. 159 (Sept. 2, 2004).

<sup>36</sup> *Maritza Urrutia v. Guatemala*, Merits, Reparations, and Costs, Judgment, Inter- Am. Ct. H.R. (ser. C) No. 103, para 94.

month<sup>37</sup> without any appropriate and valid reason where they were raped repeatedly and were forced to work, which leads to the violation of mental and moral integrity of both the sisters. Thus, unlawful detention of the sisters which placed them in a vulnerable position and endured severe psychological consequences violates Article 5 of Inter-American Human Rights Convention.

*1.B.(ii) Torture by soldiers at Special Military Base violated Article 5 of Inter-American Human Rights Convention.*

Article 2 of the Inter American Convention to Prevent and Punish Torture ('IACPPT') defines Torture as inflicting physical or mental suffering in a person with any purpose.<sup>38</sup> Torture means methods used upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.<sup>39</sup> Committee Against Torture (CAT) defines torture as an act “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”<sup>40</sup> It includes beatings, rape, psychological torment or deplorable detention conditions, among others.<sup>41</sup> In the present case, Quispe Sisters were subjected to illegal detention where they were raped repeatedly and were forcibly made to clean and cook at SMB, the grave acts of violence<sup>42</sup> to which the victims were subjected over a prolonged period of time amounted to both

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<sup>37</sup> Refer ¶ 28 of Moot Compromis.

<sup>38</sup> IACHR, July 8, 2004, Merits, *Gomez Paquiyauri Brothers v. Peru*, Series C No. 110, ¶116; ECHR, April 24, 2003, *Aktas v. Turkey*, Application No. 24351/94, ¶313.

<sup>39</sup> Inter-American Convention to Prevent and Punish Torture, art. 2,

<sup>40</sup> CAT, art. 1.

<sup>41</sup> Inter- American Commission on Human Rights, Towards the Closure of Guantanamo, OAS/ Ser.L/ V/ II., Doc. 20/ 15, 3 June 2015, para. 108, available at [http:// www.oas.org/ en/ iachr/ reports/ pdfs/ Towards- Closure- Guantanamo.pdf](http://www.oas.org/en/iachr/reports/pdfs/Towards-Closure-Guantanamo.pdf).

<sup>42</sup> ¶28 of Moot Compromis.

physical and mental torture.<sup>43</sup> Acts of violence or physical force<sup>44</sup> against the detainees amounted to violations of their rights as it was not strictly warranted by the conduct of the applicant.<sup>45</sup>

*1.B.(ii).(a) The Inter-American Court's Three-Part Test for Torture*

The Court has considered some abuses as acts that attempted to “obliterate the personality” of a victim,<sup>46</sup> it has now mainly focused upon the IACPPT’s three- part inquiry to find torture. As stated by the Tribunal, torture is “(i) intentional; (ii) causes severe physical or mental suffering, and (iii) is committed with an objective or purpose.”<sup>47</sup> Intentionality requires that “the acts committed were deliberately inflicted upon the victim and not the result of negligent conduct, an accident or force majeure.”<sup>48</sup> The Soldiers of SMB inflicted Torture on the Quispe Sisters and other women who were often forced to strip naked in front of soldiers, who beat and groped them in the cells on the base which obliterated the personality of women and was not the result of any negligent conduct. The Act of Soldiers of SMB clearly fulfils all the three part test of torture.

*1.B.(ii).(b) Sexual Violence Amounted to Torture*

This Court has defined 'sexual violence' as actions of “a sexual nature committed with a person without their consent, which besides including the physical invasion of the human body, may

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<sup>43</sup> IACHR, November 25, 2000. Merits, Reparations and Costs, *Bamaca Velasquez v. Guatemala*, Series C No. 70, ¶158.

<sup>44</sup> Supra Note 42.

<sup>45</sup> ECHR, August 27, 1992, *Tomasi v. France*, Application No 12850/87, ¶113.

<sup>46</sup> Maritza Urrutia v. Guatemala, Merits, Reparations, and Costs, Judgment, Inter- Am. Ct. H.R. (ser. C) No. 103, para. 94 (Nov. 27, 2003).

<sup>47</sup> Espinoza Gonzáles v. Peru, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter- Am. Ct. H.R. (ser. C) No. 289, para. 143 (Nov. 20, 2014); Bueno Alves v. Argentina, Merits, Reparations, and Costs, Judgment, Inter- Am. Ct. H.R. (Ser. C) No. 164, para. 79 (May 11, 2007).

<sup>48</sup> Espinoza Gonzáles v. Peru, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter- Am. Ct. H.R. (ser. C) No. 289, para. 189 (Nov. 20, 2014).

include acts that do not imply penetration or even any physical contact whatsoever.”<sup>49</sup> Such degrading treatment may be “characterized by the fear, anxiety and inferiority induced for the purpose of humiliating the victim and breaking his physical and moral resistance.”<sup>50</sup> In *J. v. Peru*<sup>51</sup>, the Court concluded that the “inappropriate touching” of her genital area, without her consent, comprised an act of sexual violence.<sup>52</sup> The court held that the abuse was “both physically and emotionally degrading and humiliating” in violation of Article 5(2)<sup>53</sup>. Furthermore, sexual violence in the form of rape has particularly been held to constitute torture.<sup>54</sup> In *Miguel Castro Castro Prison Case*<sup>55</sup> tribunal observed that the rape “of a detainee by a State agent is an especially gross and reprehensible act, taking into account the victim’s vulnerability and the abuse of power displayed by the agent.”<sup>56</sup> Since that judgment, the Court has consistently recognized that rape constitutes torture, as it is “an extremely traumatic experience” that leaves victims with “great physical and psychological damage,” as well as emotional suffering and social stigma.<sup>57</sup> The Court

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<sup>49</sup> *Miguel Castro Castro Prison v. Peru*, Merits, Reparations, and Costs, Judgment, Inter- Am. Ct. H.R. (ser. C) No. 160, para. 306 (Nov. 25, 2006) (paraphrasing the ICTR judgment). See also *Espinoza Gonzáles v. Peru*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter- Am. Ct. H.R. (ser. C) No. 289, para. 191 (Nov. 20, 2014).

