Case of María Elena Quispe and Mónica Quispe

v.

Republic of Naira

Memorial for the State

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II. STATEMENT OF THE FACTS

From 1970 to 1999, the Republic of Naira (hereinafter: the State) was confronted with an armed movement called "Freedom Brigades" which carried out terrorist attacks in the South of Naira.[1] Then-president Morales declared a state of emergency to deal with the violence and maintain control over the affected provinces.[2] Additionally, he suspended guarantees and instated Judicial Command Units within Special Military Bases (hereinafter: SMB) in the affected districts between 1980 and 1999.[3]

During the state of emergency, military officials allegedly abused the local population. When NGOs reported human rights violations the State conducted several *ex officio* investigations[4], which were closed due to lack of evidence.[5]

After a high-profile domestic violence case in December 2014 accusations came to light in an interview with Mónica Quispe.[6] This represented the first time that the story of Mónica and her sister María Elena (hereinafter: the petitioners) came to light. According to their statements they were held captive for a month at the ages of 15 and 12 respectively by the SMB in the province of Warmi in March 1992.[7] While in custody of military personnel, they were allegedly the victims of rape and were made to wash, cook and clean every day.[8] This allegedly resulted in a reduction of their quality of life. Upon seeing the interview, the NGO Killapura offered to take on the

[1] Hypothetical, §8.
[2] *Ibid.*, §9.
[3] *Ibid.*
[4] C.Q., No.43.
[5] *Ibid.*
[6] Hypothetical, §§23-28.
[7] Hypothetical, §28; C.Q., No.69.
[8] Hypothetical, §28.

petitioners' case.[9] The authorities issued a statement denying all the claims which was supported by the residents of Warmi.[10]

The petitioners filed a claim before a national Criminal Court, however the claim was time-barred due to the Statute of Limitations, which sets the time limit for launching criminal proceedings on 15 years.[11] Killapura then requested the State to take the necessary measures to allow for these acts to be prosecuted. Additionally, Killapura asked for measures not limited to the petitioners but a general and contextual investigation into what happened at the time of the SMB, disregarding the Statute of Limitations.[12] Furthermore, it sought reparations for the women of Warmi and their children.[13]

The State has introduced measures aimed at helping the victims of the alleged violations, including the establishment of a High-Level Committee to look into the re-opening of the criminal cases, the creation of a Truth Commission (hereinafter: TC) to investigate the facts surrounding the alleged violations, and the creation of a Special Fund for Reparations. Additionally, the petitioners' case has also been included in the Zero Tolerance Policy on Gender-Based Violence (hereinafter: ZTPGBV)[14], which has been allocated a significant budget for its implementation and is based on cooperation with civil society, victims' associations and women's organizations.[15] This policy includes specific and immediate measures to address gender-based violence.[16] The State also established a Gender-Based Violence Unit in the public prosecutor's office and the judicial branch, which includes mandatory training and education for public servants and it also provides assistance

[9] *Ibid.,* §31.
[10] *Ibid.*, §32.
[11] *Ibid.*, §33; C.Q., No.20.
[12] Hypothetical, §33.
[13] *Ibid.*
[14] *Ibid.*, §34.
[15] *Ibid.*, §19; C.Q., No.64.
[16] *Ibid,* §19.

to female victims.[17] Furthermore, the State is considering amending the legislation on femicide, violence, discrimination and issues of gender identity[18] and intends to create an Administrative Program on Reparations and Gender for the implementation of reparations for victims of gender-based violence.[19]

The petitioners allege that all of the above-mentioned measures were insufficient.[20] Killapura filed a petition before the Inter-American Commission on Human Rights (hereinafter: the Commission), citing violations of Articles 1(1), 2, 4, 5, 6, 7, 8 and 25 of the American Convention on Human Rights (hereinafter: ACHR) as well as violations of Article 7 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (hereinafter: Belém do Pará). [21]

The State denies that it is responsible for the alleged human rights violations and does not intend to reach a friendly settlement.[22] The Commission found both that the case was admissible and that there were violations of all the aforementioned Articles. The State did not agree with the Commission's recommendations and on September 20, 2017, the Commission referred the case to the jurisdiction of the Inter-American Court of Human Rights (hereinafter: the Court).[23]

[17] *Ibid*, §20.
[18] *Ibid.*, §21.
[19] *Ibid*., §22.
[20] *Ibid.*, §36.
[21] *Ibid.*, §38.
[22] *Ibid*., §40.
[23] *Ibid.*, §42.

III. LEGAL ANALYSIS

PRELIMINARY OBJECTIONS

1. Lack of jurisdiction *ratione temporis* of the Court with regards to Belém do Pará

The State has filed a preliminary objection before the Commission concerning the lack of jurisdiction *ratione temporis* of the Court over Article 7 Belém do Pará.[24] As the State only ratified The Convention of Belém do Pará in 1996[25], the Court cannot rule in this case on the basis of said Convention, since the alleged violations took place in March 1992, four years before the ratification.[26]

The Court has consistently referred to the Vienna Convention on Law of Treaties (hereinafter: VCLT) in its case-law as an interpretation tool.[27] Article 28 VCLT, regarding the non-retroactivity of treaties, which Naira is a Party to[28], states that:

> *"Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."*[29]

[24] C.Q., No.7.
[25] Hypothetical, §7.
[26] *Ibid*., §28.
[27] *Yakye Axa Indigenous Community v. Paraguay*, IACtHR, 17 June 2005, §126; *The "Mapiripán Massacre" v. Colombia*, IACtHR, 15 September 2005, §106; *González et al. v. Mexico*, IACtHR, 16 November 2009, §32.
[28] Hypothetical, §7.
[29] Article 28, Vienna Convention on the Law of Treaties, 1969.

The Convention of Belém do Pará does not contain any provision suggesting its retroactive applicability. Furthermore, in *Miguel Castro Castro Prisons* the Court clarified that in case of facts predating the ratification, there only needs to be compliance if there is a continuing violation.[30]

It is the position of the State that there have been no continuing violations, meaning violations which began before the State accepted the jurisdiction of the Court and persisted afterwards.[31] The violations that allegedly occurred in March 1992 were of an instantaneous nature, which means that the Court does not have jurisdiction over these acts. The State has, as shall be further discussed in Section B4, fulfilled all of its procedural obligations, and in doing so has ensured that no violations are taking place.

In light of these reasons, the Court does not have the competence to rule by means of Article 7 Belém do Pará on the alleged violations, due to the lack of jurisdiction *ratione temporis*.

2. Six months' time-bar

On March 10, 2015, the petitioners filed a criminal complaint alleging acts of sexual violence.[32] This complaint was time-barred by the expiration of the 15-year Statute of Limitations.[33] The petitioners waited until May 10, 2016 to file a petition with the Commission.[34]

In order for a petition to be admissible, Article 46(1)(b) ACHR provides that it needs to be lodged within a period of six months from the date on which the party alleging a violation of its rights was notified of the final domestic judgement.[35] Article 32 of the Rules of Procedure of the

[30] *Miguel Castro Castro Prison v. Peru*, IACtHR, 25 November 2004, §378.
[31] *Alfonso Martín del Campo-Dodd v. Mexico*, IACtHR, 3 September 2004, §79; *Moiwana Community v. Suriname*, IACtHR, 15 June 2005, §39.
[32] Hypothetical, §33.
[33] *Ibid.*
[34] *Ibid.*
[35] Article 46(1)(b) American Convention of Human Rights, OAS, 1969.

