
INTER-AMERICAN COURT OF HUMAN RIGHTS

SAN JOSE, COSTA RICA

MARÍA ELENA QUISPE ET AL

Petitioners

V.

THE REPUBLIC OF NAIRA

Respondent

MEMORIAL FOR THE REPRESENTATIVES OF THE STATE

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III. Statement of Facts

1. *Background on the State of Naira*

[1] Naira is a monist State which affords constitutional status to duly ratified treaties.¹ The State has recognized the contentious jurisdiction of the Inter-American Court on Human Rights, (hereinafter the “IACtHR”),² and has ratified all major international Human Rights Treaties.³ It has a population of 20 million people, and is divided into 25 provinces.⁴ The on-going political crisis in Naira has lasted for several years affecting the past three governments.⁵ The Democratic Reform Party was elected in 2014.⁶ Regulatory change has been difficult as the administration faces intense opposition from the legislature.⁷ Political groups have formed a united front in Parliament with the mandate of challenging the President on any reform they consider radical.⁸

[2] The ‘Respect my Children’ Party, one of the most influential groups in parliament, contends that Naira is undergoing a value crisis due to recent legal and constitutional reform.⁹ As a result, they have consistently resisted any attempt at reform.¹⁰ The Party has prevented the inclusion of a gendered perspective in the national educational curriculum.¹¹

¹ Hypothetical § 6.

² Clarifications Q&A 5.

³ Hypothetical § 7; Clarifications Q&A 96.

⁴ Hypothetical § 1.

⁵ Hypothetical § 1.

⁶ Hypothetical § 2.

⁷ Hypothetical § 3.

⁸ Hypothetical § 3.

⁹ Hypothetical § 4.

¹⁰ Hypothetical § 4.

¹¹ Hypothetical § 4.

President Benavente has tried to maintain a harmonious relationship between the branches of government to the extent of evaluating the possibility of making concessions to ensure governability.¹²

2. The general context in Naira

[3] The armed group, ‘Freedom Brigades’ (hereinafter “FB”), began carrying out terrorist actions between 1970 and 1999.¹³ These acts of terrorism were carried out with the intention of continuing drug trafficking activities without State intervention.¹⁴ A series of measures including; the declaration of a state of emergency, suspension of guarantees, and establishment of Political and Judicial Command Units in troubled provinces, including Warmi, were undertaken.¹⁵

[4] The Political and Judicial Command Units took control of the provinces by establishing military bases between the period of 1980 and 1999.¹⁶ The media reported some complaints of human rights violations but nothing came of them,¹⁷ despite independent investigations undertaken by the government, on its own initiative.¹⁸

[5] Today, there are many reported cases of gender-based violence that occur daily in Naira.¹⁹ There are 10 femicides or attempted femicides a month. Every two hours a woman in Naira is the victim of sexual violence.²⁰ Three out of five women were assaulted by their partners in 2016. Thirteen hundred girls between the ages 11 and 14 as well as three thousand 15

¹² Hypothetical § 5.

¹³ Hypothetical § 8.

¹⁴ Hypothetical § 8.

¹⁵ Hypothetical § 9.

¹⁶ Hypothetical § 9.

¹⁷ Hypothetical § 10.

¹⁸ *Ibid*; Clarifications Q&A 43.

¹⁹ Hypothetical § 11.

²⁰ Hypothetical § 12.

year olds, gave birth in 2015.²¹ Seven out of ten women between the ages of 15 and 35 have been subject to daily sexual street harassment.²² These statistics were reported by the Nairan Public Ministry, National Statistics Institute and National Opinion Institute respectively.²³ Also notable is the increase in hate crimes involving the LGBTI.²⁴

[6] Naira’s regulatory framework includes *LAW 25253* and *LAW 19198* which deal with violence against women and the family as well as street harassment.²⁵ The Criminal Code of Naira recognizes the offences of femicide, as expressed in Article 234-C,²⁶ and rape.²⁷ However, it does not define any other sexual violence as a crime.²⁸

3. *Gender-based violence in Naira*

[7] In 2010, a transgender women was murdered by her husband.²⁹ Naira’s Supreme Court held that the crime could not fall within the statutory definition of femicide as the victim had undergone gender reassignment surgery and her national ID card identified her as male.³⁰ Additionally, in 2015, a 19 year old student was raped and killed. Her assailant though convicted, was recognized to be out on probation after a previous rape conviction.³¹

[8] In response, the State took specific and immediate measures, collectively known as the Zero Tolerance Policy on Gender Based-Violence (hereinafter “ZTPGBV”).³² Not only was the ZTPGBV allotted an extraordinary budget, amounting to 3% of Naira’s GDP,³³

²¹ Hypothetical § 12.

²² Hypothetical § 12.

²³ Hypothetical § 12.

²⁴ Hypothetical § 12.

²⁵ Hypothetical § 14; Clarifications Q&A 73.

²⁶ Clarifications Q&A 4.

²⁷ Hypothetical § 14.

²⁸ Hypothetical § 14.

²⁹ Hypothetical § 17.

³⁰ Hypothetical § 17.

³¹ Hypothetical § 18.

³² Hypothetical § 19.

³³ Clarifications Q&A 64.

but relevant groups such as civil society, women's organizations and victim's associations were invited to submit proposals for the design of this measure.³⁴

[9] Within the ZTPGBV, the State created a Gender-Based Violence Unit in both the public prosecutor's office and the judicial branch.³⁵ This Unit includes specific measures to assist female victims, as well as to implement mandatory training for judges, prosecutors, and other public servants.³⁶ Additionally, the Unit was authorized to penalize public officials for acts of gender-based violence or discrimination.³⁷ Naira has even offered to review the legislation relating to femicide, violence, discrimination and issues of gender identity with a consensus from the population with the intent to amend any point which is considered to be discriminatory.³⁸ Also created was an Administrative Program on Reparations and Gender to implement reparations for victims of any type of gender-based violence but with priority given to cases of femicide and rape.³⁹

4. The Case of María Elena and Mónica Quispe

[10] In January 2014 Ms. María Elena Quispe attempted to report her husband, Mr. Perez, for having disfigured her with a broken bottle.⁴⁰ She was not able to file a police complaint, as she was not allowed to undergo the requisite medical examination,⁴¹ due to the medical examiner being on vacation.⁴² Given that the police report was not filed, the Nairan Police Department could not take action despite *Law 25253* requiring urgent action

³⁴ Hypothetical § 19.

³⁵ Hypothetical § 20.

³⁶ Hypothetical § 20.

³⁷ Hypothetical § 20.

³⁸ Hypothetical § 21.

³⁹ Hypothetical § 22.

⁴⁰ Hypothetical § 23.

⁴¹ Hypothetical § 23.

⁴² Clarifications Q&A 22.

for protection of victims.⁴³ Ms. Quispe later had an altercation with Mr. Perez, which resulted in her sustaining minor injuries.⁴⁴ He was sentenced to a year of suspended jail time as he had no prior history of violence.⁴⁵ Another altercation between Mr. Perez and Ms. Quispe ended with her being partially disabled.⁴⁶ He was subsequently arrested.⁴⁷ Mónica Quispe, María Quispe's sister, filed a complaint which is still pending before the domestic Courts.⁴⁸

[11] In an interview, Mónica Quispe alleged that a Special Military Base (hereinafter “SMB”) committed abuses against the population.⁴⁹ She further accused the SMB of sexual violence, rape, forcing herself, her sister and other detainees to wash, cook and clean every day.⁵⁰ The allegations of the conduct in the SMB were never reported by any alleged victim.⁵¹ Further, mere days after the news report, authorities in the province of Warmi issued a public statement denying the events alleged by Mónica Quispe.⁵² The public statement by the Warmi authorities was supported by the majority of its residents.⁵³ Despite the decree by State authorities against the allegations by Mónica Quispe, and the denial of the events by the majority of the population, the NGO, Killapura, still sought to file a criminal action against the State but was time barred.⁵⁴

⁴³ Hypothetical § 24.

⁴⁴ Hypothetical § 25.