<sup>50</sup> *Caesar v. Trinidad & Tobago*, Merits, Reparations, and Costs, Judgment, Inter- Am. Ct. H.R. (ser. C) No. 123, para. 69 (Mar. 11, 2005); *Loayza Tamayo v. Peru*, Merits, Judgment, Inter- Am. Ct. H.R. (ser. C) No. 33, para. 57 (Sept. 17, 1997). See also *Ireland v. the United Kingdom*, Eur. Ct. H.R., App. No. 5310/ 71, para. 167 (Jan. 18, 1978).

<sup>51</sup> *J. v. Peru*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter- Am. Ct. H.R. (ser. C) No. 275, para. 360 (Nov. 27, 2013).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* *J. v. Peru*, Interpretation of the Judgment on Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter- Am. Ct. H.R. (ser. C) No. 291, para.361.

<sup>54</sup> *Raquel Martí de Mejía v. Perú*, Case 10.970, Report No. 5/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.91 Doc. 7 at 157 (1996); Association for the Prevention of Torture and the Center for Justice and International Law, The next year, the European Court followed suit. *Aydin v. Turkey*, Eur. Ct. H.R., App. No. 23178/ 94 (Sept. 25, 1997).

<sup>55</sup> *Miguel Castro Castro Prison v. Peru*, Merits, Reparations, and Costs, Judgment, Inter- Am. Ct. H.R. (ser. C) No. 160.

<sup>56</sup> *Ibid.*, para. 311 (Nov. 25, 2006).

<sup>57</sup> *Espinoza Gonzáles v. Peru*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter- Am. Ct. H.R. (ser. C) No. 289, para. 193 (Nov. 20, 2014); *Rosendo Cantu et al. v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter- Am. Ct. H.R. (ser. C) No. 216, para. 114 (Aug. 31, 2010).

held that such treatment constituted sexual violence. The combination of factors caused “serious psychological and moral suffering” and amounted to “cruel treatment” in breach of Article 5(2).<sup>58</sup>

Sexual violence as committed by state agents<sup>59</sup> at SMB in the present case constitutes torture and violation of Article 5 of the American Convention.

*I.B.(iii). Failure to ensure State Responsibility violated Article 5 of Inter-American Human Rights Convention.*

The State has failed to bring the SMB,<sup>60</sup> to justice by means of a criminal prosecution thus violating the investigatory aspect of Article 5.<sup>61</sup> Any violation of standards in NIACs should amount to ‘grave breaches’ of the GC convention.<sup>62</sup> Acts of torture must be punished by appropriate penalties according to their grave or serious nature.<sup>63</sup> An investigation is required even in the absence of a complaint from the victim.<sup>64</sup>

The Court has repeatedly stated that to ensure the rights under Article 5, States have the “obligation to investigate possible acts of torture or other cruel, inhuman or degrading treatment.”<sup>65</sup> In *Villagrán Morales et al. v. Guatemala*<sup>66</sup>, the Court held that States should seek to provide citizens with the “minimum conditions for a dignified life.” Even when the acts have not been reported to local authorities, whenever there are indications that such violations have occurred, the State must

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<sup>58</sup> Miguel Castro Castro Prison v. Peru, Merits, Reparations, and Costs, Judgment, Inter- Am. Ct. H.R. (ser. C) No. 160, para.308.

<sup>59</sup> □28 of Moot Compromis.

<sup>60</sup> Ibid.

<sup>61</sup> ECHR, January 24, 2008, *Maslova and Nalbandov v. Russia*, Application No. 839/02, ¶¶92-97; ECHR, November 2, 2004, *Abdulsamet Yaman v. Turkey*, Application No. 32446/96, ¶¶55-61.

<sup>62</sup> ICTY, October 2, 1995, *Prosecutor v. Tadic*, IT-94-1-A, Separate Opinion of Judge Abi-Saab, Part IV.

<sup>63</sup> Article 4, UNCAT; Article 6, IACPPT, 1985.

<sup>64</sup> Article 13, UNCAT; Article 8, IACPPT, 1985.

<sup>65</sup> Bayarri v. Argentina, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter- Am. Ct. H.R. (ser. C) No. 187, para. 88 (Oct. 30, 2008); Ximenes Lopes v. Brazil, Merits, Reparations, and Costs, Judgment, Inter- Am. Ct. H.R. (ser. C) No. 149, para. 147 (July 4, 2006).

<sup>66</sup> Villagrán Morales v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63 (Nov. 19, 1999).



initiate, ex officio and immediately, an impartial, independent and meticulous investigation that allows the nature and origin of the injuries observed to be determined, those responsible to be identified, and their prosecution to commence.<sup>67</sup>

The Tribunal has found Article 5 violations solely on the basis of the State's failure to ensure the right to personal integrity. A failure to investigate serious allegations of ill treatment can result in an independent Article 5 violation— what the European Court has called a “procedural” breach to the corresponding provision of the European Convention.<sup>68</sup> In case of Bayarri, where the Inter-American Court declared two violations to Article 5: the first for the torture perpetrated upon the victim, and the second for Argentina's deficient criminal investigation.<sup>69</sup> The Court has held that the State obligation to investigate is “reinforced” by Articles 1, 6, and 8 of the IACPPT.<sup>70</sup> These three provisions are consonant with the Court's case law, as they require States to “take effective measures to prevent and punish” both torture and “other cruel, inhuman or degrading treatment or punishment.”<sup>71</sup>

In the more recent judgment *Afro- Descendant Communities Displaced From the Cacarica River Basin (Operation Genesis) v. Colombia*<sup>72</sup>, the Court held Colombia responsible “for having failed to comply with its obligation to prevent violations and to protect the rights to life and to personal integrity.

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<sup>67</sup> Bayarri v. Argentina, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter- Am. Ct. H.R. (ser. C) No. 187, para. 92 (Oct. 30, 2008).

