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

**SAN JOSE, COSTA RICA**

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**MONICA QUISPE & MARIA ELENA QUISPE**

**PETITIONERS**

**v.**

**THE STATE OF NAIRA**

**RESPONDENT**

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**MEMORIAL FOR THE STATE**

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### III. STATEMENT OF FACTS

The State of Naira is an economically stable democracy<sup>1</sup> buttressed by the supremacy of the constitution<sup>2</sup>. It is a monist State and pursuant to Article 22 of its constitution, duly ratified treaties are attributed constitutional status, which supersede other national laws<sup>3</sup>. All international treaties have been ratified by Naira, chief among which are: the American Convention on Human Rights (hereinafter “ACHR”); the Inter-American Convention to Prevent and Punish Torture; and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (hereinafter “Convention of Belém do Pará” or Belém do Pará Convention)<sup>4</sup>.

#### **The Watershed Era**

Southern Naira, particularly the provinces of Warmi, Killki and Soncco, was plagued with a wave of violence between 1970 and 1999. During this time the Freedom Brigades (FB)—an armed group linked to drug trafficking—carried out terrorist activities in order to eliminate state interference in its affairs<sup>5</sup>. In an effort to subvert the group’s radical behaviour, the then President, Juan Antonio Morales, declared a state of emergency in the region, suspended guarantees, and established Political and Command Units in the named provinces<sup>6</sup>. These units comprised of Special Military Bases (SMB), which ultimately took control of the area and fought crime between 1980 and 1999<sup>7</sup>.

#### **Treatment of Monica Quispe and Maria Elena Quispe in Warmi**

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<sup>1</sup> Hypothetical, para 1

<sup>2</sup> Hypothetical, para 6

<sup>3</sup> Hypothetical, para 6

<sup>4</sup> Hypothetical, para 7

<sup>5</sup> Hypothetical, para 8

<sup>6</sup> Hypothetical, para 9

<sup>7</sup> Hypothetical, para 9, 27



The purpose of these units was to curb the terrorist activities of the Freedom Brigades, however, the officials—hiding behind the guise of State duty—allegedly abused their power to falsely imprison natives of the provinces and commit other human rights atrocities, particularly acts of sexual violence against women in the province of Warmi<sup>8</sup>.

A Special Military Base (SMB) was established in Warmi between 1990 and 1999 in order to regain control of the area and counteract the violence and confrontations from the insurgent group<sup>9</sup>. In March 1992 Monica Quispe and her sister, Maria Elena Quispe, who were 15 years old and 12 years old respectively<sup>10</sup>, were both taken to the Warmi base<sup>11</sup>. They were held there temporarily on the grounds that they were accomplices to the Freedom Brigades and that they furnished the armed group with information about the military bases<sup>12</sup>. However, it is not until nearly two decades later that Monica, during an interview with channel GTV—Naira's most important media outlet<sup>13</sup>, stirred up allegations about their time at the SMB in 1992 during the state of emergency. She alleges that the sisters were told to engage in domestic activities and that they were raped and gang-raped repeatedly<sup>14</sup>.

### **Deactivation of the Armed Groups**

In 1999 the capitulation of the armed group returned control to the provinces and the Special Military Bases were deactivated<sup>15</sup>. However, the deactivation of these units did not propel the Quispe sisters or the other female victims to report the sexual and domestic abuse endured while detained at the SMB<sup>16</sup>. There was some media coverage of reports of human

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<sup>8</sup> Hypothetical, 10, 28, 29

<sup>9</sup> Hypothetical, para 9, 27

<sup>10</sup> Clarification Questions and Answers 69

<sup>11</sup> Hypothetical, 28

<sup>12</sup> Clarification Questions and Answers 42

<sup>13</sup> Hypothetical, 27

<sup>14</sup> Hypothetical, para 28

<sup>15</sup> Hypothetical, para 30

<sup>16</sup> Hypothetical, para 30

rights violations and subsequent governments attempted to investigate the matter but nothing fruitful came of either of them<sup>17</sup>.

### **Gender-based Violence in Naira**

In light of the alleged acts of sexual violence and domestic abuse at the SMB in Warmi<sup>18</sup>, acts of gender-based violence are reportedly quite common in Naira<sup>19</sup>. These acts are reported by the media or other organizations<sup>20</sup> in Naira. Killapura is one such organization, which litigates cases of gender-based violence and is of the opinion that Naira has not properly addressed the matter<sup>21</sup>. However, the State has shown its commitment to combatting this issue through legislation, the ratification of international treaties, and the adoption of a gender-based violence policy.

### **Measures to Combat Gender-Based Violence**

The State's legislative framework includes Law 25253, Law 19198 and the Criminal Code of Naira<sup>22</sup>. Law 25253, which entered into force on January 2, 2014<sup>23</sup>, speaks to violence against women and the family and requires law enforcement to take immediate action to protect victims<sup>24</sup>. Law 19198 addresses street harassment<sup>25</sup> and entered into force on July 7, 2014<sup>26</sup> and the Criminal Code recognizes offences of femicide and rape<sup>27</sup>. The Zero Tolerance Policy on Gender-based Violence (ZTPGBV)<sup>28</sup> was established in 2015<sup>29</sup> and a Gender-Based Violence

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<sup>17</sup> Hypothetical, para 10

<sup>18</sup> Hypothetical, para 30

<sup>19</sup> Hypothetical, para 11

<sup>20</sup> Hypothetical, para 11

<sup>21</sup> Hypothetical, para 15

<sup>22</sup> Hypothetical, para 14

<sup>23</sup> Clarification Questions and Answers 28

<sup>24</sup> Hypothetical, para 14, 24

<sup>25</sup> Hypothetical, para 14

<sup>26</sup> Clarification Questions and Answers 28

<sup>27</sup> Hypothetical, para 14

<sup>28</sup> Hypothetical, para 19

<sup>29</sup> Clarification Questions and Answers 9

Unit was set up in the public prosecutor's office as well as in the judicial branch<sup>30</sup>. This unit is responsible for compulsory training of judges, prosecutors and other civil servants. In addition to assisting female victims, the Gender-Based Violence Unit has the authority to punish public officials guilty of committing acts of gender-based violence and discrimination<sup>31</sup>. The State has also created an Administrative Program on Reparations and Gender, which will provide economic and symbolic assistance to address physical and mental health as well as the education, housing and employment of victims<sup>32</sup>.

### **The Assault Case of Maria Elena Quispe**

Mara Elena Quispe was in an abusive relationship with her husband, Jorge Perez, and on January 20, 2014 she attempted to report him to the police for marring her with a broken bottle<sup>33</sup>. In light of the obligations under Law 25253, a police report was not filed due to the absence of a medical certificate<sup>34</sup>. The absence of a police report precluded the Office of the Public Prosecutor from bringing charges against Mr Perez, who escaped arrest.

In May 2014, Mr Perez approached Maria on the street and proceeded to verbally and physically assault her<sup>35</sup>. He was arrested and prosecuted, but sentenced to a year of suspended jail time given that he had no history of violence and the medical examiner ruled Maria's injuries as minor<sup>36</sup>.