Commission (hereinafter: RoP of the Commission) elaborates on this requirement, by defining two possible time-spans within which the petition can be lodged. [36]

The first one being a period of six months, following the date on which the alleged victim has been notified of the decision that exhausted the domestic remedies. [37] First of all, there were still domestic remedies to be exhausted. It has previously been held by the Court that administrative remedies are also included under the domestic remedies.[38]

Of particular importance for the present case is the creation of the TC, which is in the process of analysing the petitoners' case.[39] In order for an administrative remedy to be considered a domestic remedy, three requirements need to be fulfilled. First, the body needs to be independent. The independence of the TC is being guaranteed by its composition.[40] Secondly, the decision should be enforceable. Nothing in the facts suggests that the report would not be binding[41], especially since the TC has such a specific mandate.[42] Thirdly, the remedies it provides must be adequate and correct for the circumstances of the case.[43] The reparations provided by the TC include measures of satisfaction, guarantees of non-repetition, rehabilitation, restitution and monetary measures[44], which are adequate and correct for the circumstances of this case given the poor financial situation of the petitioners[45] and the wider allegations of children being born as a result of human rights violations. [46] Consequently, the TC can be considered a domestic remedy that needed to be

[36] Article 32 Rules of Procedure of the Inter-American Commission on Human Rights, 2013.
[37] Article 31(2) *juncto* Article 32(1) RoP of the Commission.
[38] *Ibid.*, §51.
[39] C.Q., No.37, 60, 65.
[40] *Ibid.*, No.65.
[41] *Ibid.*, No.47.
[42] *Ibid.*, No.37, 60, 65.
[43] *Las Palmeras v. Colombia*, IACtHR, 6 December 2001, §58.
[44] C.Q., No.65.
[45] *Ibid.*, No.17.
[46] Hypothetical, §33.

exhausted prior to submitting the petition. Since the petitioners did not wait for the results of the TC, they did not exhaust all the available remedies.[47]

However, even if the Court were to decide that the TC does not constitute a domestic remedy that needs to be exhausted, then this would entail that the petitioners would have had six months starting from March 10, 2015. They did not fulfil this requirement as they filed the complaint seven months late on May 10, 2016.[48]

The second potential time-span assigns a reasonable time to those cases in which the exceptions from Article 31(2) are applicable.[49] Those exceptions in particular refer to domestic legislation not affording due process of law for the protection of the rights that allegedly have been violated, denial of access to the remedies or an unwarranted delay in rendering the final judgment.[50] None of these exceptions are applicable in this case. The legal system of Naira does provide due process. The fact that there is a Statute of Limitations does not interfere with this. The Court decided in *Trujillo Oroza* that provisions regarding statutes of limitations and the establishment of measures designed to eliminate responsibility are inadmissible.[51] However, it is clear that a statute of limitations of 15 years is not designed to eliminate responsibility, but is merely in place to give citizens ample opportunity to lodge complaints.[52] Considering all these reasons, it is the position of the State that this petition should be found inadmissible on the grounds of the time limit having been exceeded to bring a case before the Court as imposed by Article 46(1)(b) ACHR.

[47] *Ibid.*, §38.
[48] *Ibid.*, §33.
[49] Article 32(2) RoP of the Commission.
[50] FAÚNDEZ LEDESMA, H., *"The Inter-American System for the Protection of Human Rights",* IIHR, 2008, 302-315
[51] *Trujillo Oroza v. Bolivia*, IACtHR, 27 February 2002, §106.
[52] *Coëme and others v. Belgium*, ECtHR, 18 October 2000, §146.

ALLEGED VIOLATIONS CONCERNING THE ARTICLES 4, 5, 6, 7, 8 AND 25 OF THE AMERICAN CONVENTION ON HUMAN RIGHTS

1. DEPRIVATION OF LIBERTY

The claim has additionally been made that the petitioners' detention in March 1992 amounted to a violation of their right to personal liberty. However, it is the position of the State that, in this case, a derogation from Article 7 was allowed as there existed within the country a state of emergency under Article 27 ACHR.[53] Nonetheless, even if the Court does not find this to be the case, the State will establish that the detention was lawful according to Article 7 ACHR.

i. Derogation from Article 7 ACHR

As Article 7(1-5) and Article 7(7) ACHR are not amongst the non-derogable rights listed under Article 27(2)[54], these rights may be derogated from[55], provided that these derogations only exist *"to the extent and for the period of time strictly required by the exigencies of the situation".*[56] Further clarifying these criteria, the Commission has noted that the classifications apply where there is an *"extremely grave situation of such a nature that there is a real threat to law and order or the security of the State…, public danger or other emergency that imperils the public order or security of a Member State."*[57]

It is the position of the State that, in this case, there were grave enough circumstances within Naira that given the *"exigencies of the situation"*[58], a declaration of a state of emergency and suspension

[53] Article 27(1) ACHR.
[54] Article 27(2) ACHR.
[55] Article 27(1) ACHR.
[56] *Ibid.*
[57] *Report on Terrorism and Human Rights*, IACHR, 22 October 2002, §51.
[58] Article 27(1) ACHR.

of guarantees was necessary to maintain governmental control and protect the public.[59] Freedom Brigades was creating a situation of public disorder and an issue of public safety through its terrorist activities, drug trafficking and other acts of violence and confrontations.[60] These actions could constitute a real threat to law and order and the security of the State and its inhabitants. The aim of Freedom Brigades was ultimately to force the government to allow them to continue their drug trafficking unimpeded, which is a criminal act that the UN Office on Drugs and Crime has considered crucial to tackle due to its ability to be a major contributor to both government corruption and terrorism levels.[61] Given these stakes, it is clear that it was imperative that the State took action to combat Freedom Brigades. Particularly, the State submits that the derogation from Article 7 ACHR would be such as to allow for the more efficient apprehension of perpetrators of terrorism, at an earlier stage in the planning of attacks.

In addition to the derogations being required by the exigencies of the situation, the State also submits that the state of emergency did not exist for any longer than was strictly necessary. It has been maintained by the case-law of the Court and the Commission that the state of emergency may only last for the length of time *"strictly required"* given the situation the country is in.[62] In the current case, the SMBs, including the one in Warmi, were deactivated in 1999, as soon as the area was brought back under control by the government and Freedom Brigades surrendered.[63] Given the immediacy of the decision to remove the SMB after Freedom Brigades surrendered, it cannot be said that the State maintained the state of emergency for any longer than strictly necessary.

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[59] LEGG, A., "*The margin of appreciation in international human rights law: deference and proportionality"*, Oxford, Oxford University Press, 2012, 198.
[60] Hypothetical, §8.
[61] *World Drug Report 2017*, United Nations Office on Drugs and Crime, United Nations, 2017, Booklet 5, pg.31-42.
[62] Article 27(1) ACHR; *Zambrano Vélez v. Ecuador*, IACtHR, 4 July 2007, §47; *Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights)* (Advisory Opinion), IACtHR, 30 January 1987, §19.
[63] Hypothetical, §30.

