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September 16, 2020

Dr. Paulo Abrão
Executive Secretary
Inter-American Commission on Human Rights
Organization of American States
Washington, D.C., 20006

Re: Amber Anderson *et al.*, Petition No. P-106-14
Observations on Response of the United States Dated November 4, 2019

Dear Dr. Abrão:

The Gender Justice Clinic of Cornell Law School is pleased to submit these Observations on the United States' Response of November 4, 2019, which was transmitted to Petitioners' Counsel on June 16, 2020.

The original Petition was submitted to the Commission on January 23, 2014, on behalf of former US Military service members Amber Anderson, Amber Yeager, Amy Lockhart, Andrea Neutzling, Andrew Schmidt, Blake Stephens, Elizabeth Lyman, Jodi Jeloudov, Hannah Sewell, Jessica Kenyon, Kristen Stark, Mary Gallagher, Myla Haider, Panayiota Bertzikis, Rebekah Havrilla, Sandra Sampson, Sarah Albertson, Stephanie B. Schroeder, Tina Wilson, and Valerie Desautel.

Counsel wish to relay Petitioners' gratitude for consideration of their Petition, and we remain ready to assist the Commission with any further information.

Yours sincerely,

Elizabeth Brundige, Esq.

Sharon Hickey, Esq.
Counsel for Petitioners

Enclosures: A) Supplemental Brief for Plaintiffs-Appellants; B) Supplemental Brief for Defendants-Appellees

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

Petition No. P-106-14 (United States)

Petitioners Amber Anderson, Amber Yeager, Amy Lockhart, Andrea Neutzling, Andrew Schmidt, Blake Stephens, Elizabeth Lyman, Jodi Jeloudov, Hannah Sewell, Jessica Kenyon, Kristen Stark, Mary Gallagher, Myla Haider, Panayiota Bertzikis, Rebekah Havrilla, Sandra Sampson, Sarah Albertson, Stephanie B. Schroeder, Tina Wilson, and Valerie Desautel

Petitioners' Observations on the United States' Response

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I. INTRODUCTION

1. Sexual violence in the U.S. Military remains endemic and pervasive.
2. The Petitioners were sexually assaulted, violently beaten, severely bruised, raped, harassed—many repeatedly, some by those in Command, and one petitioner while pregnant.
3. Petitioners were called "slut," "whore," "liar," "snitch," "bitch," or "faggot."
4. The Petitioners were denied access to justice. In some cases, they were threatened or intimidated so that they would not pursue justice. Those who reported sexual violence were subjected to social persecution and in some cases retaliatory prosecution.
5. The Petitioners continue to suffer ill-effects of the government's mistreatment—from the end of their military careers and denial of benefits, to physical afflictions, anxiety, depression, nightmares, PTSD, and for one Petitioner, attempted suicide.

These are simple statements that the United States cannot deny.

There are yet more facts that the State cannot refute. In 2019, the Department of Defense reported an estimated 20,500 instances of "unwanted sexual contact" in the 2018 fiscal year, an increase of 38% from the previous survey in 2016.[1] One out of every 16 women in the military reported being sexually assaulted or raped in the 2018 fiscal year.[2] Of the 6,236 reports of sexual violence in 2019, nearly 90% were never brought to court martial.[3] In 2019, 73% of alleged retaliators against sexual violence victims were a superior in the Chain of Command of the reporter.[4]

Overall, the State seeks to portray the events alleged in the Petition as idiosyncratic instances of interpersonal violence disconnected from the military's operations. But the Petitioners' experiences originate from the same cause: the U.S. Military fosters a toxic,

[1] DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2019, app. B at 11 (2020), *available at* https://media.defense.gov/2020/Apr/30/2002291671/-1/-1/1/3_APPENDIX_B_STATISTICAL_DATA_ON_SEXUAL_ASSAULT.PDF.
[2] DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2018 3 (2019), *available at* https://www.sapr.mil/sites/default/files/DoD_Annual_Report_on_Sexual_Assault_in_the_Military.pdf.
[3] DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2019, app. B at 8, 21 (2020), *available at* https://media.defense.gov/2020/Apr/30/2002291671/-1/-1/1/3_APPENDIX_B_STATISTICAL_DATA_ON_SEXUAL_ASSAULT.PDF.
[4] *Id.* at 38.

patriarchal culture that allows acts of sexual harassment and violence to occur with regularity and impunity, and disproportionately against women, sexual minorities, and gender non-conforming individuals. In contravention of the American Declaration on the Rights and Duties of Man, the United States systemically failed Petitioners by failing to act with due diligence to prevent and respond to the sexual violence they experienced while serving in the military. The U.S. Military system effectively denies survivors of military sexual assault meaningful access to civilian courts to realize their rights. It instead grants commanders broad powers in decisions to prosecute sexual violence and in any subsequent judicial process, which presents systematic barriers to survivors' ability to achieve impartial redress. In an all-encompassing and hierarchical system that privileges the communal good over victims' autonomy and individual rights, insurmountable conflicts of interest arise in investigations, trials, and punishment against higher ranking military members or "good soldiers" who have committed sexual violence. The United States has further failed to take adequate steps to prevent social and professional retaliation against military sexual assault survivors or afford redress to those, like the Petitioners, who have been subjected to such retaliation. And it has denied several of the Petitioners, and other survivors, equal access to disability benefits.

The attempt to mischaracterize this Petition and dwell on ancillary matters only underscores the culture of erasure and denial within the military in regard to endemic sexual misconduct and gender-based violence. The Petitioners universally suffer from post-traumatic stress disorder or extreme emotional distress as a result of the sexual violence they suffered and the State's subsequent repudiation of their experiences. The State's failure in its Response to validate or even acknowledge the profound harms that the Petitioners suffered is all the more disappointing given that the Petitioners voluntarily dedicated their lives to service of the State by joining the U.S. Military. Instead of gratitude for their loyalty and sacrifices, the Petitioners once again endure thinly-veiled derision, which mirrors the Military's rejection of the Petitioners.

As outlined in these Observations, the Petitioners have easily met the admissibility standards to proceed on the merits. Petitioners have exhausted domestic remedies as required by Article 31 of the Rules of Procedure and are exempt from the extraordinary, ineffective, and inadequate remedies presented by the State. The Petition plainly surpasses the admissibility requirements of Article 34 of the Rules of Procedure, in that it clearly states facts that tend to establish violations of the Declaration. Further, the statements of Petitioners are well grounded,

with the undisputed facts alone demonstrating clear *prima facie* violations of the rights enshrined in the American Declaration.

While these Observations will address much of the equivocation in the State's Response, we implore the Commission to focus on the core issues: the United States created, fostered, and failed to remedy a system that inflicted sexual violence on Petitioners, thereby depriving them of the rights to equal protection, to life, to security of the person, to freedom from inhumane treatment, to privacy, to protection of honor and reputation, to inviolability of the home, to work, to truth, to resort to the courts, to petition the government and to receive a prompt decision. The State also violated one Petitioner's right to special protection as a pregnant woman. The Commission is the Petitioners' only chance for recognition of the wrongs committed against them, and for vindication of their human rights guaranteed under the American Declaration on the Rights and Duties of Man.

II. PROCEDURAL UPDATES AND REQUESTS

The Petitioners respectfully request that the Honorable Commission join and process this petition with Petition P-2340-15, which was submitted to the Commission by Carla Butcher, Erica Dorn, Christian Everage, Mariel Marmol, Nicole McCoy, Lamanda Walker, and Elle Woods on January 18, 2015. In P-2340-15, the Petitioners, who are represented by Counsel for the Petitioners in this case, had requested that their case be joined with Petition P-106-14 and processed together in the same file, pursuant to Article 29(5) of the Rules of Procedure of the Inter-American Commission on Human Rights ("Rules of Procedure").

The Petitioners in this case, Amber Anderson *et al.,* P-106-14, support and affirm this request. The Petitioners in both cases were sexually assaulted while serving in the U.S. Military and then were denied redress by the United States in violation of the fundamental rights set forth in the American Declaration of Human Rights. The petitions are therefore suitable to process together. Petitioners also request that the Honorable Commission defer a decision on the admissibility of this petition until such a time that the admissibility of petitions P-106-14 and P-2340-15, together with Petitioners' request for joinder, can be considered together.[5]

[5] In a letter to the Petitioners of P-2340-15 dated July 8, 2020, the Honorable Commission indicated that it had sent their petition to the United States for its observations pursuant to Article 30(3) of the Rules of Procedure.

The Petitioners also wish to inform the Honorable Commission about several updates relating to the parties and counsel in this case. First, Petitioner Greg Jeloudov has changed her name to Jodi Jeloudov, as reflected in the above list of named Petitioners. We respectfully request that the Honorable Commission refer to her as Jodi Jeloudov in all future documents. Second, the institutional affiliation of Petitioners' Counsel has changed from the Cornell International Human Rights Clinic to the Cornell Gender Justice Clinic. Third, Petitioners request that attorney Sharon Hickey be added to the case as Co-Counsel. Petitioners respectfully request the Honorable Commission to note and confirm these updates.

III. BACKGROUND

The United States claims that its military sexual assault response systems complied with the American Declaration at the time the Petitioners were sexually assaulted and sought redress, and that further improvements have been made to the system since then.[6] It argues that "it would be inconsistent with respect for the sovereignty of the United States for the Commission to attempt to intercede in this area" as the United States continues to strengthen its efforts to address the problem of military sexual assault.[7]

This argument ignores the fact that the United States' sovereignty is not absolute but is qualified by its membership in the Organization of American States and ratification of its Charter. This argument also discounts the mandate of this Honorable Commission to hold states accountable with respect to the human rights obligations they have voluntarily assumed. Sovereignty claims and good intentions do not establish that these obligations have been met.

The Petitioners' experiences show that the U.S. Military perpetuated a culture of misogyny and impunity that contributed to the sexual violence to which they were subjected. The United States and its military then denied the Petitioners meaningful access to justice and failed to protect them from retaliation. These failures violated Petitioners' rights under the American Declaration and continue to do so to this day; in the years since the Petitioners approached the Commission, the United States has not afforded them redress for the human rights violations they experienced. Moreover, as we discuss below, although it has adopted some positive legal

[6] State Response, at 5.
[7] *Id*. at 13–14.

and policy measures to improve its response to military sexual assault, the United States has failed to remedy the systemic problems that continue to deny survivors the justice to which they are entitled.

A) The United States Has Failed to Act with Due Diligence to Prevent Sexual Violence and End the Culture of Impunity in the U.S. Military.

Sexual violence in the U.S. Military continues to be perpetrated at alarmingly high rates. In its 2018 Report on Sexual Assault in the Military, the Department of Defense estimated that 20,500 service members, representing 13,000 women and 7,500 men, were subjected to sexual violence in fiscal year 2018, a 38% increase from 2016.[8] While rates of sexual assaults against men did not increase, rates of sexual assaults against women increased by 47%, with one in sixteen military women reporting being sexually assaulted in that year.[9] At the same time, only an estimated 30% of service members who experienced sexual assault reported their assault, a slight decrease in reporting from 2016.[10] In 2019, reporting increased by 3% to 7,825, but this figure cannot be compared with overall estimates of sexual assault, as the Department of Defense's reports are based on an anonymous survey of service members only on even fiscal years.[11] Additionally, a separate study reported that the number of sexual assaults in U.S. Military academies increased by 47% between 2016 and 2018, while reporting remained at the same low rates.[12]

[8] DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2018, 3 (2019), *available at* https://www.sapr.mil/sites/default/files/DoD_Annual_Report_on_Sexual_Assault_in_the_Military.pdf.
[9] *Id.*
[10] *Id.* at 4.
[11] *See* DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2019, 15 (2020), *available at* https://media.defense.gov/2020/Apr/30/2002291660/-1/-1/1/1_DEPARTMENT_OF_DEFENSE_FISCAL_YEAR_2019_ANNUAL_REPORT_ON_SEXUAL_ASSAULT_IN_THE_MILITARY.PDF.
[12] *See* Tara Copp, *Academy Sex Assaults Up 47% Since 2016, DoD Estimates*, MILITARY TIMES, Jan. 31, 2019, *available at* https://www.militarytimes.com/news/your-military/2019/01/31/dod-estimate-academy-sex-assaults-up-47-since-2016/; Jim Garamone, *Survey Shows 'Frustrating' Increase in Academy Sexual Misconduct*, U.S. DEP'T OF DEFENSE, Jan. 31, 2019, *available at* https://www.defense.gov/Newsroom/News/Article/Article/1745481/survey-shows-frustrating-increase-in-academy-sexual-misconduct/.