<sup>68</sup> Nechiporuk and Yonkalo v. Ukraine, Eur. Ct. H.R., App. No. 42310/ 04, para. 165 (Apr. 21, 2011).

<sup>69</sup> Supra Note 67.

<sup>70</sup> Gudiel Alvarez et al. (“Diario Militar”) v. Guatemala, Merits, Reparations, and Costs, Judgment, Inter- Am. Ct. H.R. (ser. C) No. 253, para. 274 (Nov. 20, 2012).

<sup>71</sup> IACPPT, Art. 6.

<sup>72</sup> *Afro- Descendant Communities Displaced From the Cacarica River Basin (Operation Genesis) v. Colombia*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter- Am. Ct. H.R. (ser. C) No. 270, para 281.

*1.B.(iv) The conditions of detention are an outrage upon personal dignity.*<sup>73</sup>

Certain minimum standards regarding conditions of detention must be observed regardless of the State's level of development.<sup>74</sup> This Court has opined that unliveable prison conditions are a violation of both, Articles 4 and 5.<sup>75</sup> States act as the guarantor of inmates' rights while in detention centres.<sup>76</sup>

In the present case, both the sisters were repeatedly raped, gang raped and were forced to work, thus constituting a violation of personal integrity under Article 5(2).<sup>77</sup>

*1.B.(v). State Emergency does not operate as a defense in the instant case.*

The prohibition against torture and cruel, inhuman, or degrading treatment or punishment is absolute and non-derogable, even under the most difficult circumstances, such as war, threat of war, the fight against terrorism and any other crimes, states of emergency, or internal unrest or conflict, suspension of constitutional guarantees, internal political instability or other public emergencies or catastrophes, this prohibition is part of international **jus cogens**.<sup>78</sup> The prohibition of torture and cruel, inhuman, or degrading treatment is absolute, even in the face of terrorism and

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<sup>73</sup> Articles 8(2) (b) (xxi) and (c) (ii), ICC Statute, 2002.

<sup>74</sup> *Mukong v. Cameroon*, (1994) UN Do CCPR/C/51/D/458/1991, ¶9(3).

<sup>75</sup> IACHR, July 5, 2006, Preliminary Objections, Merits, Reparations and Costs, *Montero Aranguren et al v. Venezuela*, Series C No. 150, ¶104.

<sup>76</sup> IACHR, September 7, 2004, Merits, Reparations & Costs, *Tibi v. Ecuador*, Series C No. 114, ¶150, United Nations Standard Minimum Rules for the Treatment of Prisoners, U.N. Doc. A/CONF/611.

<sup>77</sup> IACHR, September 7, 2004, Merits, Reparations & Costs, *Tibi v. Ecuador*, Series C No. 114, ¶150.

<sup>78</sup> *Ruano Torres et al. v. El Salvador*, Merits, Reparations and Costs, Judgment, Inter- Am. Ct. H.R. (ser. C) No. 292, para. 120 (Oct. 5, 2015); *Caesar v. Trinidad and Tobago*, Merits, Reparations, and Costs, Judgment, Inter- Am. Ct. H.R. (ser. C) No. 123, para. 100 (Mar. 11, 2005).

threats to national security.<sup>79</sup>In the present case even though President Juan Antonio Morales suspended basic guarantees and declared emergency it will not be a valid defence against the torture and cruel treatment inflicted upon Quispe Sisters and other women in Warimi as right to humane treatment may not be suspended under any circumstances.

Article 27 of the American Convention establishes that the entirety of Article 5 is non-derogable. The Inter-American Court has reiterated that “the right to humane treatment may not be suspended under any circumstance.”<sup>80</sup>

***1.C. There was a gross violation of Article 7 of the Convention pertaining to Personal Liberty of Individual.***

Deprivation of liberty can be justified only when it is not arbitrary and adheres to procedures and reasons, established by law.<sup>81</sup>Article 7 of the ACHR establishes this general right.<sup>82</sup>The Quispe sisters were deprived of their personal liberty in the Warimi State when it was under military control and also, faced atrocities at the hands of the military who constitute state actors.<sup>83</sup> Detainment on false grounds also forms a part of deprivation of personal liberty and is violative of the Convention.<sup>84</sup>

Any form of detention, imprisonment, institutionalization, or custody of a person in a public or private institution in which that person is not permitted to leave at will, or is by order of or under

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<sup>79</sup>Association for the Prevention of Torture and the Center for Justice and International Law, Torture in International Law: A Guide to Jurisprudence 30, 72, 111 (2008); Nihal Jayawickrama, The Judicial Application of Human Rights Law: National, Regional, and International Jurisprudence 298 (2002).

<sup>80</sup> Ximenes Lopes v. Brazil, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 149, para. 126 (July 4, 2006); “Juvenile Reeducation Institute” v. Paraguay, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 112, para. 157 (Sept. 2, 2004).

<sup>81</sup> Ibid.

<sup>82</sup> Neptune v. Haiti, Merits, Reparations and Costs, Judgment, IACrtHR(ser.C)No.180, ¶89 (May 6, 2008).

<sup>83</sup> ¶ 28 of Moot Compromis.

<sup>84</sup> ACHR, Article 7(5).

de facto control of a judicial, administrative or any other authority, for reasons of humanitarian assistance, or because of crimes or legal offenses, including by the military at a military base,<sup>85</sup> is contemplated under Article 7.<sup>86</sup> Violation of right of personal liberty also leads to a violation of the right to personal security. Any deprivation, must not be beyond the usual hardship inherent in conditions of detention.<sup>87</sup> The detainment of the women, including the Quispe sisters by the military personnel is a violation of their rights. They were also subjected to torture both physical as well as mental. They were detained without any reason, hence violating the very basis of the principle of habeas corpus and their freedom. After their release, they were not given a chance to air their grievances, nor was any action or investigation made into the conduct of the military. The status of women in NAIRA was such that, Maria Quispe didn't have the liberty or the security to go to her place of work without fear.