Any questions raised by the petitioners as to an alleged disproportionate length of the state of emergency cannot have any merit. Although the state of emergency was of a considerable length of time, the existence of states of emergency do fall within the State's discretion.[64]

Firstly, it must be considered that the State has the right, and indeed the duty, to guarantee its own security and that of its citizens.[65] Declaring a state of emergency was in line with this duty. Furthermore, the State does not dispute that it has limited discretion as regards this right, nor that it is the role of this Court to *"exercise this control in a subsidiary and complimentary manner, within the framework of their respective competences"*[66]. The State acknowledges that this Court has authority to rule on whether or not the longevity of the state of emergency is within the competence of the State.

However, there is no set rule on what constitutes a disproportionate length of time for a state of emergency to exist. Rather, each case must be decided based on the *"character, intensity, pervasiveness and particular context of the emergency"*[67]. The Commission has recommended that a state of emergency be lifted due to the reasons for the implementation no longer existing[68], and not due to any specific length of time. The duration of the state of emergency is still consistent with the context and intensity of the situation, keeping in mind that Freedom Brigades did not surrender until 1999. Had the state of emergency been lifted before this time, certain measures which the State had implemented would no longer have been available as a means of combatting Freedom Brigades.

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[64] *Zambrano Vélez et. al. v. Ecuador,* IACtHR, 4 July 2007, §47.
[65] *Durand and Ugarte v. Peru,* IACtHR, 16 August 2000, §69; *Godínez-Cruz v. Honduras,* IACtHR, 20 January 1989, §162.
[66] *Zambrano Vélez et al. v. Ecuador*, IACtHR, 4 July 2004, §47.
[67] *Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights)* (Advisory Opinion), IACtHR, 30 January 1987, §22.
[68] *Report on the Situation of Human Rights in Argentina,* IACHR, 11 April 1980, Recommendation 4.

The State also fulfilled its obligations under Article 27(3) by immediately notifying other State parties through the Organization of American States (hereinafter: OAS) Secretary General of the declaration of a state of emergency.[69]

Considering that all of the conditions of Article 27 have been met, it is the position of the State that it rightfully declared a state of emergency, through which it had the right to derogate from the right to personal liberty.

ii. Right to habeas corpus

The State does acknowledge that the right of *habeas corpus* found in Article 7(6) ACHR cannot be derogated from under the state of emergency due to its position of *"fundamental importance"*[70]as part of the judicial guarantees necessary to protect rights.[71]

It must first and foremost be noted that the right to *habeas corpus* is distinct from the right to have the merits of a case decided by a judge.[72] Rather, *habeas corpus* exists solely as a means to *"verify whether the detainee is still alive and whether or not he or she has been subjected to torture or physical or psychological abuse"*[73]. In order to do so, the principle must not only exist as a matter of law, but must also be effective and capable of providing results or responses to the alleged violations.[74]

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[69] *Ibid*.
[70] *Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights)* (Advisory Opinion), IACtHR, 30 January 1987, §40.
[71] Article 27(2) ACHR.
[72] Article 7(5), 7(6) ACHR.
[73] *Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights)* (Advisory Opinion), IACtHR, 30 January 1987, §12; FARRALL, B., *"Habeas Corpus in International Law",* Cambridge University Press, 2013, 133-124.
[74] *Chaparro Álvarez and Lapo Íñiguez v. Peru,* IACtHR, 21 November 2007, §133; ANTKOWIAK, T. M. and GONZA, A., "*The American Convention on Human Rights: essential* rights", Oxford University Press, New York, 2017, 168-169.

As to the first requirement, the State has recognised the principle of *habeas corpus*, providing for it in law.[75] A writ of *habeas corpus* must be invoked by either the person in detention[76] or another person on their behalf.[77] In this case, the petitioners did not ask for *habeas corpus*, nor did anyone else on their behalf.[78] This was not an issue of the State, but rather of inaction on the part of the petitioners.

However, even if the petitioners had sought a remedy of *habeas corpus*, nothing in the facts suggests that the authorities would have acted partially, or else would have been unable to respond to the alleged violations.

As the issue of *habeas corpus* was not raised, and it has already been established that *habeas corpus* was, as a remedy, both effective and provided for in law, the State submits that it cannot be held to have violated its duties under Article 1(1) and 7(6) ACHR.

iii. Lawfulness of the deprivation of liberty

Even if the Court does not find that the derogation from the rights under Article 7 ACHR was justified by the state of emergency, it is clear that the detention is lawful.

Firstly, in order to be legal under Article 7(3) ACHR, the detention cannot be arbitrary. In *Wong Ho Wing*, a detention was held not to be arbitrary where *"(i) the purpose of the measures that deprive or restrict liberty are compatible with the Convention; (ii) that the measures adopted are appropriate to achieve the purpose sought; (iii) that they are necessary in the sense that they are absolutely essential to achieve the purpose sought… and (iv) that the measures are strictly proportionate."*[79]

[75] C.Q., No.81.
[76] *López Álvarez v. Honduras*, IACtHR, 1 February 2006, §96.
[77] Article 7(6) ACHR.
[78] C.Q., No.27.
[79] *Wong Ho Wing v. Peru*, IACtHR, 30 June 2015, §248.

Taking this into account, the detention of the petitioners was not arbitrary. The petitioners were detained due to being suspected of being accomplices to Freedom Brigades.[80] Clearly, such actions could pose a severe risk to both the national security of the State and, if Freedom Brigades decided to carry out a terrorist attack, the lives of those within and around the base. These are concerns which are upheld through the ACHR. States have a duty to protect themselves[81] and the right to life of all. In addition, it is the position of the State that the detention was an appropriate, essential and proportionate measure to achieve these aims. Detaining the petitioners was the most appropriate measure as it was the only way to ensure that information did not get back to Freedom Brigades. As such, it must be concluded that the measure was necessary and appropriate based on the knowledge available to the State at the time.[82]

Finally, the issue of proportionality must be considered. The State acknowledges that it has extra responsibilities due to the petitioners being children at the time of the detention and as such being entitled to extra protections.[83] Children have been defined as a human being below the age of 18 years.[84] This must be taken into account in the determination of proportionality. In *Mendoza* it was held that, for the purposes of proportionality, *"the arrest, detention or imprisonment of the child should happen only as a last resort and for the shortest period of time that is necessary"*[85]. As has been previously established, the detention of the petitioners was necessary. Additionally, the petitioners were held for the shortest possible period of time, with them being released after one

[80] C.Q., No.42.
[81] *Durand and Ugarte v. Peru,* IACtHR, 16 August 2000, §69; *Godínez-Cruz v. Honduras*, IACtHR, 20 January 1989, §162.
[82] C.Q., No.42.
[83] C.Q., No.69; Article 19 ACHR.
[84] Article 1, United Nations Convention of the Rights of the Child, United Nations Human Rights Office of the High Commissioner, 1990.
[85] *Mendoza et al. v. Argentina,* IACtHR, 14 May 2013, §162.

month.[86] In doing so, the State ultimately upheld their right to personal liberty, despite the potential risks, and thus the measure must be seen to have been proportionate.

In addition to the requirements of Article 7(3) ACHR, the State has also conformed with the requirement that the detention be lawful, with the conditions for the deprivation of liberty being set out in law beforehand by the State.[87] A detention is lawful where *"the domestic law was observed when a person was deprived of his liberty"*[88]. The State installed the measures which allowed for the derogation from Article 7 prior to 1980[89], meaning that by 1992, the domestic laws permitting Article 7 derogations would have been well established.[90] Furthermore, in the creation of these measures, the State complied with the necessary procedural requirements of Article 27(c) by notifying the other OAS Member States of the State's intention to derogate.[91]

Given this evidence of compliance, it can be shown that the detention of the petitioners was set out within prior domestic law, and as such complied with the Article 7(2) requirement for lawfulness.