While rates of sexual assault have increased, rates of prosecution, conviction and punishment have remained extremely low.[13] More than one quarter of the 7,829 reports of sexual assault in 2019 were made and handled confidentially through the restricted reporting system, which does not provide for investigation and a judicial remedy.[14] Of those reports handled by the unrestricted system,[15] which allows for investigation and possible prosecution, disciplinary action for a sexual offenses was taken in about 29% of cases.[16] However, "disciplinary action" is a very broad category, and includes such minor punishments as a verbal reprimand, which fail to afford meaningful redress to survivors of sexual violence. In 2019, only 795 cases were referred for prosecution of one or more sexual assault offense, and 363 sexual assault cases proceeded to trial. [17] Of these, 276 cases resulted in convictions, only some of which were on a sexual offense charge. Although the Department of Defense did not report the total number of convictions for sexual offenses, there were only 138 offenders convicted of a sexual offense and were required to register as a sex offender by law, suggesting a conviction rate of around that number.[18]

Arguments by the United States that the military has established effective systems of military sexual assault prevention, response, and victim protection that serve as models for others[19] are not supported by these statistics.[20] Rather, these stark metrics point to broad systemic failures by the United States to meet its obligations under the American Declaration.

[13] Service Women's Action Network, Press Release, SWAN Responds to Pentagon's Report on Sexual Assault in the Military (May 5, 2019), https://www.servicewomen.org/press-releases/2019-pentagons-report-on-sexual-assault-in-the-military/.

[14] DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2019, 15 (2020), *available at* https://media.defense.gov/2020/Apr/30/2002291660/-1/-1/1/1_DEPARTMENT_OF_DEFENSE_FISCAL_YEAR_2019_ANNUAL_REPORT_ON_SEXUAL_ASSAULT_IN_THE_MILITARY.PDF.
Of the 7,825 reports made in 2019, 35% were initially filed through the restricted reporting system, although some of these were later converted to unrestricted reports, leaving 27% of the overall reports within the unrestricted system. *Id.*

[15] In FY19, the Department of Defense reported handling 4,700 unrestricted sexual assault reports. 966 of the 5699 unrestricted reports filed were excluded from the reported information due to insufficient information about the status of the subject/victim. DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2019, app. B at 11 (2020), *available at* https://media.defense.gov/2020/Apr/30/2002291671/-1/-1/1/3_APPENDIX_B_STATISTICAL_DATA_ON_SEXUAL_ASSAULT.PDF.

[16] *Id*. at 7, 17.

[17] *Id*. at 21.

[18] *Id*.

[19] State Response, at 5.

[20] During the 2019 confirmation hearings of the army's top general, U.S. Senator Kirsten Gillibrand highlighted the discrepancy between the military's claims to have the problem of military sexual assault well in hand and the reality on the ground for service members. She told the nominee, "I am tired of this statement that I get over and over from the chain of command, 'We got this, ma'am. We got this.' You don't have it. You're failing us. The trajectories of

B) The U.S. Military Continues to Foster a Culture of Sexual Harassment and Violence.

To this day, the U.S. Military continues to foster a culture that enables acts of sexual violence and harassment, like those the Petitioners experienced, to occur with regularity and impunity. Service members like the Petitioners face an ingrained military culture of masculinity and hierarchy that facilitates gender stereotyping, gives rise to sexual misconduct, and prevents justice when such misconduct occurs.[21] Petitioners' and other survivors' experiences of harassment, abuse, and retaliation in the military reflect this culture.

Moreover, the policies and programs that the United States has adopted more recently to improve the military's response to sexual assault have failed adequately to address these cultural problems. In its 2018 report, the Department of Defense recognized the contribution of "unhealthy workplace climates" to the prevalence of sexual assault, noting that sexual harassment and gender discrimination substantially contribute to the risk of sexual assault in a unit.[22] The report further indicated that rates of sexual harassment increased in 2018.[23] Similarly, young officers in training programs are exposed to a culture in which sexual harassment, discrimination, and violence are prevalent and unlikely to result in adverse consequences.[24]

Recent events illustrate how far the United States still has to go to overcome the military culture enabling sexual violence. In August 2020, the body of missing soldier Elder Fernandes was found about 30 miles from his base at Fort Hood, Texas. According to his family's lawyer, he had been sexually assaulted by his sergeant, which the Army had found to be unsubstantiated,

every measurable are now going in the wrong direction." Rebecca Kheel, *Gillibrand Tears Into Army Nominee Over Military Sexual Assault: "You're Failing Us*," THE HILL, May 2, 2019, *available at* https://thehill.com/policy/defense/441840-gillibrand-tears-into-army-nominee-over-military-sexual-assault

[21] Antonieta Rico, *Why Military Women are Missing from the #MeToo Movement*, TIME, Dec. 12, 2017, *available at* http://time.com/5060570/military-women-sexual-assault/; Zachary Cohen, *From Fellow Solder to 'Monster' in Uniform: #MeToo in the Military*, CNN, Feb. 7, 2018, *available at* https://www.cnn.com/2018/02/07/politics/us-military-sexual-assault-investigations/index.html.

[22] DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2018, 7, 11–12 (2019), *available at* https://www.sapr.mil/sites/default/files/DoD_Annual_Report_on_Sexual_Assault_in_the_Military.pdf.

[23] *Id.*

[24] *See* Leo Shane III, *As Sexual Assault Cases Rise, Service Academy Superintendents Struggle for Solution*, MILITARY TIMES, Feb. 13, 2019, *available at* https://www.militarytimes.com/news/pentagon-congress/2019/02/13/as-sexual-assault-cases-rise-service-academy-superintendents-struggle-for-solutions/.

and then been bullied and hazed for reporting the assault.[25] In July 2020, another missing Fort Hood Soldier, Specialist Vanessa Guillen, was found dead, buried by a river; investigators believe that she was bludgeoned to death by a soldier who killed himself as he was being taken into custody.[26] Her family says that she had told them a few months earlier that she was being sexually harassed by a superior but did not report it because of fear of retaliation.[27]

These reports have prompted renewed calls for justice and cultural changes, as other survivors have come forward to share their stories. As one survivor explained, military sexual harassment and assault, and inadequate victim support, is a systemic problem "that is deep in the culture of the military."[28] Service members victimized in the 2017 Marines United scandal would agree; their nude photos were uploaded to a Google Drive folder to which all 30,000 of the Facebook group were provided access.[29] These events, together with the military's own surveys and metrics, corroborate the experiences of the Petitioners and point to a broken system that presents deep structural and cultural impediments to justice for survivors.

C) The Chain of Command Structure Within the U.S. Military Criminal Legal System Continues to Impede Survivors of Sexual Violence from Obtaining Redress.

As outlined by the Petitioners, the U.S. Military criminal legal system is an exceptionally closed system that investigates, prosecutes, and punishes most criminal allegations by and

[25] Rachel Treisman, *Body of Missing Fort Hood Soldier Elder Fernandez Found a Week After Disappearance*, NPR WSKG, Aug. 26, 2020, *available at* https://www.npr.org/2020/08/26/906396032/body-of-missing-fort-hood-soldier-elder-fernandes-found-a-week-after-disappearan.
[26] *Fort Hood Soldier Vanessa Guillén's Murder a "Tipping Point," Army Secretary Says*, CBS NEWS, Aug. 7, 2020, *available at* https://www.cbsnews.com/news/fort-hood-vanessa-guillen-murder-tipping-point-army-secretary/
[27] Ignacio Torres et al., *Vanessa Guillen Didn't Report Harassment Because She Says She Wouldn't Be Believed, Her Mom Says*, ABC NEWS, July 16, 2020, *available at* https://abcnews.go.com/US/vanessa-guillen-didnt-report-harassment-wouldnt-believed-mom/story?id=71780670
[28] Ella Torres, *Military Sexual Assault Victims Say the System is Broken*, ABC NEWS, Aug. 28, 2020, *available at* https://abcnews.go.com/US/military-sexual-assault-victims-system-broken/story?id=72499053; Meghann Myers, *A Culture that Fosters Sexual Assault and Sexual Harassment Persists Despite Prevention Efforts*, a New Pentagon Study Shows, MILITARY TIMES, April 30, 2020, *available at* https://www.militarytimes.com/news/your-military/2020/04/30/a-culture-that-fosters-sexual-assaults-and-sexual-harassment-persists-despite-prevention-efforts-a-new-pentagon-study-shows/.
[29] Andrew deGrandpre & Jeff Schogol, *A Nude Photo Scandal has Shaken the Entire Marine Corps.*, MARINE CORPS TIMES (Mar. 5, 2017), *available at* https://www.marinecorpstimes.com/news/your-marine-corps/2017/03/05/a-nude-photo-scandal-has-shaken-the-entire-marine-corps/. When this was finally exposed, the backlash was severe; members of the military sent threats to the whistleblower suggesting he be imprisoned and tortured for his actions. *Id*.

against its members. Although sexual assault victims may disclose a sexual assault to a variety of actors,[30] a formal report is not made until a specific form is signed and filed with a Sexual Assault Response Coordinator or sexual assault Victim Advocate or a military law enforcement investigator initiates an investigation (triggered either by an unrestricted report or a disclosure to a Commander or other mandated reporter).[31] Given the closed nature of the military system, individuals within the victim's Chain of Command have the ability to influence victims' decisions about whether to report and in many cases have discouraged victims from reporting by warning them about the risk of collateral punishment or sometimes directly telling them not to report.[32] The Department of Defense's 2019 Military Sexual Assault Report noted that focus group participants suggested that an "unhealthy command climate" can deter survivors from reporting.[33]

Commanders in the accused's Chain of Command continue to have broad power over the decision to prosecute and over any subsequent judicial process involving a sexual assault. While unrestricted reports are referred to military law enforcement for investigation, the accused's unit supervisor, or "Commander," plays a significant role in determining how a case is resolved. When service members report an incident, a Commanding officer, in the role of a Convening Authority, has discretion in deciding whether or not to prosecute the case and whether to prosecute in a military or civilian court.[34] For some types of assault, Commanders are also able to impose non-judicial or administrative punishments.[35] A Commanding Officer as the convening authority is responsible for making key decisions, from appointing jury members to adding or dismissing charges to approving or rejecting plea deals.[36] While legislative changes

[30] State Response, at 15.
[31] *See* U.S. DEP'T OF DEF. Instr. 6495.02, at 3, para. 4(b)(1).
[32] Protect Our Defenders, *Nine Roadblocks to Justice* (last updated 2018), *available at* https://www.protectourdefenders.com/roadblocks-to-justice/.
[33] DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2019, 16 (2020), *available at* https://media.defense.gov/2020/Apr/30/2002291660/-1/-1/1/1_DEPARTMENT_OF_DEFENSE_FISCAL_YEAR_2019_ANNUAL_REPORT_ON_SEXUAL_ASSAULT_IN_THE_MILITARY.PDF.
[34] *See* Department of Defense, Victim and Witness Assistance Council, *Military Justice Overview* (last visited April 2019), *available at* http://vwac.defense.gov/military.aspx (last visited April 2019) ("Unlike civilian communities, military commanders exercise discretion in deciding whether an offense should be charged and how the offenders should be punished."). As discussed below, though a Commander must consult a sexual assault survivor regarding their preference in prosecuting in a military or civilian court, the Commander ultimately decides whether to proceed through the military criminal legal system or not.
[35] *See id.*
[36] Protect Our Defenders, *Nine Roadblocks to Justice* (last updated 2018), *available at* https://www.protectourdefenders.com/roadblocks-to-justice/.

have removed Commanders' authority to reverse convictions for sexual assault, Commanders still retain authority to modify sentences in certain circumstances.[37]

Petitioners' experiences reflect how the discretion Commanders are given in sexual assault and other serious cases continues to impede victims' access to justice. Commanders are not positioned to be impartial. They may have close working and personal relationships with the accused, and in some cases supervise both the accused and the complainant.[38] They are not attorneys and generally have little substantial legal training in handling sexual abuse cases.[39] Additionally, Commanders are evaluated according to how successfully they carry out their mission, not on providing redress to individual survivors of sexual assault. They may be unable to devote adequate attention to sexual assault complaints and face a tension between their duty to carry out justice, their responsibility for preserving unit cohesion, and their interest in avoiding potential negative consequences to their own career.[40] Given these imperatives and the closed nature of the military system, Commanders may implicitly or explicitly weigh the victim's value to the military against that of the alleged perpetrator. This means that the criminal legal process is not truly individualized assessments of the harm suffered by Petitioners to vindicate their rights. Commanders' inherent conflict of interest and structural partiality compromises the military's ability to afford meaningful redress to survivors of sexual violence.

