

**TO THE HONORABLE MEMBERS OF THE INTER-AMERICAN COMMISSION ON  
HUMAN RIGHTS, ORGANIZATION OF AMERICAN STATES:**

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**PETITION ALLEGING VIOLATIONS OF THE HUMAN RIGHTS OF MARY  
GALLAGHER, REBEKAH HAVRILLA, MYLA HAIDER, SARAH ALBERTSON,  
GREG JELODOV, AMBER ANDERSON, PANAYIOTA BERTZIKIS, ANDREW  
SCHMIDT, JESSICA KENYON, ANDREA NEUTZLING, KRISTEN STARK,  
STEPHANIE SCHROEDER, AMBER YEAGER, AMY LOCKHART, BLAKE  
STEPHENS, ELIZABETH LYMAN, SANDRA SAMPSON, HANNAH SEWELL, TINA  
WILSON, AND VALERIE DESAUTEL BY THE UNITED STATES OF AMERICA AND  
THE UNITED STATES DEPARTMENT OF DEFENSE, WITH REQUEST FOR AN  
INVESTIGATION AND HEARING ON THE MERITS**

Submitted by attorneys appearing as counsel for the petitioners under the provisions of Article 23  
of the Commission's Regulations, on behalf of the petitioners, United States citizens:

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## **I. INTRODUCTION**

The twenty petitioners in this petition are all United States citizens and former members of the United States Military and its branches: the United States Navy and Marine Corps, the United States Coast Guard, the United States Army, and the United States Air Force. The petitioners, seventeen women (Gallagher, Havrilla, Haider, Albertson, Anderson, Bertzikis, Kenyon, Neutzling, Stark, Schroeder, Yeager, Lockhart, Lyman, Sampson, Sewell, Wilson and Desautel) and three men (Jeloudov, Schmidt, and Stephens) were sexually assaulted and/or raped by their United States Military colleagues. When the petitioners reported being assaulted they were labeled “troublemakers” by their fellow military officers and forced to endure severe retaliation and harassment. In most instances, the petitioners’ claims were not investigated or when investigated, the perpetrators received no to minimal punishment. In the majority of instances, reporting the rapes led to the termination of petitioners’ military careers. The rape victims were not able to take any actions that civilians may take to protect themselves from sexual predators, such as calling the police, going to a shelter, changing housing or jobs, or relocating.

For example, Petitioner Greg Jeloudov was forced out; Petitioner Panayiota Bertzikis was denied rank due to her “pending investigation”; Petitioner Andrew Schmidt left due to extreme emotional distress as a result of the sexual violence committed against him; Petitioner Amber Yeager was subjected to an investigation after reporting rape; Petitioner Amy Lockhart was demoted and lost the rank of Captain; Petitioner Blake Stephens was chaptered out early; Petitioner Hannah Sewell was medically discharged because of injuries sustained when she was raped; and Petitioner Valerie Desautel was forced out.

In contrast to the rape victims, the sexual perpetrators escaped any serious punishment. The vast majority were not prosecuted or punished in any meaningful way in accordance with the seriousness of their offenses. For example, Petitioner Mary Gallagher's perpetrator was reassigned and issued a no contact order; Petitioner Sarah Albertson's perpetrator received no punishment; Petitioner Amber Anderson's perpetrator received six months of reduced pay and a reduced rank; Petitioner Panayiota Bertzikis' perpetrator received no punishment; Petitioner Andrew Schmidt's perpetrators were forced to apologize; Petitioner Jessica Kenyon's perpetrator was demoted in rank and assigned forty-five days extra duty; Petitioner Kristen Stark's perpetrator was forced to resign but permitted to re-enlist as a Major in the Army Reserves; Petitioner Jessica Nicole Hinves' perpetrator received no punishment; Petitioner Stephanie B. Schroeder's perpetrator received no punishment; Petitioner Amber Yeager's perpetrator was demoted; Petitioner Amy Lockhart's perpetrator received no judicial action; Petitioner Blake Stephens' perpetrator was ordered to do extra pushups; Petitioner Sandra Sampson's perpetrator received no punishment; and Petitioner Hannah Sewell's perpetrator received no punishment and was promoted twice during the pending investigation. In short, in striking contrast to rape victims, the offenders suffered little or no consequences for their sexual offences.

The United States Congress, the governmental authority vested with the power of creating law for the military, has attempted repeatedly to address rampant sexual violence and rape in the military over the past twenty years. However, their laws and policies have not gone far enough to address the problem, and the United States Department of Defense, which directs the United States military's operations, has refused to implement relevant laws passed by Congress or to enact any effective measures to remedy the epidemic. Former Secretaries of Defense Donald Rumsfeld and Robert Gates were in charge of the United States Department of Defense and

United States Military when the petitioners experienced their human rights abuses. During this time period, incidents of sexual violence and rape rose sharply in the United States Military. Despite this increase in incidents, both Secretaries continued to ignore Congressional laws and to enact policies that supported a culture of impunity for sexual violence and rape. For example, the United States Congress passed United States Public Law 105-85 in 2004, which directed the Secretary of Defense, then Donald Rumsfeld, to establish a commission to investigate policies and procedures with respect to the military investigation of reports of sexual misconduct. Secretary Rumsfeld refused to appoint any members to the commission. His successor, Robert Gates, was required by United States law to develop a database that would centralize all reports of rape and sexual assault, but he failed to meet his statutorily mandated deadline of January 2010. The database was not created until mid-2012.

The United States Military is an exceptionally closed system that investigates, prosecutes and punishes any criminal allegations by and against its members. Within the United States Military, victims are given the option to report incidents of rape and sexual violence through either the restricted or unrestricted reporting system. The restricted reporting system is confidential but does not provide a judicial remedy, while the unrestricted reporting system requires the victim to report the incident to his or her supervisors, otherwise known as the “Chain of Command”, but includes an avenue for possible prosecution.

The Department of Defense established the restricted reporting system in an effort to provide health care on a confidential basis to those rape and assault victims not willing to publicly report the crimes against them, but restricted reporting does not always remain

confidential. Instead, the Command<sup>1</sup> learns that a report has been made and is often able to ascertain by the description of the circumstances who made the report.<sup>2</sup> As a result, even those who chose the restricted route because they were fearful of retaliation are subjected to retaliation. While the restricted reporting system allows victims to receive much needed medical attention, it does so at the expense of giving them any possible avenue to access justice.

When a case is reported through unrestricted reporting, the Chain of Command possesses the power to determine whether a case will be referred to the military judicial system for investigation and prosecution. In many cases, the perpetrator receives an Article 15 non-judicial punishment under the Uniform Code of Military Justice (UCMJ), which evades referring the perpetrator to court martial. In other cases, the perpetrator will be tried for ‘adultery’ under UCMJ Article 134 instead of rape under Article 120. Even when a case is tried and a perpetrator found guilty, the Chain of Command possesses the authority to overturn a verdict or to grant a different punishment from the one recommended by the judge at trial. As a result, victims are afraid to report incidents to their supervisors for fear that their allegations will not be believed or investigated and that they will face retaliation. Additionally, this closed and controlled system results in victims having to work, often closely, with their perpetrators unless and until the victim or the perpetrator is reassigned to a different Command.

The petition alleges several human rights violations under the American Declaration of Human Rights. The United States’ failure to investigate petitioners’ complaints and provide them with a remedy (through the military justice system as well as the federal courts, which bar civil law suits against the US military) violated their rights to equal protection before the law under

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<sup>1</sup> In this petition, the term “Command” refers generally to the petitioners’ supervisors (plural). The term commander is used when referring to a singular supervisor.

<sup>2</sup> See DEPARTMENT OF DEFENSE, FISCAL YEAR 2009 ANNUAL REPORT ON SEXUAL ASSAULT IN THE US MILITARY 11 (2010),



Article II, their rights to truth under Article IV, their rights to resort to the courts under Article XVIII, and their rights to petition the government and receive a prompt decision under Article XXIV. In allowing petitioners to be sexual assaulted and in retaliating against them for reporting the incidents, the United States violated petitioners' rights to life and security of person under Article I, their rights to be free of inhumane treatment under Article I, their rights to privacy under Article V, their rights to protection of honor and reputation under Article V, their rights to special protection under Article VII, their rights to inviolability of the home under Article IX, and their rights to work under Article XIV.

The current military judicial system will only be able to provide victims with redress and access to justice if the decision whether to investigate, prosecute, and punish alleged perpetrators is taken away from the Chain of Command and an independent reporting mechanism is established to encourage victims to come forward without fear of reprisal from their Chain of Command. The UCMJ must also be amended to include laws that prevent retaliation, prohibit prosecuting perpetrators of sexual violence with Article 134 (adultery) instead of Article 120 (rape), and prohibit punishing perpetrators of sexual violence under Article 15 (non-judicial punishment).

The petitioners therefore request that the Commission: declare this petition admissible; investigate, with hearings and witnesses as necessary, the facts alleged in this petition; declare that the United States of America is responsible for the violation of petitioners' rights under the American Declaration of the Rights and Duties of Man, including their rights under Articles I, II, IV, V, VII, IX, XIV, XVIII, and XXIV; grant monetary compensation for the violation of their rights under the American Declaration; recommend adoption by the United States and the United States Department of Defense necessary laws and measures to ensure the successful

investigation, prosecution and punishment of rape and sexual violence crimes, including the removal of the decision whether to investigate, prosecute, and punish perpetrators from the victims' or perpetrators' Chain of Command, the creation of a reporting mechanism that is independent of the Chain of Command for reporting incidents of sexual violence, the adoption of laws preventing the military from using Articles 15 (non-judicial punishment) and 134 (adultery) of the Uniform Code of Military Justice to punish perpetrators of sexual violence, and the adoption of laws to prohibit retaliation against service members who report sexual assault; recommend access to United States federal courts so victims may sue for civil relief when the United States Military violates their human and United States constitutional rights; request an advisory opinion from the Inter-American Court of Human Rights regarding the nature and scope of the United States' obligations under the American Declaration in light of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women ("Convention of Belém do Pará") and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); and any other recommendations and relief that the Honorable Commission may deem just and necessary.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

### **A) Summary of Facts**

The following are summaries of the violations alleged by the individual petitioners. Further information is available in Petitioners' First Amended Complaint (Attachment A).

#### *1. Petitioner Mary Gallagher*

Mary Gallagher was deployed to Iraq in 2009 as a member of the United States Air National Guard. Petitioner Gallagher was stalked and then sexually assaulted by her co-worker. On November 5, 2009, her co-worker offered to drive her home but instead took her to a remote

area and tried to kiss her. When she objected, the co-worker verbally abused her. Petitioner Gallagher reported the incident to her Command who told her that there was nothing they could do about it. On November 7, 2009 the co-worker began stalking Petitioner Gallagher by breaking into her room and also telephoning her. Again, when she reported her co-worker's behavior, Command said there was nothing they could do about it because it was a "he said she said" situation.

On November 12, 2009, the co-worker sexually assaulted Petitioner Gallagher in the restroom by pulling her pants and underwear down, running his hand on her vagina, and grinding his penis up against her. Petitioner Gallagher did not immediately report the incident to Command because of the poor results she received after reporting the first two incidents. Two weeks later, Command called her in and questioned her about the previous two incidents, which was when she reported the violent assault. Command's only response was to reassign Petitioner Gallagher's assailant and order him to refrain from any contact with her. Petitioner Gallagher was then lectured by the base chaplain who claimed that 96% of sexual assaults on women occur when drinking is involved even though Petitioner Gallagher had not been drinking during any of the incidents. The base marshals eventually contacted Petitioner Gallagher for a statement, but they questioned her about why she had "waited so long to report the assaults and harassment" when in fact Petitioner Gallagher had reported the first two incidents on the same day they occurred. Petitioner Gallagher suffers from post-traumatic stress disorder as a result of these incidents.<sup>3</sup>

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<sup>3</sup> See Petitioners' First Amended Complaint at ¶¶ 29-38, *Cioca v. Rumsfeld*, CV00151 (E.D. of Va. Sep. 6, 2011) (Attachment A).

## 2. *Petitioner Rebekah Havrilla*

Rebekah Havrilla served in the United States Army from January 2004 until September 2009. During basic training, Command equated being female with being weak or incompetent and used terms such as “bitch, pussy, fag and cunt.” Although Command required that Petitioner Havrilla and her co-workers attend sexual assault prevention trainings, Command made a mockery of these classes. When Petitioner Havrilla deployed to Afghanistan in 2006, her supervisor immediately began to sexually harass her and on one occasion stated that he “really wanted to fuck [her] right now.” On a separate occasion he grabbed her waist and kissed and bit the back of her neck. He then began a pattern of slapping her bottom whenever he walked by her.

On a separate occasion, Petitioner Havrilla’s other co-worker pulled her into his bed, held her down, and raped her. Petitioner Havrilla reported the sexual harassment and rape within one month under the military’s restricted reporting policy. Petitioner Havrilla suffers from post-traumatic stress disorder and chronic depression.<sup>4</sup>

## 3. *Petitioner Myla Haider*

Myla Haider served in the United States Army from 1994 to 1999 and November 2000 to October 2005. Petitioner Haider was raped by a co-worker after a social event in 2002. At the time, Petitioner Haider was interning with the Criminal Investigation Division (CID) in Korea. The CID is the military unit charged with investigating crimes, including rape and sexual assault. She did not report the rape at the time because she had witnessed firsthand the attitude that the CID had towards rape victims and she did not believe she would receive justice.

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<sup>4</sup> *See id.* at ¶¶ 39-47.

Two years later, a CID investigator contacted Petitioner Haider because he had heard she was raped and her rapist was being investigated for serial sex offenses. Petitioner Haider testified at her perpetrator's trial.<sup>5</sup>

#### *4. Petitioner Sarah Albertson*

Sarah Albertson served in the United States Marine Corps from 2003 until 2008. Petitioner Albertson was raped by a fellow Marine on August 27, 2006. When Petitioner Albertson reported the rape to her Command, Command told her that they would charge her with "Inappropriate Barracks Conduct" because she had been consuming alcohol. Command also told her they would charge her perpetrator with the same offense for raping her. Petitioner Albertson's rapist outranked her, and she was ordered by Command to obey his orders and was forced to work closely with him for two years and report to him on a daily basis. Command also refused to allow Petitioner Albertson to change housing, and she lived one floor below her rapist for two years. After Petitioner Albertson reported the rape to Command, her superiors, acting openly with the knowledge, support and approval of Command, ostracized and harassed her.

Petitioner Albertson suffered trauma as a result of the rape. After Command forced her to disclose the medications she took to treat her trauma, they revoked her security clearance and downgraded her work assignments. Although the Navy Criminal Investigative Service investigated the incident, Petitioner Albertson's Command failed to permit the matter to be adjudicated within the military justice system and her rapist was never prosecuted or brought to justice. Petitioner Albertson suffers from post-traumatic stress disorder as a result of the rape.<sup>6</sup>

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<sup>5</sup> See *id.* at ¶¶ 48-54.

<sup>6</sup> See *id.* at ¶¶ 55-68.

5. *Petitioner Greg Jeloudov*

Greg Jeloudov served in the United States Army from February 2009 until June 2009. Petitioner Jeloudov was harassed by his fellow soldiers and called a “commie faggot.” On May 17, 2009, Petitioner Jeloudov was raped in his barracks. When Petitioner Jeloudov reported the incident to Command, Command forced him to sign a statement stating falsely that he was a “practicing homosexual.” Command then discharged Petitioner Jeloudov under the military’s “Don’t Ask, Don’t Tell” policy. Petitioner Jeloudov suffers from post-traumatic stress disorder as a result of the rape.<sup>7</sup>

6. *Petitioner Amber Anderson (DeRoche)*

Amber Anderson served in the United States Navy from December 2000 to December 2005. In August 2001, Petitioner Anderson was raped by two shipmates while on port of call in Thailand. The two shipmates took turns holding her down and raping her. They then washed her in the shower and left her on the streets in Thailand. Petitioner Anderson went to the military police the next day. A medical exam uncovered bruises and injuries all over her body. After reporting the rape, Petitioner Anderson became a target for retaliation, and on one occasion she was placed in the medical ward and denied food. Command refused to let her leave the ship and forced her to be on call for 24 hours per day. After confiding in the ship’s chaplain, Petitioner Anderson was finally permitted to leave that shift and serve on a different ship.

Command did not court martial Petitioner Anderson’s perpetrators. Instead, it gave them an USMJ Article 15 “non-judicial punishment” of docking their pay for six months and reduced the rank of one of the rapists. Petitioner Anderson suffers from post-traumatic stress disorder.<sup>8</sup>

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<sup>7</sup> See *id.* at ¶¶ 69-75.

<sup>8</sup> See *id.* at ¶¶ 76-84.

### 7. *Petitioner Panayiota Bertzikis*

Panayiota Bertzikis served in the United States Coast Guard from November 2005 to May 2007. On May 30, 2006, Petitioner Bertzikis was raped by a shipmate while on a hike. He threw her on the ground, punched her in the face, and raped her. When Petitioner Bertzikis reported the rape to Command, Command told her to keep quiet or she would be charged with the military crime equivalent to slander. Command failed to take any substantial steps to investigate the matter or punish her perpetrator in any way. Later, Petitioner Bertzikis obtained photographs and admissions made by her rapist through the United States Freedom of Information Act, but her perpetrator was never prosecuted. Petitioner Bertzikis was instead forced to live on the same floor as and work alongside her rapist so that, according to Command, they could “work out their differences.”

When Petitioner Bertzikis was transferred, she faced retaliation and harassment. She was called a “liar” and a “whore” and on one occasion she was cornered by Coast Guard personnel who told her she would “pay for snitching” on their friend. Petitioner Bertzikis reported this incident and the rape to a “victim advocate” who informed her not to report the assault and other harassment because she would be seen as difficult and it would not help bring her perpetrator to justice. Her assigned attorney also asked Petitioner Bertzikis, “If [her rapist] did not have a history of sexual assault, why would he assault anyone now?” Petitioner Bertzikis was denied a promotion because of the “pending investigation” even though she met all the necessary requirements. Petitioner Bertzikis was diagnosed with post-traumatic stress disorder as a result of the incident.<sup>9</sup>

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<sup>9</sup> *See id.* at ¶¶ 85-94.

8. *Petitioner Andrew Schmidt*

Andrew Schmidt served in the United States Navy from 1999 until 2001. In Spring 2001 as Petitioner Schmidt was lining up to receive gear for training, a Marine corporal shoved his fingers up Petitioner Schmidt's anus until they penetrated him. Petitioner Schmidt objected but did not report the incident. The same individual assaulted Petitioner Schmidt in the same manner later that year. This time, a sergeant saw the incident and made the perpetrator apologize.