The offences combined with impunity, is a reminder of a case where there existed an asylum claims, where the woman was battered by her husband, with no police intervention even after pleading.<sup>88</sup>

Impunity for sexual violence in NAIRA existed in homes and on the streets, and contributed to these crimes being viewed as less serious.<sup>89</sup> The issue of sexual violence was 'normalized' in post-

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<sup>85</sup> Galindo Cardenas et al. v. Peru, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 301, □ 121 (Oct. 2, 2015).

<sup>86</sup> Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (2008), General Provision, OEA/Ser.L/V/II.131 doc. 26, available at <http://www.oas.org/en/iachr/mandate/Basics/principlesdeprived.asp>.

<sup>87</sup> Chaparro Álvarez and Lapo Íñiguez v. Ecuador, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 170 (Nov. 21, 2007).

<sup>88</sup> See Transcript of Hearing, *Matter of Rodi Alvarado Pefia*, at 23-4, 27-8 (Oct. 19, 1995); see also *Matter of R-A-*, 22 I&N Dec. 906 (BIA 1999), *vacated*, 22 I&N Dec. 906 (A.G. 2001), *remanded*, 23 I&N Dec. 694 (A.G. 2005), *remanded*, 24 I&N Dec. 629 (A.G. 2008).

<sup>89</sup> JELKE BOESTEN, SEXUAL VIOLENCE DURING WAR AND PEACE: GENDER, POWER AND POST-CONFLICT JUSTICE IN PERU 99 (2014); see Romi Sigsworth NahlaValji, Continuities of Violence against Women and the Limitations of Transitional Justice: The Case of South Africa, in GENDER IN TRANSITIONAL JUSTICE 115, 119-20 (Susanne Buckley-Zistel & Ruth Stanley eds., 2012).

conflict contexts, as a result of continuous inaction.<sup>90</sup> The utter disregard for Maria Quispe's protection despite previous assaults, reflects this indifference. The women in NAIRA were treated as mere property.<sup>91</sup>

Deprivation of liberty is always an exception.”<sup>92</sup>The victims were not provided with reasons for detainment, an obligation under Article 7(4).<sup>93</sup> Neither of these were provided, nor were the required procedures complied with. Further, (6) is violated where those deprived of their liberty were not entitled to recourse before a competent court.<sup>94</sup>There was no hearing or investigation in the matter pertaining to the state of affairs in Warmi. Hence the appeal to the IACrtHR was necessary. Further delay in the delivery of justice would be unfair on the part of the victims.<sup>95</sup>Also, it is the duty of the State to protect the rights of all its citizens, equally.<sup>96</sup>NAIRA has not taken any substantive measures to ensure that the rights of women are safeguarded and that equality prevails.

***1.D The detainment of the Quispe sisters by the military and the treatment given to them fall within the definition of slavery, under Article 6 of the ACHR.***

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<sup>90</sup> U.N. Secretary General, Report of the Secretary-General on the implementation of Security Council resolutions 1820 (2008) and 1888 (2009), ¶14, U.N. Doc. A/65/592-S/2010/604 (Nov. 24, 2010).

<sup>91</sup> Kathleen Barry, Female Sexual Slavery: Understanding the International Dimensions of Women's Oppression, 3 Hum. Rts. Q. 44 (1981); Compromis, ¶ 24, 25.

<sup>92</sup> Norín Catrimán et al. (Leaders, members, and activists of the Mapuche Indigenous People) v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 279, para. 309 (May 29, 2014).

<sup>93</sup> Expelled Dominicans and Haitians v. Dominican Republic, Preliminary Objections, Merits, Reparations and Costs, Judgment, IACrtHR (ser. C) No. 282, ¶ 369 (Aug. 28, 2014).

<sup>94</sup> ANTKOWIAK, T. M., & GONZA, A. (2017). The American Convention on Human Rights: essential rights; p.168.

<sup>95</sup> Galindo Cardenas et al. v. Peru, Preliminary Objections, Merits, Reparations and Costs, IACrtHR (ser. C) No. 301, ¶ 44 (Oct. 2, 2015).

<sup>96</sup> Ibid; LópezÁlvarez v. Honduras, Merits, Reparations, and Costs, Judgment, IACrtHR (ser. C) No. 141, ¶96–98 (Feb. 1, 2006).

Article 6 forbids anyone from being subjected to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women.<sup>97</sup> The women were forced into involuntary servitude while they were illegally detained which affects the very dignity or the physical or intellectual capacity of a prisoner.<sup>98</sup>

In March 1992, while they were still minors, they were held at the SMB on false accusations for a month, and were forced to wash, cook, and clean. Both the sisters were also repeatedly raped by the soldiers.<sup>99</sup> Similar treatment was suffered by the other women who were subjected to this detainment. In the case of *Ituango massacres v. Colombia*<sup>100</sup>, the victims had been forced to work for the attackers for a period of 19 days, which the Court held to be violative of this article and the forced labour was brought into the ambit of slavery.

The atrocities against these women have become a part of NAIRA's history.<sup>101</sup> It has become a part of the very culture of Naira and hence the women themselves feel that this is their fate. The truth commission reports addressing human rights abuses in the conflicts in Guatemala and Peru revealed brutal sexual violence, in particular against women from indigenous and rural communities.<sup>102</sup> In Colombia, reports from human rights organizations and the Constitutional Court's rulings highlighted the extensive amount of sexual violence perpetrated by armed actors

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<sup>97</sup> Article 6(1), ACHR.

<sup>98</sup> Article 6(2) ACHR.

<sup>99</sup> ¶ 28 of Moot Compromis.

<sup>100</sup> *Ituango Massacres v. Colombia*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, IACrHR. (ser. C) No. 148 (July 1, 2006).

<sup>101</sup> ¶ 10 of Moot Compromis.