In its 2018 report on sexual assault in the military, the Department of Defense recognized that a prevalence of sexual harassment and gender discrimination increases the probability of sexual assault in a unit and noted that "[t]he odds of sexual assault were also higher for members indicating their command took less responsibility for preventing sexual assault, encouraging

[37] *Id.*; David Vergun, *Legislation Changes UCMJ for Victims of Sexual Assault*, ARMY NEWS SERVICE, Jan. 7, 2015, *available at* https://www.army.mil/article/140807/legislation_changes_ucmj_for_victims_of_sexual_assault .
[38] *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 (Apr. 13, 2012), *available at* http://www.ncdsv.org/images/SWAN_BriefingPaper-DODAnnualReportOnSexualAssaultInTheMilitaryFY2011_4-13-2012.pdf.
[39] Protect Our Defenders, *Nine Roadblocks to Justice* (last updated 2018), *available at* https://www.protectourdefenders.com/roadblocks-to-justice/; Protect Our Defenders, *Policy Priorities*, *available at* https://protectourdefenders.com/protect-our-defenders-policy-priorities.
[40] Service Women's Action Network, *Briefing Paper: Department of Defense (DoD) Annual Report on Sexual Assault in the Military, Fiscal Year (FY) 2011*, 2 (Apr. 13, 2012), *available at* http://www.ncdsv.org/images/SWAN_BriefingPaper-DODAnnualReportOnSexualAssaultInTheMilitaryFY2011_4-13-2012.pdf.

reporting, or creating a climate based on mutual respect."[41] These findings imply that Commanders who create hostile environments have higher rates of sexual violence within their units, and therefore are likely to oversee more sexual violence proceedings. Providing Commanders who foster a culture tolerant of sexual harassment and impunity with the power to make key decisions in cases of reported sexual violence perpetuates the problem and restricts access to impartial justice. The U.S. Congress has repeatedly failed to pass legislation that would remove discretion to prosecute sexual assaults from Commanders.[42] In the Petitioners' cases, the Chain of Command thus still presents an enormous barrier for military sexual assault survivors seeking justice.

D) The United States Still Has Not Taken Adequate Steps to Address Retaliation Against Survivors of Military Sexual Violence.

Many of the Petitioners were subjected to retaliation after reporting their sexual violence, for which they still have not received redress. Moreover, the retaliation that they faced continues in the military today. An anonymous 2018 Department of Defense survey found that 64% of female service members who experienced and reported sexual assault in the past year perceived retaliation associated with their reporting, while about 21% experienced a behavior meeting the narrower category of retaliatory behavior prohibited by military law.[43] Additionally, a study by Human Rights Watch found that service members who report are 12 times more likely to experience retaliation than to see their abuser convicted of a sexual offense.[44]

Retaliation against service members who report sexual violence includes threats to safety and life, physical assault, ostracism, and harassment, as well as various forms of professional

[41] DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2018, 12 (2019), *available at* https://www.sapr.mil/sites/default/files/DoD_Annual_Report_on_Sexual_Assault_in_the_Military.pdf.
[42] *See* Richard Lardner, *Sexual Assault Remains a Problem in U.S. Military, New Senate Report Says*, PBS NEWSHOUR, Sept. 7, 2017, *available at* https://www.pbs.org/newshour/nation/sexual-assault-remains-problem-u-s-military-new-senate-report-says.
[43] Department of Defense, Office of People Analytics, *2018 Workplace and Gender Relations Survey of Active Duty Members: Overview Report*, 38 (May 2019); DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2018, ann. 1 (2019), *available at* https://www.sapr.mil/sites/default/files/Annex_1_2018_WGRA_Overview_Report.pdf .
[44] Human Rights Watch, *EMBATTLED: Retaliation Against Sexual Assault Survivors in the U.S. Military*, at 3 (May 2015), *available at* https://www.hrw.org/report/2015/05/18/embattled/retaliation-against-sexual-assault-survivors-us-military#.

retaliation, including "lost promotions or opportunities to train, loss of awards, lost privileges, demotions, a change in job duties, disciplinary actions, mental health referrals, and administrative discharge."[45] Victims who report may face punishment for minor "collateral misconduct," such as underage drinking or "conduct unbecoming an officer," which only came to the military's attention because of the victim's report of sexual assault.[46] Moreover, continued impunity for retaliatory behavior presents a further barrier to survivors' reporting.[47]

Although Congress has now created a criminal offense of retaliation, the United States has not shown that this has adequately addressed the problem of retaliation. The Department of Defense reports that of the 129 retaliation cases it investigated in 2018, only one was referred for prosecution,[48] despite the fact that 64% of female survivors who reported sexual assault said that they experienced retaliation.[49] As these numbers suggest, proving retaliation is extremely difficult, due to a high burden of proof on survivors[50] or a mismatch between survivors' experiences of retaliation and the scope of the criminalized actions, and tremendous barriers exist to reporting at all. For example, 66% of retaliation reports in 2018 stated that retaliators were in the victim's Chain of Command, further highlighting the problems with conferring prosecutorial discretion on Commanders in sexual assault cases.[51] Focus groups of active duty service

[45] *Id.* at 36.
[46] *Id.* at 5.
[47] Lolita C. Baldor, *Pentagon: Claims of Retaliation for Sexual Offense Complaints on Rise*, MILITARY, May 1, 2018, *available at* https://www.military.com/daily-news/2018/05/01/pentagon-claims-retaliation-sexual-offense-complaints-rise.html.
[48] DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2018, 38 (2019), *available at* https://www.sapr.mil/sites/default/files/DoD_Annual_Report_on_Sexual_Assault_in_the_Military.pdf. Informal verbal counselling was given in five other cases. *Id.*
[49] Department of Defense, Office of People Analytics, *2018 Workplace and Gender Relations Survey of Active Duty Members: Overview Report*, 38 (May 2019); DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2018, ann. 1 at 3 (2019), *available at* https://www.sapr.mil/sites/default/files/Annex_1_2018_WGRA_Overview_Report.pdf .
[50] Sara Darehshori, *Here's What the Military Can Do to Address its Sexual Assault Crisis*, WASHINGTON POST, May 15, 2019 (noting that it is "virtually impossible" to prove retaliation under the law in military sexual assault cases due to the high burden of proof on victims); *see also* Shilpa Jindia, *We Are Vanessa Guillén: Killing Puts Sexual Violence in US Military in Focus*, THE GUARDIAN, July 14, 2020 ("If there's not actual accountability for [retaliation], then the fact that things have changed a little bit on the books doesn't change the culture at all.")(quoting Sara Darehshori), *available at* https://www.theguardian.com/us-news/2020/jul/14/vanessa-guillen-killing-sexual-violence-us-military.
[51] Shilpa Jindia, *We Are Vanessa Guillén: Killing Puts Sexual Violence in US Military in Focus*, THE GUARDIAN, July 14, 2020, *available at* https://www.theguardian.com/us-news/2020/jul/14/vanessa-guillen-killing-sexual-violence-us-military. According to Tristeza Ordez, a retired Marine Corps staff sergeant who started a letter on behalf of women and non-binary veterans calling for an investigation into Vanessa Guillén's case, "When the chain of command tries to be the one that's involved, it's like the police policing itself." *Id.*

members conducted as part of the Department of Defense's 2019 Military Sexual Assault Report, reported that service members continue to fear retaliation for reporting sexual assault and worry about punishment for collateral offenses.[52] In July 2020, a Congressional hearing was convened to consider "lack of reporting of sexual harassment in the Department of Defense due to fear of retaliation."[53] Retaliation is clearly a serious problem in the military today, as it was for the Petitioners in this case, and the United States has failed to meet its due diligence obligation to prevent such retaliation, ensure that perpetrators are held accountable, and protect, support, and afford meaningful redress to survivors.

E) The United States Denies Military Sexual Assault Survivors Access to Civilian Courts.

The Petitioners were and continue to be denied their right to resort to civilian courts to ensure their rights. Survivors today continue to face most of the same structural barriers to justice. Legislative changes in 2015 now require the Department of Defense to establish a process for consulting with sexual assault survivors to solicit their preference regarding whether the offense is prosecuted by a military or civilian court.[54] However, as the State acknowledges,[55] a survivor's preference is not binding on a Commander in making a disposition determination.[56] Also, in practice, many survivors are not informed about their right to be consulted, do not have an opportunity to share their views, and are not even aware that some cases may be brought before a civilian judge.[57]

[52] DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2019, 16 (2020), *available at* https://media.defense.gov/2020/Apr/30/2002291660/-1/-1/1/1_DEPARTMENT_OF_DEFENSE_FISCAL_YEAR_2019_ANNUAL_REPORT_ON_SEXUAL_ASSAULT_IN_THE_MILITARY.PDF.

[53] House Armed Services Committee, *Subcommittee on Military Personnel Hearing: "The Military's #MeToo Moment: Examination of Sexual Harassment and Perceived Retaliation in the Department of Defense and at Fort Hood*, July 29, 2020, *available at* https://armedservices.house.gov/hearings?ID=181B4125-F673-405B-932B-100BCBAA4F3C.

[54] 10 U.S.C. § 1044e; *see* David Vergun, *Legislation Changes UCMJ for Victims of Sexual Assault*, ARMY NEWS SERVICE, Jan. 7, 2015, *available at* https://www.army.mil/article/140807/legislation_changes_ucmj_for_victims_of_sexual_assault; United States Response, at 11.

[55] State Response, at 11.

[56] 10 U.S.C. § 1044e; *See* State Response, at 11.

[57] *See* Tom Vanden Brook, *Military Fails to Advise Victims of Sexual Assault of Civilian Court Option, Advocates Say*, USA TODAY, June 10, 2018, *available at* https://www.usatoday.com/story/news/politics/2018/06/10/military-sex-assault-victims-not-told-right-civilian-trial/686503002.

Moreover, the Petitioners have been barred from seeking a meaningful remedy from the United States itself in federal court. As discussed in the Petition, legal doctrine established by the U.S. Supreme Court has established that military service members may not pursue a tort action against the United States for injuries or civil rights violations "where the injuries arise out of or are in the course of activity that is incident to [military] service."[58] The application of this doctrine by two courts of appeal to dismiss the federal class action lawsuits brought by Petitioners[59] continues to reflect U.S. law today. Sexual assault survivors like the Petitioners, who are unable to achieve redress through the military and who find their rights violated by the system that was supposed to protect them, are then barred by judicial doctrine from seeking redress in federal courts.

F) The United States Continues to Deny Survivors of Military Sexual Violence Equal Access to Disability Benefits.

As the Petitioners' experiences demonstrate, military sexual assault has a substantial and long-lasting impact on survivors' lives. A Service Women's Action Network ("SWAN") survey identified "military sexual trauma ("MST") as the number one factor negatively affecting [survivors'] mental wellness."[60] This means that MST has a greater impact on the lasting mental wellness of survivors than any other psychological stressor, including combat-related post-traumatic stress disorder ("PTSD").[61] Nonetheless, veteran survivors of MST continue to be denied equal access to disability benefits. Survivors who have been less-than-honorably discharged in retaliation for reporting or for conduct associated with the sexual assault they

[58] *See* Feres v. United States, 340 U.S. 135, 146 (1950). Moreover, survivors of military sexual assault may not bring a tort action against the United States for the intentional torts of assault committed by its service members due to the sovereign immunity conferred upon the government for such torts under the Federal Torts Claims Act. *See* 28 USC § 2680.

[59] *Cioca v. Rumsfeld*, 11-CV-00151 (E.D. Va. Dec. 9, 2011); *Cioca v. Rumsfeld*, 720 F. 3d 505 (4th Cir. 2013); *Klay v. Panetta*, 924 F. Supp. 2d 8 (D.D.C. 2013); *Klay v. Panetta*, No. 13-5081 (D.C. Cir. 2014).

[60] Antonieta Rico, *Why Military Women are Missing from the #MeToo Movement*, TIME, Dec. 12, 2017, *available at* http://time.com/5060570/military-women-sexual-assault/; Service Women's Action Network (SWAN), Media Advisory, *Service Women Identify Sexual Assault, Not Deployment, as the Number One Factor That Negatively Affects Their Mental Wellness*, (Nov. 10, 2017), *available at* https://www.servicewomen.org/press-releases/media-advisory-service-women-identify-sexual-assault-not-deployment-as-number-one-factor-that-negatively-affects-their-mental-wellness.