Petitioner Schmidt was then transferred to a different ship. There, several different Marines held Petitioner Schmidt while they fondled, squeezed, and tickled his testicles. Petitioner Schmidt's attackers were higher rank than he was and when he tried reporting the frequent incidents of sexual assault, Command discouraged him from "reporting against one of your own." When he pressed forward with the complaints, Command told him "Don't make us deal with you in a physical way," and "the Marine Corps know where your mother is."

Petitioner Schmidt was again reassigned, but his former Command told his new location that he was a "snitch," which led to further physical and verbal abuse. After two years of complaints, Petitioner Schmidt was finally allowed to meet with the Commanding General of Fort Lejune, where he was stationed. The General admitted that the physical abuse Petitioner Schmidt described did occur with frequency, but told Petitioner Schmidt that it did not rise to the level of sexual harassment or assault. Petitioner Schmidt suffers from extreme emotional distress.<sup>10</sup>

9. *Petitioner Jessica Kenyon*

Jessica Kenyon served in the United States Army from August 2005 to August 2006. During her training, Petitioner Kenyon's teaching sergeant touched her and made sexual jokes

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<sup>10</sup> See *id.* at ¶¶ 102-116.



and comments to her. Petitioner Kenyon did not immediately report him because the commander of the unit made a statement that “this unit never had any problems until females came into it.” In December 2005, Petitioner Kenyon was raped by a member of the United States Army National Guard while she was home for the holidays. At this point, Petitioner Kenyon reported both the sexual harassment and rape to an Army sexual assault response coordinator. The coordinator advised Petitioner Kenyon to put the rape “on the back burner” and focus on the harassment. Petitioner Kenyon then reported the rape to Command who told her that if she continued to press forward, the rape would be used against her during promotional review.

Command called ahead to warn Petitioner Kenyon’s new supervisor about her. Petitioner Kenyon’s sergeant at her new assignment made an announcement to her unit that they “should be careful who you talk to because they might report you.” In the spring of 2006, a specialist and squad leader grabbed Petitioner Kenyon’s breasts and tried to make her touch his penis, but she fought him off. Petitioner Kenyon reported the incident, but her perpetrator denied the charges under oath. After failing a lie detector test, the perpetrator finally admitted that he had tried to force Petitioner Kenyon to have sex with him. The perpetrator was charged with “lying on a sworn statement”, given a UCMJ Article 15 nonjudicial punishment, demoted two ranks and given forty-five days of extra duty. Petitioner Kenyon suffers from post-traumatic stress disorder as a result of these incidents.<sup>11</sup>

*10. Petitioner Andrea Neutzling*

Andrea Neutzling served in the United States Army from 2000 until 2004 and the United States Army Reserve from August 2004 to April 2010. In 2002, Petitioner Neutzling was sexually assaulted by a co-worker outside the latrine. After reporting the incident to Command,

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<sup>11</sup> See *id.* at ¶¶ 127-135.

Command sentenced the perpetrator to five days of base restriction. In June 2005, Petitioner Neutzling was sexually assaulted again, but she did not report the incident after the poor results she received after the first incident. In August 2005, petitioner Neutzling was deployed to Iraq and raped by two soldiers from the unit that her unit was replacing. She suffered serious bodily injury including bruises from her shoulders to elbows from being held down. She reported the rape to Command after learning that the soldiers were circulating a video of the rape. Command told her that she did not act like a rape victim because she “did not struggle enough.” Command also informed her that Command from both units agreed not to disclose the allegations to the investigative services because it would prevent her two perpetrators from going home on time. Petitioner Neutzling suffers from post-traumatic stress disorder as a result of these incidents.<sup>12</sup>

#### *11. Petitioner Kristen Stark (Reuss)*

Kristen Stark served in the United States Ohio Army National Guard from July 1998 to July 2004. In July 2001, Petitioner Stark’ commander sexually assaulted her three times. When she disclosed the incident to a friend, the friend reported that the commander had done the same thing to her. Petitioner Stark then reported the incident to Command. While questioning Petitioner Stark and her colleague, another woman came forward with the same complaint. The local police jailed the perpetrator, and Petitioner Stark was told that two charges of criminal sexual assault were filed. Shortly after, Petitioner Stark learned the charges were dropped and that the perpetrator was forced to resign from the National Guard. Two years later, Petitioner Stark discovered that her perpetrator had joined the United States Army Reserves. Petitioner Stark suffers from depression as a result of the incidents.<sup>13</sup>

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<sup>12</sup> See *id.* at ¶¶ 136-143.

<sup>13</sup> See *id.* at ¶¶ 144-150.

*12. Petitioner Stephanie B. Schroeder*

Stephanie B. Schroeder served in the United States Marine Corps from 2001 to 2003. On April 20, 2002, Petitioner Schroeder was physically abused and raped by a co-worker in a woman's bathroom while socializing with fellow Marines off base. When Petitioner Schroeder reported the incident to Command, Command replied, "Don't come bitching to me because you had sex and changed your mind." Command asked Petitioner Schroeder's perpetrator if he had raped her, which he denied. Command then accused Petitioner Schroeder of lying and placed her on base restriction. When Command found out that Petitioner Schroeder talked to a fellow Marine about the incident, Command accused her of lying and issued her a non-judicial punishment for "Conduct Unbecoming". Petitioner Schroeder had to forfeit her pay and allowance, was put on restriction for two weeks, and could not be promoted. Command did not punish Petitioner Schroeder's rapist and instead made her work with him.

Petitioner Schroeder was transferred to a new location, but her former Command called and told her new supervisors that she was a troublemaker. Petitioner Schroeder's new superior attempted to sleep with her and when she refused him, he began to humiliate and verbally sexually harass her at work. Command ignored Petitioner Schroeder when she reported the harassment to Command. A month later, the superior entered Petitioner Schroeder's room at night and sexually assaulted her. The next morning, Command disciplined Petitioner Schroeder for having a male in her room and she was ordered to perform menial labor throughout the night in addition to her normal work during the day. Petitioner Schroeder then moved off base because she feared for her safety. The following week Command accused her again of having males in her room. When Petitioner Schroeder pointed out the impossibility of this, Command reprimanded her for moving off base without permission. In November 2002, Petitioner

Schroeder and a co-worker were moving some supplies. On the way to the warehouse, the co-worker took a detour in the woods and attempted to have sex with Petitioner Schroeder. When she refused, he proceeded to masturbate in front of her. Petitioner Schroeder did not report this incident for fear of reprisal. Petitioner Schroeder suffers from depression and anxiety.<sup>14</sup>

### *13. Petitioner Amber Yeager*

Amber Yeager served in the United States Army from 1999 to 2007. Petitioner Yeager was raped by her sergeant while on deployment over Memorial Day weekend in 2001. The sergeant had pursued her and when she refused his advances, he pinned her down and raped her. Petitioner Yeager did not immediately report the incident because her Command had told her during training that “what happens down range, stays down range.” Petitioner Yeager confided in her non-commission officer at her next deployment. She finally filed a formal report to Command and with the Military Police when returning to her base. During the Criminal Investigative Division (CID) investigation, Petitioner Yeager was interrogated and intimidated. The CID agents told Petitioner Yeager that the assault was not rape, and the charges were dropped.

After the charges were dropped, Command accused Petitioner Yeager of having “holes” in her story and launched an investigation against her. Command questioned members of her unit about her personal character and threatened to bring charges against her if she sought redress for the sexual assault. The perpetrator was removed from his position and placed on the same base as Petitioner Yeager where he would harass her regularly and tell her “you know you liked it.”

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<sup>14</sup> See *id.* at ¶¶ 160-174.

Petitioner Yeager has been diagnosed with post-traumatic stress disorder, anxiety, and depression as a result of the incidents.<sup>15</sup>

#### *14. Petitioner Amy Lockhart*

Amy Lockhart joined the Navy in 1997 and is still on active duty. Petitioner Lockhart was raped by a co-worker after attending a party at the end of a two-week training program. Petitioner Lockhart went back to her room at the end of the party and woke up the next morning naked with no recollection of taking her clothes off. Two weeks later during a Disciplinary Review Board hearing, Lockhart's Command threatened to charge her with fraternization with a co-worker and said he had a sworn statement from her perpetrator admitting to sex with her. Lockhart denied the charges and explained that she could not have consented to sex with the individual because she was passed out. Instead of giving her information about reporting her sexual assault, Command demoted Petitioner Lockhart and she lost her Captain status.

Command then threatened to charge Petitioner Lockhart with adultery if she pressed forward with the case. He also asked her Victim Advocate, "How could I look at a slut like that with a straight face?" Navy Criminal Investigative Service completed an investigation into the case and a hearing was held, but Command took no action against her perpetrator. Petitioner Lockhart was diagnosed with post-traumatic stress disorder and major depressive disorder. She was originally stripped of her security clearance after this diagnosis, but was able to hire an attorney and get it back.<sup>16</sup>

#### *15. Petitioner Blake Stephens*

Blake Stephens served in the United States Army from 2001 to 2003. Petitioner Stephens was repeatedly assaulted by other men in his unit who would grab and fondle his testicles, spit on

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<sup>15</sup> See *id.* at ¶¶ 175-187.

<sup>16</sup> See *id.* at ¶¶ 188-198.

him, and slide their hands down the inside of his butt crack. On one occasion, his clothes were stolen while he was showering and when he went out into the snow to retrieve them, his perpetrators took naked pictures of him. Petitioner Stephens reported the incident to Command who took no action and called him a “chick” and a “bitch.”

Petitioner Stephens was assaulted by a group of his fellow service members who held him down and shoved a 20-ounce bottle of soda into his rectum. He was then carried to a loading dock, thrown off it, and then choked. When Petitioner Stephens reported the incident to Command, Command made everyone do pushups until the perpetrators confessed. The perpetrators were given extra push-ups as their sole punishment. Petitioner Stephens then gave a sworn statement to the Inspector General (IG) at Headquarters about the assaults and Command’s response, but the IG told him he would not interfere. Petitioner Stephens then asked Command to be reassigned, and his request was denied.

Petitioner Stephens was told by his fellow service members that his Command had ordered the harassment because Command believed Petitioner Stephens was homosexual and wanted him out of the military. After a failed suicide attempt, Petitioner Stephens was informed by Command that he was being chaptered out of the military a year and a half early due to anxiety and depression even though Petitioner Stephens had asked for a transfer and had been denied. Petitioner Stephens was diagnosed with post-traumatic stress disorder, anxiety, and depression as a result of the incidents. He experiences violent nightmares, is on medication, and receives disability.<sup>17</sup>

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<sup>17</sup> See *id.* at ¶¶ 199-213.

*16. Petitioner Elizabeth Lyman*

Elizabeth Lyman served in the United States Marine Corps from March 2008 to January 2010. On October 18, 2008, Petitioner Lyman was raped in her barracks by a fellow service member. She was eleven weeks pregnant at the time. She agreed to a medical exam and rape kit, which revealed signs of force, bruising, and lacerations in the vaginal area consistent with a sexual assault. In addition, NCIS collected DNA from her rapist's penis, and found his blood on her bed. Her rapist was jailed for six months while awaiting court martial.

At trial, Command allowed six witnesses to testify to the character of Petitioner Lyman's perpetrator, while Petitioner Lyman was limited to only one witness. Command also threw out the rape kit evidence and pictures taken of bruises and lacerations after the assault. Command cleared Petitioner Lyman's perpetrator of all charges and allowed him to continue to serve on base. Command denied Petitioner Lyman's request for a transfer, and she was forced to work daily next to those who had testified against her. Petitioner Lyman suffers from post-traumatic stress disorder, depression, and anxiety as a result of the incident.<sup>18</sup>

*17. Petitioner Sandra Sampson*

Sandra Sampson began serving in the United States Army National Guard in 2008. In 2008, Petitioner Sampson's officer began sending her sexually explicit emails. When she complained to Command, she was treated badly and harassed. While on deployment, Petitioner Sampson was grabbed and touched by a fellow servicemember while at the gym one night. He might have also raped her, but other people entered the gym. Petitioner Sampson reported the attack to her Command. Command opened an investigation, concluded the case unfounded, and told her to stop causing trouble. Her case was later reopened and her claims substantiated, but

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<sup>18</sup> See *id.* at ¶¶ 241-250.

Command took no action against her perpetrator. Petitioner Sampson suffers from post-traumatic stress disorder and anxiety as a result of the incident.<sup>19</sup>

*18. Petitioner Hannah Sewell*

Hannah Sewell served in the United States Navy from October 2008 to July 2009. In 2009, Petitioner Sewell was raped by a male classmate at a hotel while attending a training off-base. She reported the rape to Command, filed an unrestricted report, pressed charges with the civilian police department, and went to the hospital for a medical exam and rape kit. Petitioner Sewell sustained a back injury during the assault and was never given proper medical attention. As a result, she could not sleep lying down and had to be put on light duty. During the investigation, Petitioner Sewell provided statements to both NCIS and the civilian police. Her perpetrator was never questioned and declined to provide any statements. After launching the investigation, Command pulled Petitioner Sewell out of training and put her on full-time cleaning duty, but allowed her perpetrator to finish the training course. Her perpetrator was moved to the barracks across from her. Additionally, her perpetrator was promoted twice during the investigation, and Command transferred him to another base while at the same time denying Petitioner Sewell's request for a transfer.

Command scheduled a UCMJ Article 32 hearing to determine whether to pursue court martial two years after Petitioner Sewell reported the rape, but Command told Petitioner Sewell that the evidence from her rape kit, testimony from the nurse who examined her, and pictures from her exam were "lost." Petitioner Sewell was medically discharged because of the back

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<sup>19</sup> See *id.* at ¶¶ 251-256.



injury she sustained during the rape. Petitioner Sewell suffers from panic attacks and nightmares as a result of the incident.<sup>20</sup>

*19. Petitioner Tina Wilson*

Tina Wilson served in the United States Navy from 2005 to 2009. Petitioner Wilson was sexually assaulted by a doctor while stationed in Japan. She reported the assault to NCIS, which launched an investigation during which three other victims were identified. The investigation was closed without the perpetrator being interviewed, and Command transferred the perpetrator to Kuwait. When incidents of sexual assault were reported in Kuwait, the perpetrator was sent back to Japan for an ongoing investigation. During the court martial, Petitioner Wilson was not informed properly about her ability to testify and missed the hearing as a result. Her perpetrator was found guilty on two counts of “Wrongful Sexual Misconduct” and two counts of “Conduct Unbecoming of an Officer.” Although he was sentenced to 24 months in prison, Command suspended his sentence after one week. While his sentence requires him to be listed with the National Sex Offender Registry, he failed to register after being released.<sup>21</sup>

*20. Petitioner Valerie Desautel*

Valerie Desautel served in the United States Army. Petitioner Desautel was raped on March 31, 2002 at a hotel on her base. She did not know her rapist. Petitioner Desautel reported the rape to Command, and she was taken to the hospital for a rape kit. DNA and fingerprints were taken from her examination. A blood test also showed drugs in her system. CID said they would be able to find and convict her rapist with the evidence, but one agent insinuated that Petitioner Desautel was lying. In response, Petitioner Desautel revealed she was gay and had not consented to sex. After Command was notified about the investigation, her entire platoon found

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<sup>20</sup> See *id.* at ¶¶ 257-268.

<sup>21</sup> See *id.* at ¶¶ 282-291.

out about the rape and her sexual orientation. Command then discharged Petitioner Desautel under the “Don’t Ask Don’t Tell” policy and closed the investigation into her rape two months after her separation.<sup>22</sup>

B) Procedural Background

Although each case discussed above varies slightly with regard to the facts, the outcomes were all the same – the petitioners were precluded from obtaining access to justice within the military justice system. The petitioners’ claims were all either never investigated or never given an adequate trial in the military justice system. The perpetrators in all of the cases received little to no punishment under the military justice system for their violent actions. Nor was there an appeals process available to petitioners when their cases were not investigated and prosecuted. The petitioners, having no access to justice within the military justice system, then filed a civil suit in United States federal court.

The petitioners filed suit against former Secretary of Defense Donald Rumsfeld and former Secretary of Defense Robert Gates [hereinafter “the Defendants’] as the leaders and representatives of the United States Department of Defense and the United States Military in U.S. District Court for the Eastern District of Virginia on February 15, 2011. An amended complaint was then filed on September 6, 2011. In their complaint, the petitioners alleged that their United States Constitutional rights had been violated. In particular, they alleged that their right to substantive due process under the Fifth Amendment to the Constitution was violated when the Defendants condoned a culture that allowed sexual harassment, sexual assault and rape; that their procedural due process Fifth Amendment rights were violated when the Defendants failed to implement military and federal regulations regarding sexual harassment, sexual assault

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<sup>22</sup> See *id.* at ¶¶ 292-298.

and rape, denied plaintiffs access to justice, and unfairly terminated or otherwise mistreated defendants; that their Fifth and Fourteenth Amendment right to equal protection was violated when Defendants “subjected Plaintiffs to a pattern of sexual harassment, rape and sexual assault, failed to protect servicewomen and servicemen from rape, sexual assault, and sexual harassment; failed to conduct proper investigations and prosecute offenders; retaliated against service members who reported being raped, harassed or sexually assaulted; discriminated on the basis of gender; and encouraged a culture of sexism and misogyny”;<sup>23</sup> and finally that their First Amendment right to freedom of speech was violated when the Defendants retaliated against petitioners for exercising their right to speak about being raped, sexually assaulted, or sexually harassed.

The petitioners sought money damages for violations of their constitutional rights pursuant to *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In *Bivens*, the Supreme Court of the United States found a cause of action against a federal agent for Fourth Amendment Constitutional violations. Unfortunately, Supreme Court and other federal case law protects the United States Military from *Bivens* actions.

On December 9, 2011 the United States District Court for the Eastern District of Virginia dismissed the petitioners’ complaint, finding that

[i]n the present case, the Plaintiffs sue the Defendants for their alleged failures with regard to oversight and policy setting within the military disciplinary structure. This is precisely the forum in which the Supreme Court [of the United States] has counseled against the exercise of judicial authority. *Where the Supreme Court has so strongly advised against judicial involvement, not even the egregious allegations within Plaintiffs’ Complaint will prevent dismissal.*<sup>24</sup>

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<sup>23</sup> Petitioners’ First Amended Complaint at ¶ 352.