In August 2014, Mr Perez went to his wife's place work and proceeded to beat her leaving her permanently partially disabled. Monica, who now has to care for her nephew, is in

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<sup>30</sup> Hypothetical, para 20

<sup>31</sup> Hypothetical, para 20

<sup>32</sup> Hypothetical, para 22

<sup>33</sup> Hypothetical, para 23

<sup>34</sup> Hypothetical, para 24

<sup>35</sup> Hypothetical, para 25

<sup>36</sup> Hypothetical, para 25

the midst of a custody battle with her brother-in-law and filed a complaint against Mr Perez<sup>37</sup>. He was arrested thereafter. However, the court has not made a ruling.

Maria's case garnered the attention of the media and an interview by channel GTV was conducted in December 2014, which documented Maria's life and family background as well as her and Monica's period of detention in Warmit's Special Military Base in March 1992<sup>38</sup>.

### **Killapura takes on the Quispe Case**

After the airing of the interview Killapura contacted the Quispe sisters and decided to take on their case<sup>39</sup>. The organization conducted a thorough investigation, which included testimony by victims, witnesses and neighbours. However, the complaints of alleged acts of sexual violence against the Quispe sisters were statute-barred—prompting Killapura to recommend that the government commence a wide scope investigation into the acts alleged and take the necessary steps to prosecute and punish those guilty<sup>40</sup>.

On March 15, 2015, the State of Naira, in response to Killapura's request, decided to create a High-Level Committee tasked with the duty of exploring the reopening of the criminal cases, which would include in the investigation of Monica and Maria Elena Quispe's case<sup>41</sup>. Other initiatives included the creation of Truth Commission and a Special Fund for Reparations<sup>42</sup>.

Killapura then decided to file a petition with the Inter-American Commission on Human Rights on May 10, 2016 alleging the violation of Articles 4, 5, 6, 8 and 25 all in relation to Article 1.1 of the American Convention on Human Rights as well as Article 7 of the Inter-

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<sup>37</sup> Hypothetical, para 26

<sup>38</sup> Hypothetical, para 28, 29

<sup>39</sup> Hypothetical, para 31

<sup>40</sup> Hypothetical, para 33

<sup>41</sup> Hypothetical, para 34

<sup>42</sup> Hypothetical, para 34

American Commission on the Prevention, Punishment, and Eradication of Violence against Women<sup>43</sup>. On June 15, 2016, the petition was admitted and the salient parts were given to Naira<sup>44</sup>. On August 10, 2016 the State of Naira denied responsibility for the alleged human rights violations and opted not to implement the recommendations posited by the Inter-American Commission on Human Rights. The matter is now before this Honourable Court<sup>45</sup>.

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<sup>43</sup> Hypothetical, para 38

<sup>44</sup> Hypothetical, para 39

<sup>45</sup> Hypothetical, para 40, 42

## IV. LEGAL ANALYSIS

### A. ADMISSIBILITY

#### *Statement of Jurisdiction*

The State of Naira (hereinafter referred to as “The State” or “Naira”) ratified the ACHR in 1979 and accepted the contentious jurisdiction of the court in 1979<sup>46</sup>. The State denied its responsibility for the alleged human rights violations and is not in favour of reaching a friendly settlement. However, it is willing to approach the court for adjudication of the matter<sup>47</sup>. Therefore, having completed the procedures set forth in Articles 48 and 50—pursuant to Article 62(3) of the ACHR, the Inter-American Court on human Rights (hereinafter “IACtHR”) has jurisdiction to hear this case.

### B. PRELIMINARY OBJECTION

#### **Jurisdiction *ratione temporis* of the Inter-American Court on Human Rights**

##### *The Court lacks jurisdiction *ratione temporis* for alleged violations of the ACHR prior to 1979*

Article 62(2) of the ACHR permits States Parties, upon their acceptance of the jurisdiction of the Court, to declare whether or not they choose to do so with a temporal condition. Such declaration may either be unconditional, on the condition of non-reciprocity, for a specific period or for specific cases. Most States parties opt for non-retroactivity from the date of recognition; that is, the Court does not have jurisdiction over acts or omissions that took place prior to a State’s recognition of the contentious jurisdiction of the Court. This Court in the

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<sup>46</sup> Clarification Questions and Answers 5

<sup>47</sup> Hypothetical, para 40

*Cotton Field Case*<sup>48</sup>, noted that ‘Article 62 of the ACHR established a rule of express jurisdiction, according to which the Court’s jurisdiction must be established by “special declaration” or by “special agreement”.’ It must be noted, however, that it is a general rule of international law that treaties are not retrospective in effect<sup>49</sup>.

In the present case, the former President of Naira, Juan Antonio Morales, in response to an increase in terrorist activity by the Freedom Brigades, declared Southern Naira to be under a state of emergency and as such suspended guarantees. There were rumours of human rights violations during this time. However the State did not accept the Court’s contentious jurisdiction until 1979. It is for this reason that the Court does not have jurisdiction *ratione temporis* over any alleged violations prior to the date of acceptance of the jurisdiction of the Court to hear matters relating to the violations of the ACHR.

## C. MERITS

### **Article 7— Belém do Pará Convention**

*Naira fulfilled its due diligence duties under Article 7 of the Convention of Belém do Pará*

Article 7 of the Convention of Belém do Pará imposes a duty on all States Parties to condemn all forms of violence against women and to adopt measures, without delay, that allow for the prevention, punishment and eradication of such violence. This Article in essence creates a legislative foundation for combatting violence against women Article 7(b) is of particular importance because it gives legal life to the due diligence obligations laid down in the landmark

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<sup>48</sup> *Gonzalez et al. (Cotton Field)* v Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgment of November 16, 2009, para 36

<sup>49</sup> Pasqualucci JM, *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge University Press 2003) p. 107; United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, Article 28

case of *Velásquez Rodríguez v Honduras*<sup>50</sup>. In this case this Court found that a State can accrue international responsibility for an illegal act, which is initially not attributable to the State, not for the commitment of the act, but for a failure to discharge the due diligence duty required to prevent the violation in question<sup>51</sup>. The Court went on to say that this duty entails all the legal, political, administrative and cultural measures necessary to promote the protection of human rights and to ensure that all violations are deemed illegal, where the perpetrators are punished and the victims are indemnified with damages<sup>52</sup>.

The State of Naira understands the unfortunate circumstances surrounding the victims and the alleged treatment they endured while in custody at the Special Military Base in Warmi. However, the State has not failed to discharge its duties under Chapter III, Article 7 of the Belém do Pará Convention. It has taken the necessary legal, political, administrative and cultural measures to promote the protection of human rights for women and men. The duties under Articles 7, 8 and 9 of the Convention of Belém do Pará is a tripartite approach to addressing violence against women.