[61] Service Women's Action Network (SWAN), Media Advisory, *Service Women Identify Sexual Assault, Not Deployment, as the Number One Factor That Negatively Affects Their Mental Wellness*, (Nov. 10, 2017), *available at* https://www.servicewomen.org/press-releases/media-advisory-service-women-identify-sexual-assault-not-deployment-as-number-one-factor-that-negatively-affects-their-mental-wellness.

experienced are often ineligible for disability and other veterans' benefits.[62] Additionally, because survivors face particular challenges in reporting and documenting assault when it occurs, they may not be able to produce the evidence typically required to support a claim for benefits.[63]

The VA has also mishandled and inappropriately denied benefits to sexual assault survivors.[64] Although the Veterans Benefits Administration ("VBA") has provided guidance to ensure a "liberal approach" to evidence in MST cases, a 2018 VA Inspector General report found that nearly half of denied MST-related claims—an estimated 1,300 claims in 2017—were improperly handled on the bases of failure to order appropriate medical exams, failure to obtain necessary supporting records, and failure to properly take into account contradictory evidence.[65] In response, the VBA agreed to review MST benefit claims that were denied from October 2016 to June 2018.[66] However, the United States must also put institutional reforms into place to prevent a recurrence of these errors and to ensure survivors have equal access to benefits. Improper denial of PTSD claims related to MST and lack of access to veterans' benefits remain a barrier to those who experience sexual violence during their military careers.

[62] *See* Veteran Benefits Administration, Applying for Veterans Benefits and Your Character of Discharge, *available at* https://www.benefits.va.gov/benefits/character_of_discharge.asp (last visited Sept. 20, 2019); Human Rights Watch, *Booted: Lack of Recourse for Wrongfully Discharged U.S. Military Rape Survivors* 4–5 (May 19, 2016), *available at* https://www.hrw.org/report/2016/05/19/booted/lack-recourse-wrongfully-discharged-us-military-rape-survivors; Protect Our Defenders, *Defense Department Ordered to Turn Over Documents on Military Sexual Assault*, PROTECT OUR DEFENDERS NEWS BLOG, July 16, 2019, *available at* https://www.protectourdefenders.com/defense-department-ordered-to-turn-over-documents-on-military-sexual-assault/.

[63] Department of Veterans Affairs, Office of Inspector General, Veterans Benefits Administration, *Denied Posttraumatic Stress Disorder Claims Related to Military Sexual Trauma*, (Aug. 21, 2018), *available at* https://www.va.gov/oig/pubs/VAOIG-17-05248-241.pdf.

[64] *See* Donovan Slack, *Sexual Trauma Claims by Veterans Wrongly Denied by VA, Investigation Finds*, USA TODAY, Aug. 21, 2018, *available at* https://www.usatoday.com/story/news/politics/2018/08/21/va-wrongly-denied-hundreds-veteran-claims-military-sexual-trauma/1051558002/.

[65] Department of Veterans Affairs, Office of the Inspector General, Office of Audits and Evaluations, *Veterans Benefits Administration: Denied Posttraumatic Stress Disorder Claims Related to Military Sexual Trauma* (Aug. 21, 2018), *available at* https://www.va.gov/oig/pubs/VAOIC-17-05248-241.pdf; The mistakes were caused by a variety of factors, including inadequate training, lack of reviewer specialization, lack of an additional level of review, and discontinuation of special focused reviews. *Id.*; *see also VA May Have Denied Half of Military Sexual Trauma Claims in Error*, VETERANS OF FOREIGN AFFAIRS, Aug. 24, 2018, *available at* https://www.vfw.org/media-and-events/latest-releases/archives/2018/8/va-may-have-denied-half-of-military-sexual-trauma-claims-in-error.

[66] Leo Shane II, *Report: VA May Have Mishandled Thousands of Sexual Assault Cases*, MILITARY TIMES, Aug. 21, 2018, *available at* https://www.militarytimes.com/veterans/2018/08/21/report-va-may-have-mishandled-thousands-of-sexual-assault-cases/.

G) Petitioners' Proposed Remedies Have Not Been Adopted by the United States.

The United States argues that it has already adopted many of the remedies proposed by the Petitioners, implying that the Petition's claims were unfounded or are moot.[67] This claim is incorrect and misleading, as none of the core requests for relief set out by the Petitioners have been effectively implemented by the State.[68]

The State takes issue with three of the points offered as examples of the Petitioners' request that this Commission recommend "the adoption by the United States and the United States Department of Defense of necessary laws and measures to ensure the successful investigation, prosecution, and punishment of rape and sexual violence crimes."[69]

First, it suggests that the Petition's call for U.S. military law to be amended "to include laws that prevent retaliation" is moot because Congress recently amended the Uniform Code of Military Justice to include an offense of retaliation.[70] As discussed in Section III(D) above, however,

the United States has not shown that this legislation has adequately addressed the problem of retaliation against service members who report military sexual assault. Moreover, even if the problem of retaliation had been fixed by the amendment, the Petitioners could still seek adjudication by the Commission because the amendment was not in place at the times relevant to their claims and they still have not received adequate remediation of the retaliation they experienced.[71]

Second, the United States argues that there is no need to create a reporting mechanism for military sexual assault that is independent of the Chain of Command as such a system already exists. However, as discussed in Section III(C) above, although victims may report sexual assault to several actors within the military, the closed nature of the military system means that individuals within the victim's Chain of Command can and do influence the reporting process.[72]

[67] State Response, at 14.
[68] Petition, at 78–79.
[69] *Id*. at 78.
[70] State Response, at 15.
[71] *See* IACHR, Report No. 81/13, Petition 12.743. Merits. Homero Flor Freire. Ecuador. November 4, 2013, paras. 78–80.
[72] Protect Our Defenders, *Nine Roadblocks to Justice* (last updated 2018), *available at* https://www.protectourdefenders.com/roadblocks-to-justice/; *see also* DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2019, 16 (2020)

Third, the State selectively quotes the Petitioners' recommendation for "removal of the decision whether to investigate, prosecute, and punish perpetrators from the victims' or perpetrators' Chain of Command," and argues that "U.S. law requires that all sexual assault reports be investigated; no one in the Chain of Command has any discretion not to investigate such a report."[73] Although it is true that U.S. law mandates investigations into sexual assault reports, this law was instituted on December 26, 2013,[74] which was less than a month before the Petition was filed, and *after* all of the occurrences of rights violations that the Petitioners alleged. While this legal change is a positive step, Commanders still retain prosecutorial discretion and, to a more limited extent, disposition decisions that keep key functions in the victims' or perpetrators' Chain of Command. The State acknowledges that Commanders retain prosecutorial discretion and, as of the time of the Response, declines to adopt a remedy for it and instead supports it.[75]

The other "remedies" cited by the United States are in actuality factual or legal observations drawn from earlier parts of the Petition rather than proposed remedies included in their requests for relief. For example, the Petition pointed out that "moral waivers" had been granted to recruits with histories of sexual assault in recent years; although the State argues that this practice was prohibited by the legislation enacted a few weeks before the Petition was filed,[76] this was not presented as a "proposed remedy" but a fact relevant to Petitioners' claims that the United States fostered a culture of sexual violence and impunity that enabled the sexual violence they experienced to occur.[77] Likewise, the Petition cited the Commission's call for criminalization of sexual harassment as part of an analysis of the Commission's interpretation of the right to work in the context of sexual harassment and violence.[78] The Petitioners have already explained how the U.S. Military continues to foster a culture of sexual harassment and violence.[79]

(reporting a focus group finding that "unhealthy command climate" can deter service members from reporting sexual assault), *available at* https://media.defense.gov/2020/Apr/30/2002291660/-1/-1/1/1_DEPARTMENT_OF_DEFENSE_FISCAL_YEAR_2019_ANNUAL_REPORT_ON_SEXUAL_ASSAULT_IN_THE_MILITARY.PDF.

[73] Response, at 14.

[74] *See* National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1742 (2013).

[75] Response, at 16–17.

[76] *Id*. at 15.

[77] Petition, at 28.

[78] *Id*. at 66; *see* State Response, at 16–17.

[79] Section III(A), *supra.*

The Petition describes how the United States' failure to protect Petitioners from being subjected to sexual violence, to respond effectively to their complaints, and to provide them with a meaningful remedy violated Petitioners' human rights. Their experiences reflect the United States' systematic failure to prevent and respond to sexual violence in all branches of the military, which continues to impede justice for survivors to this day.

IV. THE PETITION IS ADMISSIBLE UNDER ARTICLE 31 OF THE INTER-AMERICAN COMMISSION'S RULES OF PROCEDURE.

The Commission should declare the Petition admissible because it has met the requirements of Article 31 of the Commission's Rules of Procedure. Pursuant to Article 31(1), the Commission must verify that petitioners exhausted domestic remedies in accordance with generally recognized principles of international law to find their petition admissible.[80] However, Article 31(2) specifies that this requirement does not apply if (a) the rights allegedly violated are not protected by due process of law under the domestic legislation, (b) the petitioners have been denied access to or have been prevented from exhausting domestic remedies, or (c) the petitioners have faced unwarranted delay in receiving a final judgment under the domestic remedies.[81] In other words, the Commission only requires petitioners to pursue a domestic remedy that is proven to be "available," "adequate," and "effective" to rectify the petitioners' alleged violations.[82] When a State argues that petitioners failed to exhaust domestic remedies, the State carries the burden of indicating which remedies should have been pursued and demonstrating that they are suitable for remedying the alleged violations.[83]

Petitioners have satisfied their duty to exhaust domestic remedies under Article 31(1) by pursuing their claim in U.S. federal courts. Additionally, the Commission should declare the Petition admissible under Article 31(2) because Petitioners are exempt from exhausting any unpursued domestic remedies as they were inadequate, unavailable, or ineffective. The State also

[80] 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. 31.1.
[81] *Id.* art. 31.2.
[82] IACHR, Report No. 225/19, Case 312-13. Admissibility. Siddharta Fisher and Cynthia Low 'Cindi' Fisher. United States of America. September 11, 2019, para. 8; IACHR, Report No. 42/10, Petition 120-07. Admissibility. N.I. Sequoyah v. United States. March 17, 2010, para. 39.
[83] IACHR, Report No. 192/18, Petition 1506-08. Admissibility. Oswaldo Marcelo Lucero et al. United States of America. December 31, 2018, para. 18.

consistently fails to satisfy its burden of either identifying the alleged unpursued domestic remedies or demonstrating how the domestic remedies it did identify would be suitable to rectify the violations alleged in the Petition. Despite the State's omissions and frivolous arguments, Petitioners address each of the State's claims in full.

A) Petitioners Exhausted Domestic Remedies by Pursuing Their *Bivens* Claim to the Fourth Circuit Court of Appeals.

The State incorrectly claims that Petitioners did not exhaust the domestic remedies pursued for their Articles I, II, IV, V, XIV, XVIII, and XXIV claims because they did not petition the U.S Supreme Court ("Supreme Court") for a writ of certiorari after the Fourth Circuit Court of Appeals ("Fourth Circuit") dismissed Petitioners' federal constitutional tort claim, also known as a *Bivens* claim.[84] Petitioners satisfied the exhaustion requirement upon the Fourth Circuit's final dismissal of their *Bivens* claim because review by the Supreme Court is an extraordinary remedy that the Commission has previously declared unnecessary to pursue to fulfill the exhaustion requirement under Article 31(1). Alternatively, Petitioners were not required to pursue a federal constitutional tort remedy because they had no reasonable prospect of success under well-established case law that bars *Bivens* actions in the military context from federal courts. Therefore, this remedy was not effective or adequate as required by Article 31(2).

1. Petitioners Were Not Required to Petition the Supreme Court for a Writ of Certiorari to Exhaust Domestic Remedies.

The Petitioners exhausted their domestic remedies by pursuing their *Bivens* claim to the Fourth Circuit, and they were not required to pursue a further extraordinary remedy of petitioning the Supreme Court for a writ of certiorari.