2. Alleged rape

i. Issues with the burden of proof and lack of proof

The Court applies the generally accepted principle that the party raising the allegations must bear the burden of proof.[92] In this case, that would clearly suggest that it is incumbent upon the petitioners to prove the alleged violations of Article 5.

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[86] Hypothetical, §30.
[87] Article 7(2) ACHR.
[88] *Wong Ho Wing v. Peru*, IACtHR, 30 June 2015, §261.
[89] Hypothetical, §9.
[90] C.Q., No.27.
[91] *Ibid.*, §10.
[92] *Velásquez Rodríguez v. Honduras*, IACtHR, 29 July 1988, §123; *Barreto-Leiva v. Venezuela*, IACtHR, 17 November 2009, §99; PASQUALUCCI, J.M., *"The Practice and Procedure of the Inter-American Court of Human Rights",* Cambridge University Press, 2013, 171-173.

Article 5 in relation to Article 1(1) ACHR prohibits any cruel, inhuman or degrading treatment.[93] The State acknowledges that rape can entail a violation of this article.[94]

The State does acknowledge that in exceptional situations, the burden of proof can be reversed, namely in cases where it would not be able to bring evidence without the cooperation of the State.[95] In such situations, the Court has shown itself willing to redistribute the burden of proof to the State, making it its duty to disprove the allegations.[96] Nevertheless, it is the position of the State that this is not the approach that should be taken in this case.

The inversion of the burden of proof is designed to address the imbalance between an applicant and a State where the two do not have equal access to the evidence.[97]

Too much time has passed between the alleged violations and the petition for it to be possible for the State to be expected to bring sufficient evidence to disprove the allegations. The Court has clarified that a State will have the burden of proof where it is in control of the means to clarify the facts.[98] In the present case, the State does not have control over the facts. Had the petitioners raised their complaint after the alleged violations, or even post-1999 when the soldiers were gone and the alleged atmosphere of fear had lessened[99], then the State would have had the opportunity to take measures, such as collect evidence. However now, twenty years later, the collection of such proof would be impossible.

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[93] Article 5 ACHR.
[94] *Rosendo Cantú v. Mexico*, IACtHR, 31 August 2010, §118.
[95] *Cantoral-Benavides v. Peru*, IACtHR, 18 August 2000, §189; *Bámaca Velásquez v. Guatemala*, IACtHR, 25 November 2000, §152.
[96] *Ibid.*
[97] *Bámaca Velásquez v. Guatemala*, IACtHR, 25 November 2000, §153; *Hiber Conteris v. Uruguay*, Communication 139/1983, UN Human Rights Committee, 1988, §§182-186.
[98] *Bámaca Velásquez v. Guatemala*, IACtHR, 25 November 2000, §153.
[99] C.Q., No.43.

The State recognized that there may be reasons why women do not speak up. However, it is addressing these obstacles by raising awareness through various new programs.[100]

While it is not possible to collect physical evidence any longer, the State did conduct *ex officio* investigations, but no proof of any violations was found.[101] Additionally, there is minimal testimonial evidence and moreover, the people in Warmi have denied that any violations took place.[102] It must be noted that the mere fact that the investigations were closed cannot imply that there has been a violation of rights.[103]

The issue of the lack of proof has already been tackled in *Loayza Tamayo.* In this case, given the serious nature of the allegation and the lack of evidence, it was ultimately decided that rape could not be proven, and a violation could not be found.[104] Due to the lack of evidence in this case, the Court should decide accordingly and find that there has been no violation of Article 5 in conjunction with Article 1(1), 2 and 19 ACHR.

3. Work during detention

It is the position of the State that the work performed by the petitioners during their detention at the SMB was not a violation of Article 6 ACHR as it amounted to neither slavery[105], nor forced labour.[106]

[100] *Supra*, section II.
[101] C.Q., No.43.
[102] Hypothetical, §32.
[103] See e.g. *Fernández Ortega v. Mexico*, IACtHR, 30 August 2010, §191; *González et al. v. Mexico*, IACtHR, 16 November 2009, §289.
[104] *Loayza Tamayo v. Peru*, IACtHR, 17 September 1999, §58.
[105] Article 6(1) ACHR.
[106] Article 6(2) ACHR.

i. No slavery

Slavery has been defined in the UN Slavery Convention as *"the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised"*[107].

In the *Workers of Hacienda Brazil Verde* the Court recognised that the meaning of slavery has evolved, stating that one of the requirements for slavery to exist is that the liberty of a person has been restricted with the aim of exploiting them.[108] However, in this case, the State authorities did not detain the petitioners with such an intention. Rather, as has previously been established, the petitioners were detained due to concerns of national security and public safety.[109] Additionally, nowhere in the facts is it suggested that any member of the military within the SMB at any time exercised ownership rights over the petitioners.[110] As there was no intention to exploit and no ownership rights were exercised, a situation of slavery cannot be said to have existed.

ii. No forced labour

Forced labour has been defined by the International Labour Organization (hereinafter: ILO) as *"all work or service, which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily"*[111]. This definition has been adopted and used by the Court where the definition was clarified. [112] A test was established whereby, for there to be a situation of forced labour there has to be (i) the menace of a penalty[113], (ii) an unwillingness to perform the work or service[114] and (iii) a connection with State agents[115].

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[107] Article 1(1), The United Nations Slavery Convention, United Nations Human Rights Office of the High Commissioner, 1926.
[108] *Workers of Hacienda Brazil Verde v. Brazil,* IACtHR, 20 October 2016, §271.
[109] *Supra,* section III.B.1.iii.
[110] C.Q., No.50.
[111] Article 2(1), Convention Concerning Forced or Compulsory Labour, ILO, 1930.
[112] *Ituango Massacres v. Columbia,* IACtHR, 1 July 2006, §159.
[113] *Ibid.,* §161.
[114] *Ibid.,* §164.
[115] *Ibid.,* §166.

The State submits that in this case not all of the requirements for forced labour were met as there was no menace of penalty. The Court has held that there needs to be a real and actual presence of intimidation for a menace of penalty to exist. This can take the form of coercion, threats of physical violence, isolation and detention with the aim of threatening the victim or his family members with death.[116]

As there is no indication in the case that there was a real and actual presence of intimidation in reference to the work being carried out by the petitioners, it cannot be proven that a situation of forced labour existed.

iii. Child labour

Article 32 UN Convention on the Rights of the Child (hereinafter: CRC), referred to by the Court in *Workers of Hacienda Brazil Verde*[117] states that children may not undertake any work *"that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development"*[118].

In the current case, the petitioners were not required to carry out any duties which could fall under the above classifications. Their tasks consisted of cooking, cleaning and washing.[119] Such tasks can be considered standard and take place within any household. Therefore these low intensity chores cannot be considered harmful within the meaning of Article 32.

Moreover, in *Hacienda Brazil Verde Worker* the Court established that the State has an obligation to prevent children from being subjected to the worst forms of child labour.[120] Article 3 of the Worst Forms of Child Labour Convention states that the worst forms of child labour includes,

[116] *Workers of Hacienda Brazil Verde v. Brazil,* IACtHR, 20 October 2016, §293.
[117] *Ibid.*, §331.
[118] Article 32 United Nations Convention on the Rights of the Child.
[119] Hypothetical, §28.
[120] *Workers of Hacienda Brazil Verde v. Brazil,* IACtHR, 20 October 2016, §§331-332.

amongst others, slavery and forced labour[121], however, as has been established, neither of these existed in the current case.