Naira has discharged the legislative duties under Article 7 through its legislative framework with the Criminal Code, Law 25253 and Law 19198<sup>53</sup> as well as the ratification of international treaties, which prevail over national law<sup>54</sup>. One of these treaties is the Convention on Elimination of all forms of Discrimination against Women (CEDAW). General Recommendation No. 35 on Gender-Based Violence against Women<sup>55</sup> under CEDAW is instructive. Under this general recommendation is the “General obligations of States parties

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<sup>50</sup> *Velásquez Rodríguez v Honduras* (Merits) Inter-Am. Ct. H.R. Series C. No. 4 (29 July 1988), para 149

<sup>51</sup> *ibid*, para 172

<sup>52</sup> *ibid*, para 175

<sup>53</sup> Hypothetical, para 14

<sup>54</sup> Hypothetical, para 6 & 7

<sup>55</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, 14 July 2017, CEDAW/C/GC/35



under the Convention relating to gender-based violence against women” and the State of Naira has adhered to the provisions in this recommendation, especially where its due diligence obligation to “have laws, institutions and a system in place to address such violence.

The State has discharged its duties under Article 8, specifically Article 8(c), through ZTPGBV,<sup>56</sup> which has set aside a significant budget to cater to its immediate implementation. Within that framework includes Gender-Based Violence Units. Naira has instructed the creation these Units in the judicial branch as well as the public prosecutor’s office in order to assist female victims, which will include mandatory training and education for judges, prosecutors and other civil servants<sup>57</sup>. Naira has discharged its duties under Article 9 through the creation of the Administrative Program on Reparations and Gender<sup>58</sup>.

Lastly, with respect to the State’s duty to “punish” perpetrators of violence against women laid down in Article 7, the executive branch of Naira stated on March 15, 2015 that it would create a High-Level Committee tasked with exploring the potential reopening of criminal cases and the case of the Quispe sisters would be included in the ZTPGBV<sup>59</sup>. Additionally, the Truth Commission has begun investigations into the allegations, conducted interviews and took statements in areas during the wave of violence between 1970 and 1999<sup>60</sup>

The Court lacks material competence in relation to Article 7 of the Convention of Belém do Pará

Article 12 of the Convention of Belém do Pará permits a person or any non-governmental entity lawfully recognized in a member State of the Organization of American States (hereinafter “OAS”) to lodge petitions with the Inter-American Commission on Human Rights with respect

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<sup>56</sup> Hypothetical, para 19

<sup>57</sup> Hypothetical, para 20

<sup>58</sup> Hypothetical, para 22

<sup>59</sup> Hypothetical, para 34

<sup>60</sup> Clarification Questions and Answers 44

to violations of Article 7 of the Convention of Belém do Pará. It must be noted, however, that the competence *ratione materiae* of the Court is not explicitly extended to the IACtHR. Furthermore, the competence of the Court is carefully defined in Article 62 of the ACHR and concerns the interpretation and application of this convention with respect to alleged violations of the rights therein<sup>61</sup>. This Article does not extend the Court's competence (upon special declaration or special agreement) to other instruments within the Inter-American Human Rights System nor outside its scope.

The Vienna Convention on the Law of Treaties (VCLT)<sup>62</sup> is instructive in this regard. While it is important to look at the object and purpose of a treaty as well as the context for the purpose of interpretation, Article 32 of the VCLT states that “recourse may be had to supplementary means of interpretation, including the preparatory work and the circumstances of its conclusion.” Although this Article suggests that the VCLT requires resort to the *travaux préparatoires* as a subsidiary means to interpretation of treaties, the International Law Commission in its Commentary on Articles 31 and 32 noted that there is a general link between the two articles and must not be divorced when interpreting a particular treaty provision<sup>63</sup>.

The jurisprudence of the IACtHR views the “preparatory work” for the Convention of Belém do Pará as purely subsidiary or as “complementary interpretation criteria”,<sup>64</sup> and prefers to use the literal method of interpretation provisions of the Convention of Belém do Pará. The Court in the *Cotton Field Case* looked to Article 12, which permits any person or nongovernmental entity in a State Party to the OAS to lodge petitions with the Inter-American

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<sup>61</sup> Article 62(3) ACHR

<sup>62</sup> United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155

<sup>63</sup> Report of the International Law Commission on the second part of its seventeenth session and on its eighteenth session (UN Doc. A/6309/Rev.1) in Yearbook of the International Law Commission 1966, vol II (New York): UN, 1967) at 177-274 (A/CN.4SER.A/1966/Add.1)

<sup>64</sup> *Gonzalez et al. (“Cotton Field”) v. Mexico*, Preliminary Objection, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (Series C) No. 205, paras 66-73

Commission on Human Rights (IACHR) for violations of Article 7, to determine its jurisdiction. The Court concluded that the literal meaning of Article 12 of the Convention of Belém do Pará gives the Court jurisdiction by virtue of the individual petition system established through the IACHR and it relied on Article 11, the consultative function of the Court, as well as the “norms and procedures established in the ACHR” to justify its competence.

Interestingly, in that case Mexico filed a preliminary objection submitting that the IACtHR lacked jurisdiction over Articles 7, 8 and 9 of the Convention of Belém do Pará but the Court only accepted the objection with respect to Articles 8 and 9. These three articles fall under Chapter III of the said convention—Duties of the State—and a proper analysis of these Articles shows an overlap of duties of States Parties. Article 7 addresses the legislative measures States must take in preventing and eradicating violence against women; Article 8 details the educational measures; and Article 9 encourages the demographics that must be taken into consideration.

The State of Naira submits that the IACHR and the IACtHR in the *Cotton Field* case failed to appreciate the inter-connected nature of the articles under Chapter III of the Convention of Belém do Pará. If the Court lacks jurisdiction over Articles 8 and 9, then it should not assume jurisdiction over Article 7. Nevertheless, the State discharged its duties under Article 7 of the said convention and continues to adhere to its obligations under therein.

### **Article 27—American Convention on Human Rights**

*The State of Naira followed the procedural guidelines under Article 27 of the ACHR permitting it to suspend guarantees.*

Article 27(1) of the ACHR permits such derogation or restriction on human rights during times of war, public danger or any other emergency that threatens the independence or security of a State Party. Similarly, Article 4 of the International Covenant on Civil and Political Rights

(ICCPR), which is of particular relevance to this Court given that Naira has ratified all international treaties and has given them constitutional status<sup>65</sup>, sets the threshold for governments to establish states of emergency in the event of all acts that “threaten the life of the nation.” Such circumstances include clashes, acts of violence, vandalism, inter-ethnic confrontations and terrorist attacks<sup>66</sup>. Given the similarity of Article 4 of the ICCPR, the threshold is instructive as it relates to the ACHR.

Article 27(3) of the ACHR requires any State Party availing itself of the right to suspend guarantees to immediately report this to other States Parties through the Secretary General of the OAS and include in this report, the reasons giving rise to the suspension and the date for termination of such suspension. The State of Naira duly submitted this information under the leadership of then President Juan Antonio Morales<sup>67</sup> because the scores of acts of violence and confrontations rose to the level of terrorist attack, which threatened the survival of Naira and the three Southern Provinces of Warmi, Killki and Soncco in particular<sup>68</sup>.