<sup>24</sup> Judgment of the United States District Court for the Eastern District of Virginia, December 9, 2011, 2. (Attachment B) (citing to *United States v. Stanley*, 483 U.S. 669, 693 (1973))(emphasis added).

The petitioners appealed the case to the United States Court of Appeal for the Fourth Circuit where the court, affirming the District Court’s reasoning, also dismissed the case.

The Fourth Circuit cited its past decision in *Lebron v. Rumsfeld*, which discussed *Bivens* suits against the United States Military. In that case, the Fourth Circuit held that “judicial abstention from sanctioning a *Bivens* claim in the military context is, at its essence, a function of the separation of powers under the Constitution which ‘delegates authority over military affairs to Congress and to the President as Commander in Chief. It contemplates no comparable role for the judiciary.’”<sup>25</sup> The Fourth Circuit went on to highlight Supreme Court precedent stating:

Preserving the constitutionally prescribed balance of powers is thus the first special factor counseling hesitation in the recognition of [the plaintiff’s] *Bivens* claim. The “Constitution contemplated that the Legislative Branch [have] plenary control over rights, duties, and responsibilities in the framework of the military establishment, including regulations, procedures, and remedies.” *Chappell v. Wallace*, 462 U.S. 296, 301 (1983). Indeed, that control is explicit and not merely derivative of other powers: Congress has the enumerated powers to declare war, *see* U.S. Const., art. I, § 8, cl. 11; establish the armed forces, *see id.* cl. 12–13; and “make Rules for the Government and Regulation of the land and naval Forces,” *id.* cl. 14. As the Supreme Court has noted, “What is distinctive here is the specificity of that technically superfluous grant of power . . . Had the power to make rules for the military not been spelled out, it would in any event have been provided by the Necessary and Proper Clause—as is, for example, the power to make rules for the government and regulation of the Postal Service.” *United States v. Stanley*, 483 U.S. 669, 682 (1987) (internal citation omitted). As a consequence, “in no other area has the Court accorded Congress greater deference.” *Rostker v. Goldberg*, 453 U.S. 57, 64–65 (1981).<sup>26</sup>

In addition to the separation of powers reasoning against finding a *Bivens* action for petitioners, the Fourth Circuit also cited Supreme Court case law that articulated the Supreme Court’s reluctance to find monetary causes of action against the United States Military. The Fourth Circuit cited the Supreme Court decision in *Chappell v. Wallace*:

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<sup>25</sup> Judgment of the United States Court of Appeal for the Fourth Circuit, July 23, 2013, 10, citing to *Lebron v. Rumsfeld*, 670 F.3d 540, 548 (4th Cir. 2012), [hereinafter “Fourth Circuit Decision”]. (Attachment C).

<sup>26</sup> Fourth Circuit Decision at 10-11.

*The special status of the military has required, the Constitution has contemplated, Congress has created, and this Court has long recognized two systems of justice, to some extent parallel: one for civilians and one for military personnel. The special nature of military life—the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel—would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command.*<sup>27</sup>

The Fourth Circuit went on to highlight *Chappell*, which found that ““the unique disciplinary structure of the Military Establishment and Congress’ activity in the field constitute ‘special factors’ which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers.””<sup>28</sup>

The decision in *Chappell* relied on the law created in *Feres v. United States*, which is known commonly as the “Feres Doctrine.”<sup>29</sup> The Feres Doctrine states that “the Government is not liable under the [Federal Tort Claims Act] for injuries to servicemen where the injuries arise out of or are in the course of activity that is incident to service.”<sup>30</sup> The incident to service test asks whether ““particular suits would call into question military discipline and decision making [and would] require judicial inquiry into, and hence intrusion upon, military matters.””<sup>31</sup>

Applying the Supreme Court precedent in *Chappell* and *Feres*, the Fourth Circuit held that:

The Complaint clearly alleges injuries that stem solely from Plaintiffs’ military service. Indeed, the Plaintiffs allege that the Defendants’ command and management, or mismanagement, of the military is the ultimate cause of their injuries. For that reason, the Complaint states a claim for injuries that are “incident to military service” as the Supreme Court has applied that concept.<sup>32</sup>

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<sup>27</sup> Fourth Circuit Decision at 13 (citing *Chappell v. United States*, 462 U.S. 296, 303-304 (1983))(emphasis added).

<sup>28</sup> Fourth Circuit Decision at 14 (citing *Chappell*, 462 U.S. at 304).

<sup>29</sup> Fourth Circuit Decision at 14.

<sup>30</sup> *Id.* (citing *Feres v. United States*, 340 U.S. 135, 146 (1950)). The Federal Torts Claims Act is a federal statute that permits private parties to sue the United States in a federal court for most torts committed by persons acting on behalf of the United States.

<sup>31</sup> Fourth Circuit Decision at 23 (citing *United States v. Stanley*, 483 U.S. 669, 682 (1987)).

<sup>32</sup> Fourth Circuit Decision at 24.

This makes the case inactionable under the Feres Doctrine. The Fourth Circuit's final conclusion states that:

In the more than twenty-five years since the Supreme Court pronounced in *Stanley* that service members will not have an implied cause of action against the government for injuries arising out of or incident to their military service under *Bivens*, Congress has never created an express cause of action as a remedy for the type of claim that Plaintiffs allege here. And it is Congress, not the courts, that the Constitution has charged with that responsibility. . . . [O]ur decision reflects the judicial deference to Congress and the Executive Branch in matters of military oversight required by the Constitution and our fidelity to the Supreme Court's consistent refusal to create new implied causes of action in this context. Those principles, as clearly expressed in *Chappell*, *Stanley*, and *Feres*, counsel that judicial abstention is the proper course in this case.

The Fourth Circuit therefore found that the petitioners possessed no *Bivens* civil cause of action against the United States Military for its violations of petitioners' constitutional rights. The strong Supreme Court case law cited in the Fourth Circuit's decision prevents petitioners from bringing suit against the United States Military in the United States.

### **III. BACKGROUND AND PATTERNS**

#### **A) The United States Military Fosters a Culture of Sexual Violence and Rape**

Sexual violence and rape in the military is endemic. Eighteen to twenty-five percent of American women and three to four percent of American men report experiencing either an attempted or completed rape in their lifetime.<sup>33</sup> In contrast, between 9.5% and 33% of women experienced an attempted or completed rape while serving in the United States Military.<sup>34</sup> When taking into consideration that these figures only apply to a brief period of these women's lives (while they are in service), these numbers are particularly high.<sup>35</sup> Unfortunately, similar studies have not been conducted on men in the military, but at least one study of male service members

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<sup>33</sup> See J. Turchik & S. Wilson, *Sexual Assault in the US Military: A Review of the Literature and Recommendations for the Future*, 15 AGGRESSION AND VIOLENT BEHAVIOR, 268 (2010).

<sup>34</sup> See *id.*

<sup>35</sup> See *id.*

found that 4% of those seeking benefits for PTSD experienced in-service sexual assault.<sup>36</sup>

According to the Department of Defense's most recent study, 6.1 percent of military women and 2.1 percent of military men experienced some type of unwanted sexual contact in the last year alone.<sup>37</sup>

Recent studies have found that military culture may promote sexual violence.

“Sexualized and violent language, the general acceptance of violence, the learned ability to objectify other people, strong obedience to the chain of command, encouraged protection of the military, and the promoted belief that those outside the military will not understand what goes on within the military” may all contribute to military sexual violence.<sup>38</sup> Additionally, “the group cohesion and deindividualization achieved in military units are powerful elements which allow for the socialization and maintenance of negative normative sexual and gender beliefs.”<sup>39</sup> “At the unit level, the absence of a grievance procedure, an unprofessional work atmosphere, and the existence and acceptance of a sexist attitude in the workplace have been found to be the most salient predictors” of military sexual violence.<sup>40</sup> “Such an environment may make it more difficult for sexual assault victims to report an assault because of the fear of stigmatization and repercussions.”<sup>41</sup>

Additionally, the United States Military further enables a culture of violence through the number of previous sexual offenders within its ranks. Ninety-nine percent of the perpetrators of

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<sup>36</sup> *See id.*

<sup>37</sup> *See* DEPARTMENT OF DEFENSE, FISCAL YEAR 2012 ANNUAL REPORT ON SEXUAL ASSAULT IN THE US MILITARY 2 (2013), available at [http://www.sapr.mil/public/docs/reports/FY12\\_DoD\\_SAPRO\\_Annual\\_Report\\_on\\_Sexual\\_Assault-VOLUME\\_ONE.pdf](http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf)

<sup>38</sup> J. Turchik & S. Wilson, *supra* note 33 at 271.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

sexual assault in the United States military are men.<sup>42</sup> Studies of Navy recruits found higher rates of men who had perpetrated sexual assaults prior to joining the military (9.9%-11.6%) than a similar sample of men attending college (4.4%).<sup>43</sup> The Army and Air Force do not require that people convicted of sexual assault be banned from service. In recent years, all the branches have participated in “moral waivers” to increase recruiting numbers and an increased number of moral waivers were given to recruits with histories of “[r]ape, sexual abuse, sexual assault, criminal sexual abuse, incest, or other sex crimes” and “[i]ndecent acts or liberties with a child, molestation.”<sup>44</sup>

B) The Department of Defense’s Failed Response to Sexual Violence and Rape in the United States Military Created a Culture of Impunity for these Types of Crimes

Although an endemic problem, the Department of Defense has been slow to respond to the issue of sexual violence and rape in the United States Military. Secretaries of Defense Donald Rumsfeld and Robert Gates were in charge of the United States Military during the time period when the human rights violations alleged in this petition took place. As the military’s leaders they were responsible for ensuring that sexual violence and rape is prosecuted and that the rights of service member victims are not violated. However, their inaction and policies to address incidents of sexual violence and rape in the United States Military created a culture of impunity that encouraged sexual violence and rape.

For example, in 2004 Congress passed Public Law 105-85, which required the Secretary of Defense to establish a commission to investigate policies and procedures with respect to the military investigation of reports of sexual misconduct. Secretary Rumsfeld ignored this

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<sup>42</sup> *Id.* at 270.

<sup>43</sup> *Id.*

<sup>44</sup> Committee on Oversight and Government Reform, Letter from Henry Waxman to The Honorable David Chu, Apr. 21, 2008, *available at* <http://www.hsdl.org/?view&did=485463>.



Congressional directive and failed to appoint any members to the commission. Secretary Rumsfeld resigned without having appointed any members of the task force and without directing the task force to begin its work. On March 31, 2004, Members of Congress wrote to Secretary Rumsfeld expressing concern that he had ignored the recommendations made in 18 reports issued over the previous 16 years. The Members stated, “We are concerned that the problem of sexual misconduct in the military is repeatedly investigated, but recommendations for substantive change in the reports are often ignored.” The inaction of the Secretary of Defense sent a strong message that the military was resisting Congressional oversight efforts designed to change a military culture where rape, sexual assault and sexual harassment were not deterred by effective investigation or prosecution.

The next Department of Defense Secretary, Robert Gates, also interfered with and opposed Congressional directives designed to eliminate rape and sexual assault in the military. In July 2008, the Congressional House Oversight Committee on National Security and Foreign Affairs subpoenaed Dr. Kaye Whitley to testify on July 31, 2008 about her office’s efforts to eradicate sexual assault. Secretary Gates and his subordinates directed Dr. Whitley to ignore the subpoena, which she did. As stated by the Chair of the Committee at the subsequent hearing, “But what kind of a message does her and the Department’s unwillingness until now to allow testimony send to our men and women in uniform? Do they take Dr. Whitley’s office seriously? Is she being muzzled, or is the Department hiding something?”<sup>45</sup> Secretary Gates also failed to ensure that the Department met its statutorily-mandated deadline of January 2010 for implementing a database prescribed by the National Defense Authorization Act for Fiscal Year

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<sup>45</sup> See Hearing on Sexual Assault in the Military – Part II, Subcommittee on National Security and Foreign Affairs, Serial No. 110-188 (Sep. 10, 2008).

2009 that would centralize all reports of rapes and sexual assaults. The database was not created until mid-2012.

As reported by the Washington Post on November 26, 2010, Secretary Gates and his subordinates ignored the competitive procurement process for contracting, and instead selected an inexperienced and tiny firm known as US2 to receive the \$250 million contract designed to implement the Army's obligations to prevent sexual assault and harassment.<sup>46</sup> Prior to being selected without any competition for the sexual assault work, US2 had only three employees and several small contracts for janitorial work.

Over the past nine years, the Department of Defense permitted military Command to rely on the UCMJ Article 15 nonjudicial punishment process for allegations involving rapes, sexual assaults, and sexual harassment instead of referring those allegations to the military justice system for investigation and prosecution. It repeatedly permitted military Command to interfere with the impartiality of criminal investigations by preventing individuals from being prosecuted, overturning guilty verdicts, and shortening sentences of convicted perpetrators. It repeatedly permitted the military Command to charge those alleged to have raped or sexually assaulted a co-worker under UCMJ Article 134 (adultery) rather than under Article 120 (rape). It permitted eighty percent of those military personnel convicted of sex crimes to be honorably discharged from the military and receive their full retirement benefits. It permitted Command to repeatedly retaliate against those service members who reported being raped, assaulted and harassed.

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<sup>46</sup> See Robert O'Harrow Jr., *Alaska native status gave tiny, inexperienced firm a \$250 million Army contract*, WASH. POST, Nov. 26, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/25/AR2010112503333.html?nav=hcmodule>.

These policies towards sexual assault led to an increase in the number of sexual violence and rape cases. The chart below details the number of sexual offense<sup>47</sup> cases in the military every year, the number of cases that were referred to court martial, and the number of cases that were referred for nonjudicial punishment or administrative action. There is also a column for the actual likely number of assaults. Because victims face a hostile environment for reporting offenses, the Department of Defense predicts that only 20% of the cases are ever reported.<sup>48</sup> These numbers are taken from the Department of Defense’s annual reports on sexual assault, which they began producing in 2005 after a new Congressional law was passed.<sup>49</sup>

<b>Year</b>	<b>Number of Reported Offenses</b>	<b>Estimated Number of Actual Offenses<sup>50</sup></b>	<b>Referred for Court-martial<sup>51</sup></b>	<b>Nonjudicial Punishment</b>	<b>Administrative Action</b>
2004	1,700	8,500	113	132	97
2005	2,374	11,870	79	91	104
2006	2,947	34,200	72	114	84
2007 <sup>52</sup>	2,688	13,440	103	120	126
2008	2,908	14,540	317	247	268
2009	3,230	16,150	137	201	111
2010	3,158	19,349	187	163	118
2011	3,192	15,960	240	155	75

<sup>47</sup> The term describes completed and attempted oral, anal, and vaginal penetration with any body part or object, and the unwanted touching of genitalia and other sexually-related areas of the body.

<sup>48</sup> See DEPARTMENT OF DEFENSE, FISCAL YEAR 2010 ANNUAL REPORT ON SEXUAL ASSAULT IN THE US MILITARY 15 (2011).

<sup>49</sup> See DEPARTMENT OF DEFENSE, CALENDAR YEAR 2004 ANNUAL REPORT ON SEXUAL ASSAULT IN THE US MILITARY (2005); DEPARTMENT OF DEFENSE, CALENDAR YEAR 2005 ANNUAL REPORT ON SEXUAL ASSAULT IN THE US MILITARY (2006); DEPARTMENT OF DEFENSE, CALENDAR YEAR 2006 ANNUAL REPORT ON SEXUAL ASSAULT IN THE US MILITARY (2007); DEPARTMENT OF DEFENSE, CALENDAR YEAR 2007 ANNUAL REPORT ON SEXUAL ASSAULT IN THE US MILITARY (2008); DEPARTMENT OF DEFENSE, FISCAL YEAR 2008 ANNUAL REPORT ON SEXUAL ASSAULT IN THE US MILITARY (2009); DEPARTMENT OF DEFENSE, FISCAL YEAR 2009 ANNUAL REPORT ON SEXUAL ASSAULT IN THE US MILITARY (2010); DEPARTMENT OF DEFENSE, FISCAL YEAR 2010 ANNUAL REPORT ON SEXUAL ASSAULT IN THE US MILITARY (2011); DEPARTMENT OF DEFENSE, FISCAL YEAR 2011 ANNUAL REPORT ON SEXUAL ASSAULT IN THE US MILITARY (2012); and DEPARTMENT OF DEFENSE, FISCAL YEAR 2012 ANNUAL REPORT ON SEXUAL ASSAULT IN THE US MILITARY: Volume One (2013).

<sup>50</sup> The 2006, 2010 and 2012 statistics are based on the military’s actual estimates while the other numbers are estimated based on the military’s figure that only 20% of cases are actually reported.

<sup>51</sup> This is the number of cases that were referred to court-martial in the same year that they were reported. Some cases were referred to court-martial in a later year.

<sup>52</sup> During this year, the Department of Defense went from calendar year to fiscal year reporting.

2012	3,374	26,000	266	109	74
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As the table details, the Department of Defense has been unsuccessful at curbing sexual violence within its ranks. The number of incidents has increased over the years as the number of punishments (which is a strikingly small number compared to incidents) has, for the most part, stayed the same. In 2012, out of the 1,714 cases that qualified for possible disciplinary action, only 37% went to military courts.<sup>53</sup> The other cases received Article 15 nonjudicial punishments. In 2011, only 64% of cases that went to trial and resulted in a conviction ended in a discharge or dismissal, which means that the military retained one in every third convicted perpetrator.<sup>54</sup> In addition, the 2008 rate of rapes and sexual assaults against servicemen and servicewomen serving in combat areas (primarily Iraq and Afghanistan) rose by twenty-five percent compared to the rate in 2007. In 2009, the rate of rapes and sexual assaults within the active duty military increased by eleven percent compared to the rate in 2008, with a sixteen percent increase in the rates of rape and sexual assault among those deployed to combat areas.

Studies have proven that more sexual violence “occurs in units where the commanding officer is neutral or indifferent to abuse than in those where officers did not tolerate abuse.”<sup>55</sup> In fact, one study found that “[i]n military units where sexual harassment is tolerated or initiated by senior officers, incidents of rape triple or quadruple.”<sup>56</sup> Therefore, it is no wonder that sexual violence increased overall in the military when the leaders of the Department of Defense refused to seriously address the issue.

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<sup>53</sup> See DEPARTMENT OF DEFENSE, FISCAL YEAR 2012 ANNUAL REPORT ON SEXUAL ASSAULT IN THE US MILITARY 69-70 (2012).

<sup>54</sup> See DEPARTMENT OF DEFENSE, FISCAL YEAR 2011 ANNUAL REPORT ON SEXUAL ASSAULT IN THE US MILITARY 3, 11-13 (2012). This is a trend across several years. Currently the Navy is the only branch that discharges service members convicted of these crimes.