⁴⁵ Hypothetical § 25.

⁴⁶ Hypothetical § 25.

⁴⁷ Hypothetical § 25.

⁴⁸ Hypothetical § 26.

⁴⁹ Hypothetical § 28.

⁵⁰ Hypothetical § 28.

⁵¹ Hypothetical § 30.

⁵² Hypothetical § 32.

⁵³ Hypothetical § 32.

⁵⁴ Hypothetical § 33.

[12] In response to this, the Government noted that it was not within its purview to interfere with matters of the Judiciary. The Government instead, created a High-Level Committee to explore the potential reopening of the criminal case.⁵⁵ Additionally, a Truth Commission was created to urgently investigate the allegations made by Mónica Quispe.⁵⁶ Further, following a presidential decree which promised justice and redress where appropriate, a Special Fund was created for reparations concerning possible violations.⁵⁷

[13] Notwithstanding the previous measures, the ZTPGBV provided assurance that it would undertake monitoring of the case of attempted femicide of María Elena Quispe, as well as the custody litigation involving her son.⁵⁸ They also reiterated their significant efforts in combating the widespread culture of discrimination in Naira.⁵⁹ However, Killapura still maintained their opinion that the measures offered were not sufficient.⁶⁰

5. Proceedings in the Inter-American System

[14] Killapura filed a petition with the Inter-American Commission on Human Rights, (hereinafter the “IACHR”), alleging violations of the rights enshrined in the American Convention on Human Rights (hereinafter the “ACHR” or the “Convention”),⁶¹ namely; Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 7 (Right to Personal Liberty), Article 8 (Right to Fair Trial), and Article 25 (Right to Judicial Protection), all in relation to Article 1(1) of the ACHR. And violation of Article 7 of the Inter-American Convention on the Prevention, Punishment and

⁵⁵ Hypothetical § 34.

⁵⁶ Hypothetical § 34.

⁵⁷ Hypothetical § 34.

⁵⁸ Hypothetical § 35.

⁵⁹ Hypothetical § 35.

⁶⁰ Hypothetical § 36.

⁶¹ Organization of American States (OAS), *American Convention on Human Rights (ACHR)*, “*Pact of San Jose*”, *Costa Rica*, 22 November 1969.

Eradication of Violence against Women (hereinafter the "Convention of Belem do Para"),⁶² in relation to María Elena and Mónica Quispe.⁶³

[15] In keeping with its Rules of Procedure and the provisions of the ACHR, the Commission adopted a report declaring the case admissible.⁶⁴ Naira, denied responsibility for the alleged human rights violations and provided an account of all actions taken in favour of the victims and women in general.⁶⁵ As such the State did not find it necessary to implement the recommendations made by the IACHR, the case was subsequently submitted to the IACtHR.⁶⁶

IV. Legal Analysis

A. Admissibility

[16] In 1979 the State of Naira, ratified the ACHR,⁶⁷ and further recognized the Court's contentious jurisdiction.⁶⁸ Pursuant to Articles 61, and 62,⁶⁹ the Court has authorization to deliberate on matters relating to the interpretation and application of the ACHR, and thus has the requisite jurisdiction.

⁶² Organization of American States (OAS), *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women* ("Convention of Belem do Para"), 9 June 1994.

⁶³ Hypothetical § 38.

⁶⁴ Hypothetical § 41.

⁶⁵ Hypothetical § 40.

⁶⁶ Hypothetical § 42.

⁶⁷ Hypothetical § 7.

⁶⁸ Clarifications Q&A 21.

⁶⁹ ACHR, (n 61).

1. The Court lacks jurisdiction, *ratione temporis*, to adjudicate on the Convention of Belem do Pará.

[17] Naira ratified the Convention of Belem do Pará, in 1996.⁷⁰ However, the claim before the IACtHR is solely in relation to the detriment of María Elena and Mónica Quispe with respect to the alleged violations in 1992.⁷¹

[18] The Convention of Belem do Pará, is regulated by the Vienna Convention on the Law of Treaties.⁷² Article 28 of which, sets out the principle of non-retroactive application,⁷³ which states that the provisions of a treaty cannot bind a party in relation to a situation which ceased prior to the entry into force of the given treaty with respect to that party.⁷⁴ Therefore, the State cannot be liable for any alleged breach of the Convention of Belem do Pará, which would have occurred before its ratification.

[19] Assuming that the Court decides that the current petition is admissible, the State of Naira submits that it has neither violated the ACHR nor the Convention Belem do Pará.

B. Merits.

1. The State of Naira did not violate Article 4 in conjunction with Article 1(1) of the ACHR in relation to María Elena and Mónica Quispe.

[20] The right to life as protected by the ACHR and other international Human Rights treaties,⁷⁵ requires the respect for the individual's right to life, protection of the right by

⁷⁰ Hypothetical § 7.

⁷¹ Hypothetical § 41; Clarifications Q&A 74; Clarifications Q&A 94.

⁷² United Nations, *Vienna Convention on the Law of Treaties*, (VCLT) 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 33.

⁷³ VCLT, (n 72), Article 28.

⁷⁴ *Ibid.*

⁷⁵ UN General Assembly, *International Covenant on Civil and Political Rights*, (ICCPR) December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 6.

law and prevention of the arbitrary deprivation of one's life.⁷⁶ The State has fulfilled all the obligations under Article 4 in conjunction with Article 1(1) of the ACHR.

1.1. The State of Naira has not arbitrarily deprived María Elena and Mónica Quispe of their right to life.

[21] Article 4 of the ACHR, prescribes that every person has the right to have his life protected against arbitrary deprivation. The right to life is taken to have both negative and positive obligations.⁷⁷ Article 1(1) of the ACHR charges State Parties with the duty to respect and guarantee the rights provided in the Convention.⁷⁸ The negative obligation imposed on the State relates to its responsibility to ensure no arbitrary deprivation of the right to life,⁷⁹ at the hands of State agents,⁸⁰ as well as by third parties in the private sphere.⁸¹ This negative obligation is not in contention as, in the current petition, there was no loss of life.

1.2. The State of Naira has fulfilled its obligation to effectively investigate, prosecute, punish and provide redress for the alleged deprivation of María Elena and Mónica Quispe's right to life.

[22] Article 4, in conjunction with Article 1(1) of the ACHR gives rise to these positive obligations. The positive duties imposed on State Parties require the organizing of all structures, through which public power is exercised, to guarantee that they are capable of

⁷⁶ ACHR, (n 61), Article 4.

⁷⁷ *Baldeón-García v. Peru* (Merits, Reparations and Costs) April 6, [2006], IACtHR, Series C No. 147. § 84.

⁷⁸ *Vélasquez-Rodríguez v Honduras* (Merits) Judgment of July 29, [1998], IACtHR, Series C No. 4 § 164.

⁷⁹ *Case of the Pueblo Bello Massacre* (Merits, Reparations and Costs) Judgment of January 31, [2006], IACtHR, Series C No. 140. § 120.

⁸⁰ *Case of the "Street Children" (Villagran-Morales et al.) v. Guatemala*, (Merits) Judgment of November 19, [1999], IACtHR, Series C No 63. § 144.

⁸¹ *Gonzalez LLUY et al. v Ecuador* (Merits, Reparations and Costs) Judgment of September 1, [2015], IACtHR, Series C No. 298. § 170.

ensuring the free and full enjoyment of this right.⁸² This translates to the obligations of prevention, investigation, punishment and reparation of any rights recognised in the Convention.⁸³

[23] The duty of prevention extends to measures of a legal, political, administrative and cultural nature.⁸⁴ It is the requirement that alleged violations are effectively considered and treated as wrongful,⁸⁵ and further, that such violations likely lead to sanctions and reparation.⁸⁶ States are required to create a judicial system consisting of substantive criminal law, and procedural criminal law,⁸⁷ which effectively prevents and punishes the violation of human rights.⁸⁸

[24] Substantive criminal law as it relates to the duty of prevention refers to the enactment of criminal legal provisions that meet the requirements of punitive law in a democratic society.⁸⁹ The widespread incorporation of international treaty provisions into the domestic law of the State,⁹⁰ by virtue of Naira's monist nature,⁹¹ and automatic incorporation upon ratification,⁹² as well as the inclusion of Article 234-C which codifies

⁸² *Vélasquez-Rodríguez v Honduras*, (n 78), § 164.