<sup>102</sup> COMISION DE ESCLARECIMIENTO HIST6RICO, GUATEMALA: MEMORIA DE SILENCIO (1999), <http://www.centrodememoriahistorica.gov.co/descargas/guatemala-memoria-silencio/guatemala-memoria-del-silencio.pdf> [hereinafter CEH Final Report]; Comisi6n de la Verdad y Reconciliaci6n [Truth and Reconciliation Commission] [Final Report] (2003), <http://cverdad.org.pe/ifinal/>.

in the conflict, the different categories of victims and the multiple uses of this violence.<sup>103</sup> These documentation efforts played an important role in making visible the nature, scale and patterns of sexual violence in each conflict.

The situation in Guatemala from 1960-1996 was similar, where the military rule encompassed a lot of atrocities against the women. The Commission found that the government-led counterinsurgency campaign resulted in gross human rights abuses against civilians, as well as in the genocide of various Mayan communities in four regions of the country.<sup>104</sup> It also found that state agents perpetrated widespread and systematic sexual violence as part of its counterinsurgency campaign.<sup>105</sup> Along with torture, rape was one of the human rights violations that most contributed to generating and maintaining state terror during the conflict, and that it was committed with the intention to destroy the victims' identity and dignity in a profound way.<sup>106</sup>

Female sexual slavery is present in all situations where women or girls cannot change the immediate conditions of their existence; where regardless of how they got into those conditions they cannot get out; and where they are subject to sexual exploitation and physical abuse.<sup>107</sup> For these reasons hence, the recognition of the slavery, especially sexual slavery is of utmost importance in this case, against the Quispe sisters and the other women in Warmi.

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<sup>103</sup> BastaYa! Colombia: Memorias de Guerra y Dignidad, CENTRO NACIONAL DE MEMORIA HISTORICA, <http://www.centrodememoriahistorica.gov.co/descargas/informes2013/bastaYa/basta-ya-colombia-memorias-de-guerra-y-dignidad-2016.pdf>.

<sup>104</sup> CEH Final Report, Section IX at ¶¶1731-57 (Statistical summary); CEH Final Report, Section XVIII at ¶ 2901.

<sup>105</sup> CEH Final Report, at ¶¶ 2351, 2393. CEH Final Report, at ¶¶ 2398, 2476-78.

<sup>106</sup> MEMORY OF SILENCE: THE GUATEMALAN TRUTH COMMISSION REPORT, at 153; CEH Final Report, at ¶ 2482-83.

<sup>107</sup> Kathleen Barry, Female Sexual Slavery: Understanding the International Dimensions of Women's Oppression, 3 Hum. Rts. Q. 44 (1981).

***I.E. Failure of Respondent to Investigate, Prosecute and Punish within reasonable time is inconsistent with its International obligations and has violated Article 8 and Article 25 of Inter-American Human Rights Convention.***

The Court calls this constellation of guarantees for victims and family members “the right of access to justice,” and finds its basis in Articles 8 and 25 of the American Convention<sup>108</sup>. Articles 8 and 25 of the ACHR are necessary to ensure free<sup>109</sup> and full<sup>110</sup> exercise of the rights and freedoms protected therein.<sup>111</sup>

States Parties are required to take to fulfil their guarantee obligation consists in providing effective judicial remedies in line with the rules of due process, and seeking the restoration of the violated right, if possible, and reparation of any damage caused.<sup>112</sup> Consequently, it is the duty of the State to investigate human rights violations, prosecute those responsible and avoid impunity.<sup>113</sup> Article 8(1) of the Convention includes the rights of the victim's relatives to judicial guarantees and recognizes the right to have the crimes effectively investigated, those responsible prosecuted for committing said unlawful acts and to have the relevant punishment, where appropriate, meted out.<sup>114</sup> The State in the present case completely disregarded the acts of SMB, leaving the victims

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<sup>108</sup> Cruz Sánchez et al. v. Peru, Preliminary Objections, Merits, Reparations, Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 292, para. 398 (Apr. 17, 2015); Landaeta Meijias Brothers et al. v. Venezuela, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 281, para. 265 (Aug. 27, 2014).

<sup>109</sup> IACHR, August 16, 2000, Merits, Durand and Ugarte v. Peru, Series C No. 68, ¶17.

<sup>110</sup> IACHR, August 18, 2000, Merits, Cantoral Benavides v. Peru, Series C No. 69, ¶171.

<sup>111</sup> IACHR, June 26, 1986, Preliminary Objections, Velasquez Rodriguez v. Honduras, Series C No. 1, ¶91; IACHR, May 11, 2007, Merits, Reparations and Costs, La Rochela Massacre v. Colombia, Series C No. 163, ¶145; IACHR, May 14, 2013, Merits, Reparations and Costs, Mendoza et al. v. Argentina, Series C No. 260, ¶217.

<sup>112</sup> Velásquez-Rodríguez v. Honduras. Preliminary Objections. Judgment of June 26, 1987. Series C No. 1, para. 91; Case of the Miguel Castro-Castro Prison v. Peru. Merits, reparations, and costs. Judgment of November 25, 2006. Series C No. 160, para. 381; Case of the Rochela Massacre, supra note 9, para. 145; and Case of Zambrano-Vélez et al., supra note 9, para. 114.

<sup>113</sup> Loayza-Tamayo v. Peru, 1998 Inter-Am. Ct. H.R. (ser. C) No. 42, 7 169- 170 (Nov. 27, 1998).

<sup>114</sup> Blake v. Guatemala, 1998 Inter-Am. Ct. H.R. (ser. C) No. 36, \$T 96-97 (Jan. 24, 1998); Las Palmeras v. Colombia, 2001 Inter-Am. Ct. H.R. (ser. C) No. 90, \$S 59-67 (Dec. 6, 2001); Durand v. Peru, 2000 Inter-Am. Ct. H.R. (ser. C) No. 68, T 111, 131, 146 (Aug. 16, 2000).



without any sort of judicial protection, which has allowed offenders to go unpunished violating Article 8 and 25 (judicial guarantees and judicial protection) of the American Convention.