4. General Conditions of Detention

Article 4 in relation to Article 1(1) ACHR provides that no person may be deprived of his life arbitrarily and that he will not be prevented from having access to the conditions that guarantee a dignified existence.[122] As stated above, Article 5 in relation to Article 1(1) ACHR prohibits any cruel, inhuman or degrading treatment.[123]

Moreover the State acknowledges that there is a duty to protect people in detention[124], even more so when those in detention are children and are entitled to additional measures of protection under Article 19 ACHR. In order to accommodate these extra protections, a state must be *"all the more diligent and responsible in its role as guarantor"*[125].

To evaluate whether or not the State complied with its obligations, the Court takes into account living situation, access to food, education, and health.[126] In *Juvenile Reeducation Institute* it was due to the overcrowded confinement that Paraguay violated its obligation under Article 4 ACHR.[127] It cannot be implied from the facts that there were issues of availability of food, education or health for the petitioners, and so it cannot be concluded that the State violated its obligation under Article 4 ACHR.

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[121] Article 3(a), Worst Forms of Child Labour Convention, ILO, 1999.
[122] *Pueblo Bello Massacre v. Colombia*, IACtHR, 31 January 2006, §120; *Miguel Castro Castro Prison v. Peru*, IACtHR, 25 November 2006, §237; *Vargas-Areco v. Paraguay*, IACtHR, 26 September 2006, §75; *González et al. v. Mexico*, IACtHR, 16 November 2009, §245; GARCIA RAMÍREZ, S., "*La corte interamericana de derechos humanos"*, Editorial Porrua, Mexico, 2007, 243.
[123] Article 5 ACHR.
[124] *Bulacio v. Argentina*, IACtHR, 18 September 2003, §126, §138.
[125] *Juvenile Reeducation Institute v. Paraguay*, IACtHR, 2 September 2004, §160.
[126] *Ibid.*, §161; *The Juridical Condition and Human Rights of the Child*, (Advisory Opinion), IACtHR, 28 August 2002, §80, §81, §84 and §§86-88; *Villagrán Morales and Others v. Guatemala*, 19 November 1999, §196.
[127] *Juvenile Reeducation Institute v. Paraguay*, IACtHR, 2 September 2004, §166, §§172-176.

What also needs to be taken into account is the vulnerability of the petitioners due to their indigenous background. The Court's case-law[128] in this regard mostly deals with indigenous communities whose dignified life has been violated because the State ousted them from their land. Clearly, discriminatory measures such as these would be an infringement of the duty to protect indigenous peoples, however in this case, there is nothing to suggest that there any sort of discrimination at play on the basis of the petitioners' indigenous background. The State's actions in Warmi were targeted solely towards Freedom Brigades and its criminal and terrorist activities.[129] The State therefore submits that, in this case, the indigenous background of the petitioners did not lead to an additional level of vulnerability, and so there can be no violation of the right to extra protection under Article 4 ACHR.

Given the lack of violation under Article 4 ACHR, it can be implied that there is furthermore no violation of Article 5 as the detention conditions are not sufficient to reach the threshold of inhuman treatment.[130]

5. Alleged violation of procedural rights

In addition to the allegations of violations of substantive rights, the petitioners have alleged the violation of procedural rights.[131] As has already been established in Section A1 the Court lacks jurisdiction *ratione temporis* over any issues arising from the Convention of Belém do Pará in regards to the events of 1992. Furthermore, the duties contained within Articles 4, 5, 8 and 25 ACHR in conjunction with Article 1(1) and 2 have been fulfilled by the State. Additionally, even

[128] *Yakye Axa v. Paraguay*, IACtHR, 17 June 2005, §131; *Sawhoyamaxa Indigenous Community v. Paraguay*, IACtHR, 29 March 2006, §5; *Xákmok Kásek v. Paraguay*, IACtHR, 24 August 2010, §2.
[129] Hypothetical, §27.
[130] *Boyce et al. v. Barbados*, IACtHR, 20 November 2007, §97.
[131] Hypothetical, §38.

if the Court were to consider the Convention of Belém do Pará to be applicable, all of the duties within Article 7 of this Convention have been fulfilled.

It was held in *Velásquez-Rodríguez* that the State is positively obliged to *"prevent, investigate and punish any violation of the rights recognized by the Convention."*[132] This has been confirmed by later case-law.[133]

The State is aware of its function as special guarantor of rights of individuals, especially in relation to women[134], children[135], detainees[136] and indigenous peoples[137]. Therefore, in order to prove that none of the obligations have been violated and to demonstrate Naira's commitment to its role as guarantor, each obligation shall be examined in turn.

i. Obligation to prevent

General obligation

The Court's case-law has well expressed that states have a duty to prevent violations in relation to Articles 4, 5, 8 and 25 ACHR[138], with the "*foreseeable risk"* criteria being established to determine whether a violation of this duty has taken place.[139]

Under these criteria, for a State to be responsible for a crime there must be a situation of real and immediate risk; the situation must threaten a specific individual or group; the State must know or

[132] *Velásquez-Rodríguez v. Honduras*, IACtHR, 29 July 1988, §166.
[133] *Loayza Tamayo v. Peru*, IACtHR, 27 November 1998, §168; *Blake v. Guatemala*, IACtHR, 24 January 1998, §97
[134] *González et al. v. Mexico*, IACtHR, 16 November 2009, §408.
[135] *Río Negro Massacres v. Guatemala*, IACtHR, 4 September 2012, §142; BURGORGUE-LARSEN, L. and UBEDA DE TORRES, A., "*The Inter-American Court of Human Rights: Case Law and Commentary"*, New York, Oxford University Press, 2011, 494
[136] *Bulacio v. Argentina*, IACtHR, 18 September 2003, §126.
[137] *Yakye Axa Indigenous Community v. Paraguay*, IACtHR, 17 June 2005, §163.
[138] *Ibid.*, §169; *Velásquez Rodríguez v. Honduras* (Merits), IACtHR, 29 July 1988, §174.
[139] MOSER P.T., "Duty to Ensure Human Rights and its Evolution in the Inter-American System: Comparing Maria de Pengha v. Brazil with Jessica Lenagan (Gonzales) v. United States", *Am. U. J. Gender & Soc. Pol'y & L*. 21, No.2 (2012), 444.

ought to have known of the risk; and the State could have reasonably prevented or avoided the materialization of the risk.[140]

In this case, these criteria have not been met. The government of Naira was not aware of any real and immediate risk to the petitioners. It was only after Mónica Quispe conducted the interview in December 2014 that the State was made aware of the alleged violations.[141]

It is insufficient that a State is aware of a general danger, it must be aware of a real and immediate risk specifically to the victims in the case.[142] In this case the authorities did not know of any existence of a situation posing an immediate and certain risk. As to whether the authorities should have known, the Court stated that the petitioners must provide "*evidence to prove that the State should have known about the specific situation of danger"*.[143] In *Human Rights Defender* the petitioners had frequently filed a complaint with the authorities and even then the Court put the burden of proof onto the petitioners to prove that the State should have known. As the petitioners did not manage to provide evidence that Naira knew or should have known, the Court does not have sufficient elements to declare that the State failed in its obligation.[144]