*The acts of violence, links to drug-trafficking and terrorist activity of the Freedom Brigades in Southern Naira threatened the life of the nation.*

In the *Lawless Case*<sup>69</sup>, the European Court of Human Rights interpreted the words, “public emergency threatening the life of the nation” in Article 15 of the European Convention on Human Rights to mean “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed”<sup>70</sup>. Here, the Irish government discovered a secret army—Irish Republican

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<sup>65</sup> Hypothetical, para 7

<sup>66</sup> *ibid*

<sup>67</sup> Hypothetical, para 9; Clarification Questions and Answers 10

<sup>68</sup> Hypothetical, para 8

<sup>69</sup> *Lawless v Ireland* (No 3) [1961] ECHR 2, Judgment on the Merits, App no 332/57 (A/3)

<sup>70</sup> *ibid* [28]

Army (IRA), which operated outside the State—thereby threatening relations with its neighbour. The army used force in order to carry out its unconstitutional activities and cause an upsurge in terrorist attacks. The European Court of Human Rights held that these activities justified the Irish Government declaring a state of emergency and suspending guarantees. Similarly in *Aksoy v Turkey*<sup>71</sup>, which involved derogation of obligations as a result of terrorist acts from the Kurdistan Workers' Party (PKK), the European Court of Human Rights held that the “impact of the PKK terrorist activity in South-East Turkey has undoubtedly created, in the region concerned, a “public emergency threatening the life of the nation”<sup>72</sup>.”

It was highlighted in the United Nations Office on Drugs and Crime (UNODC) World Drug Report 2017 that funding for armed violence has long been linked to the illicit drug trade in regions such as Latin American and the Middle East and the drug trade has been a significant source of income for armed groups such as the Taliban in Afghanistan, Boko Haram in Nigeria and its neighbouring countries, armed groups in the Syrian Arab Republic, the Shining Path (Sendero Luminoso) in Peru, as well as the Revolutionary Armed Forces of Colombia (FARC)<sup>73</sup>. This interplay between drug trafficking and terrorism is explored in Vaicius and Isacson's policy report<sup>74</sup>, where they noted, “fighting drug-trafficking equals fighting terrorism.” This symbiotic relationship calls for action by the State to implement measures in order to eradicate narco-terrorism.

Naira submits that the terrorist activity of the armed group and its links to the illicit drug trade met the threshold described in the ICCPR, and mirrored in the ACHR, as they threatened

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<sup>71</sup> *Aksoy v Turkey* [1996] ECHR 68, Merits and Just Satisfaction, App No 21987/93

<sup>72</sup> *ibid* [70]: “see mutatis mutandis, the *Lawless v Ireland* Judgment, Series no. 3, p. 56, para 28)

<sup>73</sup> United Nations Office on Drugs and Crime, World Drug Report 2017 (ISBN: 978-92-1-148291-1, eISBN: 978-92-1-060623-3, United Nations publication, Sales No. E.17.XI.6)

<sup>74</sup> Vaicius I and Isacson A “*The War on Drugs' meets the 'War on Terror'*” (CIP International Policy Report February 2003) p.13

the life of the nation. The facts are silent on how the Freedom Brigades financed their terrorist activities; however as has been seen with the FARC in Colombia and the Taliban in Afghanistan, a link between the illicit drug trade and the Freedom Brigades can be damaging to the life of Naira. The State of Naira submits that the Freedom Brigades is a terrorist group akin to that of the IRA as in the *Lawless* case and the PKK in *Aksoy v Turkey* and failure to prevent further destruction threatened the life of the nation.

*The terrorist activity in Southern Naira qualify as a special circumstance justifying the suspension of guarantees*

The IACtHR has determined that the term “suspension of guarantees” means that rights protected by the provisions in the ACHR are inherent to man and any derogation or suspension is not absolute but rather the full and effective exercise of the right is suspended or limited<sup>75</sup>. Additionally, the suspension of rights and/or guarantees is only permitted “for the period of time strictly required by the exigencies of the situation”. The “exigencies of the situation” therefore suggest that the cause for a declaration of state of emergency or suspension of guarantees must be one of “exceptional gravity”<sup>76</sup> that cannot be tackled under normal circumstances.

It was also acknowledged by the IACtHR that, more often than not, the only way to effectively address emergency situations and thus preserve the life of the nation is to suspend guarantees. However this does not mean there is an abandonment of the rule of law or the principle of legality<sup>77</sup>. Acts of terrorism constitute a situation of exceptional gravity and States

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<sup>75</sup> *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights) Advisory Opinion OC-8/87*, January 30, 1987, Inter-Am. Ct. H.R (Series. A) No. 8 (1987) para, 18

<sup>76</sup> Grossman, Claudio. "A Framework for the Examination of States of Emergency Under the American Convention on Human Rights." *American University International Law Review* 1, no. 1 (1986): 35-55; *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights) Advisory Opinion OC-8/87*, January 30, 1987, Inter-Am. Ct. H.R (Series. A) No. 8 (1987).

<sup>77</sup> *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights) Advisory Opinion OC-8/87*, January 30, 1987, Inter-Am. Ct. H.R (Series. A) No. 8 (1987) [20-24]

have a duty pursuant to Security Council Resolution 1373 (2001) to adopt measures to prevent, punish and suppress such activity. Furthermore, Article 1 of the Inter-American Convention Against Terrorism states that States Parties ought to adopt the necessary measures to prevent, combat and eradicate terrorism and the suspension of guarantees permitted by Article 27 of the American Convention on Human Rights is one such measure where there exist “public danger, or other emergency that threatens the independence or security of a State Party.”

In its Advisory Opinion on Habeas Corpus in Emergency Situations, the Inter-American Court stated that the rights guaranteed under the ACHR should not be suspended unless the conditions in Article 27(1) have been met. While Article 27(2) provides a list of rights that are non-derogable, irrespective of the seriousness of the emergency, the Court pointed out that only “special circumstances” justify the suspension of some rights. However, there is no blanket approach to a suspension of guarantees, as what may be permissible under certain circumstances may be unlawful in another<sup>78</sup>. The character, intensity, pervasiveness and context of the emergency must be assessed in order to determine the corresponding measures to be taken.<sup>79</sup>

The acts committed by the Freedom Brigades, coupled with the group’s ties to drug trafficking, had a debilitating effect on the State at large<sup>80</sup>, thereby threatening the very life of the nation. The character, intensity, pervasiveness and context of the emergency in the present case came in the form of terror attacks in the Southern Nairan provinces of Soncco, Killki and Warmi between 1970 and 1999. This required an immediate counter-terrorism response from the State. The atrocities committed by the Freedom Brigades qualified as a situation so exceptional, the Juan Antonio Morales-led government saw no other option but to declare a state of emergency.

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<sup>78</sup> *Habeas Corpus in Emergency Situations* (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights) Advisory Opinion OC-8/87, January 30, 1987, Inter-Am. Ct. H.R (Series. A) No. 8 (1987)

<sup>79</sup> *ibid*, para 22

<sup>80</sup> Hypothetical, paras 8-9

Naira followed the appropriate procedure for suspending guarantees during states of siege<sup>81</sup> pursuant to Article 27(3) of the ACHR, and limited such suspension to Article 7 (right to personal liberty); Article 8 (right to a fair trial); and Article 25 (right to judicial protection)<sup>82</sup>. These rights are not listed in the Article 27(2) non-derogable rights and the State of Naira fully acknowledges that the suspension of these rights were not absolute but rather, a limitation was imposed on their full and effective exercise during the state of emergency.