If petitioners try to resolve the matter brought in their petition by first making use of a "valid, adequate alternative [to the Commission] available in the domestic legal system and the State had an opportunity to remedy the issue within its jurisdiction," then the petitioners fulfilled the requirement to exhaust domestic remedies.[85] The Commission has explained that the

[84] State Response, at 19.
[85] IACHR, Report No. 201/19, Case 611-12. Admissibility. Mumia Abu-Jamal. United States of America. December 6, 2019, para. 10.

exhaustion requirement does not require petitioners to "exhaust all remedies available to them, which implies that extraordinary remedies do not need to be exhausted."[86] The Commission considers a writ of certiorari by the Supreme Court an extraordinary remedy.[87]

For example, in *Padilla v. United States*, petitioners brought a civil suit against State agents who allegedly unconstitutionally detained, interrogated, and tortured one of the petitioners.[88] The Ninth Circuit Court of Appeals dismissed the petitioners' suit, and the petitioners did not file for a writ of certiorari with the Supreme Court.[89] Nevertheless, the Commission stated that the petitioners exhausted their domestic remedies and "were not obliged to bring a writ of certiorari (an extraordinary remedy) in order to fulfil the requirements of Article 31.1."[90]

Similarly, in *Juvenile Offenders Sentenced to Life Imprisonment Without Parole v. United States*, the petitioners alleged that the State violated various human rights when the State convicted and sentenced the petitioners to life imprisonment without parole for homicides that they committed while minors.[91] While very few of the 32 petitioners petitioned for a writ of certiorari before the Supreme Court, the Commission found that the petitioners met the requirements of Article 31.[92] The Commission stated that extraordinary remedies, including writs of certiorari, need not be exhausted for purposes of admissibility because "they have a discretionary character, and their procedural availability is restricted and does not fully satisfy the right of the accused to challenge the judgment."[93] The Commission emphasized the discretionary nature of writs of certiorari by comparing how the Supreme Court denied one

[86] IACHR, Report No. 118/19, Case 2282-12. Admissibility. Jose Padilla and Estela Lebron. United States of America. June 10, 2019, para. 29 (internal quotation marks omitted).
[87] *Id*. para. 29; IACHR, Report No. 18/12, Case 161-06. Admissibility. Juvenile Offenders Sentenced to Life Imprisonment Without Parole. United States of America. Mar. 20, 2012, paras. 48, 60; *see also* IACHR, Report No. 181/18, Case 300-09. Admissibility. Ronald Bullock. United States of America. December 26, 2018, para, 15 (holding that the petitioner exhausted domestic remedies even though the petitioner did not petition the Supreme Court for writ of certiorari); IACHR, Report No. 73/12, Case 15-12. Admissibility. Edgar Tamayo Arias. United States of America. July 17, 2012, paras. 36–37, 39 (holding that the petitioners exhausted domestic remedies despite a petition for a writ of certiorari still pending at the Supreme Court).
[88] IACHR, Report No. 118/19, Case 2282-12. Admissibility. Jose Padilla and Estela Lebron. United States of America. June 10, 2019, para. 1.
[89] *Id.* paras. 4–5, 13–14.
[90] *Id.* para. 29.
[91] IACHR, Report No. 18/12, Case 161-06. Admissibility. Juvenile Offenders Sentenced to Life Imprisonment Without Parole. United States of America. Mar. 20, 2012, para. 6.
[92] *Id.* para. 60.
[93] *Id.* paras. 48, 59–60.

petitioner's petition with "basically similar" issues to two later petitions[94] granted by the Supreme Court.[95]

After the military criminal legal system denied Petitioners access to redress, Petitioners sought redress through litigation in U.S. federal courts. Petitioners brought their *Bivens* claim to the U.S. District Court for the Eastern District of Virginia and appealed upon dismissal to the Fourth Circuit. The Fourth Circuit dismissed the case, which exhausted Petitioners' domestic remedies. As exemplified in *Padilla* and *Juvenile Offenders Sentenced to Life Imprisonment Without Parole*, Petitioners were not required to petition the Supreme Court for a writ of certiorari to satisfy the requirements of Article 31.

The State attempts to distinguish the facts of the Petition from the facts of *Juvenile Offenders Sentenced to Life Imprisonment Without Parole* by stating that in the latter case, the Supreme Court had received a writ of certiorari from one of the 32 petitioners, which presented the Court with an opportunity to rule on the relevant issues in that case.[96] However, the Supreme Court has similarly had numerous opportunities to address the availability of tort remedies for service members injured incident to military service, including in the military sexual assault context, in light of the *Feres* doctrine.[97] Petitioners specifically pursued a *Bivens* constitutional

[94] Note that the two petitions granted by the Supreme Court were brought by individuals unrelated to the petitioners in *Juvenile Offenders Sentenced to Life Imprisonment Without Parole*. However, the Supreme Court ultimately ruled in favor of the juveniles in those cases, holding that the Eighth Amendment's prohibition of cruel and unusual punishment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile homicide offenders. Miller v. Alabama, 567 U.S. 460 (2012) (consolidating the two cases of *Miller v. Alabama* and *Jackson v. Hobbs*).

[95] IACHR, Report No. 18/12, Case 161-06. Admissibility. Juvenile Offenders Sentenced to Life Imprisonment Without Parole. United States of America. Mar. 20, 2012, para. 60.

[96] State Response, at 22. Let it also be known that the State provided the Commission in *Juvenile Offenders Sentenced to Life Imprisonment Without Parole* evidence of the Supreme Court granting two writs of certiorari "basically similar" issues to those raised by the petitioners IACHR, Report No. 18/12, Case 161-06. Admissibility. Juvenile Offenders Sentenced to Life Imprisonment Without Parole. United States of America. Mar. 20, 2012, para. 60. Despite this showing that the Supreme Court indicated a potential willingness to rule favorably for the petitioners in the future—the Supreme Court ultimately did find in favor of the juvenile homicide offenders in the two granted writs—the Commission still found that a writ of certiorari is a discretionary and special remedy that need not be pursued to fulfill the exhaustion requirement. *See* case and accompanying text discussed at *supra* note 94.

[97] The *Feres* doctrine bars service members from suing the federal government for damages for injuries sustained incident to military service. The Supreme Court has extended the *Feres* doctrine to also preclude the type of constitutional tort claim, known as a *Bivens* claim, that Petitioners brought in their domestic lawsuit. *See* Section IV(A)(2), *supra*. *See, e.g.*, Matreale v. State of N.J. Dep't of Military & Veterans Affairs, 487 F.3d 150 (3d. Cir. 2007), *cert. denied*, 552 U.S. 1099 (2008) (applying the *Feres* doctrine to bar a national guard's tort claim that alleged that the military violated anti-discrimination law when the soldier's supervisors retaliated against him after he assisted a victim in a sexual harassment case against another soldier); Lynom v. Widnall, 254 F.3d 315 (Fed. Cir. 2000), *cert. denied*, 534 U.S. 821 (2001) (applying the *Feres* doctrine to bar a lieutenant's constitutional tort claims that alleged that the lieutenant's superiors advanced a conspiracy in an effort to deny the lieutenant her civil and

tort claim, which allows an injured person to recover damages against a federal agent who violates the injured person's constitutional rights.[98] Lower courts have consistently applied the *Feres* doctrine to preclude civil legal action, which includes *Bivens* actions, against the government for a wide range of activities—from medical errors to wrongful death to sexual violence.[99] The Supreme Court has upheld the application of the *Feres* doctrine[100] and has rejected numerous petitions for certiorari asking the Court to clarify, reevaluate, narrow, or overrule the *Feres* doctrine.[101]

The State also incorrectly claims that Supreme Court review is an "ordinary" remedy.[102] The State argues that Petitioners should have filed a petition for a writ of certiorari in hopes that the Supreme Court would overrule its own binding precedent that forecloses tort remedies to service members injured incident to service. Such arguments suggest that the Supreme Court has a proclivity to grant certiorari and a willingness to overrule or narrow its own precedent. This is far from true. Federal courts of appeals handle more than 50,000 cases per year.[103] Parties may not appeal the decisions of these courts to the Supreme Court as of right; rather, their only option

constitutional rights after she reported rampant sexual harassment and retaliation by fellow and superior officers); Smith v. United States, 196 F.3d 774 (7th Cir. 1999), *cert. denied*, 529 U.S. 1068 (2000) (applying the *Feres* doctrine to bar a servicewoman's tort claim alleging that the government negligently supervised her drill sergeant that sexually assaulted her while they were off-post and off-duty); Becker v. Pena, 107 F.3d 877 (9th Cir. 1997), *cert. denied*, 522 U.S. 813 (1997) (applying the *Feres* doctrine to bar a coast guard's tort claim to recover injuries caused by repeated sexual harassment by her superiors).

98 Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971); *see also* Chappell v. Wallace, 462 U.S. 296, 298 (1983).

99 *See, e.g.*, cases discussed at *supra* note 97; Siddiqui v. United States, 783 Fed. Appx. 484 (6th Cir. 2019), *cert. denied*, 140 S. Ct. 2512 (2020) (applying the *Feres* doctrine to bar tort action against the government for failing to protect a marine from discriminatory abuse that led to his death and failing to fully investigate his death); Daniel v. United States, 889 F.3d 978 (2018), *cert. denied*, 139 S. Ct. 1713 (2019) (applying the *Feres* doctrine to bar a medical malpractice suit following a naval officer's death due to childbirth complications); Davidson v. United States, 647 Fed. Appx. 289 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 480 (2016) (applying the *Feres* doctrine to bar tort action against two national guard superiors for retaliation); Purcell v. United States, 656 F.3d 463 (7th Cir. 2011), *cert. denied*, 565 U.S. 1261 (2012) (applying the *Feres* doctrine to bar a wrongful death suit against the Department of Defense for negligently failing to prevent an officer's suicide).

100 *See, e.g.*, United States v. Johnson, 481 U.S. 681 (1987) (upholding the *Feres* doctrine and barring a tort action on behalf of a service member killed during a rescue mission, even though the alleged negligence was by civilian employees of the Federal Government).

101 *See* cases discussed at *supra* note 99; *see also U.S. Supreme Court Refuses To Hear Case Seeking To Overturn Feres Doctrine*, MML HOLDINGS LLC (June 5, 2019), *available at* https://www.medicalmalpracticelawyers.com/federal-medical-malpractice-claims-2/u-s-supreme-court-refuses-to-hear-case-seeking-to-overturn-feres-doctrine/; Kevin M. Lewis, *The Feres Doctrine: Congress, the Courts, and Military Servicemember Lawsuits Against the United States*, CONG. RESEARCH SERV. (June 5, 2019), *available at* https://fas.org/sgp/crs/misc/LSB10305.pdf.

102 State Response, at 21.

103 THE JUDICIAL BRANCH, *available at* https://www.whitehouse.gov/about-the-white-house/the-judicial-branch/ (last visited Sept. 11, 2020).

is to file a petition for a discretionary writ of certiorari.[104] This exceptional review is sought for less than 10 percent of appellate court decisions.[105] The Supreme Court rejects about 98 percent of writ petitions.[106] Thus, federal courts of appeals are the final decision-making courts in the vast majority of federal cases.[107] Even U.S. law has long described writs of certiorari as extraordinary writs.[108]

Further, the Supreme Court rarely overrules itself. Only about 1.8 percent of Supreme Court decisions are ever overturned in full or in part.[109] As the State describes, *stare decisis* is a well-established doctrine in the U.S. legal system.[110] For this reason, established precedent is extremely difficult to overturn. In 1932, Supreme Court Justice Louis Brandeis infamously wrote, "*Stare decisis* is usually the wise policy, because, in most matters it is more important that the applicable rule of law be settled than that it be settled right."[111] Therefore, the State is misinformed to claim that it would be "viable" and "ordinary" for Petitioners to successfully

[104] *Appellate Courts and Cases—Journalist's Guide*, U.S. COURTS, *available at* https://www.uscourts.gov/statistics-reports/appellate-courts-and-cases-journalists-guide (last visited Sept. 11, 2020).
[105] *Id.*
[106] *About the Supreme Court*, U.S. COURTS, *available at* https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about (last visited Sept. 11, 2020).
[107] *See* THE JUDICIAL BRANCH, *available at* https://www.whitehouse.gov/about-the-white-house/the-judicial-branch/ (last visited Sept. 11, 2020) (noting that "the court of appeals usually has the final word in the case, unless it sends the case back to the trial court for additional proceedings").
[108] *See, e.g.*, Sup. Ct. R. 20. (describing writs authorized under the All Writs Act, 28 U.S.C. § 1651, which includes writs of certiorari, as "extraordinary writ[s]"); Degge v. Hitchcock, 229 U.S. 162, 172 (1913) (stating "[t]he writ of certiorari is one of the extraordinary remedies, and being such it is impossible to anticipate what exceptional facts may arise to call for its use"); S. Ry. Co. v. Madden, 224 F.2d 320, 320 (4th Cir. 1955) (describing writs of certiorari as "extraordinary writs"); In re Urohealth Systems, Inc., 252 F.3d 504, 506–07 (1st Cir. 2001) (noting that "[t]he Supreme Court has defined the parameters of the use of writs, holding them to be 'extraordinary remedies . . . reserved for really extraordinary cases,'" then specifically listing writs of certiorari as extraordinary writs).
[109] Amanda Shendruk, *Fewer Than 2% of Supreme Court Rulings Are Ever Overturned*, QUARTZ (July 14, 2018), *available at* https://qz.com/1326096/despite-its-pending-hard-right-turn-the-supreme-court-is-unlikely-to-overturn-roe-vs-wade/#:~:text=The%20US%20Supreme%20Court%20has,made%20by%20the%20high%20court.
[110] State Response, at 19.
[111] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). This sentiment has been cited in 14 subsequent court opinions. *See, e.g.*, Kimble v. Marvel Entm't, LLC, 576 U.S. 446, 455 (2015); Agostini v. Felton, 521 U.S. 203, 235 (1997); Payne v. Tennessee, 501 U.S. 808, 827 (1991). *Stare decisis* is usually more important than deciding the law correctly because it "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." Payne, 501 U.S. at 827. Supreme Court Chief Justice John Roberts recently reiterated the importance of following precedent when he chose precedent over his own ideologies when striking down a Louisiana abortion law. June Med. Servs. v. Russo, 140 S. Ct. 2103, 2134 (2020) (Roberts, J., concurring) ("But for precedent to mean anything, the doctrine must give way only to a rationale that goes beyond whether the case was decided correctly.").

obtain review by the Supreme Court on certiorari and also convince the Supreme Court to overrule its own binding precedent.