⁸³ *Vélasquez-Rodríguez v Honduras*, (n 78), § 166; *Case-law of the Inter-American Court of Human Rights*, Chronicle for the Year 2008, Marie Rota, p. 129-138.

⁸⁴ *Velasquez Paiz et al v Guatemala* (Preliminary Objections, Merits, Reparations and Costs) Judgement of October 4, [2010], IACtHR, Series C No. 307 § 107.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Albán-Cornejo et al. v. Ecuador*, (Merits, Reparations, and Costs) Judgment of November 22, [2007], IACtHR, Series C No. 171 § 135.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ Hypothetical, § 7; most notably; UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, (CEDAW), 18 December 1979, United Nations, Treaty Series, vol. 1249; Organization of American States (OAS), *Inter-American Convention to Prevent and Punish Torture*, 9 December 1985, OAS Treaty Series, No. 67.

⁹¹ Hypothetical § 6.

⁹² *Complete International Law: Text, Cases, and Materials*. Ademola Abass, Oxford University Press (2012) pg. 160.

the offence of femicide,⁹³ has the effect of creating a domestic legal framework which satisfies the substantive law requirement under the right to life.

[25] Additionally, the procedural law requirement as it relates to the duty of prevention, obliges States to ensure that any person who is a victim of a human right violation, has access to effective resources that ensure justice in a timely manner.⁹⁴ Accordingly, Member States should earmark necessary budgetary allocations to equip themselves with the human, technical and infrastructural resources necessary for specialized investigation.⁹⁵

[26] Naira has satisfied this obligation through its implementation of two measures. Firstly, its creation of the ZTPGBV by way of an extraordinary budget allocation,⁹⁶ implemented since 2015.⁹⁷ Secondly, the creation of The Gender-Based Violence Unit, which aids in satisfaction of the duty of prevention. The Unit was designed to assist female victims and penalize public officials who commit acts of gender-based violence.⁹⁸ These actions of the State satisfy the requisite standards relating to its procedural obligations as it facilitates access to justice. Thus, Naira has satisfied the positive obligations as it relates to the duty of prevention, both the substantive and procedural criminal law requirements within its judicial system.

[27] In relation to the duty of prevention, the Court must decide whether in the specific case, the individual was in a dangerous situation and whether the State acting in its sphere of competence could have adopted measures which may have reasonably prevented the

⁹³ Clarifications Q&A 4.

⁹⁴ *Albán-Cornejo et al. v. Ecuador*, (n 87), § 135.

⁹⁵ *Report on Citizen Security and Human Rights*, Inter-American Commission on Human Rights, 31 December 2009, OEA/Ser.L/V/II. Doc. 57 pg. 43, § 112.

⁹⁶ Hypothetical, § 19.

⁹⁷ Clarification Q&A 35.

⁹⁸ Hypothetical, § 20.

situation.⁹⁹ To this end, the Court must assess (a) whether the State should have been aware of the situation,¹⁰⁰ and (b) whether it had a reasonable possibility of preventing or avoiding the perpetration of the offence.¹⁰¹ This need for prevention is heightened as the alleged violations surround the rights of persons who were children at the time of the offence.¹⁰² In the current situation, the absence of a report on the alleged violations,¹⁰³ the political crisis,¹⁰⁴ the presence of the armed group carrying out terrorist activities,¹⁰⁵ and the state of emergency,¹⁰⁶ Naira was not only unaware of the alleged violations at the time of its alleged occurrence,¹⁰⁷ but was not in a position to undertake measures to reasonably prevent the alleged violations and hence cannot be held responsible.

[28] The duty of investigation requires, state authorities to begin *ex officio* and without delay, a serious, impartial and effective investigation.¹⁰⁸ This is, however, hinged on the awareness of a violation.¹⁰⁹ The IACtHR has previously held that the duty to investigate is not breached merely because an investigation does not produce a satisfactory result.¹¹⁰ However, investigation must not be undertaken as a mere formality predestined to be

⁹⁹ *Valiz Franco v Guatemala* (Preliminary Objections, Merits, Reparations and Costs) Judgment of May 19, [2014], IACtHR, Series C No. 277, § 142.

¹⁰⁰ *Pueblo Bello Massacre case*, (n 79), § 123.

¹⁰¹ *Ibid*; *Case of Afro-descendants Communities of the Cacarica River v Colombia* (Preliminary Objections, Merits, Reparations and Costs) Judgment of November 20, [2013], IACtHR, Series C No. 270, § 224.

¹⁰² UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

¹⁰³ Hypothetical § 30.

¹⁰⁴ Hypothetical § 1.

¹⁰⁵ Hypothetical § 8.

¹⁰⁶ Hypothetical § 9.

¹⁰⁷ Clarifications Q&A 8.

¹⁰⁸ *Miguel Castro Castro Prison Case* (Merits, Reparations, and Costs) Judgment of August 2, [2008], IACtHR, Series C No. 160 § 256; *Case of the “Mapiripán Massacre”* Judgment of September 15, [2005], IACtHR, Series C No. 134, §. 219 and 223.

¹⁰⁹ *Miguel Castro Castro Prison Case*, (n 108), § 256; *Case of the “Mapiripán Massacre”*, (n 78), § 219 and 223.

¹¹⁰ *Velasquez Rodriguez v Honduras*, (n 78), § 173, *Miguel Castro Castro Prison Case*, (n 108), § 255.

ineffective,¹¹¹ but must be carried out by all available legal means with the aim of determining the truth.¹¹² This positive obligation must not be interpreted in a way which imposes an impossible or disproportionate burden on authorities.¹¹³

[29] For the positive obligation of investigation to arise, it must be established that the authorities knew or ought to have known at the time, an existence of a real and immediate danger to the life of the individual or individuals.¹¹⁴ Given that neither María Elena nor Mónica Quispe or any of the alleged victims made any report of any human rights violations at the SMBs,¹¹⁵ the positive obligation cannot be said to have arisen. Notwithstanding that, Naira did conduct an independent investigation on its own initiative which yielded no evidence of the acts denounced.¹¹⁶ Additionally, when the State of Naira was notified of the possible violations of human rights within the SMBs in 2014,¹¹⁷ the State ordered the creation of a Truth Commission, comprised of representatives of the State and civil society to urgently undertake an investigation into the violations.¹¹⁸ Therefore the State has fulfilled its positive obligation under the duty to investigate.

[30] While there exists under the positive obligations of the ACHR, the duties of punishment and reparation,¹¹⁹ in the instant proceedings these obligations do not arise as the investigation conducted, yielded no evidence of the acts.¹²⁰ Hence there was no

¹¹¹ *Case of the “Mapiripán Massacre*, (n 108), §. 223; *Case of the Serrano Cruz Sisters*. Judgment of March 1, [2005], IACtHR, Series C No. 120, § 61.

¹¹² *Case of the “Mapiripán Massacre”*, (n 108), § 237; *Case of the Serrano Cruz Sisters*, (n 111), § 170.

¹¹³ *Pueblo Bello Massacre case*, (n 79), § 63.

¹¹⁴ *Pueblo Bello Massacre case*, (n 79), § 63. *Osman v UK*, [1998], ECHR 101, § 116.

¹¹⁵ Hypothetical, § 30.

¹¹⁶ Clarifications Q&A 43.

¹¹⁷ Clarifications Q&A 8.

¹¹⁸ Hypothetical § 34.

¹¹⁹ *Velasquez-Rodriguez v Honduras*, (n 78), § 166; *Case-law of the Inter-American Court of Human Rights*, (n 83), p. 129-138.

¹²⁰ Clarifications Q&A 43.

requirement for punishment and no evidence to suggest that the petitioners were wronged and required reparations.

2. The State of Naira did not violate Article 5 in conjunction with Article 1(1) of the ACHR in relation to María Elena and Mónica Quispe.