In light of the suspension of the above rights during the state of emergency, it must be highlighted that the Nairan government at the time put in place mechanisms to allow for judicial recourse. The Political and Judicial Command Units set up at each Special Military Base<sup>83</sup>, allowed for continued judicial oversight and ensured that citizens continued to enjoy the judicial guarantees essential for the protection of their rights during the State of emergency.

#### **Article 4—ACHR**

*The State of Naira has not breached its obligation to respect the right to life of the Quispe Sisters*

Article 4(1) of the Convention stipulates that: Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

The right to life is a fundamental human right and its full enjoyment is essential for the enjoyment of all the other human rights.<sup>84</sup> If it is not respected, all the other rights lack meaning. Owing to this fundamental characteristic, restrictive approaches to it in ordinary times are

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<sup>81</sup> Clarification question, 10

<sup>82</sup> Clarification Questions and Answers 10

<sup>83</sup> Hypothetical, para 9

<sup>84</sup> *Baldeón-García v Peru*, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (Ser. C) No. 147, para. 82; *Sawhoyamaya Indigenous Community v Paraguay*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (Ser. C) No. 146, para. 150; *Pueblo Bello Massacre v Colombia*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (Ser. C) No. 140, para. 120.



inadmissible.<sup>85</sup> The Court has created both positive and negative State responsibilities in terms of implementing and upholding the right to life within the domestic context. Specifically, the Court has explained that the right to life requires not only that no person be arbitrarily deprived of her life (negative obligation), but also that the States adopt all appropriate measures to protect and preserve the right to life (positive obligation), under their duty to ensure full and free exercise of the rights by all persons under their jurisdiction.<sup>86</sup>

In the State of Naira, with rampant crime<sup>87</sup>, the state has a duty to protect all citizens from the debilitating effects of prolonged instability and the infringement of human rights by criminal elements, and as such duly suspended guarantees, under Article 27 of the American Convention, and intensified its criminal eradication strategy with the Special Military Base in Warmi Town.<sup>88</sup>

Article 27(2) of the Convention establishes that the right to life forms part of a group of rights that are non-derogable, because it is one of the rights that cannot be suspended in time of war, public danger or other emergency that threatens the independence or security of a State Party.<sup>89</sup> While states are prohibited from derogating from the right to life, this Court admits that the suspension of guarantees also constitutes an emergency situation in which it is lawful for a government to subject rights and freedoms to certain restrictive measures that, under normal circumstances, would be prohibited or more strictly controlled<sup>90</sup>. For a positive obligation to

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<sup>85</sup> *Nachova and Others v. Bulgaria* [GC], ECtHR, Nos. 43577/98 and 43579/98 Judgment of 6 July 2005, para. 94; *Myrna Mack-Chang v Guatemala*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (Ser. C) No. 101

<sup>86</sup> *Ibid.* at 92–93.

<sup>87</sup> Hypothetical, para 8

<sup>88</sup> Hypothetical, para 9

<sup>89</sup> *Baldeón-García v Peru*, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (Ser. C) No. 147, para. 82; *Sawhoyamaya Indigenous Community v Paraguay*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (Ser. C) No. 146; *Pueblo Bello Massacre v Colombia*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (Ser. C) No. 140, para. 119

<sup>90</sup> *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)* Advisory Opinion OC-8/87, January 30, 1987, Inter-Am. Ct. H.R. (Series. A) No. 8 (1987), para. 24

arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate danger to the life of an identified individual or individuals from the criminal acts of a state or non-state party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that danger.<sup>91</sup> In such a context of hostility and state intervention, the right to life, fundamentally means that that no person may at any time be arbitrarily killed<sup>92</sup>.

The Quispe sisters' right to not be subjected to arbitrary killing was not breached. In cases dealing with the right to life, while balancing the State's duty to protect society from threats of and the reality of violence, the Court has yet to make a conclusion that even where the victims had not died under the circumstances of a suspension of guarantees, the State would still be in breach of the right to life. Such a decision would frustrate the States duty to provide an environment of peace and security especially where Inter-American jurisprudence<sup>93</sup> declares that while the right to life cannot be subjected to a suspension, it can however be restricted in a state of emergency.

With respect to Article 1.1, Naira has fulfilled its due diligence obligation to ensure all persons within its jurisdiction enjoy the rights and freedoms enshrined in the convention and to be free from violence and crime by way of preventing, investigating and punishing any violation of the rights recognized by the Convention. Persons in Warimi Town, inclusive of the Quispe Sisters were subjected to the onslaught of domestic terrorist whose aim was to ply their drug trafficking ring immune to state intervention. Naira fulfilled its obligation by military intervention to curb the authority and hold of the "Freedom Brigades" on Warimi Town. The

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<sup>91</sup> *Kilic v. Turkey*, ECtHR, Judgment of 28 March 2000, Application No. 22492/93, paras. 62-63; *Osman v. the United Kingdom*, ECtHR Judgment of 28 October 1998, Reports of Judgments and Decisions, paras. 115-116

<sup>92</sup> *McCann and Others v. the United Kingdom*, ECtHR, (Series A), No. 324, para 148

<sup>93</sup> *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)* Advisory Opinion OC-8/87, January 30, 1987, Inter-Am. Ct. H.R (Series. A) No. 8 (1987)

Military intervention did not conclude with the arbitrary killing of the Quispe, on the contrary it led to surrendering of armed terrorist group, after which the Special Military Base was deactivated.<sup>94</sup>

### **Article 5—ACHR**

*The State of Naira has taken sufficient and effective steps to prevent acts of inhumane treatment*

Article 5(2) of the American Convention states that no one shall be subjected to torture or cruel, inhuman, or degrading punishment or treatment and all persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person. It is a well-recognized norm of international law that persons deprived of their liberty have a right to humane treatment<sup>95</sup>. Principle 1 of the Inter-American Commission on Human Rights' Resolution on the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas speaks to the unconditional right to humane treatment. Here the IACHR states that no-one shall be subjected, inter alia, to threats and acts of torture, disappearance, cruel, inhuman or degrading treatment or punishment intended to obliterate their personality or diminish their physical or mental capacity.

In the case of *Baptiste v Grenada*<sup>96</sup>, the petitioner was convicted of capital murder and argued before the Inter-American Commission on Human Rights (IACHR) that the State violated certain rights under the ACHR, one of which was the right to humane treatment. His conditions of detention included being forced to spend 23 hours each day in a 9x16 cell; he was given a bucket instead of a toilet and only allowed to empty its contents once a day and he was deprived

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<sup>94</sup> Hypothetical, para 30

<sup>95</sup> IACHR, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116.Doc.5 rev.1 corr., adopted on October 22, 2002, para 147; IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, OEA/Ser.L/V/II.Doc.64, adopted on December 31, 2011, para 67; UN General Assembly, *Human Rights in the Administration of Justice*, A/RES/67/166; UN General Assembly, *Standard Minimum Rules for the Treatment of Prisoners*, A/69/489

<sup>96</sup> IACHR, *Baptiste v Grenada*, Report No 38/00

of natural lighting and ventilation. These conditions clearly deprived the petitioner of his physical and mental capacity, given his isolated incarceration. The IACHR concluded that these conditions failed to meet the minimum standards of treatment for prisoners.