*1.E.(i) Incompetency of Domestic Laws and Lack of State Action violated the rights of Quispe Sister.*

Article 25(1), ACHR provides that everyone has the right to an effective recourse<sup>115</sup> by a competent court for acts violating the fundamental rights recognized by the ACHR,<sup>116</sup> so that, inter alia, those responsible for the violations be prosecuted, impunity<sup>117</sup> prevented and reparations obtained for the damages suffered.<sup>118</sup> The legitimacy of the judgement rests upon the legitimacy of the process.<sup>119</sup>

Upon receiving information of the incidents,<sup>120</sup> State of Naira should have conducted a serious<sup>121</sup>, impartial<sup>122</sup>, and effective investigation<sup>123</sup>, subject to the requirements of due process<sup>124</sup>, to clarify the facts pertaining to the detention<sup>125</sup>, torture<sup>126</sup>, and to identify and punish those responsible, in compliance with its obligation pursuant to Article 1(1) of the Convention.<sup>127</sup>

*1.E.(ii) Pre-Trial Detention By Soldiers At Smb Violated Rights Of Quispe Sisters*

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<sup>115</sup> Article 8, UDHR, 1948.

<sup>116</sup> IACHR, January 25, 1996, Preliminary Objections, *Paniagua Morales et al. v. Guatemala*, Series C No. 23, ¶164; IACHR, August 16, 2000, Merits, *Durand and Ugarte v. Peru*, Series C No. 68, ¶103.

<sup>117</sup> IACHR, November 27, 1998, Reparations and Costs, *Loayza-Tamayo v. Peru*, Series C No. 42, ¶170.

<sup>118</sup> Ibid. ¶168.

<sup>119</sup> IACHR, May 30, 1999, Merits, Reparations and Costs, *Castillo Petruzzi et al. v. Peru*, Series C No. 52, ¶219.

<sup>120</sup> ¶10, 15, 32 of Moot Compromis.

<sup>121</sup> IACHR, August 16, 2000, Merits, *Durand and Ugarte v. Peru*, Series C No. 68, ¶125 and 126.

<sup>122</sup> IACHR, May 14, 2013, Merits, Reparations and Costs, *Mendoza et al. v. Argentina*, Series C No. 260, ¶218.

<sup>123</sup> IACHR, May 26, 2010, Preliminary Objections, Merits, Reparations and Costs, *Manuel Cepeda Vargas v. Colombia*, Series C No 104, ¶117.

<sup>124</sup> Article 8, ACHR, 1978.

<sup>125</sup> Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment 1988.

<sup>126</sup> Article 2(1), Inter-American Convention to Punish and Prevent Torture, 1985.

<sup>127</sup> IACHR, July 8, 2004, Merits, *Gomez Paquiyauri Brothers v. Peru*, Series C No. 110, ¶146.

The Republic of Naira has violated 8(2) of the American Convention, insofar as the Pre-trial detention of Quispe sister's exceeded the temporal, reasonable and proportional limits to which it should have been subjected. Tribunal judgments that have held pre trial detention to be illegal.<sup>128</sup> In *Palamara Iribarne v. Chile*, the Court found a violation of Article 7(2) along with Convention Article 8(2), which establishes the presumption of innocence, among other guarantees. In the case of Palamara Iribarne, it was held that his pre-trial detention was contrary to domestic law and the American Convention.<sup>129</sup> In the present case both the sisters, were held at the SMB on false accusation for a month where they were raped and were forced to work, cook and clean.<sup>130</sup> Therefore it can be concluded that State of Naira has clearly violated Article 8(2) of this convention. Further, when a person is secretly detained, the Court has noted the impossibility of exercising the right to judicial protection which in turn violates Article 25 and Article 8.<sup>131</sup>

*1.E.(iii) Prolonged Delay In Administration Of Justice By State Of Naira Violated Rights Of Quispe Sisters.*

A delay may, in itself, constitute a violation of judicial guarantees.”<sup>132</sup> Article 25 in relation to Article 1(1) of the American Convention obliges the State to guarantee to every individual access to the administration of justice and, in particular, to simple and prompt recourse, so that, inter alia,

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<sup>128</sup> Barreto Leiva v. Venezuela, Judgement (IACtHR, 17 Nov. 2009), p.123.

<sup>129</sup> Palamara Iribarne v. Chile, Merits, Reparations, Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 135, para. 213 (Nov. 22, 2005).

<sup>130</sup> □ 28 of Moot Compromis.

<sup>131</sup> Expelled Dominicans and Haitians v. Dominican Republic, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 282, para. 396 (Aug. 28, 2014).

<sup>132</sup> Radilla Pacheco v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, InterAm. Ct. H.R. (ser. C) No. 209, para. 191 (Nov. 23, 2009); Anzualdo Castro v. Peru, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 202, para. 124 (Sept. 22, 2009).

those responsible for human rights violations may be prosecuted and reparations obtained for the damages suffered.<sup>133</sup>

Further, Article 8(1) of the Convention mandate that a State immediately initiate a criminal investigation in response to allegations of torture. Article 8 has been given a broad interpretation. Thus interpreted, the aforementioned In *Landaeta Meijias Brothers et al. v. Venezuela*, after 17 years, the State had not proceeded beyond an initial investigation for an extrajudicial execution.<sup>134</sup> This delay, by itself, violated Article 8, and the Court did not find it necessary to include any further considerations on the other elements relating to the reasonable time.”<sup>135</sup> There has already been a delay of 25 years by the state in initiating an investigation.<sup>136</sup> In December 2014 channel GTV interviewed Monica Quispe where she described difficult circumstances she and her sister had faced by officials of SMB<sup>137</sup>. This neglectful behaviour on part of state has been part of its history as well as present, violating human rights. There is a breach of duty by state of Naira since the acts of sexual violence were never reported or investigated by the state on its own initiative.<sup>138</sup>

Between 1970 and 1999 there were numerous acts of violence and confrontations in Southern Naira. The media reported complaints of human rights violations but nothing ever came of them.<sup>139</sup> and no proper investigation was carried out and the offenders were not punished by the

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<sup>133</sup> Loayza-Tamayo v. Peru, 1998 Inter-Am. Ct. H.R. (ser. C) No. 42, 168 (Nov. 27, 1998).