[31] The right to humane treatment affords the individual the right to have his physical, mental and moral integrity respected,¹²¹ as well as protection from acts that constitute cruel, inhumane or degrading treatment or torture.¹²² The duty placed on States is to ensure the protection of this right as the State is the guarantor of the rights contained within the Convention.¹²³

2.1. The State of Naira did not subject María Elena or Mónica Quispe to torture, cruel, inhumane or degrading treatment.

[32] The Inter-American Convention to Prevent and Punish Torture¹²⁴ (hereinafter “the Convention to Prevent and Punish Torture”) defines torture as an intentional act performed to inflict physical or mental pain as a means of investigation, intimidation, or punishment.¹²⁵ Torture is an aggravated form of inhumane treatment.¹²⁶ Under the Inter-American system, for an act to constitute torture it must; be intentional, result in severe physical or mental suffering, be committed with a purpose or aim,¹²⁷ and be perpetrated by a public servant or by a private person at the instigation of a public servant.¹²⁸ It

¹²¹ ACHR, (n 61), Article 5(1).

¹²² ACHR, (n 61), Article 5 (2); ICCPR, (n 75).

¹²³ *López-Álvarez v Honduras*, (Merits, Reparations and Costs) Judgment of February 1, [2006], IACtHR, Series C No. 141.

¹²⁴ *Inter-American Convention to Prevent and Punish Torture*, (n 90).

¹²⁵ *Inter-American Convention to Prevent and Punish Torture*, (n 108), Article 2.

¹²⁶ *Report on Terrorism and Human Rights*, Inter-American Commission on Human Rights, Report No. 8/16, Case 11.661 § 158.

¹²⁷ *Bueno-Alves v Argentina* (Merits, Reparations and Costs) Judgment of May 11, [2007], IACtHR, Series C No. 164 § 79, *Luis Lizardo Cabrera v. Dominican Republic*, Case 10.832, Inter-Am. Comm'n. H. R., § 81.

¹²⁸ *Luis Lizardo Cabrera v. Dominican Republic*, (n 127), § 81.

therefore follows that acts which lack intention or are not pursuant to a specific purpose, cannot constitute torture but rather inhumane treatment.¹²⁹ Therefore the alleged rape of María Elena and Mónica Quispe would not be able to amount to torture as the allegation lacks the requisite intention or pursuance of a specific purpose.

[33] Rape, while always recognized as criminal conduct, can only be equated to torture in limited circumstances.¹³⁰ For this equation to be made, the act has to satisfy the three aforementioned criteria necessary for the establishment of torture.¹³¹ It follows, that the allegations made by Mónica Quispe,¹³² cannot constitute torture as prescribed by Article 5 of the ACHR given that the requirement of being committed with an intention cannot be satisfied.¹³³

[34] When dealing with rape allegations in relation to breaches of Article 5 of the ACHR, the requisite standard of proof is that, ‘beyond a reasonable doubt’ when assessing material evidence.¹³⁴ This standard requires existence of sufficiently strong, clear, concordant inferences or of similar unrebutted facts.¹³⁵ The claims made by María Elena and Mónica Quispe cannot satisfy the requisite standard of proof. In the case of *Loayza Tamayo v Peru*¹³⁶ on similar facts, the only witnesses who could testify to the alleged rape

¹²⁹ United Nations, *Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Report submitted to the (former) Commission on Human Rights, E/CN.4/2006/6, adopted on December 23, 2005, § 35.

¹³⁰ *Report on the Human Rights of Persons Deprived of Liberty in the Americas*. IACHR, Report No. 11/15, Case 12.833 § 432; IACHR, *Report on Terrorism and Human Rights* § 161.

¹³¹ *Raquel Martín de Mejía (Peru)*, Case 10.970, Report N° 5/96.

¹³² Hypothetical § 28.

¹³³ *Bueno-Alves v Argentina*, (n 127), § 79; UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.

¹³⁴ *Case of Ireland v UK*, (1979-80) 2 EHRR 25, § 161; *The Greek Case* : Report of the Commission, European Commission of Human Rights : Application No. 3321/67, 1970 §. 30; *Becciev v Moldova* (2007), 45 EHRR 11 § 104.

¹³⁵ *Becciev v Moldova*, (n 134), § 104.

¹³⁶ *Loayza-Tamayo v. Peru* (Merits) Judgment of September 17, [1997], IACtHR, Series C No. 33.

of the victim, were also victims. The IACtHR held that in light of the nature of the facts, the rape could not be substantiated despite the IACHR's assertion.¹³⁷

[35] The allegations of rape by María Elena and Mónica Quispe are denied by the majority population of the province of Warmi,¹³⁸ State authorities have also issued statements denouncing such events.¹³⁹ Further allegations cannot be substantiated based solely on the testimony of victims.¹⁴⁰ The combination of these events, result in a lack of clear, concordant, unrebutted facts capable of being proven beyond a reasonable doubt. Hence the rape allegations made by the Quispe sisters cannot be substantiated to have actually occurred and would not be decided on its merit, thus the allegations cannot amount to torture or cruel, inhumane or degrading treatment.

[36] Neither the ACHR, the Convention to Prevent and Punish Torture nor other International Human Rights treaties,¹⁴¹ clearly define what actions constitute inhumane or degrading treatment.¹⁴² The IACtHR has in previous adjudications, adopted the definition of inhumane and degrading treatment from the European Commission on Human Rights (hereinafter the "EC").¹⁴³ The EC demarcates treatment as being degrading if it deliberately causes unjustified and severe mental or psychological suffering, severe humiliation, or forces a person to act against his wishes or conscience.¹⁴⁴

¹³⁷ *Loayza-Tamayo v. Peru*, (n 136), § 58.

¹³⁸ Hypothetical § 32.

¹³⁹ Hypothetical § 32.

¹⁴⁰ *Loayza-Tamayo v. Peru*, (n 136), § 58.

¹⁴¹ *ICCPR*, (n 75).

¹⁴² *Report on Terrorism and Human Rights*, (n 126), § 156.

¹⁴³ *Luis Lizardo Cabrera v. Dominican Republic*, (n 127), § 77.

¹⁴⁴ *Report on Terrorism and Human Rights*, (n 126), § 156, *Luis Lizardo Cabrera v. Dominican Republic*, (n 127), § 77, *The Greek Case*, (n 134), §186.

[37] The EC further stipulates a minimum level of severity, necessary for treatment to be considered inhumane or degrading.¹⁴⁵ The relativity of this minimum level, requires the court to take into consideration specific factors in every scenario such as the duration of the treatment, its physical and mental effects, and other particulars of the victim.¹⁴⁶ The Quispe sisters, were only detained for a month's time, in which they were allegedly forced to cook, wash and clean every day.¹⁴⁷ These actions cannot amount to cruel, inhumane or degrading treatment as it was not done deliberately to cause unjustified mental or psychological suffering or severe humiliation.

2.2. The State of Naira has fulfilled its obligations under Article 5 in conjunction of Article 1(1) of the ACHR in relation to María Elena and Mónica Quispe.

[38] Article 5 in conjunction with Article 1(1) of the ACHR, imposes positive obligations on State Parties. Namely to ensure the respect and guarantee of rights enshrined in the Convention. The guarantee of these rights impose the duty to prevent,¹⁴⁸ investigate, punish and provide reparations.¹⁴⁹ The execution of effective investigation is a fundamental and conditioning element for the protection of the right to humane treatment.¹⁵⁰

[39] The State has the obligation to initiate, *ex officio* and immediately, a genuine, impartial and effective investigation.¹⁵¹ For an investigation to be effective, it may be regarded as necessary for the persons responsible for and carrying out the investigation to

¹⁴⁵ *Caesar v Trinidad and Tobago* (Merits, Reparations and Costs) Judgment of March 11, [2005], IACtHR, Series C No. 123, § 67, *Ireland v UK*, (n 134), § 162.

¹⁴⁶ *Gomez Paquiyauri Brothers v Peru* (Merits, Reparations and Costs) Judgment of July 8, [2004], IACtHR, Series C No. 110, § 113.