Petitioners have met the exhaustion of domestic remedies requirement because they provided the State an opportunity to address the issues in the Petition when they brought a civil lawsuit in U.S. federal court. Although the facts of each Petitioner's case vary slightly, the outcomes in the military criminal legal system were the same—Petitioners were precluded from obtaining access to justice. Petitioners, having been denied access to justice by the military criminal legal system, then filed a civil suit in U.S. federal court. The federal courts had the opportunity to find that the facts of Petitioners' case fell outside the *Feres* doctrine but instead chose to follow well-established precedent that dictates that *Bivens* claims stemming from sexual assault in the military are barred from federal courts.[112] The Fourth Circuit, the final and most binding decision maker for nearly all claims in that circuit, ultimately dismissed Petitioners' lawsuit.[113] The Commission clearly stated in both *Padilla* and *Juvenile Offenders Sentenced to Life Imprisonment Without Parole* that petitioning the Supreme Court for a writ of certiorari is not a requirement to exhaust domestic remedies as such a writ is an extraordinary remedy with no reasonable prospect of success. Therefore, the State had multiple opportunities to remedy issues brought in this Petition but chose not to, which means that Petitioners sufficiently exhausted their domestic remedies as required by Article 31(1).

2. Petitioners Were Not Required to Pursue Their Bivens *Claim Because This Remedy Was Unavailable, Inadequate and/or Ineffective*

Alternatively, Petitioners were not required to pursue a federal constitutional tort remedy at all because they had no reasonable prospect of success under well-established case law that bars *Bivens* actions in the military context from federal courts. Therefore, this remedy was not effective or adequate as required by Article 31(2).

As discussed above, under Article 31(2), petitioners need not pursue remedies that are ineffective.[114] A remedy is ineffective if any proceeding raising the petitioner's claims before domestic courts appears to have no reasonable prospect of success, such as, for example, if the

[112] Cioca v. Rumsfeld, 720 F.3d 505, 517–18 (4th Cir. 2013).
[113] *Id.* at 506.
[114] *See* cases discussed at *supra* note 82.

State's highest court recently rejected proceedings in which the underlying issue of the petitioner's claims had been raised.[115]

In *Undocumented Workers v. United States*, the Commission found a remedy ineffective when U.S. courts historically denied that remedy to individuals similarly situated to the petitioners of that case.[116] In *Undocumented Workers*, undocumented immigrants in the United States alleged that they were injured due to poor working conditions and that the United States discriminated against them by not affording them the employment rights and remedies available to documented immigrants.[117] The Commission determined that the undocumented immigrants were not required to pursue workers' compensation benefits before filing their petition because U.S. courts had consistently rejected workers' compensation claims brought by undocumented immigrants in similar situations.[118]

Petitioners filed a *Bivens* cause of action in their domestic litigation.[119] A *Bivens* cause of action allows an injured person to recover damages against a federal agent who violates the injured person's constitutional rights.[120] However, this remedy is not available when "special factors counsel[] hesitation."[121] The *Feres* doctrine first indicated that military service is a special factor that counsels hesitation from courts to hear certain tort claims.[122] The Supreme Court created this doctrine in *Feres v. United States* when the Court barred service members from bringing general tort claims against the U.S. government for injuries sustained incident to military service.[123] The primary rationale behind the *Feres* doctrine was to protect "[t]he peculiar and special relationship of the soldier to his superiors" and avoid the "extreme" effects such tort suits would have on military discipline.[124]

115 IACHR, Report No. 43/10, Case 242-05. Admissibility. Mossville Environmental Action Now. United States. March 17, 2010, para. 32; IACHR, Report No. 17/17. Admissibility. Pedro Roselló et al. United States. January 27, 2017, paras. 3, 8.
116 IACHR, Report No. 134/11, Case 1190-06. Admissibility. Undocumented Workers. United States. October 20, 2011, paras. 27, 29–30.
117 *Id.* paras. 18–19.
118 *Id.* paras. 29–30.
119 *See* Cioca v. Rumsfeld, 720 F.3d 505 (4th Cir. 2013).
120 Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971); *see also* Chappell v. Wallace, 462 U.S. 296, 298 (1983).
121 Bivens, 403 U.S. at 396.
122 Chappell, 462 U.S at 298.
123 340 U.S. 135 (1950).
124 United States v. Brown, 348 U.S. 110, 112 (1954). This rationale has since been broadened to say that the judiciary should not allow tort claims to be brought incident to military service in order to prevent the deleterious effect of undermining military order and discipline. Regan v. Starcraft Marine, LLC, 524 F.3d 627, 635 (5th Cir. 2008).

The Supreme Court later applied the *Feres* doctrine to bar *Bivens* claims for service members' injuries that are incident to military service, even if the claims do not present military hierarchy concerns.[125] The Supreme Court reasoned that it would be inappropriate to provide service members a *Bivens* remedy because of the *Feres* doctrine rationale that the military depends on strict order and discipline and the added rationale that U.S. Congress has constitutional authority over the military criminal legal system and has not statutorily provided any similar *Bivens*-type remedy.[126]

At the time that the Fourth Circuit upheld the dismissal of Petitioners' case based on *Feres*, numerous other courts had applied this Supreme Court doctrine to hold that *Bivens* claims similar to Petitioners' may not proceed.[127] Later circuit court decisions have only strengthened this bar by continuing to apply the *Feres* doctrine to dismiss *Bivens* claims brought by survivors of military sexual assault.[128] As mentioned earlier, the Supreme Court has repeatedly rejected opportunities to permit tort claims in the military sexual assault context under the *Feres* doctrine.[129]

As set forth by *Feres* and its progeny, Petitioners were foreclosed from pursuing their *Bivens* claim in U.S. federal courts because the sexual assaults occurred incident to Petitioners' military service. In light of consistent case law applying *Feres*, and the Supreme Court's unwillingness to review dismissed *Bivens* claims in the military sexual assault context, Petitioners had no reasonable prospect of success when bringing their tort claim to federal court.

[125] *See* Chappell, 462 U.S. 296 (applying the *Feres* doctrine to *Bivens* actions when dismissing a Black sailors' constitutional tort claim that alleged racial discrimination by their superiors); *see also* United States v. Stanley, 483 U.S. 669, 679–80 (1987) (applying the *Feres* doctrine to bar a *Bivens* action that did not implicate military chain-of-command concerns).

[126] Chappell, 462 U.S. at 300, 304.

[127] *See* Matreale v. N.J. Dep't of Military & Veterans Affairs, 487 F.3d 150, 152–54 (3d Cir. 2007) (applying the *Feres* doctrine to bar a tort claim alleging that superiors retaliated against an officer for supporting a sexual assault claim by a fellow soldier); Mackey v. United States, 226 F.3d 773, 774–77 (6th Cir. 2000) (applying the *Feres* doctrine to bar a tort claim alleging that superior officers sexually harassed a soldier); Smith v. United States, 196 F.3d 774, 776–78 (7th Cir. 1999) (applying the *Feres* doctrine to bar a tort claim alleging that superiors negligently supervised a sergeant who allegedly raped a soldier); Davis v. Marsh, 876 F.2d 1446, 1450 (9th Cir. 1989) (applying the *Feres* doctrine to bar a *Bivens* claim alleging sexual harassment by superior officers); Stubbs v. United States, 744 F.2d 58, 61 (8th Cir. 1984) (applying the *Feres* doctrine to bar a *Bivens* claim alleging sexually assault by a superior).

[128] *See, e.g.*, Klay v. Panetta, 758 F.3d 369 (Fed. Cir. 2014) (applying *Feres* to dismiss several former service members' *Bivens* claim for injuries arising from sexual assault, harassment, and retaliation by their fellow service members and superiors while serving in the military); Doe v. Hagenbeck, 870 F.3d 36 (2d Cir. 2017) (applying *Feres* to dismiss a *Bivens* claim brought by a student at a military academy for injuries arising from the academy's atmosphere of sexual hostility that enabled a male cadet to sexually assault her).

[129] *See* cases discussed at *supra* note 97.

Even the State agrees that the federal courts were "required by Supreme Court precedent" to dismiss Petitioners' complaint.[130] Similar to the undocumented immigrants in *Undocumented Workers* that were exempt from pursuing workers' compensation benefits due to previous unsuccessful attempts by other undocumented workers, Petitioners here needed not pursue a tort remedy prior to filing the Petition because many service members previously unsuccessfully pursued tort remedies in a similar contexts. Accordingly, Petitioners never needed to pursue a domestic tort remedy because their claim falls under the Article 31(2) exhaustion exemption for ineffective remedies.

B) Petitioners Were Not Required to Exhaust Any Other Domestic Remedies Because Any Such Remedies Were Unavailable, Inadequate and/or Ineffective.

The State also incorrectly claims that Petitioners did not exhaust other potential domestic remedies because they did not 1) pursue non-tort relief in federal court,[131] 2) pursue relief from the U.S. Veterans Benefits Program,[132] 3) raise all claims alleged in the Petition in domestic proceedings,[133] or 4) pursue a valid claim on behalf of Petitioner Bertzikis.[134] Petitioners are exempt from the exhaustion requirement as these domestic remedies were unavailable, ineffective, or inadequate.

1. Petitioners Were Not Required to Seek Federal Non-Tort Relief Because This Remedy Was Ineffective and/or Inadequate.

The State incorrectly claims that Petitioners did not exhaust all domestic remedies because they did not seek non-tort relief, in the form of an injunction or declaratory judgment, in federal court.[135] An exception to the exhaustion principle applies because Petitioners had no effective or adequate remedy for any non-tort claim in U.S. federal courts.

[130] State Response, at 19.
[131] *Id.* at 25.
[132] *Id.* at 24.
[133] *Id.* at 22.
[134] *Id.* at 26.
[135] *Id.* at 25.

a. Petitioners Had No Effective Remedy in Seeking Non-Tort Relief.

Petitioners had no reasonable prospect of success in bringing an equitable relief claim. As explained above, a remedy is ineffective if any proceeding raising the petitioner's claims before domestic courts appears to have no reasonable prospect of success, such as, for example, if the State's highest court recently rejected proceedings in which the underlying issue of the petitioner's claims had been raised.[136]

The Supreme Court has not defined justiciable from nonjusticiable intramilitary claims for equitable relief, such as injunctive and declaratory relief.[137] Therefore, circuit courts are left to determine the parameters of providing such equitable relief.[138] The State contends that "some" circuit courts do not bar claims for injunctive or declaratory relief.[139] The reality is that the vast majority of circuit courts, including the Fourth Circuit, have adopted the position that intra-military immunity bars most claims for equitable relief in civilian courts.[140] These courts have determined that courts have little competence or authority to interfere with military function, discipline, and management,[141] often citing the same rationale behind the *Feres* doctrine as "weigh[ing] heavily" to preclude claims for equitable relief.[142] Most of the circuit courts find a narrow exception exists to the bar on equitable relief for cases involving "challenges to the facial validity of military regulations" that are distinct from "discrete personnel matters."[143]

136 *See* cases discussed at *supra* note 115.
137 *See* Dibble v. Fenimore, 339 F.3d 120, 126 (2d Cir. 2003).
138 *Id.*
139 State Response, at 25.
140 The full list includes the Second, Fourth, Fifth, Seventh, Eighth, Ninth, Eleventh, and D.C. Circuits. *See* Dibble v. Fenimore, 339 F.3d 120 (2d Cir. 2003); Guerra v. Scruggs, 942 F.2d 270 (4th Cir. 1991); Crawford v. Tex. Army Nat'l Guard, 794 F.2d 1034 (5th Cir. 1986); Knutson v. Wis. Air Nat'l Guard, 995 F.2d 765 (7th Cir. 1993); Watson v. Ark. Nat'l Guard, 886 F.2d 1004 (8th Cir. 1989); Christoffersen v. Wash. State Air Nat'l Guard, 855 F.2d 1437 (9th Cir. 1988); Speigner v. Alexander, 248 F.3d 1292 (11th Cir. 2001); Kreis v. Sec'y of the Air Force, 866 F.2d 1508 (D.C. Cir. 1989).
141 Meister v. Tex. Adjutant Gen.'s Dep't, 233 F.3d 332 (5th Cir. 2000).
142 Watson, 886 F.2d at 1008.
143 Crawford v. Tex. Army Nat'l Guard, 794 F.2d 1036, 1036 (5th Cir. 1986). The State cites *Frontiero v. Richardson* for the proposition that the Supreme Court will adjudicate military issues in non-tort cases. *See* State Response, at 26 n.130. However, *Frontiero* falls within the narrow exception of cases that the majority circuit courts find judiciable because it deals with facial challenges to the constitutionality of military rules or regulations and does not require determining the validity of military personnel decisions. Frontiero v. Richardson, 411 U.S. 677, 680, 690–91 (1973) (invalidating statutes that allowed servicemen to claim their spouse as dependent without requiring any proof of dependency but prohibited servicewomen from claiming their spouse as dependent without proof of dependency).