<sup>134</sup> *Landaeta Meijias Brothers et al. v. Venezuela*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 281, para. 265 (Aug. 27, 2014).

<sup>135</sup> *Rodriguez Vera et al. (Persons Disappeared from the Palace of Justice) v. Colombia*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 287, para. 506 (Nov. 14, 2014); *García and Family Members v. Guatemala*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 258, para. 153 (Nov. 29, 2012).

<sup>136</sup> *Id.*

<sup>137</sup> □ 27 of Moot Compromis.

<sup>138</sup> □ 30 of Moot Compromis.

<sup>139</sup> □ 10 of Moot Compromis.

State, violating Article 8 of American convention. The right of Monica has been taken away by the state by not prosecuting the responsible for committing the disastrous act.

Hence, violation of Article 8 and Article 25 of American Convention.

*I.E.(iv) Quispe Sisters and Others were not even provided the opportunity to Fair Trial.*

Article 3(1)(d) of the Geneva Conventions provides that a person ‘hors de combat’ be should be accorded all the judicial guarantees<sup>140</sup> which are recognized as indispensable by civilized peoples, it being a part of Customary International Law.<sup>141</sup>

Quispe Sisters and other detainees’ right to a fair trial<sup>142</sup> without undue delay<sup>143</sup> and right to notify their family member, counsel or any other persons having legitimate interest in the information,<sup>144</sup> were violated by the State authorities.<sup>145</sup>

The victims were prevented from exercising, either themselves or through their representatives, their right to an effective recourse before a competent domestic court, since they were detained unlawfully and clandestinely.<sup>146</sup>

*I.E.(v) Statutory Limitation Cannot Be Invoked In The Present Case.*

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<sup>140</sup> Jean Pictet, *Commentary on the First Geneva Convention*, ICRC, at pg. 55 (1952); Rule 148, Jean Henckaerts and Louis Doswald-Beck, *Customary International Humanitarian Law*, ICRC Customary IHL Rules, (2005).

<sup>141</sup> Sandoz, Swinarski and Zimmermann, *Commentary on the Additional Protocols of June 8, 1977*, ICRC at pg. 1396 (1987) ICRC Study on Customary International Humanitarian Law (2005), Rule 100.

<sup>142</sup> Article 8(1), ACHR, 1978.

<sup>143</sup> Articles 64(2) and Article 67(1), Rome Statute; Articles 20(1) and 21(4) (c), ICTY Statute; Articles 19(1) and 20(4) (c), ICTR Statute; Articles 9(3) and 14(3) (c), ICCPR; Articles 5(3) and 6(1), ECHR; Article 8(1), African Charter on Human and People’s Rights, 1986.

<sup>144</sup> Article 10(2), Declaration on Enforced Disappearance; Article 8(2) (a), ACHR, 1978.

<sup>145</sup> IACHR, September 18, 2003, Merits, Reparations and Costs, *Bulacio v. Argentina*, Series C No. 100, ¶130.

<sup>146</sup> IACHR, November 19, 1999, Merits, “*Street Children*” (*Villagran-Morales et al.*) v. *Guatemala*, Series C No. 63, ¶236.

The statute of limitations causes the lapse of time to terminate the right to bring action for punishment and, as a general rule, it sets a restriction on the punishing authority of the State. In international criminal law and the Court's own jurisprudence, such serious crimes "shall not be subject to any statute of limitations" or benefit from other "measures designed to eliminate responsibility."<sup>147</sup> This notwithstanding, the statute of limitations is inadmissible in connection with and inapplicable to a criminal action where gross human rights violations in the terms of International Law are involved, so has been held in the Court's constant and consistent decisions.<sup>148</sup>

In case of *Bulacio*,<sup>149</sup> it was held that the duty to punish doctrine not only rejects amnesty provisions, provisions on prescription, or the establishment of measures designed to eliminate responsibility-those legal institutions explicitly rejected in *Barrios Altos*-but also rejects any "domestic legal provision or institution" viewed as an obstacle to punishment.<sup>150</sup>

The "extinguishment provisions or any other domestic legal obstacle that attempts to impede the investigation and punishment of those responsible for human rights violations are inadmissible."<sup>151</sup>

The court held "no domestic legal provision or institution, including extinguishment, can oppose compliance with the judgments of the Court regarding investigation and punishment of those responsible for human rights violations."<sup>152</sup>

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<sup>147</sup> U.N. Working Group on Enforced or Involuntary Disappearances, General Comment on Enforced Disappearance as a Continuous Crime, A/HRC/16/48, para. 2 (2010).

<sup>148</sup> *Barrios-Altos v. Peru*. Merits. Judgment of March 14, 2001. Series C No. 75, para. 41; *Case of Almonacid-Arellano v. Chile*. Preliminary Objections, Merits, reparations, and costs. Judgment of September 26, 2006. Series C No. 154, para. 110; and *Case of the Rochela Massacre*, *supra* note 9, para. 294.

<sup>149</sup> *Bulacio v. Argentina*, 2003 Inter-Am. Ct. H.R. (sec. C) No. 100, T 2 (Sept. 18, 2003).

<sup>150</sup> See *id.* 117.

<sup>151</sup> *Bulacio v. Argentina*, 2003 Inter-Am. Ct. H.R. (sec. C) No. 100, ¶116 2 (Sept. 18, 2003) (discussing potential Argentinean human rights violations under the American Convention).

<sup>152</sup> *Ibid.* ¶117.

Lastly, any statute of limitation which hampers the state's working to prosecute, investigate and punish onto the case of grave human rights violation should be abolished and to continue the investigation since court concluded that "it is necessary for the State to continue and conclude the investigation of the facts and to punish those responsible for them."<sup>153</sup> The Argentinean court was obligated to follow the Inter-American Court's decision<sup>154</sup> and subsequently ordered the continuation of the criminal prosecution in spite of statutory limitations.<sup>155</sup> Therefore, in the present case Criminal Prosecution should continue in spite of 15 year statute of limitation.