<sup>55</sup> Turchik and Wilson, *supra* note 33 at 271.

<sup>56</sup> Anne G. Sadler et al., Factors Associated with Women’s Risk of Rape in the Military Environment, 43 AM. J. INDUS. MED. 268 (2003).

C) The Chain of Command is Ineffective at Handling Sexual Violence and Rape within the Military Justice System

As detailed *supra*, very few cases of military sexual violence are ever reported, investigated, and prosecuted. The perpetrators often go unpunished. The military judicial system prosecutes only eight percent of those alleged to have engaged in rape or sexual assault, as compared to the civilian system, which prosecutes forty percent of those alleged to be such perpetrators.<sup>57</sup> Even when a case results in prosecution and conviction, the perpetrators will not necessarily face appropriate punishment as many perpetrators receive mitigated sentences.

There are many reasons for the low prosecution and conviction rates, which ultimately stem from the military's current system that requires victims to report offences to their Chain of Command. First, many victims fear retaliation from their supervisors or fellow service members for reporting incidents. Of the reported cases, sixty-two percent of women who reported unwanted sexual conduct in 2012 reported a combination of professional retaliation, social retaliation, administrative action, and/or other punishments.<sup>58</sup> Of those known who did not report to authorities, 47% indicated fear of retaliation or reprisal as the reason for not reporting, and 43% had heard about negative experiences of other victims who reported their situation.<sup>59</sup>

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<sup>57</sup> See American Association of University Women, "STOP Act Aims to End Sexual Assault in the Military," April 24, 2013, <http://www.aauw.org/article/stop-act-aims-to-end-sexual-assault-in-the-military/> (last visited Jan. 18, 2014); and Bill Brigges, *Civil Rights Commission urged to order audit of military sex-assault cases*, NBNEWS.com, Jan. 11, 2013, [http://usnews.nbcnews.com/\\_news/2013/01/11/16469177-civil-rights-commission-urged-to-order-audit-of-military-sex-assault-cases?lite](http://usnews.nbcnews.com/_news/2013/01/11/16469177-civil-rights-commission-urged-to-order-audit-of-military-sex-assault-cases?lite) (last visited Jan. 18, 2014).

<sup>58</sup> See Department of Defense Sexual Assault Prevention and Response Program, Response Systems Panel Briefing, 17 (June 27, 2013), available at [http://www.sapr.mil/public/docs/speeches/DoD\\_SAPRO\\_ResponseSystemsPanel\\_Briefing\\_27Jun13\\_Online.pdf](http://www.sapr.mil/public/docs/speeches/DoD_SAPRO_ResponseSystemsPanel_Briefing_27Jun13_Online.pdf).

<sup>59</sup> See DEPARTMENT OF DEFENSE, FISCAL YEAR 2012 ANNUAL REPORT ON SEXUAL ASSAULT IN THE US MILITARY, *supra* n. 37 at 27.

Second, the Manual for Courts-Martial (MCM)<sup>60</sup> currently maintains that the officer who determines whether or not a criminal case goes to trial is the immediate commander in the accused service member's Chain of Command.<sup>61</sup> This obvious conflict of interest prevents the victim as well as the accused from receiving impartial and unbiased treatment from the Chain of Command. In contrast, in the civilian criminal justice system, independent prosecutors bring cases to trial. There are four basic problems with delegating the authority to make sexual violence and rape case disposition decisions to junior commanders in the Chain of Command:

- 1) Commanders are not impartial. They have personal knowledge of and working or personal relationships with the accused. In some cases, the accused and the victim both work for the commander making the disposition decision.
- 2) Most commanders are not lawyers and have no substantial legal training or experience in handling sexual assault cases. Sexual assault cases are complex and involve complicated rules of evidence, confusing or conflicting witness statements, and severely traumatized victims. Most commanders have not dealt with enough of these cases to render a proper disposition decision.
- 3) Lower-level commanders do not have military lawyers on staff to advise them. In most services, lawyers do not appear on staff until the officer is a Brigade commander (O-6) or General officer (O-7). Without proper legal counsel, commanders cannot be sure they are interpreting investigations properly or complying with all aspects of military law when making disposition decisions.

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<sup>60</sup> The Manual for Courts-Martial (MCM) is the official guide to the conduct of courts-martial in the United States military. The MCM details and expands on the military law in the Uniform Code of Military Justice (UCMJ).

<sup>61</sup> The accused's Command is also in charge of whether the accused will face pre-trial detention. This poses the similar issues as Command often does not detain the offender and he is free to commit additional offenses while awaiting trial. Instead, this determination should be left to a judicial officer who is more equipped to make this determination.

- 4) Commanders are operationally focused. Many times mission requirements, operational tempo, training, workups, and deployments can create a situation where commanders are unable to devote the proper time and attention needed to rendering proper disposition decisions.<sup>62</sup>

The 2012 Workplace and Gender Relations Survey of Active Duty Members indicated that 25% of sexual assault perpetrators were in the survivor's Chain of Command, which means that victims would have had to report the incident to their perpetrator.<sup>63</sup> This is further evidence that the current military system does not provide petitioners with access to justice. The petitioners' experiences are not anomalies but part of a larger problem with investigation, prosecution, and punishment for sexual violence and rape cases in the United States Military that largely stems from the current system of relying on the Chain of Command for all determination decisions.

D) United States Federal Courts Deny Victims of Sexual Violence and Rape Access to Civil Legal Remedies

As discussed in greater detail *supra*, the United States federal court system does not provide victims with a method for seeking civil redress in federal court. The Supreme Court of the United States has long held that the United States Military cannot be sued either for violations of United States constitutional rights or monetary damages.

Victims are prevented from bringing their constitutional violation claims against the military in federal court on a theory that it violates the separation of powers doctrine in the United States Constitution. The Supreme Court has found that because the Constitution delegates

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<sup>62</sup> See SERVICE WOMEN'S ACTION NETWORK, BRIEFING PAPER: DEPARTMENT OF DEFENSE (DoD) ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, FISCAL YEAR (FY) 2011, 2-3 (2012).

<sup>63</sup> See DEFENSE MANPOWER DATA CENTER, 2012 WORKPLACE AND GENDER RELATIONS SURVEY OF ACTIVE DUTY MEMBERS 37 (2013) available at [http://www.sapr.mil/public/docs/research/2012\\_Workplace\\_and\\_Gender\\_Relations\\_Survey\\_of\\_Active\\_Duty\\_Members-Survey\\_Note\\_and\\_Briefing.pdf](http://www.sapr.mil/public/docs/research/2012_Workplace_and_Gender_Relations_Survey_of_Active_Duty_Members-Survey_Note_and_Briefing.pdf).

specific authority over military affairs to Congress and the President, the judiciary should not play any role in matters of military oversight.<sup>64</sup>

Victims are prevented from bringing liability claims for monetary damages against the military in federal court because the Supreme Court has protected the military from liability suits in what is known as the ‘Feres Doctrine.’ The Feres Doctrine states that “the Government is not liable under the [Federal Tort Claims Act] for injuries to servicemen where the injuries arise out of or are in the course of activity that is incident to [military] service.”<sup>65</sup> The 4<sup>th</sup> Circuit in *Cioca v. Rumsfeld* went into great detail describing how the petitioners’ injuries were incident to their military service, precluding them from civil relief.

This strong case law therefore prevents victims from seeking any redress in United States civilian court for violations of their rights, leaving the ineffective military justice system as their only recourse option.

#### E) The Impact of Sexual Violence and Military Sexual Trauma on Victims

Military Sexual Trauma (MST) is defined in 38 U.S.C. 1720(D) as “psychological trauma . . . resulting from a physical assault of a sexual nature, battery of a sexual nature, or sexual harassment which occurred while the Veteran was serving on active duty or active duty for training.” The most common mental health issues that arise from MST are Post-Traumatic Stress Disorder (PTSD), other anxiety disorders, depression, and other mood disorders, and substance use disorders (alcohol and drug problems).<sup>66</sup>

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<sup>64</sup> See Fourth Circuit Decision, *supra* note 25 at 23-24.

<sup>65</sup> *Id.* (citing to *Feres v. United States*, 340 U.S. 135, 146 (1950)).

<sup>66</sup> See Rape Abuse & Incest National Network (RAINN), “Military Sexual Trauma,” <http://rainn.org/effects-of-sexual-assault/military-sexual-trauma> (last visited on Jan. 18, 2014).



According to Department of Veterans Affairs (VA) statistics, in 2012, 85,000 veterans sought treatment for MST.<sup>67</sup> One study of female veterans found that those with MST had higher rates of PTSD than those who had experienced other forms of trauma.<sup>68</sup> Sixty percent of those who had experienced MST suffered from PTSD.<sup>69</sup>

Military Sexual Trauma has severe effects. It can cause veterans to feel sudden emotional responses to things, feel angry or irritable all the time, and feel depressed. Other times it can lead to feelings of numbness, feeling emotionally “flat”, and having trouble feeling love or happiness. Reminders of sexual trauma can cause intense emotional reactions leading to veterans feeling on edge or “jumpy” all the time, not feeling safe, or going out of their way to avoid reminders of the trauma. It leads veterans to have trouble trusting others, which can cause problems in relationships, cause veterans to feel alone or not connected to others, cause veterans to seek out unhealthy or abusive relationships, and cause trouble with employers or authority figures. MST also makes it hard to stay focused, and veterans often find their minds wandering and have trouble remembering things. Finally, MST can cause serious physical health problems such as sexual issues, chronic pain, weight or eating problems, and stomach or bowel problems.<sup>70</sup>

As discussed above, MST also leads to the development of PTSD. In fact, “[p]ost-traumatic stress disorder is one of the known consequences of rape . . . [and] rape is the trauma most highly correlated with the development of this disorder. Posttraumatic stress disorder associated with rape is long lasting.”<sup>71</sup> A study of female veterans who experienced sexual

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<sup>67</sup> Kevin Freking, *Military sex abuse has long-term impact for veterans*, ASSOCIATED PRESS, May 20, 2013.

<sup>68</sup> See D. Yaeger, N. Himmelfarb, A. Cammack, J. Mintz, *DSM-IV Diagnosed Posttraumatic Stress Disorder in Women Veterans With and Without Military Sexual Trauma*, 21 J GEN. INTERN MED., S65 (2006), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1513167/>.

<sup>69</sup> See *id.*

<sup>70</sup> RAINN, “Military Sexual Trauma,” *supra* note 66.

<sup>71</sup> Yaeger et al., *supra* note 68 at S65.

assault in the United States Military showed that these women were two to three times more likely to suffer from depression and alcohol abuse.<sup>72</sup>

Unfortunately, veterans with MST face additional hurdles to receiving treatment and disability compensation from the VA that other veterans with mental health issues do not experience. The VA-granted disability benefit claims rate for MST-related PTSD claims has lagged behind the grant rate for other PTSD claims by between 16.5 and 29.6% each year between 2008-2012.<sup>73</sup> While women and men both face barriers to receiving VA disability compensation for MST-related PTSD, evidence indicates that men receive higher compensation ratings than women. While women are likely to receive 10% to 30% compensation ratings, men are likely to receive 70% to 100% compensation ratings for MST-related PTSD claims.<sup>74</sup> Because women are more likely than men to seek disability and treatment for MST-related claims, these statistics mean that women are disparately impacted overall. “For every year between 2008 and 2011, a gap of nearly ten percentage points separated the overall grant rate for PTSD claims brought by women and those brought by men.”<sup>75</sup>

Additionally, the United States Military often withdraws security clearance when someone is given a mental health diagnosis. This withdrawal can mean a demotion in rank and/or discharge. Other times, Command does not understand that the victim’s performance at work is a

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<sup>72</sup> Hankin, C.S., et al., Prevalence of Depressive and Alcohol Abuse Symptoms Among Women VA Outpatients Who Report Experiencing Sexual Assault While in the Military, 12 J TRAUMATIC STRESS 608 (1999).

<sup>73</sup> See AMERICAN CIVIL LIBERTIES UNION AND SERVICE WOMEN’S ACTION NETWORK, BATTLE FOR BENEFITS: VA DISCRIMINATION AGAINST SURVIVORS OF MILITARY SEXUAL TRAUMA 1 (2013), available at <https://www.aclu.org/sites/default/files/assets/lib13-mst-report-11062013.pdf>.

<sup>74</sup> See SERVICE WOMEN’S ACTION NETWORK (SWAN), QUICK FACTS: RAPE, SEXUAL ASSAULT AND SEXUAL HARASSMENT IN THE MILITARY 2 (2012). In conjunction with the ACLU, SWAN filed a Freedom of Information Act (FOIA) request to obtain data for fiscal years 2008-2010 concerning gender differences in compensation awarded differences in compensation awarded for MST-related PTSD claims. See also Department of Veterans Affairs, Office of Inspector General, Review of Combat Stress in Women Veterans Receiving VA Health Care and Disability Benefits (2010).

<sup>75</sup> See AMERICAN CIVIL LIBERTIES UNION AND SERVICE WOMEN’S ACTION NETWORK, BATTLE FOR BENEFITS: VA DISCRIMINATION AGAINST SURVIVORS OF MILITARY SEXUAL TRAUMA, *supra* note 73 at 1.

result of the trauma and will give the victim negative reviews and/or discharge them. Therefore, the impact of MST can have severe repercussions.

#### **IV. THE PETITION IS ADMISSIBLE UNDER THE COMMISSION'S RULES OF PROCEDURE**

##### **A) The Petitioners Have Met the Requirements of Rule 31**

Petitioners must demonstrate that they have exhausted domestic remedies available to them, under Article 31 of the Rules of Procedure of the Inter-American Commission on Human Rights<sup>76</sup>. Article 31.2 states that the requirement does not apply, however, when: “(a) the domestic legislation of the State concerned does not afford due process of law for protection of the right or rights that have allegedly been violated; (b) the party alleging violation of his or her rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or (c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.”<sup>77</sup> Crucially, it is necessary for petitioners to exhaust only those domestic remedies that are “adequate to protect the rights allegedly infringed and effective in securing the results envisaged in establishing them.”<sup>78</sup> Petitioners must show either that domestic remedies have been exhausted, that remedy is unavailable as a matter of law, fact, or delay, or that any potential remedy would be inadequate or ineffective to rectify the violations alleged.

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<sup>76</sup> Rules of Procedure of the Inter-American Commission on Human Rights, approved 4-8 Dec. 2000, amended 7-25 Oct., 2002 and 7-24 Oct., 2003, art. 31 [hereinafter “Rules of Procedure”].

<sup>77</sup> Rules of Procedure, art. 31.2.

<sup>78</sup> *El Mozote Massacre v. El Salvador*, Case 10.720, Inter-Am. C.H.R., Report No. 24/06, OEA/Ser.L/V/II.124 doc. 5 ¶ 33 (2006); *see also Velasquez Rodriguez Case*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988) ¶¶ 62-66; *Fairen Garbi and Solis Corrales Case*, Judgment of March 15, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 6 (1989); *Godínez Cruz Case*, Judgment of January 20, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 5 (1989) ¶¶ 86-90; *Godínez Cruz Case*, Judgment of January 20, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 5 (1989) ¶¶ 65-69; *Donoso v. Panama*, Case 12.360, Inter-Am. C.H.R., Report No. 71/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1, ¶¶ 21-22 (2002). The Commission has incorporated the longstanding jurisprudence of the Inter-American Court which states that “[a]dequate domestic remedies are those which are suitable to address an infringement of a legal right. A number of remedies exist in the legal system of every country, but not all are applicable in every circumstance. If a remedy is not adequate in a specific case, it obviously need not be exhausted.” *Fernando A. Colmenares Castillo v. Mexico*, Case 12.170, Report No. 36/05, Inter-Am. C.H.R., OEA/Ser.L/V/II.124 Doc. 5 (2005).

### *I. Petitioners Have Met the Exhaustion of Remedies Requirement*

Petitioners sought redress through litigation in U.S. courts, bringing their civil claim to the U.S. District Court and appealing upon dismissal to the federal Court of Appeal for the Fourth Circuit. Upon final dismissal of the case by the Court of Appeals, petitioners had exhausted domestic remedies. While petitioners did not seek review by the U.S. Supreme Court, the exhaustion rule does not require Petitioners to seek the “extraordinary” remedy of U.S. Supreme Court review as the Court’s jurisdiction is exceptional and restricted. U.S. Courts of Appeal are the final decision-making courts in over 98 percent of federal cases.<sup>79</sup> Petition for writ of certiorari to the U.S. Supreme Court is discretionary in nature, and adjudication in the Supreme Court is not the final court of appeal in the majority of legal proceedings, instead functioning as an extraordinary jurisdiction of restricted scope and access.

The Commission addressed this question of “extraordinary” remedies in light of the requirement to exhaust domestic remedies in *Mendoza v. Argentina*. In *Mendoza* the Commission rejected the government’s arguments that the petitioners should have filed an extraordinary appeal before the Argentinean Supreme Court, finding that such a remedy was “special and discretionary.”<sup>80</sup> Similarly, in *Guillermo Patricio Lynn v. Argentina*, the Commission rejected the government’s claim that an extraordinary appeal before the Supreme Court was necessary to exhaust domestic remedies, holding that: “it is not meant as an adjunct to all legal proceedings, but rather functions as a jurisdiction of restricted scope and access...[m]oreover, the Supreme Court, exercising its good judgment, is empowered to reject the extraordinary remedy ...the IACHR has established that...as a general rule, the only

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<sup>79</sup> Table II(B) Cases Granted Review, 120 Harv. L. Rev. 372, 380 (2006), available at <http://hhr.rubystudio.com/media/pdf/statistics06.pdf>.

<sup>80</sup> César Alberto Mendoza et al. v. Argentina, Case 270-02, Report No. 26/08, Inter-Am. C.H.R., OEA/Ser.L/V/II.130 Doc. 22, rev. 1 (2008).

remedies that need be exhausted are those whose function within the domestic legal system is appropriate for providing protection to remedy an infringement of a given legal right. In principle, these are ordinary rather than extraordinary remedies.”<sup>81</sup> The European Court of Human Rights has adopted a parallel standard and has repeatedly found that recourse to discretionary or “extraordinary” remedies is unnecessary.<sup>82</sup>

A petition for writ of certiorari to the U.S. Supreme Court, like recourse to the Argentinian Supreme Court, is “special and discretionary.”<sup>83</sup> As such, petitioners need not appeal to the U.S. Supreme Court before submitting this petition.