Contrary to the State's argument,[144] the Fourth Circuit has addressed the availability of equitable relief in the military context.[145] In *Guerra v. Scruggs*, a soldier sought an injunction to prevent his discharge from the army for alleged cocaine and alcohol usage, arguing that his discharge proceedings violated his constitutional rights.[146] The Fourth Circuit held that equitable relief was not available for the soldier because providing such relief would require the court to interfere with the military function, expertise, and discretion.[147]

A separate Fourth Circuit decision provides guidance on the availability of equitable relief in the military sexual assault context. In *Scott v. Rice*,[148] an officer alleged sexual discrimination and harassment against her unit commander and sought a declaration that her commander ordered her discharge in violation of her Constitutional rights and an injunction restoring the officer to active-duty status.[149] The Fourth Circuit held that reviewing the officer's equitable-relief action would impermissibly interfere with military function and decision making.[150]

Had Petitioners brought a claim for injunctive or declaratory relief in domestic court, their claim likely would not have been reviewable under the Fourth Circuit's jurisprudence. The crux of Petitioners' claim challenges various military personnel's decisions on investigation,[151] discipline,[152] and discharge.[153] These are precisely the types of inquiries that the Fourth Circuit in *Guerra* determined are not fit to be reviewed by civilian courts. For even more persuasion, the

[144] State Response, at 25.
[145] The Fourth Circuit has taken a different approach to analyzing equitable claims in the military context than the other majority circuits. Unlike the other majority circuits, the Fourth Circuit does not apply *Chappell* or *Stanley* to evaluate equitable claims but instead applies a multi-factored test first outlined in *Mindes v. Seaman*. 452 F.2d 197 (5th Cir. 1971). However, while the Fourth Circuit's particular approach in analyzing the availability of equitable relief in the military context is different, the Fourth Circuit similarly precludes review in cases involving military decision-making. *See* Guerra v. Scruggs, 942 F.2d 270 (4th Cir. 1991).
[146] Guerra, 942 F.2d 270.
[147] *Id.* at 280.
[148] This is a non-binding unpublished opinion. However, unpublished opinions are persuasive and have precedential value if there is no published opinion that is as on point. *See* 4th Cir. R. 32.1.
[149] Scott v. Rice, No. 92-2463, 1993 WL 375664 at *1 (4th Cir. Sept. 23, 1993).
[150] *Id.* at *2. Note that the Fourth Circuit used a multi-factored test established in *Mindes v. Seaman* that the other circuit courts who do not find equitable relief justiciable did not use. 452 F.2d 197 (5th Cir. 1971). However, the Fourth Circuit still came to the same conclusion that challenging military decision-making was inappropriate because it would impede commanding officers in "exercising [their] own discretion and military expertise with respect to personnel matters." *Id.* at *7.
[151] *See, e.g.*, Petition, at 16 (alleging that the military's investigative division improperly investigated Petitioner Yeager's sexual assault report).
[152] *See, e.g., id.* at 10 (alleging that Command insignificantly punished Petitioner Anderson's perpetrators).
[153] *See, e.g., id.* at 10 (alleging that Command improperly discharged Petitioner Jeloudov under the military's "Don't Ask, Don't Tell" policy).

Fourth Circuit declined to review an equitable claim in the military sexual assault context in *Scott*, which posed many similar claims that Petitioners make in the Petition.[154] Therefore, Petitioners' claims fall outside the purview of domestic courts. Because Petitioners had no likelihood of success evinced by precedent from the Fourth Circuit and the majority of other circuit courts, Petitioners are exempt from pursuing equitable relief in domestic courts under Article 31(2)'s exemption for ineffective remedies.

b. Non-Tort Relief is Inadequate to Remedy the Violations Alleged in the Petition.

Even if Petitioners were able to bring a claim for equitable relief, such relief is inadequate to remedy the violations alleged in the Petition. Inadequate remedies do not need to be pursued to meet the exhaustion requirement.[155] A remedy is inadequate if it does not settle the most pressing issues in the petition.[156] If a State alleges failure to exhaust domestic remedies, then the State must identify which remedies the petitioners should have pursued and why they would be suitable to remedy the alleged violation.[157]

In *Doe v. Canada*, the Commission found a remedy inadequate when it only provides relief for ongoing harms and not for previous harms.[158] In *Doe*, three unnamed refugees contend that Canada's direct-back policy, which directs refugees back to the United States without any consideration of their asylum claims, violated the refugees' right to seek asylum.[159] The Commission found the refugees exempt from exhausting domestic remedies because Canada's proposed remedy of domestic public interest litigation is not an adequate remedy for the refugees.[160] The Commission reasoned that Canada's public interest litigation, which only provides prospective relief, is an inadequate remedy for the refugees because it could not remedy the alleged past violations of the refugees' rights.[161]

[154] *See, e.g., id.* at 17–18 (alleging that Command harassed Petitioner Stephens upon the belief that Petitioner Stephens was homosexual and later chaptered him out from the military due to alleged "anxiety and depression").
[155] *See* cases discussed at *supra* note 82.
[156] IACHR, Report No. 192/18, Case 1506-08. Admissibility. Oswaldo Marcelo Lucero et al. United States of America. December 31, 2018, para. 18.
[157] *See* IACHR, Report No. 192/18, Petition 1506-08. Admissibility. Oswaldo Marcelo Lucero et al. United States of America. December 31, 2018, para. 18.
[158] IACHR, Report No. 78/11, Case 12.586. Merits. John Doe et al. Canada. July 21, 2011, paras. 8, 19.
[159] *Id.* para. 1.
[160] *Id.* para. 19.
[161] *Id.* paras. 8, 19.

The State incorrectly argues that injunctive and declaratory relief are "comparable" to "some" of the remedies that Petitioners' seek in the Petition.[162] In the U.S. legal system, injunctive relief is a "drastic and extraordinary" remedy used in special cases that demands a party to stop doing a specific act to prevent further injustice and irreparable harm to the plaintiffs.[163] The Supreme Court has held that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs."[164] However, courts have found that nationwide injunctions, such as those that would be able to remedy structural harms like those experienced by Petitioners and other military sexual assault survivors, impermissibly afford relief beyond "the inadequacy that produced the injury in fact that the plaintiff has established.[165] Indeed, the Fourth Circuit has overruled nationwide injunctions as preventing the development of divergent views and outcomes.[166]

Declaratory judgment is a binding declaration from a court that defines the legal relationship between parties and their rights in an actual controversy.[167] Declaratory judgment is often sought prior to the filing of a lawsuit, and as such, courts are sometimes hesitant to issue declaratory judgments because they would prefer to see the case develop more before issuing a judgment.[168] Declaratory judgment is known as a "mild" remedy because it lacks a command to the parties, a sanction for disobedience, and full issue-preclusive effect.[169]

[162] State Response, at 25.
[163] Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 165 (2010).
[164] Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994) (quoting Califano v. Yamasaki, 442 U.S. 682, 702 (1979)).
[165] See Lewis v. Casey, 518 U.S. 343, 357 (1996); *see also* Trump v. Hawaii, 138 S. Ct. 2392, 2427, 2429 (2018) (Thomas, J., concurring) (stating that "[f]or most of our history, courts understood judicial power as fundamentally the power to render judgments in individual cases" and concluding that nationwide injunctions "are legally and historically dubious") (internal quotations omitted).
[166] *See* Va. Soc'y for Human Life, Inc. v. Fed. Election Comm'n, 263 F.3d 379, 393 (4th Cir. 2001) (remanding nationwide injunction in favor of more limited relief because such a broad measure encroaches on other circuits' ability to develop their own precedent), *overruled on other grounds by* Real Truth About Abortion, Inc. v. FEC, 681 F.3d 544, 550 n.2 (4th Cir. 2012).
[167] 28 U.S.C. § 2201; *see also Declaratory Judgment*, LEGAL INFO. INST., *available at* www.law.cornell.edu/wex/declaratory_judgment (last visited Sep. 12, 2020).
[168] *Declaratory Judgment*, LEGAL INFO. INST., *available at* www.law.cornell.edu/wex/declaratory_judgment (last visited Sep. 12, 2020).
[169] Steffel v. Thompson, 415 U.S. 452, 471 (1974) ("What is clear, however, is that even though a declaratory judgment has 'the force and effect of a final judgment,' it is a much milder form of relief than an injunction. Though it may be persuasive, it is not ultimately coercive; noncompliance with it may be inappropriate, but is not contempt.") (citations omitted).

Contrary to the State's argument, neither injunctive nor declaratory relief could satisfy the Petitioners' requests for relief stated in the Petition.[170] In particular, Petitioners seek monetary compensation for the violation of their rights, both past and present, and sweeping changes to the military criminal legal system applicable to all service members.[171]

Neither injunctive relief nor declaratory relief can provide monetary compensation because they are equitable, and not tort, relief. As the Commission in *Doe v. Canada* stated, remedies that only allow prospective relief, such as injunctive and declaratory relief, are inadequate in situations where redress is sought for past human rights violations.[172] And here, Petitioners seek redress for past violations in addition to the ongoing harms to their rights.[173]

Further, neither injunctive nor declaratory relief can provide the widespread policy changes that Petitioners seek because injunctions only remedy harms to individuals party to the lawsuit and declaratory judgments are mild remedies that merely state the parties' legal relationship and rights. It is also unclear exactly how the State believes a remedy often acknowledged as "mild" is adequate to remedy the "egregious"[174] violations of human rights that Petitioners faced when they were sexually assaulted in the military and denied any avenue of redress by the country that they were serving every day to protect. Because injunctions and declaratory judgments do not settle any, much less the most pressing, issues stated in the Petition, Petitioners are exempt from pursuing equitable relief in domestic courts under Article 31(2)'s exemption for inadequate remedies.

2. Petitioners Are Not Required to Pursue Relief from the U.S. Veterans Benefits Program.

The State incorrectly claims that Petitioners did not exhaust all domestic remedies because they did not pursue relief from the U.S. Veterans Benefits Program.[175] An exception to the exhaustion principle applies because relief from the U.S. Veterans Benefits Program is inadequate, ineffective, and often unavailable.

[170] Petition, at 78–79.
[171] *Id.*
[172] IACHR, Report No. 78/11, Case 12.586. Merits. John Doe et al. Canada. July 21, 2011, paras. 8, 19.
[173] *See, e.g.*, Petition, at 63–65.
[174] Cioca v. Rumsfeld, No.: 1:11–cv–151–LO–TCB, 2011 WL 13137348 at *1 (E.D. Va. Dec. 9, 2011).
[175] State Response, at 24.