Moreover, the Court also made clear that the obligation to prevent is one of means, not of results[145] and that it cannot impose an impossible, unreasonable or disproportionate burden on the State.[146] That is why in *González* it could not reasonably have been expected that Mexico prevent the

[140] *Ibid.*, 445; *González et al. v. Mexico***,** IACtHR, 16 November 2009, §280; *Sawhoyamaxa Indigenous Community v. Paraguay*, IACtHR, 29 March 2006, §§155-180.
[141] Hypothetical, §27; C.Q., No.8.
[142] *González et al. v. Mexico***,** IACtHR, 16 November 2009, §282.
[143] *Human Rights Defender et al. v. Guatemala*, IACtHR, 28 August 2014, §149.
[144] *Ibid.*
[145] *Velásquez Rodríguez v. Honduras* (Merits), IACtHR, 29 July 1988, §177; *González et al. v. Mexico***,** IACtHR, 16 November 2009, §252.
[146] *González et al. v. Mexico* (Concurring Opinion)**,** IACtHR, 16 November 2009, §5; *Vélez Restrepo v. Colombia*, IACtHR, 3 September 2012, §186; *Massacres of El Mozote and Nearby Places v. El Salvador*, IACtHR, 25 October 2012, §144; *Kiliç v. Turkey*, ECtHR, 28 March 2000, §63; *Opuz v. Turkey*, ECtHR, 9 June 2009, §129; *Osman v. The United Kingdom*, ECtHR, 28 October 1998, §116;kdmfgs

abduction of the three victims, as they had no prior knowledge of a specific danger to the victims, and that would have been a disproportionate burden.[147]

The State only became aware of the alleged violations against the petitioners after the 2014 interview, therefore it cannot be said that it violated the obligation to prevent. Between 2014 and now, a lot has changed in the national policy regarding violence against women. Taking all of this into account, together with the fact that there is no unlimited responsibility for any unlawful act against women, because it is conditioned by the awareness of a situation of real and imminent danger[148], the State has not violated its duty to prevent.

Specific obligation

The Declaration on the Elimination of Violence against Women of the General Assembly of the United Nations urged States to *"exercise due diligence to prevent… acts of violence against women*"[149].

Additionally, the UN Special Rapporteur on Violence against Women has provided guidelines on the measures that states should take to comply with their international obligations of due diligence with regard to prevention, namely ratification of the international human rights instruments; existence of national legislation and administrative sanctions providing adequate redress for women victims of violence; sensitization of the criminal justice system and the police to gender issues; availability and accessibility of support services; collection of data and statistics on

[147] *González et al. v. Mexico*, IACtHR, 16 November 2009, §282.
[148] *Pueblo Bello Massacre v. Colombia*, IACtHR, 31 January 2006, §123; *González et al v. Mexico*, IACtHR, 16 November 2009, §282; *Sawhoyamaxa Indigenous Community v. Paraguay*, IACtHR, 29 March 2006, §155; *Valle Jaramillo et al. v. Colombia*, IACtHR, 27 November 2008, §78.
[149] United Nations, Declaration on the Elimination of Violence against Women, General Assembly Resolution 48/104, 20 December 1993.

violence against women, executive policies or plans of actions which attempt to deal with the question of violence against women, etc.[150]

In order to know whether or not Naira violated its specific obligation to prevent, these guidelines need to be applied to the conduct of the State. The State has ratified all of the international human rights instruments, introduced laws to punish violence against women and created the Gender-Based Violence Unit to educate State authorities on gender issues. Additionally, reparations measures are being offered to women and the executive has created a number of bodies to deal with violence against women.[151] Taking these factors into account it can be concluded that Naira indeed complied with all the necessary guidelines, meaning it did not violate its obligation to prevent and acted in compliance with due diligence.

ii. Obligation to investigate

The State's duty to investigate alleged human rights violations with due diligence[152] is necessary to avoid impunity[153] and can be found in Articles 4, 5, 8 and 25 ACHR, and Article 7(b) Belém do Pará.

The Court stated in *Velásquez Rodríguez* that investigations *"must… be assumed by the State as its own legal duty"*[154]. The State has *ex officio* investigated both the specific case of the applicants and the alleged widespread abuses.[155]

[150] R. COOMARASWAMY, *Violence against Women in the Family: Report of the Special Rapporteur on violence against women, its causes and consequences*, UN, 10 March 1999, §25; *González et al v. Mexico*, IACtHR, 16 November 2009, §256.
[151] Hypothetical, §7, §14, §20, §22, §34.
[152] Article 7(b), Convention of Belém do Pará.
[153] *Loayza Tamayo v. Peru*, IACtHR, 27 November 1998, §170.
[154] *Velásquez Rodríguez v. Honduras*, IACtHR, 29 July 1988, §177.
[155] Hypothetical, §10; C.Q., No.43.

Obligations based on Articles 4 and 5 ACHR

When fulfilling the procedural aspects of these Articles, account must be taken of both the American Convention itself and the Inter-American Convention to Prevent and Punish Torture (hereinafter: IACPPT).

The Court has consistently held that under Article 5, a State has "*the obligation to immediately initiate ex officio an effective investigation to identify, prosecute and punish perpetrators when a complaint has been filed or when there are sufficient reasons to believe that an act of torture has been committed"*[156].

Firstly, the petitioners did not file a complaint. As proven before, the State was not aware of the existence of any alleged violations of the rights of the petitioners and therefore, the State could not have been expected to initiate an investigation. Secondly, the positive obligations of the State must be interpreted so that there is no disproportionate burden imposed upon the authorities.[157] Taking into account the state of emergency and the political instability across the country, expecting the State to open an investigation without sufficient reasons would only create more distrust and instability. As there was no reason to assume a violation had been committed, the opening of an investigation would have constituted a disproportionate burden on the State.

The obligations set forth in Articles 1, 6 and 8 IACPPT to prevent and punish torture, to install effective measures to allow this to happen and to launch an investigation if it is believed that an act of torture has taken place, must also be examined.[158] This Convention is not applicable because, as already discussed, there is no proof that any torture or inhuman treatment took place while the

[156] *Gutiérrez-Soler v. Colombia*, IACtHR, 12 September 2005, §54; *Vargas-Areco v. Paraguay*, IACtHR, 26 September 2006, §79; *Baldeón-García v. Peru*, IACtHR, 6 April 2006, §156; *Tibi v. Ecuador*, IACtHR, 7 September 2004, §159; *Ximenes-Lopes v. Brazil*, IACtHR, 4 July 2006, §148.
[157] *Pueblo Bello Massacre v. Colombia*, IACtHR, 31 January 2006, §124; *Sawhoyamaxa Indigenous Community v. Paraguay*, IACtHR, 29 March 2006, §155.
[158] Article 1, 6, 8, Inter-American Convention to Prevent and Punish Torture, 1985.

petitioners were detained in 1992. Additionally, the obligation to prevent has been addressed in the previous section and the State complied with this obligation.

Due diligence of the investigation by the State

Despite the fact that Naira was not obliged to open an investigation[159], it did extend its best efforts to manage the situation, by establishing the TC and investigating on its own initiative.[160] These investigations were handled in a serious, impartial and effective way, as is a prerequisite based on the case-law of the Court.[161]

To be effective, investigations cannot be a *"mere formality, preordained to be ineffective"*[162] and must take account of the fact that fear may have stopped victims from reporting violations[163].