¹⁴⁷ Hypothetical § 28.

¹⁴⁸ *CEDAW*, (n 90).

¹⁴⁹ *Case-law of the Inter-American Court of Human Rights*, (n 83), p. 129-138.

¹⁵⁰ "*Mapiripán Massacre*", (n 108), § 137 and 232; *Case of the 19 Merchants* (Merits, Reparations and Costs) Judgment of July 5, [2004], IACtHR, Series C No. 109 §. 153.

¹⁵¹ *Pueblo Bello Massacre*, (n 79), § 142.

be independent from those implicated in the event.¹⁵² The investigation into serious allegations of ill-treatment must be thorough and must not rely on hasty or ill-founded conclusions.¹⁵³ Further, the requirement of prevention and protection measures are hinged upon the conditional awareness of the State of a situation of real and imminent danger.¹⁵⁴ It follows that States cannot be responsible for all violations committed within its jurisdiction, and the guarantee of rights does not impose unlimited state responsibility.¹⁵⁵

[40] While the alleged violations of the ACHR occurred in 1992,¹⁵⁶ the State of Naira only learned of the events in December 2014,¹⁵⁷ which equates to twenty two years after its alleged factual occurrence. Given that the duty to launch an effective investigation arises upon the conditional awareness of a situation of real and imminent danger,¹⁵⁸ the duty under Article 1(1) of the ACHR, would have arisen in December 2014.

[41] The State of Naira satisfied its duty for effective investigation upon notification of possible violation of the Convention through its creation of a Truth Commission in March 2015.¹⁵⁹ The Commission was comprised of both State and Civil society members,¹⁶⁰ which added to its impartiality, and was given the mandate of an urgent investigation into the alleged violation.¹⁶¹ Additionally, the President of Naira publicly pledged his

¹⁵² *Barbu Anghelescu v. Romania*, no. 46430/99, 5 October 2004, § 66.

¹⁵³ *Assenov and Others v. Bulgaria* Judgment of 28 October 1998, Reports of Judgments and Decisions 1998-VIII, p. 3288, § 93.

¹⁵⁴ *Pueblo Bello Massacre*, (n 79), § 123.

¹⁵⁵ *Ibid.*

¹⁵⁶ Hypothetical § 28.

¹⁵⁷ Clarifications Q&A 7.

¹⁵⁸ *Pueblo Bello Massacre*, (n 79), § 123.

¹⁵⁹ Hypothetical § 34.

¹⁶⁰ Hypothetical § 34.

¹⁶¹ Hypothetical § 34.

commitment to objective fact finding in the investigation,¹⁶² and created a Special Fund for reparations if needed.¹⁶³

[42] Conclusively, it can be seen that the State of Naira did not subject María Elena or Mónica Quispe to torture, cruel, inhuman or degrading punishment. Further, it has satisfied its obligation of effective investigation upon the requisite conditional awareness of a situation of real or imminent danger and thus is not in violation of Article 5 in conjunction with Article 1(1) of the ACHR.

3. The State of Naira has not violated Article 6 in conjunction with Article 1(1) of the ACHR in relation to María Elena and Mónica Quispe.

[43] The right to freedom from slavery includes a prohibition from involuntary servitude and forced and compulsory labour.¹⁶⁴ Article 6 of the ACHR stands in *pari materia* with Article 4 of the European Convention on Human Rights in which the right to freedom from slavery excludes work in situations of detention.¹⁶⁵

3.1. The work performed by María Elena and Mónica Quispe cannot amount to slavery or servitude.

[44] Article 6(1) of the ACHR provides that no one shall be subject to slavery or involuntary servitude, which are prohibited in all their forms. Slavery can be defined as the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.¹⁶⁶ In *Siliadin v France*,¹⁶⁷ the applicant was made to work as a

¹⁶² Hypothetical § 34.

¹⁶³ Hypothetical § 34.

¹⁶⁴ ACHR, (n 61), Article 6; ICCPR (n 75).

¹⁶⁵ 1950 *European Convention on the Protection of Human Rights and Fundamental Freedoms* (Council of Europe) Article 4.

¹⁶⁶ League of Nations, *Convention to Suppress the Slave Trade and Slavery*, 25 September 1926, 60 LNTS 253, Registered No. 1414, Article 1.

¹⁶⁷ *Siliadin v France* (Application no. 73316/01) Judgement Strasbourg 26 July 2005.

domestic servant for fifteen hours a day without pay or days off. The Court held that the applicant could not be held in slavery as there was no genuine right of legal ownership over her thus reducing her to the status of an object.¹⁶⁸ Similarly, although María Elena and Mónica Quispe were allegedly subject to domestic work during their detention,¹⁶⁹ the work done cannot amount to slavery as there was no genuine right of legal ownership over the women to the point of reducing their status to that of an object.

[45] Additionally, servitude was defined as an obligation to provide one's services that is imposed by the use of coercion, and is to be linked with the concept of slavery.¹⁷⁰ What is prohibited is a particularly serious form of denial of freedom.¹⁷¹ Further, in addition to the obligation to perform certain services for others, the requirement of servitude includes the obligation of the 'serf' to live on another person's property and the impossibility of altering his condition.¹⁷² The detention faced by María Elena and Mónica Quispe was temporary in nature,¹⁷³ as they were suspected of being members of an armed group,¹⁷⁴ which undertook terrorist actions.¹⁷⁵ While it can be said that the sisters faced some restriction on their freedom due to the detention and allegedly performed domestic work, the situation faced by the sisters lacked the severity and permanence to satisfy the requirements necessary to amount to violation of the ACHR.

¹⁶⁸ *Siliadin v France*, (n 167), § 122.

¹⁶⁹ Hypothetical § 28.

¹⁷⁰ *Seguin v. France* (Dec.), no. 42400/98, 7 March 2000, *Siliadin v France*, (n 167), § 124.

¹⁷¹ *Van Droogenbroeck v. Belgium*, Commission's report of 9 July 1980, Series B no. 44, p. 30, §§ 78-80.

¹⁷² *Siliadin v France*, (n 167), § 123.

¹⁷³ Hypothetical § 28.

¹⁷⁴ Clarifications Q&A 42.

¹⁷⁵ Hypothetical § 8.

3.2. The work performed by María Elena and Mónica Quispe cannot amount to forced and compulsory labour.

[46] The ACHR provides that no one shall be subjected to slavery or involuntary servitude,¹⁷⁶ as well as forced or compulsory labour.¹⁷⁷ This prohibition is not subject to derogation in times of war, public danger or emergency.¹⁷⁸ However, where the work or service is normally required of a person in the execution of a sentence; is exacted in time of danger that threatens the well-being of the community or forms part of normal civic obligations it shall not amount to forced or compulsory labour.¹⁷⁹

[47] The State of Naira has undertaken the obligation to suppress the use of forced or compulsory labour in all its forms within the shortest possible period.¹⁸⁰ Forced and compulsory labour has been defined as work exacted from any person under the menace of any penalty and for which said person has not offered himself voluntarily.¹⁸¹ Within this definition exception has been made for any work or service exacted from persons in cases of emergency, which would endanger the well-being of the population as a whole or in part.¹⁸²

[48] The IACtHR has observed that the definition of forced or compulsory labour consists of two basic elements; ‘under the menace of a penalty’ and ‘performed involuntarily’.¹⁸³ The menace of a penalty can consist of an actual threat, which can assume

¹⁷⁶ ACHR, (n 61), Article 6.

¹⁷⁷ ACHR, (n 61), Article 6(2).

¹⁷⁸ ACHR, (n 61), Article 27.

¹⁷⁹ ACHR, (n 61), Article 6(3).

¹⁸⁰ *Convention concerning Forced or Compulsory Labour* (Entry into force: 01 May 1932) Adoption: Geneva, 14th ILC session (28 Jun 1930) Article 1.

¹⁸¹ *Convention concerning Forced or Compulsory Labour*, (n 180), Article 2(1).

¹⁸² *Ibid*, Article 2(2) (d).