**2. ARTICLE 7 OF THE INTER-AMERICAN CONVENTION ON THE PREVENTION, PUNISHMENT  
AND ERADICATION OF VIOLENCE AGAINST WOMEN (CONVENTION OF BELEM DO PARA)  
HAS BEEN VIOLATED.**

Cases such as that of Loayza Tamayo, where a female university professor was arrested and subjected to violence,<sup>156</sup> prove that the rate of violence against women is high and the defences are weak.

The Miguel Castro-Castro Prison case<sup>157</sup> involved gender violence in the hands of the military which devastated Peru for many years, similar to the situation that had arisen in the Warmsi State. The impact of the violence against women was to make them victims twice over, first as victims of an attack on their right to humane treatment<sup>158</sup> and second, as a woman. The Convention of

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<sup>153</sup> Ibid □ 121.

<sup>154</sup> ACHR, art. 68(1); see also Corte Suprema de Justicia [CSJN] Argentinean Supreme Court of Justice, 23/12/2004, "Espósito, Miguel Angel s/incidente de prescripción de la acción penal promovido por su defensa," La Ley [L.L.] (2004-E-224) (Arg.).

<sup>155</sup> See Esposito, Article 18 of the National Constitution.

<sup>156</sup> IACHR, September 17, 1997, Merits, Loayza Tamayo v. Peru, Series C No. 33.

<sup>157</sup> Miguel Castro Castro Prison v. Peru, Merits, Reparations, and Costs, Judgment, IACRtHR. (ser. C) No. 160, ¶ 297 (Nov. 25, 2006).

<sup>158</sup> Article 5, IACHR.

Belem do Para, entitles the duties of the State and lists the actions that the State must undertake and article 7 thereof serves as the basis of the jurisdiction of the Inter-American Court, as confirmed in the Cotton Fields case.<sup>159</sup> It requires the State to undertake to ‘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 where necessary’.<sup>160</sup> Thus Article 7 of the Convention has been violated. The brutal murder of Zuleimy Pareja, where the crime was termed as murder and not femicide by virtue of her being transgender, resulted in the accused being awarded a lesser sentence.<sup>161</sup> This case in itself violated Articles 7 (a), (c), (e) and (h) of the Convention of Belem do Para.

With respect to the brutal murder of Analia Sarmiento, her murderer, Guillermo Alcázar, was twice accused and once convicted of rape and yet was out on probation, thereby endangering the safety of multiple women, of which Analia Sarmiento was the unfortunate victim.<sup>162</sup> This situation also violated Articles 7 (b), (c).

In spite of the measures taken by NAIRA under the ZTPGBV, the policy failed to prevent the fate met by Maria Quispe, a situation that could have easily been avoided with a proper State mechanism. The IACrTHR has previously held in the case of Maria da Penha<sup>163</sup>, where the husband of the victim used to domestically abuse her and yet the lower courts did not prosecute him, even with proper evidence against him that such an act was against the IACHR as well as Convention of Belem do Para.

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<sup>159</sup> González et al (“CottonField”) v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, IACrTHR (ser. C) No. 205 (Nov. 16, 2009); Laurence Burgorgue-Larsen and Amaya Ubeda De Torres, *The Inter-American Court of Human Rights*, at pg. 445 (1st ed. 2011).

<sup>160</sup> Article 7(c), Belem do para.

<sup>161</sup> Compromis, ¶ 16.

<sup>162</sup> Compromis, ¶ 18.

<sup>163</sup> Maria da Penha Maia Fernandes v. Brazil, Case 12.051, IACHR., Report No. 54/01, OEA/Ser./L/V/II.111 doc. 20 rev. (2001).

The Convention of Belem do para states the obligation of state to condemn and pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence.<sup>164</sup> The atrocities committed against the women in the SMB were never properly investigated. A similar situation arose in Ciudad Juarez, where the Court established that the State has failed in its duty to prevent gender based violence against women, due to an inefficient State mechanism and general indifference towards the rights of women.<sup>165</sup> Further in the case of Maria da Penha,<sup>166</sup> the IACHR considered the treatment of the petitioner to be part of a general pattern of negligence and lack of effective action by the State in prosecuting and convicting aggressors. It emphasized that the case was an example of both a failure to fulfil the obligation with respect to prosecute and a failure to prevent such violence. The absence of effective judicial action, impunity, and the inability of victims to obtain compensation demonstrated the State's lack of commitment in properly addressing domestic violence.<sup>167</sup> It further held that if the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction.

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<sup>164</sup> Article 7, Convention of Belem do Para.

<sup>165</sup> Antkowiak, Thomas M. and Gonza, Isabel Alejandra, Introduction to the American Convention on Human Rights: Essential Rights (May 8, 2017).Pg. 430-431 The American Convention on Human Rights: Essential Rights (Oxford Univ. Press), 2017; Seattle University School of Law Research Paper No. 17-09; University of Washington School of Law Research Paper No. 2017-18. Available at SSRN: <https://ssrn.com/abstract=2964984>.

<sup>166</sup> Supra 163.

<sup>167</sup> Ibid.



## **REQUEST FOR RELIEF**

Based on the foregoing submissions, the Representatives for the victims respectfully request this court to find that the State of Naira has violated Articles 4, 5, 6, 7, 8 and 25 read with Article 1(1) ACHR along with violations of Article 7 of the Convention of Belem do Pará.

In finding the violation of the aforementioned articles, the representatives of the victims request this Court to order the State that: -

1. The State shall make a formal acknowledgement of the breach of its duty in Warmi during the Military Rule and tender such apology to the population and ensure its non-repetition;
2. It shall take measures to ensure that the gender based violence that occurs in Naira is prioritized, and the laws implemented strictly with stringent punishment.
3. It shall provide all victims of gender based violence adequate reparations for the delay of justice.

Date:

Counsel on behalf of the Representatives of the Victims