The facts are silent on the full conditions surrounding the custody of the Quispe sisters, which is distinguishable to the circumstances in *Baptiste v Grenada*. The State of Naira submits that the alleged acts that the Quispe sisters engaged in while in custody at the Warimi SMB fell within the minimum standards of treatment of prisoners and did not amount to a violation of Article 5 of the ACHR.

*The State of Naira regrets fully the consequences of rape for both the victims and remains committed to the eradication of gender-based violence.*

Where the State was unaware of the alleged violation and where neither the crime nor those responsible have been proven, the State cannot acknowledge and accept that the right to humane treatment<sup>97</sup>. The IACtHR in *Rosendo Cantú v Mexico*<sup>98</sup> noted that the determination of the existence of rape is not of the Court's competence, given that it is a responsibility that falls on the domestic investigatory organs. In the present case, following the surrender of the armed groups and the deactivation of the SMB<sup>99</sup>, subsequent governments opened investigations on their own initiative and discovered nothing relating to the alleged violation of rape<sup>100</sup>.

The State of Naira submits that the allegation of rape of the Quispe sisters is merely hearsay. There is no conclusive evidence that this crime was committed either once or multiple times. The only proof presented so far is the out of court statements of witnesses and so-called

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<sup>97</sup> *Rosendo Cantú et al. v. Mexico*, Merits, Reparations and Costs, Inter-Am. Ct. H.R., paras 85-88

<sup>98</sup> *ibid*

<sup>99</sup> Hypothetical, para 30

<sup>100</sup> Hypothetical, para 10

victims gathered by Killapura<sup>101</sup>. This burden of proof falls on the party making the allegation and the facts are silent on whether or not the victims did medical exams either during or after the military bases were deactivated to prove they were in fact sexually abused.

### **Article 6—ACHR**

*The State of Naira has taken sufficient action to prevent and protect the Quispe sisters from slavery or involuntary labour*

The legal definition of slavery in international law is found at Article 1(1) of the 1926 Slavery Convention, which reads: ‘Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised’<sup>102</sup>. In cases of slavery, the exercise of ‘the powers attaching to the right of ownership’ should be understood as constituting control over a person in such a way as to significantly deprive that person of his or her individual liberty, with the intent of exploitation through the use, management, profit, transfer or disposal of that person<sup>103</sup>.

The 1926 Slavery Convention recognised that forced labour can develop ‘into conditions analogous to slavery’. Although forced or compulsory labour is defined by the 1930 Forced Labour Convention 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’<sup>104</sup>; forced labour will only amount to slavery when, in substance, there is the exercise of the powers attaching to the right of ownership. Slavery will not be present in cases of forced labour where the control over a person tantamount to possession is not present.

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<sup>101</sup> Hypothetical, para 33

<sup>102</sup> League of Nations, *Convention to Suppress the Slave Trade and Slavery*, 25 September 1926, 60 LNTS 253, Registered No. 1414

<sup>103</sup> Bellagio-Harvard Guidelines on the Legal Parameters of Slavery, 2012

<sup>104</sup> Convention Concerning Forced or Compulsory Labour, 1930 (No.29)

The Court *Hacienda Brasil Verde Workers v. Brazil*<sup>105</sup>, interpreted the content and scope of Articles 6(1) and 6(2) of the ACHR and arrived at the following: First, slavery involves a substantial restriction of the legal personality and a contemporary definition of slavery includes both the *de iure* or *de facto* situation or condition of the victim as well as the exercise of “the powers attaching to the right of ownership” by the perpetrator. Second, the prohibition of slavery also prohibits practices similar to slavery, such as servitude. Third, the threshold of slave work involves stricter elements than debt bondage and forced work, namely, situations of serious and persistent violations affecting the victim’s self-determination, where control represents an expression of property rights over the workers.

On the facts, the Quispe Sisters, were not detained with the intention own them or to exploit them for free labour. They were under a precautionary measure of detention due to the allegation that they were feeding crucial military information and tactics to the armed rebels. Exercising control over the Quispe Sisters is not enough to ground a claim of slave or slave labour. In *Siliadin v. France*<sup>106</sup>, a Togolese national having arrived in France in 1994 with the intention to study, was made to work instead as a domestic servant in a private household in Paris. Her passport confiscated, she worked without pay, 15 hours a day, without a day off, for several years. The applicant complained about having been a domestic slave. The European Court of Human Rights found that the applicant had not been enslaved because her employers, although exercising control over her, had not had “a genuine right of legal ownership over her reducing her to the status of an “object”<sup>107</sup>.

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<sup>105</sup> *Hacienda Brasil Verde Workers v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R., (Ser. C) No. 54

<sup>106</sup> *Siliadin v France*, ECtHR, Application No. 73316/01, 28 June 2005

<sup>107</sup> *ibid* para, 122

In *C.N. and V. v. France*<sup>108</sup>, a case concerned allegations of servitude or forced or compulsory labour (unremunerated domestic chores in their aunt and uncle's home) by two orphaned Burundi sisters aged 16 and ten years. The Court held that there had been no violation of Article 4 (prohibition of slavery and forced labour) of the Convention in respect of the applicant, "forced labour" was to be distinguished from activities which could reasonably be required in respect of mutual assistance or cohabitation.

Article 6 of the American Convention prohibits involuntary labour under normal circumstances. However, Article 6(2) provides a limited exception to this prohibition for individuals in the custody of the State, whereby such labour is permitted so long as it does not adversely affect the dignity or the physical or intellectual capacity of those detained. This exception is supported by Article 2(2)(d) of the 1930 Forced Labour Convention, which also extends the limitation to periods of emergency such as war, flood, famine or any circumstance that would endanger the existence or well-being of the population as grounds for forced labour.

The alleged forced washing, cooking and serving the soldiers<sup>109</sup> did not affect the dignity, physical or intellectual capacity of the Quispe Sisters while in the custody of the SMB. Washing and Cooking are ordinary duties that both men and women engage in on a daily basis and are in stark contrast to forced labour or slavery.

### **Article 7—ACHR**

*The State of Naira did not exceed the limits strictly required to limit the right to physical liberty of the Quispe Sisters*

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<sup>108</sup> *C.N. and V. v. France*, ECtHR, Application No. 67724/09, 11 October 2012

<sup>109</sup> Hypothetical, para 28; Clarification Questions and Answers 50

Article 7(1) of the Convention states that every person has the right to personal liberty and security<sup>110</sup>. The IACtHR in *Chaparro Álvarez and Lapo Íñiguez v Ecuador*<sup>111</sup> stated that Article 7 of the American Convention “exclusively protects the right to physical liberty and covers physical conduct that presuppose the actual presence of the holder of the right.”<sup>112</sup> The Court in this case went on to state that any violation of sub-paragraphs 2-7 is a violation of article 7(1)<sup>113</sup>. In its description of deprivation of liberty, the Inter-American Court has adopted a broad approach<sup>114</sup> and took the view that a person is deprived of his or her liberty if he or she “is unable to leave or abandon at will the place or establishment where he or she has been placed.”