## *2. The Petitioners Claims are Excepted from the Exhaustion of Domestic Remedies Requirement*

Alternatively, the petition meets Article 31.2’s exception to the exhaustion requirement in two respects. The first is with regard to the military justice system and the second is with regard to the federal justice system.

First, the Honorable Commission “has long held that military justice systems in general (investigations and trials) have been considered to be ineffective remedies to address human rights violations, thus those with access only to the military justice system have not necessarily

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<sup>81</sup> Guillermo Patricio Lynn v. Argentina, Case 681-00, Report No. 69/08, Inter-Am. C.H.R., OEA/Ser.L/V/II.130 Doc. 22, rev. 1 (2008); *see also* ACHR, Report No. 68/01, Case 12.117, Admissibility, Santos Soto Ramírez et al., Mexico, June 14, 2001, ¶14; IACHR Case 11.581, Report No. 83/01 (2001); Zulema Tarazona Arriate et al v. Peru, Case 11.581, Report No. 83/01, Inter-Am. C.H.R., OEA/Ser.L/V/II.114 Doc. 5 rev. 1 en 265 (2001), ¶24.

<sup>82</sup> *See e.g.*, Cinar v. Turkey, Eur. Ct. H.R. No. 28602/95, (2003); Prystavka v. Ukraine, Eur. Ct. H.R. No. 21287/02, (2002).

<sup>83</sup> The Commission stated a petition for writ of certiorari to the U.S. Supreme Court was discretionary in IACHR, Report No. 18/12, Petition 161-06, Admissibility “Juvenile Offenders Sentenced to Life Imprisonment Without Parole” v. United States, March 20, 2012, stating that: “[i]n regards to the arguments of the State to the effect that the alleged victims had recourse to the Supreme Court through a writ of certiorari to remedy this situation...*the IACHR observes that the writ of certiorari is a discretionary remedy* permitting the United States Supreme Court to review the judgments of federal or state courts. The Supreme Court itself has recognized that this remedy is discretionary in the Rules of the United States Supreme Court, since a request for a writ of certiorari will only be admissible for compelling reasons; additionally, consideration of a request for a writ of certiorari is not a matter of right, but of judicial discretion.”

been required to exhaust domestic remedies before submitting cases to the Commission.”<sup>84</sup> In the case of *Márcio Lapoente da Silveira v. Brazil*, the Commission discussed the problems of military courts investigating human rights violations. Quoting case 11.820 (*Eldorado dos Carajás v. Brazil*) it stated:

“When the military justice system conducts the investigation of a case, the possibility of an objective and independent investigation by judicial authorities which do not form part of the military hierarchy is precluded. Thus, when an investigation is initiated in the military justice system, a conviction will probably be impossible even if the case is later transferred to the civil justice system . . . . In those cases which remain in the military justice system, the investigation will frequently be conducted in such a manner as to prevent the case from reaching the final decision stage.”<sup>85</sup>

The Commission therefore found that “domestic remedies need not be exhausted ‘although formally there does exist a remedy . . . for investigating human rights violations by [the] military [] . . . .’”<sup>86</sup>

In the present case, petitioners tried and failed to receive access to justice through the United States military justice system. The military justice system is incapable of conducting objective and independent investigations into violations by its own military members. The petitioners had no recourse within the military justice system and therefore sufficiently meet the exception to the exhaustion of domestic remedies requirement.

Secondly, in cases that have been dismissed by Courts of Appeal and citing strong U.S. Supreme Court precedent, the Honorable Commission has previously found that potential recourse to the Supreme Court constituted an ineffective remedy “due to a lack of prospects for success,” and that the exception to exhaustion of domestic remedies set out in Article 31.2 (b) of

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<sup>84</sup> *Márcio Lapoente da Silveira v. Brazil*, Case 4524-02 Report No. 74/08, Inter-Am. C.H.R., OEA/Ser.L/V/II.130 Doc. 22, rev. 1 (2008), ¶64.

<sup>85</sup> *Id.* at ¶69 (quoting *El Dorado Dos Carajas v. Brazil*, Case 11.820, Report No. 4/03, Inter-Am. C.H.R., OEA/Ser.L/V/II.118 Doc. 70 rev. 2 at 146 (2003), ¶32).

<sup>86</sup> *Márcio Lapoente da Silveira v. Brazil*, *supra* note 84 at ¶70.

the IACHR's Rules of Procedure would be applicable.<sup>87</sup> In that submission, the petitioners' did not appeal their case to the Supreme Court of the United States because "the domestic remedies [could] not be considered to have had a reasonable prospect of success in light of the consistent case law of the United States courts, including the Supreme Court."<sup>88</sup>

Similarly, petitioners filed a case claiming violations of their Constitutional rights in domestic federal court after they failed to obtain access to justice through the military justice system. On July 23, 2013 the Court of Appeal for the Fourth Circuit rejected those claims. The petitioners did not appeal to the Supreme Court because the strong Supreme Court case law cited to in both the District Court and Circuit Court dismissals meant that the petitioners did not have a reasonable prospect for success in that forum. The precedents established in Supreme Court decisions clearly prohibit petitioners from suing the United States Military. The Supreme Court and other federal courts have repeatedly made clear that the federal judiciary will not adjudicate military issues, regardless of whether its citizens' rights are being violated.<sup>89</sup> Therefore, an appeal to the Supreme Court would have been futile in this case and the petitioners have met the exception to the exhaustion of domestic remedies requirement.

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<sup>87</sup> *Juvenile Offenders Sentenced to Life Imprisonment Without Parole v. United States*, *supra* note 83 at ¶ 48.

<sup>88</sup> *Id.* at ¶ 57.

<sup>89</sup> *See e.g., Chappell v. United States*, 462 U.S. 296, 303-304 (1983). "The special status of the military has required, the Constitution has contemplated, Congress has created, and this Court has long recognized two systems of justice, to some extent parallel: one for civilians and one for military personnel. The special nature of military life—the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel—would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command," and further that, "the unique disciplinary structure of the Military Establishment and Congress' activity in the field constitute 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens*-type [civil] remedy against their superior officers."; *See also Feres v. United States*, 340 U.S. 135, 146 (1950). "[T]he Government is not liable under the [Federal Tort Claims Act] for injuries to servicemen where the injuries arise out of or are in the course of activity that is incident to service." The expansive incident to service test asks whether "particular suits would call into question military discipline and decision making [and would] require judicial inquiry into, and hence intrusion upon, military matters."

B) Petitioners have Filed Within a Reasonable Time and Are Thus under the Statute of Limitations

Article 32(1) of the Rules of Procedure requires that petitions be lodged “within a period of six months following the date on which the alleged victim has been notified of the decision that exhausted the domestic remedies.”<sup>90</sup> The six-month deadline from the date of the Court of Appeals decision, the date of exhaustion of domestic remedies, is on January 23, 2014. Thus the petition meets timeliness requirement outlined in the terms of Article 32(1).

Additionally and alternatively, where petitioners are subject to an exception from the prior exhaustion of domestic remedies under Article 31(2), Article 32(2) of the Rules of Procedure states, “the petition shall be presented within a reasonable period of time . . . for this purpose, the Commission shall consider the date on which the alleged violation of rights occurred and the circumstances of each case.”<sup>91</sup> Given the severity of the human rights violations suffered by petitioners and their recent recourse to U.S. federal courts, petitioners fall within the reasonableness standard. In addition, due to ongoing procedural failings and substantive legal limitations that stand in the way of petitioners making themselves whole, petitioners are subject to continuing harm consequent to the human rights violations described herein, including serious mental and physical trauma such as PTSD, anxiety and depression. Petitioners have thus filed within a reasonable period of time.

C) There Are No Proceedings Pending Before Any Other International Tribunals.

Article 33 of the Rules of Procedure renders a petition inadmissible if its subject matter “is pending settlement pursuant to another procedure before an international governmental organization . . . or, . . . essentially duplicates a petition pending or already examined and settled

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<sup>90</sup> Rules of Procedure, art. 32.1.

<sup>91</sup> Rules of Procedure, art. 32(2).



by the Commission or by another international governmental organization . . . .”<sup>92</sup> The subject of this petition is not pending settlement and does not duplicate any other petition in any other international proceeding.

D) The American Declaration of the Rights and Duties of Man Is Binding on the United States

Although the United States is not a party to the Inter-American Convention on Human Rights, the Charter of the Organization of American States (“OAS Charter”) and the American Declaration are applicable in this petition. The Honorable Commission has found that the United States “is bound to respect the provisions contained in the American Declaration, and the IACHR is competent to receive petitions alleging violations committed by the State . . . because the State ratified the OAS Charter on June 19, 1951, having been subject to the Commission's jurisdiction since 1959, the year of that organ's creation, and in accordance with Articles 1 and 20 of the IACHR's Statute and Articles 23 and 51 of its Rules of Procedure.”<sup>93</sup>

E) The Commission Should Interpret the Provisions of the American Declaration in the Context of Recent Developments in International Human Rights Law

The American Declaration imposes binding international legal obligations on the United States. On many occasions, international tribunals have found that international human rights instruments like the Declaration are to be interpreted with respect to the evolving norms of human rights law. According to the International Court of Justice, international instruments must be interpreted and applied in the overall framework of the juridical system in force at the time of

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<sup>92</sup> Rules of Procedure, art. 33.

<sup>93</sup> See *Juvenile Offenders Sentenced to Life Imprisonment Without Parole v. United States*, *supra* note 83 at ¶ 39. See also Rules of Procedure, arts. 51 & 52.

interpretation.<sup>94</sup> Further, the Inter-American Court has stated that it is appropriate to look at the look to the Inter-American system of today in determining the legal status of the Declaration.<sup>95</sup> Similarly, the Inter-American Commission recently reported that they have “traditionally interpreted the scope of the obligations established under the American Declaration in the context of the international and inter-American human rights systems more broadly, in light of developments in the field of international human rights law since the instrument was first adopted, and with due regard to other rules of international law applicable to members states.”<sup>96</sup> It is important to note that the Commission considers the American Convention on Human Rights “to represent an an authoritative expression of the fundamental principles set forth in the American Declaration.”<sup>97</sup> Analogous provisions of the Convention related reports and jurisprudence of the Commission and Court interpreting its articles thus provide a significant guide to interpretation of the Declaration.

In addition, the Commission has held that other prevailing international and regional human rights instruments are relevant in interpreting and applying the provisions of the

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<sup>94</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 21 June 1971.

<sup>95</sup> See Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10, ¶ 37 (July 14, 1989).

<sup>96</sup> Jessica Lenhan (Gonzales) v. United States, Case 12.626, Inter-Am. C.H.R., Report No. 80/11 ¶ 118 (2011) (citing generally Smith v. United States, Case 12.562, Inter-Am. C.H.R., Report No. 81/10, OEA/Ser.L/V/II.139, doc. 21 (2010); Mortlock v. United States, Case 12.534, Inter-Am. C.H.R., Report No. 63/08 (2008); Maya Indigenous Communities of Toledo Dist. v. Belize, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 (2004); Dann v. United States, Case 11.140, Inter-Am. C.H.R., Report 75/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2002); Domingues v. United States, Case 12.285, Inter-Am. C.H.R., Report No. 62/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2002)).

<sup>97</sup> Statehood Solidarity Comm. v. United States, Case 11.204, Inter-Am. C.H.R., Report No. 98/03, OEA/Ser.L/V/II.114, doc. 70 rev.1 ¶ 87 & n.79 (2003) (citing Garza v. United States, Case 12.243, Inter-Am. C.H.R., Report No. 52/01, OEA/Ser.L/V/II.111, doc. 20 rev. ¶ 88-89 (2000)); see also Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System, Inter-Am. C.H.R., OEA/Ser.L/V/II.106, doc. 40 rev. ¶ 38 (2000) [“Canadian Asylum Seekers Report”] (confirming that while the Commission does not apply the American Convention in relation to member states that have yet to ratify that treaty, its provisions may well be relevant in informing an interpretation of the principles of the Declaration).

Declaration.<sup>98</sup> The Commission has directly cited a number of human rights standards in such interpretation, including authorities from the Human Rights Committee, the Committee Against Torture, U.N. Special Rapporteurs, the European Court of Human Rights<sup>99</sup>, as well as international humanitarian law as in the Geneva Conventions<sup>100</sup>

## **V. THE UNITED STATES' FAILURE TO INVESTIGATE PETITIONERS' COMPLAINTS AND PROVIDE THEM WITH A REMEDY VIOLATED THEIR RIGHTS TO EQUAL PROTECTION BEFORE THE LAW UNDER ARTICLE II**

Article II of the American Declaration states, "All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor."<sup>101</sup> The Honorable Commission has consistently found the

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<sup>98</sup> Ramón Martínez Villareal v. United States, Case 11.753, Report No. 52/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 821 (2002) ¶ 60 (citing Garza v. United States, Case N° 12.243, Annual Report of the IACHR 2000, ¶¶ 88-89). "[I]n interpreting and applying the American Declaration, it is necessary to consider its provisions in the context of developments in the field of international human rights law since the Declaration was first composed and with due regard to other relevant rules of international law applicable to member states against which complaints of violations of the Declaration are properly lodged. Developments in the corpus of international human rights law relevant in interpreting and applying the American Declaration may in turn be drawn from the provisions of other prevailing international and regional human rights instruments."; *See also* Report on the Situation of Human Rights in the Peruvian State of Cayara, Inter-Am. C.H.R., OEA/Ser.L/V/II.83, doc. 32 rev. (1993); Report on the Situation of Human Rights in Ecuador, Inter-Am. C.H.R., OEA/Ser.L/V/II.96, doc. 10 rev. 1 (1997); *Solidarity Statehood Comm. v. United States*, Case 11.204, Inter-Am. C.H.R., Report No. 98/03, OEA/Ser.L/V/II.114, doc. 70 rev. 1 ¶¶ 91-93 (2003).

<sup>99</sup> *See, e.g.*, *Ximenes-Lopes v. Brazil*, Inter-Am. Ct. H.R. (ser. C) No. 149 ¶ 51 (2006) (citing *Storck v. Germany*, Eur. Ct. H.R., App. No 61603/00 (2005) and other international declarations, standards and principles in order to "illuminate the reach and content" of the right to life and the right to human treatment" in the Inter-American system, and finding "these soft-law documents helpful for the adjudication of the instant case"); *Ricardo Canese Case*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 111 ¶¶ 115-35 (relying on HRC General Comment 27); *YATAMA Case*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 127 ¶ 208 (quoting from HRC General Comment 25); *Raxcacó Reyes Case*, 2005 Inter-Am. Ct. H.R., (ser. C) No. 133 ¶¶ 47, 69 (citing HRC Concluding Observations on reports of Iran and Iraq); *Canadian Asylum Seekers Report*, supra, at ¶¶ 28, 159, 165 (referencing the U. N. Convention on the Rights of the Child to interpret Canada's responsibilities to asylum seekers under the American Declaration and the OAS Charter); *Maya Indigenous Community v. Belize*, Case 12.053, Inter-Am. C.H.R., Report 40/04, OEA/Ser.L/V/II.122, doc. 5 (2004) ¶¶ 112-120, 163, 174 (referencing the American Convention, jurisprudence of the Inter-American Court, and the United Nations Convention on the Elimination of Racial Discrimination (CERD) to interpret the rights to property, equality before the law, and judicial protection for indigenous peoples contained in the American Declaration).

<sup>100</sup> *See, e.g.*, Organization of American States, Regarding the Situation of the Detainees at Guantanamo Bay, United States, Resolution No. 2/11, MC 259-02 (July 22, 2011); Request for Precautionary Measures Concerning the Detainees at Guantanamo Bay, Cuba, Inter-Am. C.H.R. decision of Mar. 12, 2002, 41 ILM 532 (2002); *Bamaca Velazquez v. Guatemala*, Case No. 11/129, Inter-Am. C.H.R. ¶¶ 207-209.

<sup>101</sup> American Declaration of the Rights and Duties of Man, Organization of American States Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human

principles within this article to be the “backbone for the regional and universal protection of human rights”<sup>102</sup> and has interpreted them to mean that “States have the obligation to adopt the measures necessary to recognize and guarantee the effective equality of all persons before the law; to abstain from introducing in their legal framework regulations that are discriminatory towards certain groups either in their face or in practice; and to combat discriminatory practices”.<sup>103</sup> The Commission has required States to ensure that the right to non-discrimination is affirmatively protected<sup>104</sup>, and in interpreting the Declaration, the Commission has found the right to be free from discrimination in Article II to be analogous to the guarantees of equal protection of the law included in Articles 1 and 24 of the American Convention<sup>105</sup> and Article 4(f) of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women.<sup>106</sup> This Commission has also clarified that “the right to equality before the law does not mean that the substantive provisions of the law have to be the same for everyone, but that the application of the law should be equal for all without discrimination.”<sup>107</sup>

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Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17, art. 2 (1992) [hereinafter “American Declaration”].

<sup>102</sup> Jessica Lenahan v. United States, *supra* note 96 at ¶107.

<sup>103</sup> *Id.* at ¶109.

<sup>104</sup> *See* Maria da Penha v. Brazil, Case 12.051, Report No. 54/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 704 (2000); The situation of the rights of women in Ciudad Juárez, Mexico: the right to be free from violence and discrimination, Inter-Am. C.H.R., OEA/Ser.L/V/II.117, Doc. 44 (2003)

<sup>105</sup> American Convention on Human Rights, Art. 1(1). “The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”; American Convention, Article 24. “All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.”

<sup>106</sup> Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, Article 4(f). “Every woman has the right to the recognition, enjoyment, exercise and protection of all human rights and freedoms embodied in regional and international human rights instruments. These rights include, among others...[t]he right to equal protection before the law and of the law.”

<sup>107</sup> *Id.*

A) The United States Discriminated Against the Petitioners on the Basis of Military Status

The United States Military has adopted its own military justice system that handles criminal acts committed by and against its members. The petitioners in this case had no choice but to use this military justice system. This justice system is separate, but unequal and it therefore violates Article II of the American Declaration.

The military justice system has systematically failed to investigate and prosecute cases of sexual violence and rape. The petitioners were all denied access to justice in their cases when they may have been afforded a better remedy in United States civilian court. At the very least, petitioners' cases would have been investigated to a more thorough degree should they have been able to utilize the civilian criminal justice system and not subject to permission of their Command when determining whether to pursue their claims. This separate military justice system did not provide petitioners with an equal avenue to accessing the courts as other United States citizens possess and the actions of the military commanders –who are a part of the justice system because of their power for determining investigation and punishment - even went as far as to prevent petitioners from seeking any type of redress for the human rights violations. When the perpetrator was punished at all, the punishments given to perpetrators in this separate military justice system was substantially lesser than the perpetrator would have faced in civilian court.