Additionally, the requirement to act in line with due diligence as set out in Article 7(b) Belém do Pará[164] has been taken to mean that *"States should have an appropriate legal framework for protection that is enforced effectively, and… policies and practices that allow effective measures to be taken in response to the respective complaints"*[165].

There is nothing in the facts to suggest that there is not an effective investigation taking place. The relevant legal framework to allow due diligence to be done has been put in place through the creation of the TC[166], which is currently working diligently to collate all the relevant facts of the case. Indeed, the thoroughness and effectiveness of the investigation is evidenced by the fact that

[159] *Supra,* section III.B.5.ii.
[160] C.Q., No.43.
[161] *Gelman v. Uruguay*, IACtHR, 24 February 2011, §186; *Pueblo Bello Massacre v. Colombia*, IACtHR, 31 January 2006, §143; *Ibsen Cárdenas and Ibsen Peña v. Boliviaá*, IACtHR, 1 September 2010, §65; *Gomes Lund et al. v. Brazil*, IACtHR, 24 November 2010, §108.
[162] *Velásquez Rodríguez v. Honduras*, IACtHR, 29 July 1988, §177; *Gelman v. Uruguay*, IACtHR, 24 February 2011, §184.
[163] *Statement of the Duty of the Haitian State to Investigate the Gross Violations of Human Rights Committed during the regime of Jean Claude Duvalier*, IACHR, May 2011, §36.
[164] Article 7(b), Convention of Belém do Pará.
[165] *González et al. v. Mexico*, IACtHR, 16 November 2009, §258.
[166] Hypothetical, §34.

the Commission is investigating, conducting interviews and taking statements in the affected areas.[167] Through these measures, an effective investigation is being granted not only to the petitioners, but to women who may have suffered abuses on a wider scale, as the TC's mandate includes the investigation of all of the cases of human rights violations, and in particular the cases of alleged sexual violence, which occurred from 1970–1999.[168]

Additionally, the investigations carried out by the State after the first were conducted effectively. A number of investigations were opened, however closed again due to lack of evidence.[169] This does not suggest that the investigations were inadequate in any way. As stated before, the duty to investigate is an obligation of means and not of results.[170] Moreover, it cannot be argued that this lack of evidence existed as a result of fear to report the violations as the military left the area in 1999[171], and the investigations began subsequent to that date.

Despite the fact that the investigation did not produce a satisfactory result, it must be said that the State did fulfill its obligations under Article 8 and 25 ACHR in conjunction with Article 1(1) and 2 and Article 8 IACPPT.

iii. Providing recourse to the alleged victims

It has been established that states have an obligation "*to provide to all persons within their jurisdiction, an effective judicial remedy to violations of their fundamental rights*"[172]. Moreover, "*the State has an obligation to design and embody in legislation an effective recourse, and also to ensure the due application of the said recourse by its judicial authorities"*[173].

[167] C.Q., No.44.
[168] *Ibid.*, No.65.
[169] *Ibid.*, No.43.
[170] *Supra*, section III.B.5.ii.
[171] Hypothetical, §30.
[172] *Judicial Guarantees in States of Emergency* (Advisory Opinion), IACtHR, 6 October 1987, §23.
[173] *Villagrán Morales et al. v. Guatemala*, IACtHR, 19 November 1999, §237.

The judicial recourse available to any victims is, as will be shown, sufficient and effective as to encompass the rights under Article 8(1) ACHR and Article 25 ACHR.[174] Additionally, the State has taken steps to facilitate judicial protection under the Convention of Belém do Pará Article 7(b), (c), (e), (f) and (g).

Access to competent, impartial and independent tribunals

The State has provided the facilities to allow recourse to a competent, independent and impartial court within the meaning of Article 8(1) and 25(1) ACHR.

In Naira, those who allege human rights violations have access domestic courts, such as the Criminal Court.[175] There is no suggestion in the facts that this body is anything other than impartial and independent, however this does not mean that procedural rules e.g. the Statute of Limitations can be disregarded.

Obligation to provide prompt recourse

The Court has previously held that the requirement for prompt recourse within Article 25 ACHR should be taken as one with the Article 8 ACHR requirement for the proceedings to take place within reasonable time.[176] Determination of whether or not a State has fulfilled its obligation here depends on the complexity of the matter, the procedural activity of the interested party, the conduct of the judicial authorities and the effects that the passage of time may have on the legal situation of the person involved in the proceedings.[177]

[174] Art 25(1) ACHR.
[175] Hypothetical, §33; C.Q., No.57.
[176] *Hilaire, Constantine, Benjamin et al. v. Trinidad and Tobago*, IACtHR, 21 June 2002, §§143-148; MEDINA, C., *"The American Convention on Human Rights: Crucial Rights and their Theory and Practice",* Intersentia, 2014, 243-245
[177] *Río Negro Massacres v. Guatemala*, IACtHR, 4 September 2012, §230; *Genie-Lacayo v. Nicaragua*, IACtHR, 29 January 1997, §77.

Although the complaints lodged by Killapura on behalf of the petitioners in the Criminal Court were ultimately inadmissible due to the expiration of the 15-year time bar[178], there were no undue delays[179]. Even though the admissibility issues meant the merits of the case could not be heard, it cannot be suggested that there are issues with the timeline of the Criminal Court.

There is nothing to suggest that, on a wider scale, there was no prompt recourse available. Nothing in the facts implies that the alleged victims, had they filed a complaint within 15 years following the violations, would not have been met with prompt recourse in the Criminal Court. That no one chose to initiate any proceedings cannot be attributed to the State. As already argued, any claim that the alleged victims refrained from reporting the violations because they were afraid of retaliation can have no merit as the SMB was dismantled, and the soldiers no longer exercised effective control over Warmi.[180]

Regardless, the State has also shown its willingness to implement methods of helping women access justice more promptly. Through the ZTPGBV the State is now implementing a Gender-Based Violence Unit assisting female victims in initiating proceedings.[181] In addition, the report of the TC, due to be published in 2019[182], may lead to more judicial proceedings taking place.

Considering the complexity of the matters, the fact that alleged victims did not initiate proceedings previously, and the great detail with which the authorities are looking into the allegations[183], it is clear that a 2019 release date for the TC report falls within the meaning of reasonable time.

[178] Hypothetical, §33.
[179] *Bulacio v. Argentina*, IACtHR, 18 September 2003, §§114-115.
[180] Hypothetical, §30.
[181] Hypothetical, §20.
[182] C.Q., No.65.
[183] *Ibid.*, No.15.

On top of that, Naira has a system in place to ensure that recourse is accessible to everyone, regardless of the financial circumstances, through provisions of free legal advice and free access to the judicial system.[184]

Providing effective recourse

In order for there to be effective recourse, the remedy must not simply be provided for by the law, but rather, *"must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A remedy which proves illusory because of the general conditions prevailing in the country … cannot be considered effective"*[185]. Additionally, the Court held that where victims are not allowed access to a judicial remedy it will amount to a denial of justice, and the system will be held to be ineffective.[186] The State submits that the mechanisms in place meet with the conditions for effective recourse.

Firstly, domestic recourse such as to the Criminal Court is available[187] for violations of human rights, provided that, in accordance with Article 82(3) of the Statute of Limitations, the petition is filed within 15 years of the date on which the last criminal activity in a series of acts ended.[188] If a petition was lodged within that time, there is nothing to suggest that the Criminal Court would be anything less than effective at providing remedies for the alleged acts.