¹⁸³ *Case of the Ituango Massacres v. Colombia* (Preliminary Objections, Merits, Reparations and Costs) Judgment of July 1, [2006], IACtHR, Series C No. 148, § 160.

different forms and degrees.¹⁸⁴ The most extreme threats being those that imply; coercion, physical violence, isolation or death directed at either the victim or next of kin.¹⁸⁵ Additionally, the requirement of unwillingness to perform the work of service is satisfied in the absence of consent or free choice when the situation of forced labour begins or continues.¹⁸⁶

[49] Notwithstanding the considerations of the IACtHR, there are instances which may amount to forced or compulsory labour, but are nevertheless justifiable,¹⁸⁷ namely when exacted in time of danger or calamity.¹⁸⁸ At the time of the alleged infringement of the ACHR, Naira had declared a state of emergency.¹⁸⁹ This declaration of was due to the terrorist actions which endangered the well-being of the State.¹⁹⁰ The ‘forced and compulsory labour’ complained of during the time of emergency was that of washing, cooking and cleaning within the SMBs.¹⁹¹ The State submits, that even if the acts required by prisoners of the SMBs amounted to ‘forced and compulsory labour’, it would have been services required during an emergency, which would be nevertheless justifiable, as it amounts to service exacted in time of danger or calamity that threatens the existence or well-being of the community, and falls within the exception under Article 6(3) (c) of the ACHR.

¹⁸⁴ *Case of the Ituango Massacres v. Colombia*, (n 183), § 161; *Global report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, “A Global Alliance against Forced Labour,”* International Labour Conference, 93rd session, 2005.

¹⁸⁵ *Ibid.*

¹⁸⁶ *Case of the Ituango Massacres v. Colombia*, (n 183), § 164.

¹⁸⁷ *S v Germany*, no. 9686/82, Commission decision of 4 October 1984, DR 39; *I. v Norway*, no. 1468/62, Commission decision of 17 December 1962, 6 YB 278.

¹⁸⁸ ACHR, (n 61), Article 6(2) (3).

¹⁸⁹ Hypothetical § 9.

¹⁹⁰ Hypothetical § 8.

¹⁹¹ Hypothetical § 28.

3.3. *The State of Naira has fulfilled its positive obligations under Article 6 in conjunction with Article 1(1) of the ACHR in relation to María Elena and Mónica Quispe.*

[50] In order to comply with the obligations to penalise and prosecute effectively, any act aimed at maintaining a person in a situation of slavery, servitude or forced or compulsory labour,¹⁹² Member States are required to put in place a legislative and administrative framework which prohibits and punishes such actions.¹⁹³ The positive obligations associated with this right also require States to take operational measures.¹⁹⁴ This positive act is, however, hinged on situations where the State authorities were aware or ought to have been aware of circumstances which require the protection of individuals through operational measures.¹⁹⁵ Subsequently, the right enshrined by Article 6 of the ACHR, also calls for a procedural obligation to investigate, dependant on a credible suspicion that an individual's right has been violated.¹⁹⁶

[51] Naira has signed and ratified all international human rights treaties,¹⁹⁷ including but not limited to the ACHR, and the Convention concerning Forced and Compulsory Labour.¹⁹⁸ Naira has not only ratified these treaties, but has afforded them constitutional status.¹⁹⁹ Therefore the standards set by these Conventions in relation to forced and compulsory labour have moved into the domestic legal framework of Naira and thus

¹⁹² *C.N. v. the United Kingdom*, Application no. 4239/08, Council of Europe: European Court of Human Rights, 13 November 2012 § 66; *Siliadin v. France*, (n 167), § 112; *C.N. and v. France*, Application No. 67724/09, Council of Europe: European Court of Human Rights, 11 October 2012 § 10.

¹⁹³ *Rantsev v. Cyprus and Russia*, Application no. 25965/04, Council of Europe: European Court of Human Rights, 7 January 2010 § 285.

¹⁹⁴ *Rantsev v. Cyprus and Russia*, (n 193), § 286; *C.N. v. the United Kingdom*, (n 192), § 67.

¹⁹⁵ *Ibid.*

¹⁹⁶ *Rantsev v. Cyprus and Russia*, (n 193), § 288; *C.N. v. the United Kingdom*, (n 192), § 69.

¹⁹⁷ Clarifications Q&A 96; *ICCPR*, (n 75).

¹⁹⁸ Hypothetical § 7.

¹⁹⁹ Hypothetical § 7.

satisfies the requirement of legislation which prevents and punishes acts aimed at maintaining a situation of slavery, servitude or forced or compulsory labour.

[52] Additionally, the obligation of effective investigation into allegations of possible violations, as with the instant right, is subject to the awareness of circumstances which would require such investigation.²⁰⁰ As the reports of the allegations were only made known to the State in December 2014,²⁰¹ and as previously stated were satisfied by the creation of the Truth Commission to undertake an immediate investigation into the possible occurrences.²⁰² Therefore, the State of Naira has not violated its obligations under the ACHR.

4. The State of Naira did not violate Article 7 in conjunction with Article 1(1) of the ACHR in relation to María Elena and Mónica Quispe.

[53] The right to personal liberty protects against arbitrary arrest and detention.²⁰³ This right is not absolute as it can be restricted in certain circumstances.²⁰⁴ However, it is accepted that a State has the responsibility to ensure the rights of persons when deprived of their liberty.²⁰⁵

²⁰⁰ *Rantsev v. Cyprus and Russia*, (n 193), § 286; *C.N. v. the United Kingdom*, (n 192), § 67.

²⁰¹ Clarifications Q&A 7.

²⁰² Hypothetical § 34.

²⁰³ ACHR, (n 61), Article 7; ICCPR, (n 75).

²⁰⁴ *Gangaram Panday v. Suriname* (Merits, Reparations and Costs) Judgment of January 21, [1994], IACtHR, Series C No. 16, § 47.

²⁰⁵ *Tibi v Ecuador* (Preliminary Objections, Merits, Reparations and Costs) Judgment of September 7, [2004], IACtHR, Series C No. 114, §. 129; *Bulacio v Argentina* (Merits, Reparations and Costs) Judgment of September 18, [2003], IACtHR, Series C No. 100, § 126.

4.1. The State of Naira has not arbitrarily deprived María Elena and Mónica Quispe of their right to personal liberty.

[54] This right consists of two distinct types of guarantees; general and specific.²⁰⁶ The general guarantee is the overarching right to personal liberty and security. Whereas the specific guarantee protects the right not to be deprived of liberty unlawfully or arbitrarily; to know the reasons for detention and charges brought against the detainee; to judicial control of the deprivation of liberty and to contest the lawfulness of detention.²⁰⁷ Any violation of these specific provisions is, in and of itself, sufficient to violate the ACHR.²⁰⁸

[55] Whilst this is so, Article 27 of the ACHR does recognize that in times of emergency, a State may derogate from its obligations contained under Article 7 of the Convention.²⁰⁹ Given the crime scourge in Naira, and its threat to the safety and security of its nationals, then President Morales declared a state of emergency.²¹⁰ Article 27(1) requires that in any state of emergency there be appropriate means to control the measures taken, so they are proportionate and do not exceed the strict limits imposed or derived from the ACHR.²¹¹

[56] The first condition is that a state of emergency must exist.²¹² Apart from being declared, the state of emergency ought to meet the criteria necessary in order to validate it.²¹³ Firstly, there must be a ‘subject’. This is the legal person or entity possessing the

²⁰⁶ *Yvon Neptune v. Haiti* (Merits, Reparations and Costs) Judgment of May 6, [2008], IACtHR, Series C No. 180, § 89.

²⁰⁷ *Chaparro Álvarez and Lapo Íñiguez v. Ecuador* (Preliminary Objection, Merits, Reparations and Costs) Judgment of November 21, [2007], IACtHR, Series C No. 170, §. 51, *Wong Ho Wing v Peru* (Preliminary Objection, Merits, Reparations and Costs) Judgment of June 30, [2015], IACtHR, Series C No. 297 § 236.