B) The United States Discriminated Against the Petitioners on the Basis of Gender

The petitioners' experience of gender-based sexual violence is a form of discrimination under international and regional human rights law, and constitutes a violation of Article II of the American Declaration. The Inter-American Commission has described gender-based violence as itself constituting a form of discrimination, stating that the State's "failure to protect women

against...violence breaches their right to equal protection of the law.”<sup>108</sup> The Commission again underscored the link between discrimination and gender-based violence in its *Jessica Lenahan v. United States* report, highlighting that “the States’ duty to address violence against women also involves measures to prevent and respond to the discrimination that perpetuates this problem.”<sup>109</sup> Article 6 of the Convention of Belem do Para reasserts the discriminatory nature of gender-based violence, providing that “the right of every woman to be free of violence includes...the right of women to be free of all forms of discrimination.”<sup>110</sup> The Belem do Para Convention is highly relevant to interpretation of Article II of the Declaration. The Commission has held that “there is an integral connection” between the guarantees set forth in the Belem do Para Convention and the rights and freedoms set forth in the American Convention “in addressing the human rights violation of violence against women.”<sup>111</sup> The American Convention functions as an interpretive guide to the Declaration, and the Commission has further noted that the Belem do Para Convention “reflect[s] a hemispheric consensus on the need to recognize the gravity of the problem of violence against women and take concrete steps to eradicate it.”<sup>112</sup>

Numerous other relevant international and regional bodies have held that gender-based violence, which includes sexual violence, violates the right to non-discrimination. The identification of a link between gender-based violence and discrimination on the basis of gender was central to a growing international consensus that violence against women is global, systemic and rooted in power imbalances and structural inequality between men and women.<sup>113</sup> In his in-

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<sup>108</sup> *Opuz v Turkey*, No. 33401/02, Eur. Ct. H.R. (2009) ¶¶190-191.

<sup>109</sup> *Jessica Lenahan v the United States*, *supra* 96 note at ¶126.

<sup>110</sup> Belem do Para Convention, art. 6.

<sup>111</sup> *See Maria da Penha v. Brazil*, *supra* note 104 at ¶120

<sup>112</sup> *The Situation of the Rights of Women in Ciudad Juárez, Mexico: The Right to be Free from Violence and Discrimination*, *supra* note 104 at ¶ 03.

<sup>113</sup> *See UN Secretary General, In Depth Study on All Forms of Violence Against Women, for the G.A. UN Doc. A/61/122/Add. 1 (2006) ¶ 30.*

depth study on all forms of violence against women, the United Nations Secretary General states that “the recognition of violence against women as a form of discrimination and, thus, a human rights violation, provides an entry point for understanding the broad context from which such violence emerges and related risk factors.”<sup>114</sup>

The Secretary-General argues that the specific causes of violence against women and the factors that increase the risk of its occurrence are both grounded in a broader context of systemic gender discrimination. Making the connection between violence against women and gender-based discrimination “highlights the link between the realization of women’s rights and the elimination of power disparities” where vulnerability to violence is fundamentally conceived of as “a condition created by the absence or denial of rights.”<sup>115</sup>

It is now well established under international law that violence against women is a form of discrimination against women and a violation of human rights. In its General Recommendation 19, the CEDAW Committee stated that “gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.”<sup>116</sup> The Committee has interpreted article 1 of CEDAW to include gender-based violence: “violence that is directed at a woman because she is a woman or that affects women disproportionately.”<sup>117</sup>

In its General Recommendation 28, the CEDAW Committee emphasizes that discrimination against women on the basis of sex and gender, as gender-based violence, includes acts that “inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and

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<sup>114</sup> *Id.* at ¶65.

<sup>115</sup> *Id.*

<sup>116</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee), General Recommendation 19, ¶1.

<sup>117</sup> *Id.* at ¶6.

other deprivations of liberty, the violence that occurs within the family or domestic unit or within any other interpersonal relationship, or violence perpetrated or condoned by the State or its agents regardless of where it occurs.”<sup>118</sup> The Committee further cites the due diligence standard for state responsibility to eliminate violence against women, stating that “States parties have a due diligence obligation to prevent, investigate, prosecute and punish such acts of gender-based violence.”<sup>119</sup>

In *Jessica Lenahan v. United States*, the Honorable Commission acknowledged that a State’s failure to act with due diligence to protect women from violence constitutes a form of discrimination, and denies women their right to equality before the law as required under Article II.<sup>120</sup> The Commission has found that the “prevention and eradication of violence against women [is] . . . a crucial component of the State’s duty to eliminate both direct and indirect forms of discrimination.”<sup>121</sup> “The principle of due diligence . . . has been applied in a range of circumstances to mandate States to prevent, punish, and provide remedies for acts of violence, when these are committed by either State or non-State actors.”<sup>122</sup> It “encompasses the organization of the entire state structure – including the State’s legislative framework, public policies, law enforcement machinery and judicial system - to adequately and effectively prevent and respond to these problems.”<sup>123</sup> “A State may incur international responsibility for failing to act with due diligence to prevent, investigate, sanction and offer reparations for acts of violence against women; a duty which may apply to actions committed by private actors in certain

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<sup>118</sup> CEDAW Committee, General Recommendation 28, ¶17.

<sup>119</sup> *Id.*

<sup>120</sup> *See id.* at ¶111.

<sup>121</sup> *Id.* at ¶120.

<sup>122</sup> *Id.* at ¶122.

<sup>123</sup> *Id.* at ¶125.



circumstances.”<sup>124</sup> The Commission has also stated that “State inaction towards cases of violence against women fosters an environment of impunity and promotes the repetition of violence ‘since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts.’”<sup>125</sup>

In the present submission, the United States failed to act with due diligence to prevent, investigate, sanction, and offer reparations for acts of violence against women. Seventeen out of the twenty petitioners in this case are women. The United States not only failed to investigate and prosecute the perpetrators in these cases, but actually took an active role in preventing these women from seeking justice. In some cases this took the form of intentionally harming the petitioners through harassment, denial of promotions and other threats to their careers. In a few cases, the United States continued to allow known sexual violence perpetrators to go unpunished, leading to situations where they were able to abuse multiple women before ever being stopped. The United States’ inaction and active retaliation towards those petitioners who sought redress fostered a culture of impunity within the United States Military where sexual violence perpetrators felt free to assault women because there was no threat of punishment.

C) The United States Discriminated Against Petitioners on the Basis of Sexual Orientation

The Honorable Commission has found that sexual orientation is covered by the phrase “other social condition” contained in Article 1.1 of the American Convention, which states, “[t]he States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those

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<sup>124</sup> *Id.* at ¶126 (citing generally to *Claudia Ivette González v. Mexico*, Case 281/02, Report No. 16/05, Inter-Am. C.H.R., OEA/Ser.L/V/II.124 Doc. 5 (2005); *Opuz v. Turkey*, *supra* note 108; CEDAW Committee, Views on Communication 6/2005, *Fatma Yildirim v. Austria* (July 21, 2004)).

<sup>125</sup> CEDAW Committee, General Recommendation 28, ¶168 (quoting *Maria Da Penha v. Brazil*, *supra* note 104 at ¶56).

rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any *other social condition*.”<sup>126</sup> In finding this, the Commission held that the rights enshrined in Article 24 also applied to nondiscrimination on the basis of sexual orientation. Article 24, which is analogous to Article II of the American Declaration, states that “[a]ll persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.”<sup>127</sup>

In the same report, the Commission also found sexual orientation to be a “suspect class,” and any distinction based on this classification is subject to “strict scrutiny.”<sup>128</sup> This means that “it is assumed that the distinction is incompatible with the American Convention. Thus, only “weighty reasons” may be invoked [by the State] as justification, and those must be studied in close detail.”<sup>129</sup> “After presenting such a distinction, the burden of proof falls on the State . . . to argue the existence of a legitimate goal, but the goal sought through the distinction must represent a particularly important purpose or a pressing social need.”<sup>130</sup>

The General Assembly of the Organization of American States has also condemned human rights violations and acts of violence committed against persons because of their sexual orientation and gender identity and urged states to:

- a) investigate these acts and violations and to ensure that their perpetrators are brought to justice;
- b) take all necessary measures to ensure that acts of violence and related human rights violations are not committed against persons because of their sexual orientation and gender identity, and to ensure that victims are given access to justice on an equal footing; and

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<sup>126</sup> American Convention on Human Rights, art. 1(1)(emphasis added). *See Karen Atala and daughters v. Chile*, Case No. 12.502, Inter-Am. C.H.R. (2010), ¶ 95.

<sup>127</sup> *See Karen Atala and daughters v. Chile*, *supra* note 126 at ¶ 95.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at ¶ 88.

<sup>130</sup> *Id.* at ¶ 89.

- c) consider ways to combat discrimination against persons because of their sexual orientation and gender identity.<sup>131</sup>

In addition, many relevant international and regional bodies have held that discrimination on the basis of sexual orientation is prohibited. The International Covenant on Civil and Political Rights<sup>132</sup> proscribes discrimination on the basis of sex in Articles 2(1) or 26. The case law of the United Nations Human Rights Committee has interpreted prohibited discrimination on the basis of sex in these articles to include discrimination on the basis of sexual orientation.<sup>133</sup> The UN Committee on Economic, Social and Cultural Rights has also prohibited discrimination on the basis of sexual orientation in access to economic, social and cultural rights.<sup>134</sup> Additionally, the UN Human Rights Council expressed grave concern regarding discrimination on the basis of sexual orientation in its resolution 17/19.<sup>135</sup>

The European Court of Human Rights has found a violation of Article 8's right to a private life<sup>136</sup> where there exists discrimination on the basis of sexual orientation in the criminal law<sup>137</sup>, and in a case of discrimination on the basis of sexual orientation in the military,<sup>138</sup> and it has interpreted the clause prohibiting discrimination (Article 14) as inclusive of sexual

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<sup>131</sup> OAS Resolution on Human Rights, Sexual Orientation and Gender Identity, AG/RES. 2600 (XL-O/10), adopted by consensus, June 2010.

<sup>132</sup> UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html>.

<sup>133</sup> UN Human Rights Committee, *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

<sup>134</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No. 20, E/C.12/GC/20, ¶32.

<sup>135</sup> UN Human Rights Council, Resolution 17/19: Human rights, sexual orientation and gender identity, A/HRC/RES/17/19, 14 July 2011.

<sup>136</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8.

<sup>137</sup> *Dudgeon v. the United Kingdom*, 7525/76 Eur. Ct. H.R. 5 (1981); *Norris v. Ireland*, 10581/83 Eur. Ct. H.R. 22 (1988); *Modinos v Cyprus*, 15070/89, Eur. Ct. H.R. 19 (1993).

<sup>138</sup> *Lustig-Prean and Beckett v. the United Kingdom*, 31417/96; 32377/96 Eur. Ct. H.R. 71 (1999).

orientation.<sup>139</sup> Further, the European Union’s Charter of Fundamental Rights clearly proscribes discrimination on the basis of sexual orientation in Article 21.<sup>140</sup>

Based on the position of the Commission and relevant international and regional human rights bodies, the petitioners request that the Honorable Commission find discrimination based on sexual orientation to be a violation under the American Declaration. Petitioners Jeloudov and Desautel were discriminated against because of their sexual orientation. In each of the petitioners’ cases, the United States Military refused to investigate or prosecute the incidents of sexual assault and rape committed against them. Instead, the United States blamed the petitioners for the assaults, forced them to sign documents stating they were gay, and then discharged them under the military’s “Don’t Ask, Don’t Tell” policy.<sup>141</sup> This was a clear violation of Article II of the American Declaration and Article 24 of the American Convention. The petitioners’ cases should have been investigated and prosecuted through the military justice system, but instead the United States treated the petitioners differently because of their sexual orientation, dismissed the petitioners’ claims, and then punished the perpetrators by kicking them out of the military for “homosexual conduct.”

The State may argue that the “Don’t Ask, Don’t Tell” policy had the legitimate goal of furthering unit cohesion and military readiness. However, this argument would not meet the strict scrutiny standard of a “particularly important purpose.” The law was repealed in 2010 because those arguments were found to be unjustifiable. Furthermore, the petitioners’ cases

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<sup>139</sup> *Salgueiro Da Silva Mouta v. Portugal*, 33290/96 Eur. Ct. H.R. 176 (1999).

<sup>140</sup> Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1 (Dec. 7, 2000), art. 21(1). “1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age *or sexual orientation* shall be prohibited.” (emphasis added)

<sup>141</sup> “Don’t Ask, Don’t Tell” was a 1993 law and policy that stated homosexual conduct was a bar to service in the United States Military. The policy was repealed under the Don’t Ask, Don’t Tell Repeal Act of 2010, which occurred after the petitioners in this submission were forced out of the military.

should have been investigated regardless of the military's policies toward gay men and women as the "Don't Ask, Don't Tell" policy stated nothing about the investigation of sexual violence incidents against gay servicemembers. Instead, the United States misused the policy as an excuse not to investigate and prosecute petitioners' cases. This is a clear violation of Article II of the American Declaration and Article 24 of the American Convention.

**VI. THE UNITED STATES VIOLATED PETITIONERS' RIGHTS TO LIFE AND SECURITY OF PERSON UNDER ARTICLE I, RIGHTS TO BE FREE OF INHUMANE TREATMENT UNDER ARTICLE I, AND RIGHTS TO PRIVACY UNDER ARTICLE V**

A) Violation of Petitioners' Rights to Life and Security under Article I

Article I of the American Declaration states, "Every human being has the right to life, liberty and the security of his person." This Commission has held that "the protection of the right to life is a critical component of a State's due diligence obligation to protect women from acts of violence. This legal obligation pertains to the entire state institution, including the actions of those entrusted with safeguarding the security of the State."<sup>142</sup>

In interpreting the right to life clause in the American Convention on Human Rights, this Commission has found that States are required to "adopt the necessary measures, not only at the legislative, administrative and judicial level, by issuing penal norms and establishing a system of justice to prevent, eliminate and punish [...] and protect individuals from the criminal acts of other individuals and to investigate these situations effectively."<sup>143</sup> We ask that the court apply this useful language in interpreting the requirements of the United States under the American Declaration in this submission.

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<sup>142</sup> *Id.* at ¶128.

<sup>143</sup> Application before the Inter-American Court of Human Rights, Claudia Ivette González et. al. v. United Mexican States, Cases Nos. 12.496, 12.497 and 12.498, Inter-Am. C.H.R. ¶156 (2007) (citing to Case of the Pueblo Bello Massacre, Judgment, Series C No. 140, Inter-Am. Ct. H.R., ¶120 (Jan. 31, 2006)).

The United States repeatedly violated petitioners' rights to life and security of person by failing to meet its due diligence obligations to adopt the necessary measures to prevent, eliminate, punish and protect petitioners from the criminal acts of other individuals. The military justice system failed in every one of petitioners' cases whether in the prevention, investigation or judicial stage. In the way the current system works, Command prevents the system from functioning as a judicial system able to handle these types of cases. When Command interferes, it is often to protect the perpetrator and punish the victim. For the United States to meet its obligations, it must remove Command from the criminal investigation process and allow for perpetrators to face their trials and punishment. The United States must also establish a separate reporting system in order to ensure that Command is removed completely from the process. These measures will allow the United States to maintain a judicial system that does not violate petitioners' rights.

B) Violation of Petitioners' Rights to be Free of Torture and Cruel, Inhuman or Degrading Treatment under Article I

Article I of the American Declaration ensures "life, liberty and the security of [one's] person,"<sup>144</sup> and the protections included therein have been read by the Commission as co-extensive with those afforded by Article 5 of the American Convention.<sup>145</sup> Torture and cruel, inhuman or degrading treatment is prohibited by Article 5, which guarantees every person's "right to have his physical, mental, and moral integrity respected . . . No one shall be subjected to

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<sup>144</sup> American Declaration, art. 1.

<sup>145</sup> Report on Terrorism and Human Rights, Inter-Am. Comm'n H.R. OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr., ¶ 154 (2002), at ¶ 155 & n.388 (noting that while the American Declaration lacks a general provision on the right to humane treatment, the Commission has interpreted Article I as containing a prohibition similar to that of Article 5 of the American Convention); *see also, e.g.*, Juan Antonio Aguirre Ballesteros, Case 9437, Annual Report of the Inter-Am. C.H.R. 43, OEA/ser. L/V/II.66, doc. 10 rev. 1 (1985).

torture or cruel, inhuman, or degrading treatment.”<sup>146</sup> Furthermore, the Inter-American system recognizes the right to be free of torture as a *jus cogens*, non-derogable norm<sup>147</sup>, linking this to the security of the person outlined in Article 1: “[a]n essential aspect of the right to personal security is the absolute prohibition of torture, a peremptory norm of international law creating obligations *erga omnes*.”

Torture is defined in the Inter-American to Prevent and Punish Torture as the following:

[A]ny act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish<sup>148</sup>.

In establishing the scope of torture, the Court<sup>149</sup> and Commission<sup>150</sup> have relied on this definition, and the Court has specifically held that it must refer to the Inter-American Torture Convention in interpreting the scope and content of Article 5 of the American Convention.<sup>151</sup>

In the case of *Miguel Castro Prison v Peru*, the Court defined sexual violence as “actions with a sexual nature committed with a person without their consent, which besides including physical invasion of the human body, may include acts which do not involve penetration or even physical contact.” Each of the petitioners was subjected to sexual violence by members of the military,

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<sup>146</sup> American Convention on Human Rights, art. 5.

<sup>147</sup> See Report on the Situation of Human Rights of Asylum Seekers Within the Canadian Refugee Determination System, OEA/Ser.L/V/II.106 Doc. 40 rev, Inter-Am. C.H.R. ¶¶ 118, 154 (2000); *Cabrera v. Dominican Republic*, Report No. 35/96, OEA/Ser.L/V/II.95 doc. 7 rev. at 821 ¶ 79 (1997); *Goiburú v. Paraguay*, Inter-Am. Ct. HR (ser. C) No. 154 ¶ 128 (2006) (on torture).

<sup>148</sup> Inter-American Convention to Prevent and Punish Torture, art. 2.

<sup>149</sup> *Tibi v. Ecuador*, Judgement, Inter-Am. Ct. H.R., (Ser. C) No. 114, ¶145 (Sep. 7, 2004); *Gómez-Paquiyaury Brothers*, Provisional Measures with regard to Peru, Inter-Am. Ct. H.R., ¶105 (May 3, 2008).