In the case of *Castillo Petruzzi et al v Peru*<sup>115</sup>, the detention took place in the thick of a wave of terrorist attacks, which prompted the Peruvian government to adopt emergency measures. The Court held that the suspension of guarantees must not exceed the limits strictly required and where an act committed by public authorities goes beyond such limits the act would be illegal. This principle is underscored in the Court’s Advisory Opinion on Habeas Corpus in Emergency Situations as well as its Opinion on Judicial Guarantees in States of Emergency<sup>116</sup>.

The numerous terrorist activities committed by the Freedom Brigades and their ties to the illicit drug trade prompted the government to declare a state of emergency and suspend guarantees in order to counteract the group’s activities. Article 7 is not listed in the Article 27(2) non-derogable rights during a State of emergency nor did the State exceed the limits strictly

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<sup>110</sup> ACHR, Article 7

<sup>111</sup> *Chaparro Álvarez and Lapo Íñiguez v Ecuador*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No 170

<sup>112</sup> *ibid*, para 53

<sup>113</sup> *ibid*, para 54

<sup>114</sup> *Rights and Guarantees of Children in the Context of Migration and /or in Need of International Protection*, Advisory Opinion OC 21/14, Inter-Am. Ct. H.R. (ser. A) No. 21, para 145

<sup>115</sup> *Castillo Petruzzi et al v Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 52, para 109

<sup>116</sup> *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights) Advisory Opinion OC-8/87*, January 30, 1987, Inter-Am. Ct. H.R (Series. A) No. 8 (1987); *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights)*, Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para 36



required to address the insurgency. Furthermore, the Quispe sisters, in their recount of the alleged mistreatment, did not say whether or not they attempted to leave the base at their will. The approach of the IACtHR in testing whether or not there has been a deprivation of the person's right to physical liberty is to examine the person's ability to leave at will, which the sisters did not exercise.

*The Arrest and Detainment of the Quispe Sisters at the Warimi SMB was a precautionary measure*

Article 7 condemns the deprivation of liberty that is arbitrary or unlawful<sup>117</sup>; however, in its expansive jurisprudence, the IACtHR and IACHR, specifically Principle III of the IACHR's Resolution on Principles and Best Practices on the Protection of Persons Deprived of Liberty<sup>118</sup> in the Americas has found that preventive deprivation of liberty is an exception. According to the Commission's resolution "preventive deprivation of liberty is a precautionary measure, not a punitive one, which shall comply with the principles of legality...to the extent strictly required in a democratic society." This measure shall only be applied within the necessary limits to ensure that the individual does not impede the development of the investigations.

The exception of preventive detention was reiterated by the IACtHR in the later case of *Bayarri v Argentina*<sup>119</sup>, which said such detention shall not go beyond a reasonable time and shall not be prolonged when the reason that gave rise for the adoption of the precautionary measure no longer exists. The IACtHR observed that the national authorities shall provide "sufficient grounds to permit the reasons for which they are maintaining the restriction of

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<sup>117</sup> Article 7(3) and 7(6) of the ACHR; Burgorgue-Larsen L & Ubeda de Torres, A, *The Inter-American Court of Human Rights: Case Law and Commentary* (Oxford University Press 2011)

<sup>118</sup> Inter-American Commission on Human Rights (IACHR), *Resolution 1/08, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, 12 March 2008, No. 1/08

<sup>119</sup> *Bayarri v Argentina*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. HR. (Series C) no. 187, para 74

liberty” and such reasons must be compatible with Article 7(3) of the ACHR, which says that no one shall be subject to arbitrary arrest or imprisonment. In this case the judicial authorities imposed precautionary measure of preventive detention, which lasted 2 ½ years and the Court concluded that this time period not only exceeded the maximum legal limit established, but also was clearly excessive.

The State of Naira submits that a precautionary measure of preventive detention was adopted to take the Quispe sisters into custody in order to sever any possible communication between them and the Freedom Brigades. The Quispe sisters were held on the grounds of being accomplices to the armed groups and providing them with information about the military base<sup>120</sup>. This suspicion was enough to warrant a precautionary measure, as the *Lawless* and *Aksoy* cases have shown clearly that terrorist activity can spread like wildfire. Furthermore, they were held at the SMB for only one month<sup>121</sup>, which shows that the officials did not abuse their power to hold the sisters for an excessive period of time of 2 ½ years as was the case in *Bayarri v Argentina*.

#### *Duration of Custody of the Quispe Sisters*

According to the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty<sup>122</sup>, “juveniles who are detained under arrest or awaiting trial are presumed innocent and shall be treated as such.” In *Wong Ho Wing v. Peru*<sup>123</sup> the petitioner was detained pending extradition to China. Peru argued that the requisite domestic law did not establish a time limit for detention under these circumstances. The Court held that time limits for pre-trial detention serve as a key “safeguard” against arbitrary detentions. The absence of such a limit led to the pre-trial

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<sup>120</sup> Clarification Questions and Answers 42

<sup>121</sup> Hypothetical, para 28

<sup>122</sup> UN General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty: resolution/adopted by the General Assembly, 2 April 1991, A/RES/45/113*

<sup>123</sup> *Wong Ho Wing v. Peru*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 297

detention of Wong Ho Wing, and “constituted an additional element” in the arbitrariness of his detention in violation of article 7(3).

In the present case, the facts are silent on the duration of time stipulated in the domestic legislation of Naira for a period of detention. However, it must be highlighted that though the Quispe sisters were detained for one month, mechanisms for redress were in place in the form of the Judicial Command Units<sup>124</sup>. Where soldiers may have failed to bring them before a competent authority, the women could have exercised their rights to judicial recourse.

Naira, in light of the suspension of guarantees is committed to the continued respect and promotion of human rights for its citizens, especially those of vulnerable groups—women and children. However, it is not clear from the facts or clarification questions and answers whether or not they were brought before a competent authority and if their detainment was registered. Furthermore, the Quispe Sisters were arrested under the suspicion of their involvement with the Freedom Brigades<sup>125</sup>. The detainment of the sisters can be distinguished from two landmark cases, which shed light on the realities of children in armed conflict. In the *Molina Thiessen*<sup>126</sup> case a 14-year-old boy was kidnapped by security forces and subsequently disappeared and in the *Gómez-Paquiyaui Brothers*<sup>127</sup> case, two brothers were detained, subsequently tortured and in just short of an hour of their detainment they were executed.

The State of Naira finds it doubtful that the Quispe sisters endured such gross violations. Nevertheless, their detention was not an avenue to commit the alleged acts. The deprivation of their right to liberty was solely to prevent the Freedom Brigades from gaining information on the logistics of the SMB and therefore did not amount to a violation of their rights under Article 7.

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<sup>124</sup> Hypothetical, para 9

<sup>125</sup> Clarification Questions and Answers 42

<sup>126</sup> *Molina Thiessen v. Guatemala*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 108 (July 3, 2004)

<sup>127</sup> *Gómez-Paquiyaui Brothers v Peru*. Merits, Reparations and Costs, Judgment Inter-Am. Ct. H.R (July 8, 2004)

Naira, acknowledges that this right is assessed in relation to Article 1.1, which imposes on States Parties the positive obligation to ensure the free and full exercise of the rights and freedoms in the ACHR; however, there was a lawful limitation on Article 7 pursuant to Article 27.