²⁰⁸ *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, (n 207), § 54.

²⁰⁹ ACHR, (n 61), Article 27.

²¹⁰ Hypothetical § 9.

²¹¹ *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], IACtHR, Series A No. 9 § 21.

²¹² ACHR, (n 61), Article 27.

²¹³ *A Framework for the Examination of States of Emergency Under the ACHR*, American University International Law Review, pg. 40.

juridical capacity to declare the state of emergency.²¹⁴ The ACHR refers simply to the ‘State Party’ in this regard.²¹⁵ President Morales, in his official capacity had the legal authority to declare a state of emergency on behalf of the State.

[57] Secondly, there must be an object of the state of emergency.²¹⁶ This refers to what the declaration affects. Under a state of emergency, the State is able to limit its obligations. Article 27 of the Convention provides which rights are subject to derogation and as such States are expected not to go beyond the grounds of derogation provided.²¹⁷

[58] Thirdly, there must be a ‘cause’. This refers to the state of affairs that necessitate the declaration. Such as war or other emergencies which threaten the independence or security of a State party.²¹⁸ Given the context of Naira between 1970 and 1999, Naira had sufficient cause to warrant the declaration of a state of emergency as FB facilitated terrorist actions within its territory.²¹⁹

[59] Additionally, the declaration of emergency provisions derogating from certain obligations imposed by the ACHR must satisfy certain requirements of proper notice.²²⁰ This was satisfied as Naira notified other State Parties of its derogation.²²¹ Even in cases of emergency, States are expected to act within the confines of the ACHR, whilst still protecting other fundamental rights.²²² The derogation from Article 7 therefore allows

²¹⁴ *Ibid.*

²¹⁵ ACHR, (n 61), Article 27.

²¹⁶ *A Framework for the Examination of States of Emergency under the American Convention on Human Rights*, (n 213), pg. 41.

²¹⁷ ACHR, (n 61), Article 27.

²¹⁸ *A Framework for the Examination of States of Emergency Under the American Convention on Human Rights*, (n 213), pgs. 41, 47.

²¹⁹ Hypothetical, § 8.

²²⁰ *A Framework for the Examination of States of Emergency Under the American Convention on Human Rights*, (n 213), pg. 47, 48.

²²¹ Clarifications Q&A 10.

²²² *A Framework for the Examination of States of Emergency Under the American Convention on Human Rights*, (n 213), pg. 48, 49.

States to detain persons without the usual requirements of a warrant of probable cause.²²³

The detention of María Elena and Mónica Quispe, albeit on false accusations,²²⁴ is still in accordance with the requirements under Article 7 as they were suspected of being accomplices to the FB.²²⁵

5. The State of Naira did not violate Articles 8 and 25 in conjunction with Article 1(1) of the ACHR in relation to María Elena and Mónica Quispe.

[60] Article 8(1) of the ACHR, codifies the principle of ‘due process of law’ which is the right of every person to be heard, with due guarantees and within a reasonable time, by a competent, independent and impartial Court.²²⁶ Further, Article 25 of the ACHR obliges Member States to provide, all persons subject to its jurisdiction, an effective legal remedy against acts that violate their fundamental rights.²²⁷

5.1. The State of Naira has not deprived María Elena and Mónica Quispe of their right to a fair trial.

[61] Article 8 of the ACHR establishes the guidelines of “due process,” which is the right of every person to be heard, with due guarantees and within a reasonable time, by a competent, independent and impartial Court, previously established by law, in the substantiation of any accusation of a criminal nature made against him.²²⁸ During the state of emergency in Naira, judicial command and authority was vested in the military.²²⁹

²²³ Clarifications Q&A 10.

²²⁴ Hypothetical, § 28.

²²⁵ Clarifications Q&A 42.

²²⁶ *Yvon Neptune v. Haiti*, (n 206), § 79; *ICCPR*, (n 75).

²²⁷ *Fernández Ortega et al. v. Mexico* (Preliminary Objection, Merits, Reparations, and Costs) Judgment of August 30, [2010], IACtHR, Series C No. 215 § 180.

²²⁸ *ACHR*, (n 61), Article 8, *Genie Lacayo v. Nicaragua* (Merits, reparations and costs) Judgment of January 29, [1997], IACtHR, Series C No. 30 § 74.

²²⁹ Clarifications Q&A 12.

[62] One requirement of a fair trial is its conduction within a reasonable time frame.²³⁰

In determining whether the time frame in a particular case is reasonable the Court will take into account four elements: (a) the complexity of the matter; (b) the procedural activities of the interested party; (c) the conduct of the judicial authorities, and (d) the effects on the legal situation on the individual involved in the proceedings.²³¹ In this regard, time begins running when the first pleading is filed, and ends when a non-appealable judgement is rendered.²³² However, Killapura's complaints never advanced to a trial as it was time-barred by the statute of limitations.²³³ Thus the time frame could not have begun to run as the complaint was not successfully filed.

[63] The second limb requires that claims be heard by a competent, independent and impartial Judge or Court.²³⁴ This imposes an obligation on States to ensure that its judges and Courts are in compliance.²³⁵ The only functioning judicial system in Naira at this time, by virtue of the state of emergency, is the authority exercised by the military in SMBs.²³⁶ Previously, the IACtHR has taken the position that military criminal jurisdiction is not competent to investigate, prosecute and punish the authors of violations of human rights as it can lack independence.²³⁷

²³⁰ *Case of the 19 Merchants*, (n 150), § 189, 190.

²³¹ *Case of Fornerón and daughter v. Argentina* (Merits, Reparations and Costs) Judgment of April 27, [2012], IACtHR, Series C No. 242 § 66.

²³² *Ximenes-Lopes v. Brazil* (Merits, Reparations and Costs) Judgment of July 4, [2006], IACtHR, Series C No. 149 § 195.

²³³ Hypothetical, § 33.

²³⁴ *ACHR*, (n 61), Article 8.

²³⁵ *López Lone Et Al. v. Honduras* (Preliminary Objection, Merits, Reparations and Costs) Judgment of October 5, [2015], IACtHR, Series C No. 302 § 171.

²³⁶ Clarifications Q&A 12.

²³⁷ *Case of the Rochela Massacre v. Colombia* (Merits, Reparations and Costs) Judgment of May 11, [2007], IACtHR, Series C No. 163 § 200.

[64] However, this position was taken in circumstances where there was a functioning judicial system within the state, distinct from the military's system. This Court has subsequently acknowledged that not every military tribunal, presiding over military officials, lack impartiality or independence.²³⁸ Given that the military judicial authority was the only judicial authority operational at the time of emergency, the only obligation on the State is to have alleged offenders brought promptly before this authority, as was done in relation to María Elena and Mónica Quispe.²³⁹

5.2. The State of Naira has not deprived María Elena and Mónica Quispe of judicial protection.

[65] The judicial protection, as required by in Article 25 of the ACHR, is the codification of the established principle of Amparo.²⁴⁰ This requires States to guarantee the right of all persons under its jurisdiction to an effective judicial remedy against violations of their fundamental rights.²⁴¹ This is done through simple and prompt recourse,²⁴² in keeping with the rules of due process of law.²⁴³ It is not sufficient that such a remedy merely exists, it must be effective and offer results or answers to violations of the rights protected under the Convention.²⁴⁴

[66] María Elena and Mónica Quispe, by way of a claim filed on March 10, 2015 on their behalf by Killapura,²⁴⁵ is only now seeking to make use of the judicial guarantees of

²³⁸ *Genie-Lacayo v. Nicaragua* (Merits, Reparations and Costs). Judgment of January 29, [1997] IACtHR, Series C No. 30 § 86.

²³⁹ Clarifications Q&A 12.

²⁴⁰ *Judicial Guarantees In States of Emergency (Arts. 27(2), 25 And 8 American Convention on Human Rights)*, (n 11), § 32.

²⁴¹ *Baldeón-García v. Perú*, (n 77), § 144.

²⁴² ACHR, (n 61), Article 25.