The State rejects the argument that the 15-year time bar amounts to a denial of justice in the case of the petitioners. If the general conditions prevailing in the country throughout these 15 years had been such as to prevent the petitioners from pursuing a claim, there could be some merit to this

[184] *Ibid.*, No.52.
[185] *Judicial Guarantees in States of Emergency (Arts 27(2), 25 and 8 American Convention on Human Rights)* (Advisory Opinion), IACtHR, 6 October 1987, §24.
[186] *Ibid.*
[187] Hypothetical, §33.
[188] C.Q., No.85.

allegation.[189] The State firmly maintains that this is not the case. Even if the petitioners could allege that they refrained from reporting the abuses due to fear of retaliation from the armed forces[190], after the soldiers left in 1999 there would have still been 10 years in which the alleged victims could have lodged complaints. As such, it cannot be said that the State has denied justice, rather, the petitioners did not take up any legal proceedings to begin with.

Even if the Court were to find that this was not the case, actions by the State are also providing effective remedies, not only for the petitioners, but also for women who allegedly suffered human rights violations during this period in general.

Firstly, the State has shown willingness to set aside the elapsed time bar in the case of the petitioners through the creation of a High-Level Committee[191], despite the fact that it has been shown that this time bar was fully acceptable. This would permit the alleged victims to access the effective remedies available, offering them judicial recourse. Furthermore, as has already been stated, the ZTPGBV is leading towards the implementation the Gender-Based Violence Unit.[192] This increase in accessibility will only make the legal system in Naira even more effective.

It should also be noted that these implementations strengthen the State's commitment to its duties under the Convention of Belém do Pará[193], evidencing the State's willingness to implement provisions to punish violence against women and take legislative measures to establish fair and effective legal procedures as required under Article 7(e) and (f) Belém do Pará.

[189] *Goiburú et al. v. Paraguay*, IACtHR, 22 September 2006, §112.
[190] C.Q., No.43.
[191] Hypothetical, §34.
[192] Hypothetical, §20; C.Q., No.93.
[193] Article 7(g), Convention of Belém do Pará.

Obligation to develop the possibilities of additional remedies

In *Zambrano Vélez*, the Court deemed that "*the establishment of a Truth Commission… can contribute to build and safeguard historical memory, to clarify the events and to determine institutional, social and political responsibilities in certain periods of time of a society"*[194].

Even more so, "*the Court has granted a special value to reports of Truth Commissions as relevant evidence in the determination of the facts and of the international responsibility of the States in various cases which has been submitted before it"*[195].

Unfortunately, the State was not given the chance to truly investigate all the alleged violations, as the final report of the TC is due in 2019. [196] If the petition had been filed afterwards, the TC would have been able to complete its task, easing the Court's assessment on the plausibility of the disputed claims.

The Court also reiterated in *Zambrano Vélez* that it "*views favourably the intention of the State to clarify said acts which can amount to violations of human rights, through the establishment of a Truth Commission*"[197]. Even though this should not be understood as an alternative to judicial recourse, the efforts of the State to make the TC operational should be taken into account.[198]

Considering that the available judicial recourse is prompt and effective[199] and is complementary to the establishment of a TC, the State submits that it has complied with Articles 8 and 25 ACHR in relation to Article 1(1) and 2, Article 6 IACPPT and Article 7 Belém do Pará.

[194] *Zambrano Vélez et al. v. Ecuador*, IACtHR, 4 July 2007, §128.
[195] *Ibid.; Gómez Palomino v. Peru*, IACtHR, 22 November 2005, §54; *De la Cruz-Flores v. Peru*, IACtHR, 18 November 2004, §61; *Maritza Urrutia v. Guatemala*, IACtHR, 27 November 2003, §56.
[196] C.Q., No.65.
[197] *Zambrano Vélez et al. v. Ecuador*, IACtHR, 4 July 2007, §129.
[198] *Ibid.*, §128.
[199] *Supra,* section III.B.5.iii

iv. Fulfilling the obligation to provide reparations

Finally, states have an obligation to provide reparations to victims. The Court formulated that this goes hand in hand with the duty to put an end to the consequences of human rights violations.[200] In this situation, the petitioners accessing the Inter-American System before the State was able to grant reparations before the domestic system[201]. This does not mean that reparations have not been provided. Indeed, reparations are set to be available to any established victims. The report of the TC will allocate reparations to each of the established victims through a Special Fund for Reparations, providing the women with pecuniary measures[202] and fulfilling the State's obligation. This could result in the possibility of the petitioners escaping their impoverished situation.

As stated in *González*, reparations in a case based on gender violence ought to *"be designed to change the situation, so that their effect is not only one of restitution, but also of rectification"*[203]. In addition to the Fund for Reparations, the TC itself is offering reparations, which include administrative reparations, such as measures of satisfaction, guarantees of non-repetition and rehabilitation and restitution measures.[204]

Furthermore, the Gender-Based Violence Unit soon to be set up will also create changes on a wider scale, giving judges, prosecutors and other public servants mandatory training on gender-based violence, as well as acting as a supervisory body, which has the authorization to penalise discriminatory or violent public officials.[205]

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[200] *Blanco-Romero et al. v. Venezuela*, IACtHR, 28 November 2005, §68; *García-Asto and Ramírez-Rojas v. Peru*, IACtHR, 25 November 2005, §247; *Palamara Iribarne v. Chile*, IACtHR, 22 November 2005, §234; *López-Álvarez v. Honduras*, IACtHR, 1 February 2006, §180.
[201] C. Q., No.67.
[202] *Ibid.*, No.65; Hypothetical, §34.
[203] *González et al. v. Mexico***,** IACtHR, 16 November 2009, §450.
[204] C. Q., No.65.
[205] Hypothetical, §20.

Finally, the State is willing to review the laws regarding violence against women, amending them so as to remove any possible discrimination.[206]

Considering all the efforts, it is clear that the State is in the process of providing any alleged victims – including if applicable, the petitioners - with reparations, meeting not only the requirement of pecuniary measures, but also the requirement of measures of rectification. Therefore, it cannot be said to be violating Article 8 and 25 ACHR in relation to Article 1(1) and 2.

[206] *Ibid*., §21.

IV. REQUEST FOR RELIEF

For all of the above reasons, the State of Naira respectfully requests the Inter-American Court of Human Rights to:

1. Hold that the Court has no jurisdiction *ratione temporis* over the Convention of Belém do Pará for the alleged acts, as they relate to events prior to its ratification;
2. Hold that the petition before the Court is inadmissible as the petitioners submitted their petition to the Commission after the six months' time-bar had elapsed.
3. Subsidiarily to hold that:
    a. No violation of Article 4 and 5 *juncto* 1(1), 2 and 19 ACHR has been proven in relation to the alleged rape;
    b. The State did not violate Article 7, 8, 25 or 27 *juncto* 1(1), 2 and 19 ACHR in relation to the detention;
    c. The State did not violate Article 6 *juncto* 1(1) and 19 ACHR in relation to the work during detention;
    d. The State complied with its procedural duties embodied in Articles 4, 5, 8 and 25 *juncto* 1(1) ACHR, as well as Article 7 of the Convention of Belém do Pará.
4. In the most subsidiary order, should the Court find violations of any of the aforementioned Articles, that no further reparations are required given the extensive program of reparations set up by the State.

Respectfully,

The Republic of Naira.