<sup>150</sup> *Raquel Martín de Mejía v. Peru*, Case 10.970, Report No. 5/96, Inter-Am. C.H.R., Annual Report 1995, OEA/Ser.L/V/II.91 Doc. 7 rev. ¶185 (1996).

<sup>151</sup> *Tibi v. Ecuador*, *supra* note 149 at ¶145.

and in some cases to repeated sexual violence and/or rape.<sup>152</sup> The Inter-American Commission has consistently found that rape is a form of torture, stating in *Martin de Mejia* that “rape is a physical and mental abuse that is perpetrated as a result of an act of violence . . . Moreover, rape is considered to be a method of psychological torture . . . its objective, in many cases, is not just to humiliate the victim but also her family or community.”<sup>153</sup>

According to the Court and Commission, rape is a violation of the right to humane treatment and amounts to torture where it is an “intentional act through which physical and mental pain and suffering is inflicted on a person...committed with a purpose...by a public official or by a private person acting at the instigation of the former.”<sup>154</sup>

A number of international and regional bodies have in particular found rape by state officials, such as the military, to constitute torture. The European Court of Human Rights found that such rape was “an especially grave and abhorrent form of ill-treatment” amounting to torture<sup>155</sup>, and the African Commission on Human and Peoples’ Rights found similarly in *Malawi African Association and Others*.<sup>156</sup> The Committee on the Elimination of Discrimination Against Women has identified rape and sexual violence as a form of torture<sup>157</sup>, as have several U.N. Special Rapporteurs on Torture.<sup>158</sup> In *Celebici*<sup>159</sup> and *Furundzija*<sup>160</sup>, the International

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<sup>152</sup> Case of Miguel Castro Prison v. Peru, Judgment, Inter-Am. Ct. H.R., ¶306 (2006).

<sup>153</sup> *Martin de Majia v. Peru*, *supra* note 150 at ¶186.

<sup>154</sup> *Id.* at 157; *see also* Rosendo Cantu et al. v. Mexico, Judgment, Inter-Am. Ct. H.R. (Aug. 31, 2010); Case of Miguel Castro Prison v. Peru, *supra* note 152 at ¶309.

<sup>155</sup> *Aydin v Turkey*, No. 57/1996/676/866, Eur. Ct. H.R., ¶¶83-85 (1997).

<sup>156</sup> *Malawi African Association and Others v. Mauritani*, Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98, African C.H.R., ¶¶117-18 (2000).

<sup>157</sup> CEDAW, General Recommendation No. 19 at ¶ 7.

<sup>158</sup> Commission on Human Rights (1986), 'Report by the Special Rapporteur, Mr P Kooijmans', UN Doc. E/CN.4/1986/15, 19 February 1986 at p. 26; Commission on Human Rights (1992), 'Forty-Eighth Session, Summary Record of the 21st Meeting (Oral Statement of Special Rapporteur Kooijmans)', UN Doc. E/CN.4/1992/SR.21, 11 February 1992 at para. 35; UN Commission on Human Rights (1995), 'Report of the Special Rapporteur, Mr. Nigel S. Rodley, Submitted Pursuant to Commission on Human Rights Resolution 1992/32', UN Doc. E/CN.4/1995/34, 12 January 1995 at paras. 15-24; UN General Assembly (2008), 'Manfred Nowak 2008 Report', at paras. 26 and 34-36.

<sup>159</sup> *See* Prosecutor v. Celebici, Case No. IT-96-21 T, Ruling, ¶476 (Nov. 16, 1998).



Criminal Tribunal for the Former Yugoslavia declared that rape and other forms of sexual assault constitute torture and are prohibited by international law.

Alternatively, the sexual violence suffered by petitioners may constitute the serious human rights violation of inhuman or degrading treatment. The Commission and Court have found that acts that inflict mental and emotional suffering are sufficient to constitute inhuman treatment.<sup>161</sup> In keeping with the experiences of petitioners, acts resulting in “trauma and anxiety”<sup>162</sup>, “intimidation” or “panic”<sup>163</sup> or “emotional trauma”<sup>164</sup> violate an individual’s rights under Article 5 of the Convention.

In light of the experience of those petitioners who suffered multiple violations, such as physical violence accompanying sexual violence, it is important to note that individual acts that may not constitute torture or cruel, inhuman or degrading treatment may rise to this level when performed in combination.<sup>165</sup> With respect to the number of petitioners who are women, and the high rates of sexual violence amongst female military staff, the Commission and Court have found that the sex of the alleged victim also has bearing on whether conduct may constitute cruel, inhuman or degrading treatment.<sup>166</sup> The Commission has stated that Article 1 protections include the right to personal integrity and protection against violence against women.<sup>167</sup>

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<sup>160</sup> Prosecutor v. Anto Furudzija, Case No. IT-95-17/1-T, Ruling, ¶163 (Dec. 10, 1998).

<sup>161</sup> Urrutia v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 103, ¶ 93 (2003).

<sup>162</sup> See, e.g., Maria Mejia v. Guatemala, Report No. 32/96, Case No. 10.553, Inter-Am. C.H.R., ¶60 (1996).

<sup>163</sup> See, e.g., *id.* at ¶ 61 (finding Guatemalan military responsible for actions designed to “intimidate” and “panic” among community members).

<sup>164</sup> See e.g., Survivors of the “13 de marzo” v. Cuba, Report No. 47/96, Case No. 11.436, Inter-Am. C.H.R. OEA/Ser.L/V/II.95, Doc. 7 rev., ¶106 (1997).

<sup>165</sup> Nigel Rodley, *The Treatment of Prisoners Under International Law* (2d ed. 1999).

<sup>166</sup> Luis Lizardo Cabrera at ¶ 78, citing Ireland v. United Kingdom, 5310/71, Eur. Ct. H.R., ¶¶ 162-163 (1978); See also, Tyrer v. United Kingdom, Ser. A. No 26, Eur. Ct. H.R., ¶ 28 ff (1978).

<sup>167</sup> Report of the Inter-American Commission on Human Rights on the Status of Women in the Americas, OEA/Ser.L/V/II.100 Doc. 17, October 13, 1998, Chapter III(C)(2).

The petitioners all experienced sexual violence and rape and some of them experienced it repeatedly. Government actors, i.e. members of the United States military, were the perpetrators in every one of the cases. Furthermore, the perpetrators all acted with intention to cause the petitioners physical and mental pain and suffering. The petitioners still experience mental and emotional trauma as a result. The United States therefore violated petitioners' rights to be free of torture and cruel, inhuman or degrading treatment under Article I.

C) Violation of Petitioners' Rights to Privacy under Article 5

The sexual violence inflicted on petitioners also constitutes a violation of the right to protection of private life in Article V of the Declaration, which is further developed in Article 11 of the Convention, stating:

1. Everyone has the right to have his honor respected and his dignity recognized.
2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.
3. Everyone has the right to the protection of the law against such interference or attacks.

The experience of sexual violence incurs a number of dignitary harms that violate Articles V and 11 of the Declaration and Convention. In *González Pérez* the Commission found that sexual violence committed by members of security forces constituted a serious violation of the rights protected under Articles V of the Declaration and 11 of the American Convention. The Commission stated that “sexual abuse, besides being a violation of the victim[s'] physical and mental integrity, implies a deliberate outrage to their dignity,” in violation of Article 11 of the American Convention.<sup>168</sup> Further, the Commission concluded that such rape affected the private

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<sup>168</sup> Ana, Beatriz and Celia González Pérez v. Mexico, Report No. 53/01, Case No. 11.565, Inter-Am. C.H.R., ¶¶ 45-54 (2001).

lives of the victims and their families, causing them to exit their community “in a situation of fear, shame and humiliation.”<sup>169</sup>

Aside from subjecting victims to the dignitary harm of humiliation in their community, rape can also violate Article V’s protection of honor, reputation, private and family life through the impact of sexual violence on a victim’s ability to have intimate relations with a partner of their choosing. Article V protects the right to a sexual life and the right to establish and develop relationships with other human beings<sup>170</sup>, and the act of sexual violence may destroy the victim’s “right to decide freely with whom to have intimate relations, causing [them] to lose complete control over this most personal and intimate decision, and over [their] basic bodily functions.”<sup>171</sup>

The United States Military allowed petitioner to be abused both sexually and physically. Many of the petitioners were violated on multiple occasions. Others were violated only once but the United States harmed them mentally by threatening their careers and livelihoods on top of the abuse. All of the petitioners suffer from Military Sexual Trauma as a result of the violence that United States military members committed against them. This trauma has caused petitioners pain and suffering in their personal lives. Many feel anxious and depressed, diagnoses that have had a substantial impact on their work and personal relationships. Many of the petitioners will feel these effects for years. Petitioner Stephens is on disability as a result of his injuries. The United States has clearly violated petitioners’ rights to privacy under Article V.

## **VII. THE UNITED STATES VIOLATED PETITIONERS’ RIGHTS TO PROTECTION OF HONOR AND REPUTATION UNDER ARTICLE V, RIGHTS TO SPECIAL PROTECTION UNDER ARTICLE VII, RIGHTS TO INVIOALBILTY OF THE HOME UNDER ARTICLE IX, AND RIGHTS TO WORK UNDER ARTICLE XIV**

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<sup>169</sup> *Id.* at 52.

<sup>170</sup> Rosendo Cantu et al. v. Mexico, *supra* note 154 at ¶119.

<sup>171</sup> *Id.*

A) Violation of Petitioners' Rights to Protection of Honor and Reputation under Article V

Article V of the American Declaration provides that “Every person has the right to the protection of the law against abusive attacks, upon his honor, his reputation and his private family life.” In *Tomas Eduardo Cirio v. Uruguay*, the Commission found that “the State violated the right to honor, to the detriment of Major Cirio . . . by stripping him of his status and benefits as punishment for criticizing the activities of the armed forces, and by degrading him both in rank and status for having “affected the prestige” of the armed forces by stating that its members had committed violations of human rights.”<sup>172</sup>

The facts in *Tomas Eduardo Cirio v. Uruguay* are very similar to the facts in the present petition. In the present case, several petitioners were downgraded in rank, denied promotions or discharged (sometimes dishonorably) from the military for reporting that other military members had violated their human rights by sexually assaulting them. All of the petitioners were subjected to harassment, shame, and stigma for reporting these incidents of abuse. In some cases where the petitioners were transferred, members of petitioners' Commands called petitioners' new supervisors to inform them of petitioners' “misbehavior,” thereby destroying their reputation and ensuring that the harassment and stigmatization against the petitioners would continue. In participating in retaliation tactics against the petitioners, the United States violated petitioners' rights to honor and reputation under Article V of the Declaration in the same way that Uruguay violated Major Cirio's rights in *Tomas Eduardo Cirio v. Uruguay*.

B) Violation of Petitioners' Rights to Special Protection under Article VII

Article VII of the American Declaration states that “All women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid.”

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<sup>172</sup> *Tomas Eduardo Cirio v. Uruguay*, Case 11.500, Report No. 124/06, Inter-Am. C.H.R., OEA/Ser.L/V/II.127 Doc. 4 rev. 1, ¶ 95 (2007).

Petitioner Lyman was eleven weeks pregnant when she was raped by a fellow servicemember in her barracks. Although Petitioner Lyman's perpetrator was submitted to court martial and she testified against him, Command cleared her rapist of all charges and allowed him to continue serving on base. The United States therefore violated Petitioner Lyman's right to special protection under Article VII.

C) Violation of Petitioners' Rights to Inviolability of the Home under Article IX

Article IX of the American Declaration states that "Every person has the right to the inviolability of his home."<sup>173</sup> By failing to protect petitioners from violence within their homes, the United States has violated this section of the American Declaration.

Petitioners, as members of the United States Military, are in a unique situation. Military members are often required to live on base and in United States Military-provided housing as most of the petitioners were at the times of the incidents. As the owner and landlord of the petitioners' property who decide where petitioners live, the military was under a heightened obligation to ensure that petitioners were protected from violence within their homes. The United States violated petitioners' rights to inviolability within their homes when it allowed petitioners to be sexually assaulted and raped within their homes and when it denied petitioners' requests to be transferred to a safer location. Furthermore, as petitioners worked and lived in the same locations, the military bases should be considered their homes. In that case, petitioners who were assaulted at work also had their rights to inviolability of the home violated.

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<sup>173</sup> American Declaration, art. IX.

D) Violation of Petitioners' Right to Work under Article XIV

Article XIV of the American Declaration states that, “Every person has the right to work, under proper conditions, and to follow his vocation freely, insofar as existing conditions of employment permit.”<sup>174</sup>

Petitioners experienced widespread workplace sexual harassment in the course of their employment as United States Military service members. Sexual harassment violates the right to work under proper conditions that is protected in Article XIV of the Declaration. Reporting on women’s right to work, the Commission has stated that “it is important that the States not only abstain from discriminating or tolerating discrimination of any kind in labor related matters, but also honor their obligation to create the conditions that will better enable women to join the workforce and remain on the job”<sup>175</sup> and went on to cite the penalization of workplace and sexual harassment as priority issues related to the exercise of the right to work.<sup>176</sup>

The Commission has further recommended that States undertake the following obligations in order to respect and ensure women’s right to work and live free of discrimination in this area:

- Adopt legislative measures to make sexual harassment a punishable offense in the criminal, civil and administrative jurisdictions, and support these measures with the regulations and training that law enforcement personnel require.
- Guarantee due diligence so that all cases of gender-based violence in the labor area are investigated promptly, thoroughly and impartially, and those responsible are properly punished and the victims redressed.<sup>177</sup>

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<sup>174</sup> American Declaration, art. XIV.

<sup>175</sup> Inter-American Commission on Human Rights, “The Work, Education and Resources of Women: The Road to Equality in Guaranteeing Economic, Social and Cultural Rights,” Thematic Report OEA/Ser.L/V/II.143, ¶ 84 (2011).

<sup>176</sup> *Id.* at ¶85.

<sup>177</sup> *Id.* at ¶169.

The affront to personal dignity that occurs as a result of sexual and other types of workplace harassment detrimentally affects an individual's ability to work and to access their right to work under proper conditions. Other relevant international and regional human rights bodies have highlighted sexual harassment as a violation of the right to a safe workplace. The International Labour Organization (ILO) has held that sexually harassing conduct may be deemed a violation of the right to safe and healthy working conditions guaranteed under ILO Conventions. Defining sexual harassment, the ILO Committee of Experts on the Application of Conventions and Resolutions stated that it contains the following key elements:

- (1) any physical, verbal or non-verbal conduct of a sexual nature and other conduct based on sex affecting the dignity of women and men, which is unwelcome, unreasonable, and offensive to the recipient; and a person's rejection of, or submission to, such conduct is used explicitly or implicitly as a basis for a decision which affects that person's job; or
- (2) conduct that creates an intimidating, hostile or humiliating working environment for the recipient.<sup>178</sup>

The ILO Convention No. 155 (Occupational and Health), as amended by the 2002 Protocol requires states to take action to prevent sexual harassment as such conduct is harmful to the physical and mental health of workers.<sup>179</sup> Further, the ILO issued a report entitled "Sexual harassment at work: National and International responses" in 2005, which states that: "Sexual harassment is a hazard encountered in workplaces across the world that reduces the quality of working life, jeopardizes the well-being of women and men, undermines gender equality and

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<sup>178</sup> Committee of Experts on the Application of Conventions and Resolutions, General Observation Concerning Convention No. 111, 2003.

<sup>179</sup> International Labor Organization, Convention No.155 (Occupational and Health). Under Article 4 of Convention No. 155, states are required to "formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment" in order to "prevent accidents and injury...by minimizing...the causes of hazards inherent in the working environment." Sexual harassment is likely to be deemed a hazard inherent in the work environment, which states must work to minimize.

imposes costs on firms and organizations. For the International Labor Organization, workplace sexual harassment is a barrier towards its primary goal of promoting decent working conditions for all workers.”<sup>180</sup>

In addition, the United Nations Committee on Economic, Social and Cultural Rights - the monitoring body for the UN International Covenant on Economic, Social and Cultural Rights, which protects the international human right to work<sup>181</sup> - has held that sexual harassment constitutes a form of discrimination<sup>182</sup> that hinders individuals from accessing their economic rights, and the Committee has called upon numerous states to ensure that laws against sexual harassment are effectively enforced and to adopt preventative and protective measures to combat sexual harassment of women in the workplace, so as to uphold their economic rights.<sup>183</sup> The European Social Charter also calls upon states to undertake the following, in order to safeguard the right to dignity at work: “promote awareness, information and prevention of sexual harassment in the workplace or in relation to work and to take all appropriate measures to protect workers from such conduct.”<sup>184</sup>

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<sup>180</sup> International Labor Organization, *Sexual harassment at work: National and International Responses*, 2005, available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---travail/documents/publication/wcms\\_travail\\_pub\\_2.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_travail_pub_2.pdf), pg. vii.

<sup>181</sup> UN International Covenant on Economic, Social and Cultural Rights, art. 6.

<sup>182</sup> UN Committee on Economic, Social and Economic Rights, General Comment 20: Non-Discrimination, E/C.12/GC/20, 10 June 2009, ¶7. The European Parliament and Council also describe harassment and sexual harassment as forms of sex discrimination under Directive 2002/73/EC.

<sup>183</sup> See e.g., Concluding observations of the Committee on Economic, Social and Cultural Rights, Slovakia, U.N. Doc. E/C.12/SVK/CO/2 (2012); Concluding observations of the Committee on Economic, Social and Cultural Rights, The Former Yugoslav Republic of Macedonia, U.N. Doc. E/C.12/MKD/CO/1 (2008); Concluding observations of the Committee on Economic, Social and Cultural Rights, Republic of Korea, U.N. Doc. E/C.12/KOR/CO/3 (2009); Concluding observations of the Committee on Economic, Social and Cultural Rights, Madagascar, U.N. Doc. E/C.12/MDG/CO/2 (2009); Conclusions and recommendations of the Committee on Economic, Social and Cultural Rights, Guatemala, U.N. Doc. E/C.12/1/Add.93 (2003); Concluding observations of the Committee on Economic, Social and Cultural Rights, Dominican Republic, U.N. Doc. E/C.12/DOM/CO/3 (2010); Concluding observations of the Committee on Economic, Social and Cultural Rights, Argentina, U.N. Doc. E/C.12/ARG/CO/3 (2011).

<sup>184</sup> Council of Europe, European Social Charter (revised), Strasbourg, 1996, art. 26.