Lastly Principle III of the IACHR's Resolution on Principles and Best Practices on the Protection of Persons Deprived of Liberty carries significant weight in Naira, given that it is a monist State. This Resolution and other ratified international treaties qualify as "other measures" referred to in Article 2 of the ACHR, to give continued effect to the rights and freedoms referred to in Article 1.

### **Article 8 and Article 25—ACHR**

*The State of Naira did not suspend essential judicial guarantees during the state of emergency.*

Articles 8 and 25 of the ACHR both contribute to the matrix of judicial rights and guarantees bestowed on all individuals of State Parties to the Convention. The right to a fair trial is codified in Article 8(1) and is intrinsically linked to the writ of habeas corpus embedded in Article 7(6), which speaks to the right to judicial recourse in the event anyone is deprived of their liberty. The right to judicial protection in Article 25(1), "a general provision that gives expression to the procedural institution known as amparo<sup>128</sup>," bolsters these rights in that every individual has the right to prompt recourse, or any other effective recourse to a competent court or tribunal for protection against acts that violate his or her fundamental rights. It is the view of the IACtHR, that these three Articles collectively contain rights making up "essential judicial guarantees<sup>129</sup>." According to the IACtHR "essential" judicial guarantees means "those that

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<sup>128</sup> *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and 8 American Convention on Human Rights), Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para 32

<sup>129</sup> *Habeas Corpus in Emergency Situations* (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights) Advisory Opinion OC-8/87, January 30, 1987, Inter-Am. Ct. H.R (Series. A) No. 8 (1987); *Judicial Guarantees in*

ordinarily will effectively guarantee the full exercise of the rights and freedoms protected by that provision and whose denial or restriction would endanger their full enjoyment<sup>130</sup>.”

*The State of Naira submits that Article 8 is a procedural requirement and not strictly a judicial guarantee*

Article 8 of the ACHR, though included in the group of Articles making up the essential judicial guarantees enjoyed by every individual of States Parties to the Convention, does not acknowledge any judicial guarantees in a strict sense, but rather sets the standard for the procedural requirements that must be observed with respect to particular judicial guarantees under the Convention<sup>131</sup>. The procedural requirement of due process of law<sup>132</sup>, as opposed to a specific judicial guarantee of habeas corpus or amparo, is reflected in Article 8.

The facts do not elaborate on whether or not the proceedings in Article 8(2) were appropriately carried out<sup>133</sup> during the Quispe sisters’ custody at the SMB in Warimi. However, if the officials failed to execute these procedural requirements, the petitioners could have exercised this right upon dissolution of the military base in 1999.

*The writs of habeas corpus and amparo were preserved during Naira’s state of emergency*

According to the IACtHR, the “writs of habeas corpus and amparo are among those judicial remedies that are essential for the protection of various rights whose derogation is prohibited by Article 27(2) and they serve, moreover, to preserve legality in a democratic

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

<sup>130</sup> *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)* Advisory Opinion OC-8/87, January 30, 1987, Inter-Am. Ct. H.R (Series. A) No. 8 (1987) para 16

<sup>131</sup> *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights)*, Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para 27

<sup>132</sup> *ibid*, para 28

<sup>133</sup> Hypothetical, paras 27-30

society.<sup>134</sup>” The Court in *Tibi v Ecuador*<sup>135</sup> went on to say that these guarantees are essential to avoid detentions made by the State, which are grounded in arbitrariness and unlawfulness and reiterated its position in the *Case of the Gomez Paquiyauri Brothers*<sup>136</sup>, that the State has a duty to guarantee the rights of individuals under its custody and any information relating to its detainees. It has already been established that the detention in this case was not unlawful or arbitrary but rather a precautionary measure to prevent further communication between the Quispe sisters and the Freedom Brigades. Where the Quispe sisters felt that their rights were violated as a result of this precautionary measure, they had the opportunity to seek judicial recourse at the Judicial Command Unit<sup>137</sup>. However, there is no evidence to suggest that the sisters or any of the other victims attempted to exercise their right to judicial recourse while in custody at the SMB.

It is important to also consider the dissenting opinion of Judge Martens in the case of *Brogan And Others v. United Kingdom*,<sup>138</sup> where he noted that the executive arm of government must have extraordinary powers in order to suppress terrorism<sup>139</sup>. This does not mean that governments wish for a suspension of the rule of law nor does it requests an absolute suspension or derogation of inherent human rights, but in the face of gross atrocities committed by terrorist groups or other non-State actors, some guarantees will have to be limited in order to ensure the safety and protection of the life of the nation. The primary reason for establishing a state of emergency was to counter the terrorist acts of the armed group. At no point did the State of

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<sup>134</sup> *Habeas Corpus in Emergency Situations* (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights) *Advisory Opinion OC-8/87*, January 30, 1987, Inter-Am. Ct. H.R. (Series. A) No. 8 (1987) para 42;

<sup>135</sup> *Tibi v Ecuador*, Preliminary Objections, Merits, Reparations, and Costs, judgment, Inter-Am. Ct. H.R. (ser. C) No. 114, para 128-129

<sup>136</sup> *Gomez Paquiyauri Brothers v Peru*, Merits, Reparations and Costs, judgment, Inter-Am. Ct. H.R. (ser. C) No. 110, para 97

<sup>137</sup> Hypothetical, para 9

<sup>138</sup> *Brogan and Others v United Kingdom*, ECtHR, Judgment of 29 November 1988, Series A, No.145-B cited in Pati R, *Due Process and International Terrorism: An International Legal Analysis* (Koninklijke Brill 2009)

<sup>139</sup> *ibid*, para 3

Naira, in its notification to the Secretary General of the OAS of suspension of guarantees, that it will be suspending the rule of law. The presence of judicial units at the Warimi SMB suggests that the rule of law was maintained.

Neither the Quispe sisters nor the other victims and witnesses Killapura claims to have in its arsenal came forward with their complaints during or after the dissolution of the SMBs<sup>140</sup>, which calls into question the legitimacy of their complaints. Furthermore, when the state of emergency ended in 1999 and the Warimi SMB was deactivated<sup>141</sup>, the Quispe sisters were not at that time statute barred from making criminal complaints<sup>142</sup>. They had a total of seven years to bring a complaint against the State before the time in the statute of limitations elapsed. Yet they opted to bring proceedings 14 years later.

The State of Naira submits that the right to judicial guarantees of habeas corpus embedded amparo were preserved and respected through the establishment of Judicial Units and for this reason the State has not violated Articles 8 and 25 in relation to Article 1(1), which requires all States Parties to respect the rights and freedoms recognized in the ACHR.

## **V. PRAYER FOR RELIEF**

Taking into consideration the foregoing, the State of Naira requests that this honourable Court:

- (1) ACCEPT the preliminary objection of the State;
- (2) DECLARE that the State did not violate its due diligence obligations under Article 7 of the Convention of Belém do Pará;
- (3) DECLARE that the State did not violate the rights enshrined in Articles 4, 5, 6, 7, 8 and 25 of the American Convention on Human Rights in relation to Article 1(1);

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<sup>140</sup> Hypothetical, para 33

<sup>141</sup> Hypothetical, para 30

<sup>142</sup> Hypothetical, para 33

(4) DECLARE that the petitioners pay the costs of the proceedings.