²⁴³ *Espinoza González v. Peru* (Preliminary Objections, Merits, Reparations and Costs) Judgment of November 20, [2014], IACtHR, Series C No. 289 § 237.

²⁴⁴ *Case of Acevedo-Jaramillo et al v. Peru*, (Preliminary Objections, Merits, Reparations and Costs.) Judgment of February 7, [2006], IACtHR, Series C No. 144 § 213.

²⁴⁵ Hypothetical, § 33.

Articles 8 and 25. This claim is however barred by the domestic statute of limitations.²⁴⁶ In *Almonacid-Arellano et al v Chile*, the Court opined that a State could not rely on the expiration of a statute of limitations as a reason not to open an investigation, with the aim of punishing those responsible for possible wrongs.²⁴⁷ Naira, cognisant of this duty, opened an investigation within the period of the statute of limitation that proved to be futile.²⁴⁸ Additionally, Naira has established a Truth Commission to investigate the matter and explore reopening of the case.²⁴⁹ As previously stated, a duty is not necessarily breached just because it does not produce a satisfactory result,²⁵⁰ the duty upon States is simply to provide an effective remedy which Naira has done.²⁵¹

6. The State of Naira did not violate Article 7 of the Convention of Belem do Pará in relation to María Elena and Mónica Quispe.

[67] The Convention of Belem do Pará, is an essential instrument which represents the great effort made to identify specific measures to protect the right of women to a life free from aggression.²⁵² Article 7 of this Convention requires member States to, inter alia, adopt legislation and create policies.²⁵³ This also includes the obligation to refrain from acts of violence against women, adopting legislation to prevent and punish domestic violence, and to ensure redress for victims and effective implementation of these requirements.²⁵⁴ As

²⁴⁶ Hypothetical, § 33.

²⁴⁷ *Almonacid-Arellano et al v Chile* (Preliminary Objections, Merits, Reparations and Costs) Judgment of September 26, [2006], IACtHR, Series C No. 154 § 151.

²⁴⁸ Hypothetical § 10, Clarifications Q&A 43.

²⁴⁹ Hypothetical, § 34.

²⁵⁰ *Miguel Castro Castro Prison Case*, (n 108), § 255.

²⁵¹ Hypothetical § 23-26.

²⁵² *Maria da Penha v. Brazil*, Case 12.051, Report No. 54/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 704 (2000) § 53.

²⁵³ Article 7 Belem do Para / Wagner, Mary C. (2003) "*Belem Do Para: Moving toward Eradicating Domestic Violence in Mexico*," Penn State International Law Review: Vol. 22: No. 2, Article 5. Pg 357.

²⁵⁴ *Ibid*; *Committee on the Elimination of Discrimination against Women*, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, 14 July 2017, CEDAW/C/GC/35.

previously stated in paragraph [18], the Convention of Belem do Pará, is inapplicable due to the principle of non-retroactivity.²⁵⁵

6.1. The State of Naira has fulfilled the obligations relating to the due diligence principle as is embodied by Articles 7(b) to 7(h) of the Convention of Belem do Pará.

[68] While the IACtHR is precluded from deliberating on the alleged violations of the Convention of Belem do Pará in 1992, pursuant to the principle of non-retroactivity,²⁵⁶ the Court will have competence to determine whether there existed a violation of the ACHR.²⁵⁷ Additionally, as established by its jurisprudence, the IACtHR will examine the arguments on the alleged denial of justice in relation to the rights recognized by Article 7(b).²⁵⁸ The Court has established, that it has such competence to adjudicate as Article 7(b) codifies principles of international law also found in the ACHR and other international law treaties.²⁵⁹ Additionally, the obligations under Article 7 become applicable upon ratification of the Convention of Belem do Pará in 2006, as such, Naira has conformed to the obligations listed therein.

[69] The due diligence requirement as articulated by the Convention Belem do Pará in Article 7(b), requires prevention, punishment and elimination of violence against women.²⁶⁰ The U.N Special Rapporteur on violence against women has provided guidelines, on measures States should take to uphold its due diligence requirements with

²⁵⁵ *VCLT*, (n 72), Article 28.

²⁵⁶ *Ibid.*

²⁵⁷ *J. v. Peru* (Preliminary Objection, Merits, Reparations and Costs) Judgement of November 27, [2013], IACtHR, Series C No. 275 § 20.

²⁵⁸ *Convention of Belem do Para*, (n 62), Article 7(b).

²⁵⁹ *J. v. Peru*, (n 257), § 21.

²⁶⁰ *González et al. ("Cotton Field") v. Mexico* (Preliminary Objection, Merits, Reparations, and Costs) Judgment of November 16, [2009], IACtHR, Series C No. 205 § 253.

regard to prevention.²⁶¹ The guidelines entailed inter alia: ratification of international human rights treaties, and provision of national legislation as well as administrative sanctions which provides redress for women who fall victim to gender based violence.²⁶²

[70] Further, the IACtHR, in the case of *González et al. ("Cotton Field") v. Mexico*,²⁶³ stipulated that States should adopt comprehensive measures to fulfil the due diligence obligation.²⁶⁴ The Court specifically called for an appropriate legal framework, accompanied by effective enforcement, as well as prevention policies that enables States to take preventative measures in specific cases where gendered violence is evident.²⁶⁵ This obligation is codified in 7(c) to 7(g) of the Convention of Belem do Pará.

[71] Upon examination of the current circumstances in Naira, it can be said that the State has fulfilled these obligations. Naira has not only ratified all international human rights treaties,²⁶⁶ but has afforded these treaties constitutional status by virtue of Article 22 of its national constitution, and proclaimed its precedence over existing national law,²⁶⁷ thereby creating a satisfactory legal framework.

[72] Additionally, Naira, in an effort to combat gender-based violence, undertook the, ZTPGBV.²⁶⁸ While this adds to already sufficient national framework created by ratification of all international human rights treaties, Naira went further and allocated an extraordinary budget consisting of 3% of its GDP for immediate implementation.²⁶⁹

²⁶¹ United Nations, *Violence against women in the family: Report of the Special Rapporteur on violence against women, its causes and consequences*, Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 1995/85, UN Doc. E/CN.4/1999/68, 10 March 1999, § 25.

²⁶² *Ibid.*

²⁶³ *González et al. ("Cotton Field") v. Mexico*, (n 260).

²⁶⁴ *González et al. ("Cotton Field") v. Mexico*, (n 260), § 258.

²⁶⁵ *Ibid.*

²⁶⁶ Hypothetical § 7.

²⁶⁷ Hypothetical § 6.

²⁶⁸ Hypothetical § 10.

²⁶⁹ Hypothetical § 19; Clarifications Q&A 64.

[73] Within the framework of the ZTPGBV, the State created a Gender-Based Violence Unit in the public prosecutor's office and the judicial branch.²⁷⁰ This specialized unit includes specific measures to deal with female victims. It provides for the mandatory training and education for judges, prosecutors and other public servants. It also has the power to penalize public officials for acts of gender-based violence and discrimination.²⁷¹ Naira also offered to review of legislation relating to a broad scope of gender issues,²⁷² and finally created an Administrative Program on Reparations and Gender for the purpose of implementing reparative measures for victims of any kind of gendered violence.²⁷³

[74] From an examination of the measures undertaken by Naira, it is evident that the State has fulfilled its obligations as it not only created the requisite legal framework and constitutional guarantees, but has also provided administrative and reparative measures with a significant monetary investment to facilitate its effective implementation.

V. Request for Relief

[75] Based on the aforementioned submissions, the State of Naira humbly requests that this Honourable Court declare and adjudge in favour of the State that:

1. The State has not violated its obligations under Articles 4, 5, 6, 7, 8 and 25 in conjunction with Article 1(1) of the ACHR, in relation to María Elena and Mónica Quispe.
2. The State has not violated Article 7 of the Convention, Belem do Pará in relation to María Elena and Mónica Quispe.
3. The petitioners absorb the costs of the current proceedings.

²⁷⁰ Hypothetical § 20.

²⁷¹ Hypothetical § 20.

²⁷² Hypothetical § 21.

²⁷³ Hypothetical § 22.