Petitioners were subject to pervasive sexual harassment during the course of their employment with the U.S. military. This sexual harassment prevented petitioners from having access to a safe workplace and subjected them to a hostile and discriminatory work environment. Petitioners were thus prevented from working under proper conditions and the United States violated petitioners' right to work under Article XIV of the Declaration.

The United States also violated petitioners' right to work through widespread retaliation and harassment against petitioners in their work places when they reported incidents of sexual violence, in violation of the 'proper conditions' clause of Article XIV. For example, Petitioner Panayiota Bertzikis was denied rank due to his "pending investigation"; Petitioner Amber Yeager was subjected to an investigation after reporting rape; Petitioner Amy Lockhart was demoted and lost the rank of Captain. In several of the petitioners' cases, the United States outright dismissed petitioners from their positions or forced petitioners to leave their positions for reporting sexual violence and rape. For example, Petitioner Greg Jeloudov was forced out; Petitioner Blake Stephens was chaptered out early; Petitioner Hannah Sewell was medically discharged because of injuries sustained when she was raped; and Petitioner Valerie Desautel was forced out. By preventing petitioners from working under proper conditions and by preventing them from working all together, the United States violated Article XIV of the American Declaration.

**VIII. THE UNITED STATES VIOLATED PETITIONERS' RIGHTS TO TRUTH UNDER ARTICLE IV, RIGHTS TO RESORT TO THE COURTS UNDER ARTICLE XVIII AND RIGHTS TO PETITION THE GOVERNMENT AND RECEIVE A PROMPT DECISION UNDER ARTICLE XXIV**

A) Violation of Petitioners' Rights to Truth under Article IV

Article IV of the American Declaration states that "Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium

whatsoever.”<sup>185</sup> The Commission has found that this right to access information is a “right to truth” for “the victim, her family members and society as a whole to be informed of all happenings related to a serious human rights violation.”<sup>186</sup> Furthermore, “[t]he Commission has emphasized the principle that the ability of victims of violence against women to access judicial protection and remedies includes ensuring clarification of the truth of what has happened.”<sup>187</sup>

Petitioners Lockhart and Desautel did not know their rapists and sought answers through the investigative process of the military justice system. However, the United States refused to carry out investigations. In the case of Petitioner Lockhart, her Command threatened to charge her with adultery if she pressed forward with her case and asked her Victim Advocate, “How could I look at a slut like that with a straight face?” In the case of Valerie Desautel, the United States dismissed her under the military’s “Don’t Ask, Don’t Tell” policy instead of pursuing an investigation, even though an initial investigation showed signs of sexual violence. Therefore, the United States failed in its duty to carry out an investigation that may have yielded petitioners with answers. This failure resulted in a violation of the petitioners’ rights to truth under Article IV.

B) Violation of Petitioners’ Rights to Resort to the Courts under Article XVIII and to Petition the Government and Receive a Prompt Decision under Article XXIV

Article XVIII of the American Declaration states that “Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.” Article XXIV states that “Every person has the

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<sup>185</sup> American Declaration, art. IV.

<sup>186</sup> Jessica Lenahan v. United States, *supra* note 96 at ¶ 193.

<sup>187</sup> *Id.* at ¶ 181.

right to submit respectful petitions to any competent authority, for reasons of either general or private interest, and the right to obtain a prompt decision thereon.”

In interpreting Article XVIII, this Commission has found that “Article XVIII of the American Declaration establishes that all persons are entitled to access judicial remedies when they have suffered human rights violations. This right is similar in scope to the right to judicial protection and guarantees contained in Article 25 of the American Convention on Human Rights, which is understood to encompass: the right of every individual to go to a tribunal when any of his or her rights have been violated; to obtain a judicial investigation conducted by a competent, impartial and independent tribunal that establishes whether or not a violation has taken place; and the corresponding right to obtain reparations for the harm suffered.”<sup>188</sup> The Commission has also found that Article 25 requires States to undertake a “purposeful investigation” of the facts involving alleged violations of fundamental rights. Purposeful investigation “means in practice that the State will act with due diligence, i.e. with the existing means at its disposal, and will endeavor to arrive at a decision.”<sup>189</sup>

Petitioners were required to submit their claims of sexual violence through the military justice system, working through the Chain of Command. This is in violation of Articles XVIII and XXIV, as the Commission has long held that military justice systems, including investigations and trials, are considered ineffective remedies to address human rights violations.<sup>190</sup> The Commission has consistently found military justice systems to be inadequate in adjudicating human rights violations. In its 1992 Annual Report, the Commission advised Member States that “under no circumstances are military courts to be permitted to sit in judgment of human

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<sup>188</sup> *Id.* at ¶ 172.

<sup>189</sup> Raquel Martí de Mejía v. Perú, *supra* note 150 at ¶157.

<sup>190</sup> Márcio Lapoente da Silveira v. Brazil, *supra* note 84 at ¶64.

rights violations.”<sup>191</sup> In the 1993 Annual Report it recommended that “all cases of human rights violations must therefore be submitted to the ordinary courts.”<sup>192</sup> And again in the 1997 Annual Report, the Commission stated that “this special jurisdiction must exclude the crimes against humanity and human rights violations.”<sup>193</sup> Where alleged human rights violations related to the mistreatment and torture of a victim have been submitted to the military justice system, the Commission has found that victims were deprived of due process of law for the protection of the rights that were allegedly violated.<sup>194</sup>

As discussed *supra*, this court expounded on the inadequacies of military justice systems in the case of *Márcio Lapoente da Silveira v. Brazil* where it quoted the Working Group on the Administration of Justice’s study on “administration of justice through military tribunals and other exceptional jurisdictions.” The study concluded that “in all circumstances, the competence of military tribunals should be abolished in favor of those of the ordinary courts, for trying persons responsible for serious human rights violations . . . .”<sup>195</sup> Quoting *Eldorado dos Carajás v. Brazil* the IACHR concluded that “the Commission does not consider the military [ ] to have the independence and autonomy needed to impartially investigate alleged violations of human rights allegedly carried out by [the] military [ ].”<sup>196</sup> Furthermore, the Commission recommended that the State confer on the ordinary justice system the authority to judge all crimes committed by a

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<sup>191</sup> Inter-American Commission for Human Rights, Annual Report 1992-1993, OEA/Ser.L/V/II.83 Doc. 14 (Mar. 12, 1993), Chapter V(VII), ¶ 6.

<sup>192</sup> Inter-American Commission for Human Rights, Annual Report 1993, OEA/Ser.L/V/II.85 Doc. 8 rev. (Feb. 11, 1994), Chapter V(IV), Final Recommendations, ¶ 4.

<sup>193</sup> Inter-American Commission for Human Rights, Annual Report 1997, OEA/Ser.L/V/II.98 Doc. 6 (Feb. 17, 1998), Chapter VII, ¶ 1.

<sup>194</sup> *Márcio Lapoente da Silveira v. Brazil*, *supra* note 84 at ¶73.

<sup>195</sup> *Id.* at ¶65.

<sup>196</sup> *Id.* at ¶ 69 (quoting *Eldorado dos Carajás v. Brazil*, *supra* note 85 at ¶27).

state's military police<sup>197</sup>, finding that military courts in Brazil “tend[ed] to be indulgent with [personnel] accused of human rights and other criminal offenses, thereby allowing the guilty to go unpunished.”<sup>198</sup>

Similarly, other relevant international and regional bodies have found that the use of military justice in cases of human rights violations violates the victim's right to due process. The U.N. Special Rapporteur on Torture has stated that “military tribunals should not be used to try persons accused of torture...complaints about torture should be dealt with immediately and should be investigated by an independent authority.”<sup>199</sup>

Significantly, the Court and Commission have found that military jurisdiction is inappropriate for human rights violations *including rape*. In *Rochela Massacre* and *La Cantuta* the Court held that the military justice system is not competent for the investigation, prosecution and punishment of military perpetrators of human rights violations that include rape.<sup>200</sup> In the *Case of Ana, Beatriz and Celia Gonzales Perez*, the Commission stated that rape “cannot be in any way be considered as events that affect the legal goods linked to the military order” and therefore that “the investigation of the events in this case under military jurisdiction is totally inappropriate.”<sup>201</sup>

Not only were petitioners directed towards the military justice system at first instance, but upon their attempt to access civil remedies, alleging that defendants' acts and omissions contributed to a military culture of tolerance for the sexual crimes perpetrated against them, both

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<sup>197</sup> Inter-American Commission for Human Rights, Report on the Situation of Human Rights in Brazil, OEA/Ser.L/V/II.97, Doc. 29 rev. 1, Chapter III (29 September 1997), ¶ 95(i); *Eldorado dos Carajás v. Brazil*, *supra* note 85 at ¶28.

<sup>198</sup> IACHR, Report on the Situation of Human Rights in Brazil, *supra* note 197 at ¶77.

<sup>199</sup> Report of the Special Rapporteur on Torture. U.N. Doc. E/CN.4/1995/34, ¶76(g) (1995).

<sup>200</sup> Inter-American Court, *Rochela Massacre vs. Colombia*, (ser. C), No. 163, ¶¶200, 204 (May 11, 2007); *La Cantúta vs. Peru* (ser. C) No. 162, ¶142 (Nov. 2, 2006).

<sup>201</sup> *Ana, Beatriz and Celia González Pérez v. Mexico*, *supra* note 168 at ¶82.

the United States District Court for the Eastern District of Virginia and subsequently the United States Court of Appeals for the Fourth Circuit dismissed the complaint, with the District Court stating that “the unique disciplinary structure of the military establishment is a special factor that counsels against judicial intrusion.” The federal courts’ bar on petitioners’ claim for civil remedies further entails a violation of the right to judicial protection under the Declaration. Article 25 - reading Articles XVIII and XXIV in light of Article 25 of the Convention – together with Articles 1 and 2 of the Convention have been understood to encompass three interconnected rights: firstly, “the right of every individual to go to a tribunal when any of his rights have been violated,” secondly, the right “to obtain a judicial investigation conducted by a competent, impartial and independent tribunal that will establish whether or not the violation has taken place,” and lastly, the right to have remedies enforced when granted.<sup>202</sup> When petitioners came forward with claims of sexual violence, they were failed by a lack of investigation, or ineffective investigation, in serious violation of their rights and access to justice.

The court has previously determined that there exists an obligation to investigate the facts that constitute human rights violations, as one of the duties arising from the obligation to ensure rights established in the Convention.<sup>203</sup> The duty to investigate must be undertaken as an inherent juridical obligation by the State, not as a mere formality preordained to be ineffective.<sup>204</sup> Once State authorities are made aware of an incident, the Court and Commission have held that they must initiate without delay a serious, impartial and effective investigation that must be carried

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<sup>202</sup> *Mejía v. Peru*, 157, 190-1.

<sup>203</sup> *Velásquez Rodríguez Case*, *supra* note 78 at ¶¶166 & 176; *Case of the Barrios Family v. Venezuela*, Report No. 11/10, Case No. Case No. 12.488, Inter-Am. C.H.R. ¶174 (2010).

<sup>204</sup> *Fernández Ortega et al. v. Mexico*, Preliminary Objection, Merits, Reparations and Costs, Series C No. 215, Inter-Am. Ct. H.R. ¶ 191 (Aug. 30, 2010).

out using all available legal means with the aim of ascertaining the truth.<sup>205</sup> Further, the State must remove all obstacles and mechanisms *de facto* and *de jure* which maintain impunity and use all possible measures to advance the proceedings.<sup>206</sup>

With respect to those violations of sexual violence committed against female petitioners, the Court has held that the obligation to investigate effectively has a wider scope when dealing with cases of violence against women,<sup>207</sup> and for an investigation to be effective it must include a gender perspective.<sup>208</sup> Special care must be taken in investigations of all claims of sexual violence, as the Court held in the *Case of the Dos Erres Massacre v. Guatemala*<sup>209</sup>, that the failure to investigate serious violations of personal integrity, such as sexual violence committed in the context of systematic patterns, are a breach of the State's obligations with respect to serious human rights violations. Furthermore, as the Court observed in the "*Cotton Field*" case, when a state learns of a situation in which women are being abused and raped, its due diligence obligation requires swift action on the part of police, prosecutors and officers of the court. When an act of violence against a woman occurs, it is especially essential that authorities in charge of the investigation conduct it in a determined and effective manner, taking into account society's obligation to reject violence against women and the State's obligations to eliminate it and to ensure that victims have confidence in the State institutions for their protection.<sup>210</sup>

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<sup>205</sup> *Id.* at ¶191; Juan Carols Abella et. al. v. Argentina, Report No. 55/97, Inter-Am. C.H.R., ¶412 (1997).

<sup>206</sup> Carpio Nicolle et al. v. Guatemala, Judgment, Series C No. 117, Inter-Am. Ct. H.R., ¶134 (Nov. 22, 2004).

<sup>207</sup> González et al. ("*Cotton Field*") v. Mexico, Preliminary Objection, Merits, Reparations and Costs, Judgment, Series C No. 205, Inter-Am Ct. H.R. ¶293 (Nov. 16, 2009).

<sup>208</sup> *Id.* at ¶455.

<sup>209</sup> *Id.* at ¶¶140-141.

<sup>210</sup> Fernández Ortega et al. v. Mexico, *supra* note 204 at ¶193.

The Courts' judgments in the cases of *Inés Fernández Ortega* and *Valentina Rosendo Cantú v. Mexico*<sup>211</sup> set out the following requirements for an appropriate investigation of sexual violence:

- i) the victim's statement should be taken in a safe and comfortable environment, providing privacy and inspiring confidence;
- ii) the victim's statement should be recorded to avoid or limit the need to repeat it;
- iii) the victim should be provided with medical, psychological and hygienic treatment, both on an emergency basis, and continuously if required, under a treatment protocol aimed at reducing the consequences of the rape;
- iv) a complete and detailed medical and psychological examination should be done immediately by appropriate, trained personnel, of the sex preferred by the victim insofar as this is possible, and the victim should be informed that she can be accompanied by a person of confidence if she so wishes;
- v) the investigative measures should be coordinated and documented and the evidence handled with care, including taking sufficient samples and performing all possible tests to determine the possible perpetrator of the act, and obtaining other evidence such as the victim's clothes, immediate examination of the scene of the incident, and the proper chain of custody of the evidence, and
- vi) access to advisory services or, if applicable, free legal assistance at all stages of the proceedings should be provided.<sup>212</sup>

In general, an effective and appropriate investigation into sexual violence must endeavour to avoid re-victimizing the victim or forcing her/him to re-live the deeply traumatic experience each time she recollects or retells the events in question.<sup>213</sup> The Rules of Procedure and Evidence of the International Criminal Court, which were found relevant to investigations into cases of sexual violence by the Commission, further provide that victims of sexual violence are to have complete access to information on the proceedings.<sup>214</sup>

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<sup>211</sup> See *id. generally*; see also generally *Rosendo Cantú et al. v. Mexico*, *supra* note 154.

<sup>212</sup> See generally *Fernández Ortega et al. v. Mexico*, *supra* note 204.

<sup>213</sup> *Id.* at ¶196.

<sup>214</sup> Inter-American Commission for Human Rights, *Access to Justice for Women Victims of Violence in the Americas*, 24 & 57 (2007).



The United States military justice system is currently unable to impartially investigate alleged violations of human rights carried about by its members. In none of the petitioners' cases did the United States meet its obligation to provide a judicial remedy for the violations committed against the petitioners. Most of the petitioners' cases were never even referred for investigation before a judicial tribunal. In a couple of cases, investigations were carried out, but the evidence was subsequently "lost". In the few cases that did go to court martial before a judicial tribunal, the perpetrators were given minimal sentences or their sentences were abdicated.

The actions of the military Chain of Command in all of the cases prevented the petitioners from seeking redress because it was the Command that was in charge of whether the victims' cases went to court martial and whether the perpetrator was required to serve his punishment. Most often, Command ordered the petitioners not to pursue a criminal investigation. It is for these reasons that this Commission has strongly recommended against using the military justice system to investigate and punish human rights violations and has found that military justice systems do not provide a sufficient judicial remedy. The violations that the Commission warned against in other petitions occurred in the current petitioners' cases under the United States military justice system.

After failing to receive a judicial remedy in the military justice system, petitioners then sought redress in the civilian federal courts by suing the United States Military for a violation of their constitutional rights. Yet, the petitioners were unable to receive a judicial remedy there as well. The petitioners' claims were dismissed before the District Court and Court of Appeal because of case law from the United States Supreme Court.<sup>215</sup> This case law prevents anyone

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<sup>215</sup> See discussion *supra* Part II.2, "Procedural Background".

from bringing either a constitutional claim or liability claim against the United States Military. Therefore, the petitioners were denied access to the courts on both fronts – in both the military justice system and United States federal courts system.

#### **IX. RELIEF REQUESTED**

The facts stated herein establish that the United States of America is responsible for the violation of the petitioners' rights of under Articles I, II, IV, V, VII, IX, XIV, XVIII, and XXIV. Thus the petitioners' respectfully request that the Inter-American Commission for Human Rights:

1. Declare this petition admissible;
2. Investigate, with hearings and witnesses as necessary, the facts alleged in this petition;
3. Declare that the United States of America is responsible for the violation of petitioners' rights under the American Declaration of the Rights and Duties of Man, including their rights under Articles I, II, IV, V, VII, IX, XIV, XVIII, and XXIV.
4. Grant monetary compensation for the violation of their rights under the American Declaration;
5. Recommend adoption by the United States and the United States Department of Defense necessary laws and measures to ensure the successful investigation, prosecution and punishment of rape and sexual violence crimes including:
  - a. The removal of the decision whether to investigate, prosecute, and punish perpetrators from the victims' or perpetrators' Chain of Command,
  - b. The creation of a reporting mechanism that is independent of the Chain of Command for reporting incidents of sexual violence and assault,

- c. The adoption of laws preventing the military from using Articles 15 (nonjudicial punishment) and 134 (adultery) of the Uniform Code of Military Justice to punish perpetrators, and
  - d. The adoption of laws to prohibit retaliation against service members who report sexual assault;
- 6. Recommend access to the federal courts so victims may sue for civil relief when the United States Military violates human and United States constitutional rights;
  - 7. Seek an advisory opinion from the Inter-American Court of Human Rights regarding the nature and scope of United States' obligations under the American Declaration; and
  - 8. Provide any other recommendations and relief that the Honorable Commission deems just and necessary to remedy petitioners' human rights violations.

**X. ATTACHMENTS**

- A) Petitioners' First Amended Complaint
- B) Judgment of the United States District Court for the Eastern District of Virginia
- C) Judgment of the United States Court of Appeal for the Fourth Circuit