In *Padilla v. United States*, the Commission stated that administrative remedies, even if they offer compensation, are not always adequate mechanisms to remedy human rights violations.[176] In *Padilla*, a detainee alleged that he was unlawfully detained, interrogated, and tortured by agents of the United States.[177] The Commission determined that the detainee did not need to exhaust a claim under the Military Claims Act, a fault-based administrative proceeding to recover damages for personal injuries not incident to military service caused by military personnel or employees of the State acting within the scope of their employment.[178] The Commission reasoned that this remedy is inadequate because it is "exclusively a mechanism for supervising the administrative activity of the State aimed at securing compensation for damages caused by abuse of authority," which "does not constitute an adequate mechanism, on its own, for making reparation in cases of human rights violations."[179]

In *Alves v. Brazil*, the Commission stated that domestic proceedings are inadequate if they do not respond to the core issues of the petition.[180] In *Alves*, the Commission determined that a survivor of domestic violence did not need to exhaust domestic civil remedies in her case of "serious" human rights violations, including the failure of police to investigate her reports of domestic violence against her husband who later tried to kill her.[181] The Commission reasoned that civil remedies are inadequate to respond to the core issues of the petition, including crimes against life and personal integrity, which called for investigation and punishment of those that failed to protect the survivor.[182]

The State argues that Petitioners should have participated in the Department of Veterans Affairs' counseling and treatment program or sought compensation under the Veterans' Benefits Act (VBA).[183] The Department of Veterans Affairs' counseling and treatment program provides treatment to veterans who suffer from sexual trauma.[184] The VBA is a no-fault compensation

[176] IACHR, Report No. 118/19, Petition 2282-12. Admissibility. Jose Padilla and Estela Lebron. United States of America. June 10, 2019, para. 28.
[177] *Id.* para. 1.
[178] *Id.* para. 28; *see also* 10 U.S.C. 2733.
[179] IACHR, Report No. 118/19, Petition 2282-12. Admissibility. Jose Padilla and Estela Lebron. United States of America. June 10, 2019, para. 28.
[180] IACHR, Report No. 117/20, Case 457-09. Admissibility. Margareth Figueiredo Alves. Brazil. April 25, 2020, para. 8.
[181] *Id.*
[182] *Id.*
[183] State Response, at 24–25.
[184] 38 U.S.C. § 1720D.

scheme that provides disability benefits to veterans with service-connected disabilities.[185] However, restrictions placed on the availability and scope of disability benefits limit the ability for certain veterans to receive disability. For example, disability is not always available to those discharged under conditions other than honorable[186] and will not compensate veterans for constitutional harms[187] or for MST without a resulting medical condition.[188] Further, procedural and evidentiary burdens frustrate veterans' ability to receive disability for psychological conditions that result from MST.[189]

The State attempts to frame the VBA as a suitable substitute for the tort relief that Petitioners seek.[190] The State uses the Ninth Circuit's opinion in *Schoenfeld v. Quamme* to propose that U.S. courts find the VBA as an alternative to tort relief.[191] However, other Ninth Circuit decisions, including ones decided before and after *Schoenfeld*, reject the reasoning applied in *Schoenfeld*, including that the VBA is an alternative to tort recovery, as "incoherent" and "heavily criticized."[192] In 2018, the Ninth Circuit stated in *Daniel v. United States* that "because of extensive criticism of the [*Feres*] doctrine and its underlying justifications [including the existence of the VBA], we have 'shied away from attempts to apply these policy rationales.'"[193]

The State also cites *Stencel Aero Engineering Corporation v. United States* to describe the VBA as a "substitute" for tort liability through its "no-fault" scheme that compensates injured service members without "regard to any negligence attributable to the Government."[194] However, Supreme Court justices have challenged this characterization. In the *Stencel* dissent, Justice Thurgood Marshall and Justice William Brennan rejected the rationale of the VBA being a substitute for tort claims and stated "that the basis of *Feres* was the Court's concern with the

185 38 U.S.C. § 1110.
186 *See* 38 U.S.C. § 5303(a); *see also* 38 C.F.R. § 3.12.
187 *See* 38 U.S.C. §§ 1101–04, 1110–18, 1121–22, 1131–35, 1137, 1141–42, 1151–63.
188 *Disability Compensation for Conditions Related to Military Sexual Trauma (MST)*, U.S. DEP'T OF VETERANS AFFAIRS, *available at* https://www.benefits.va.gov/BENEFITS/factsheets/serviceconnected/MST.pdf (last visited Sept. 11, 2020).
189 *See* Petition, at 38–39.
190 State Response, at 24.
191 *Id.*
192 Costo v. United States, 248 F.3d 863, 866 (9th Cir. 2001); Daniel v. United States, 889 F.3d 978, 981 (9th Cir. 2018).
193 889 F.3d at 981 (citing *Costo*, 248 F.3d at 867) (citing Taber v. Maine, 67 F.3d 1029, 1043 (2d Cir. 1995)) (applying the *Feres* doctrine when an injury occurred incident to military service rather than attempting to apply various policy rationales).
194 State Response, at 24.

disruption of '(t)he peculiar and special relationship of the soldier to his superiors' that might result if the soldier were allowed to hale his superiors into court."[195] The Supreme Court has since adopted the reasoning in the *Stencel* dissent as the rationale behind the *Feres* doctrine as applied to *Bivens* claims.[196] As Supreme Court Justice William Brennan has stated, "[T]he VBA fails to address the violation of constitutional rights unaccompanied by personal injury that is not defined as disabling. Those whose constitutional rights are infringed, resulting in humiliation or 'in mere pain and suffering, but no lasting permanent physical injury, would not be compensated at all.'"[197]

Petitioners suffered numerous constitutional violations, in addition to human rights violations, that Justice Brennan declared not compensable through the VBA. The core issues of the Petition include frequent and severe violations to Petitioners' equal protection; life, security, and protection; freedom from torture, inhumane, and degrading treatment; privacy; honor and reputation; inviolability of their homes; ability to work; and access to truth, courts, and timely judicial decisions.[198] The VBA and the Department of Veterans Affairs' counseling and treatment program are inadequate to address these core issues. Neither can fully compensate, if at all, the violations to Petitioners' constitutional and human rights. As a no-fault proceeding and treatment program, neither can hold the State and U.S. military accountable for these violations. And neither can set forth recommendations to the State on how the military criminal legal system must change to protect human rights.

[195] Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 676 (1977) (Marshall, J., dissenting) (citing United States v. Brown, 348 U.S. 110, 113 (1954)); *see also* United States v. Johnson, 481 U.S. 681, 697 (1987) (Scalia, J., dissenting) (stating that the credibility of *Stencel* is undermined by precedent that permitted injured service members to pursue tort claims despite already being compensated under the VBA); United States v. Brown, 348 U.S. 110, 113 (1954) (stating that because "Congress had given no indication that it made the right to compensation [under the VBA] the veteran's exclusive remedy . . . the receipt of disability payments . . . did not preclude [tort] recovery"); United States v. Shearer, 473 U.S. 52, 58 n.4 (1985) (stating that the availability of veterans benefits is no longer controlling to determine whether an injured service member can pursue a tort claim; rather, it is the degree of interference with military management and decision making that controls).

[196] Chappell v. Wallace, 462 U.S. 296, 304 (1983) (applying the *Feres* doctrine to *Bivens* claims and reasoning "[h]ere, as in *Feres*, we must be 'concern[ed] with the disruption of "[t]he peculiar and special relationship of the soldier to his superiors' that might result if the soldier were allowed to hale his superiors into court'" (citing Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 676 (1977) (Marshall, J., dissenting)); *see also* Chappell, 462 U.S. at 299 (explaining *Feres* is "best explained" by the need to maintain the special relationship between soldiers and their superiors).

[197] United States v. Stanley, 483 U.S. 669, 702 n.23 (1987) (Brennan, J., concurring in part and dissenting in part) (quoting Howard Donaldson, *Constitutional Torts and Military Effectiveness: A Proposed Alternative to the Feres Doctrine*, 23 A.F.L. REV. 171, 198–99 (1982–1983)).

[198] Petition, at 47–70.

As the Commission reasoned in *Padilla*, administrative remedies, similar to the no-fault U.S. Veterans Benefits Program, are inadequate mechanisms for making "reparation in cases of human rights violations."[199] And like the Commission stated in *Alves*, violations against life and personal integrity, similar to some of the violations alleged in the Petition, require a remedy more substantial than just compensation.[200] Given that the Commission in *Padilla* and *Alves* found fault-based remedies inadequate to remedy serious human rights violations, it should follow that the State's suggested no-fault remedies, which cannot even declare that the State was in the wrong, are inadequate to remedy the State's flagrant, frequent, and ongoing human rights violations alleged in the Petition.

Further, the VBA is an ineffective and often unavailable remedy for service members suffering from MST-related medical conditions. Section III(E) of the Petition outlines the many barriers victims of MST face when trying to receive compensation through the U.S. Veterans Benefits Program, including demanding evidentiary requirements and resulting trauma that causes the victim to be discharged in a way that makes the victim ineligible to apply for benefits.[201]

Therefore, Petitioners are exempt from pursuing relief from the U.S. Veterans Benefits Program under Article 31(2)'s exemption for inadequate, ineffective, and unavailable remedies.

3. Petitioners Either Pursued or Are Not Required to Pursue Domestic Remedies for Their Articles VII and IX and Portions of Their Articles II and V Claims Under the American Declaration.

Petitioners either pursued or are not required to pursue their Articles VII and IX and portions of their Articles II and V claims because the State did not satisfy its evidentiary burden and any unpursued claim was unavailable, ineffective, or inadequate under domestic law.

First, the State did not satisfy its evidentiary burden. The State carries the burden to indicate which remedies should have been pursued and demonstrate that they are suitable for remedying the alleged violations.[202] Here, the State argues that Petitioners should have raised

[199] IACHR, Report No. 118/19, Petition 2282-12. Admissibility. Jose Padilla and Estela Lebron. United States of America. June 10, 2019, para. 28.
[200] IACHR, Report No. 117/20, Case 457-09. Admissibility. Margareth Figueiredo Alves. Brazil. April 25, 2020, para. 8.
[201] *See* Petition, at 38–39.
[202] *See* IACHR, Report No. 192/18, Petition 1506-08. Admissibility. Oswaldo Marcelo Lucero et al. United States of America. December 31, 2018, para. 18.

several other claims in domestic proceedings but fails to identify a domestic legal basis or avenue to pursue these claims or demonstrate that there are suitable remedies to protect the rights infringed in these claims.[203] For this reason alone, Petitioners are exempt from the exhaustion requirement under Article 31(2).[204]

Additionally, Petitioners either did pursue or was not required to pursue these claims. Petitioners are exempt from the exhaustion requirement if a domestic remedy is unavailable.[205] A domestic remedy is unavailable if a State does not provide a legal basis upon which relief can be granted.[206] The claims flagged by the State were either raised by the Petitioners in a domestic proceeding or have no remedy available under domestic law as explained below.

a. Right to Equal Protection on the Basis of Military Status and Sexual Orientation Under Article II.

Petitioners raised all Article II equal protection claims in their domestic litigation. In U.S. federal court, Petitioners asserted broad equal protection claims under the Fifth and Fourteenth Amendments, which encompassed discrimination on the basis of military status and sexual orientation.[207] Petitioners asserted facts in their domestic litigation that would have allowed the courts to find a violation of the equal protection clause on the basis of military status, such as the facts that Petitioners were unable to access to the civilian justice system when the military system was ineffective.[208] Petitioners also asserted facts about discrimination on the basis of sexual orientation, such as the facts that Command discharged Petitioners Jeloudov and Desautel from the military upon the belief that they were gay[209] and that Command and fellow soldiers harassed Petitioner Stephens because they believed he was gay.[210] Therefore, Petitioners exhausted their domestic remedies under Article 31(1) for these claims in their domestic litigation.

[203] State Response, at 22–23.
[204] *See* IACHR, Report No. 192/18, Case 1506-08. Admissibility. Oswaldo Marcelo Lucero et al. United States of America. December 31, 2018, paras. 11, 18 (holding that the petitioners were exempt from the exhaustion requirement when the United States could not identify a domestic legal basis or suitable remedy for the petitioners' claim that the United States failed to affirmatively protect Latinos from hate crimes).
[205] *Id.* para. 18.
[206] *Id.*
[207] *See* First Amended Complaint at 53, Cioca v. Rumsfeld, C.A. 1:11cv00151, 2011 WL 13137348 (E.D. Va. Sept. 6, 2011).
[208] *See id.*
[209] *Id.* at 15, 45–46.
[210] *Id.* at 33–35.

In any event, military status is not a recognized suspect classification under Fifth or Fourteenth Amendment jurisprudence.[211] Therefore, an equal protection claim on the basis of military status in the Petitioners' circumstances is practically unavailable, which would also make Petitioners exempt from the exhaustion requirement for this portion of their Article II claim.

b. Right to Private Family Life Under Article V.

U.S. federal law does not recognize a comparable right to private family life as defined in Article V. The U.S. Constitution does not explicitly mention a right to privacy, but some amendments provide some protections in the right to personal or familial privacy.[212] The Fifth and Fourteenth Amendments due process rights[213] provide the most relevant constitutionally protected privacy interest: the right to "independence in making certain kinds of important decisions."[214] However, this protection is not absolute[215] and only limits the government's power to regulate decisions about marriage, procreation, contraception, family relationships, and child rearing and education.[216]

Petitioners assert under Article V that the State violated Petitioners' right to private life by enabling the sexual assaults that caused the Petitioners' pain and suffering and affected their ability to maintain personal relationships.[217] This claim exceeds the protections offered by the Fifth and Fourteenth Amendments because Petitioners do not allege that the State enacted some sort of regulation that scrutinizes and controls the Petitioners' personal relationships.[218]

[211] When a non-suspect class brings an equal protection claim, a rational-basis review is applied to the claim. This review is extremely deferential to the government and only requires that the government have a reasonable and non-arbitrary reason for enacting the particular law. F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993). The legislature and the Supreme Court have frequently cited "inescapable demands of military discipline and obedience to orders" as the reason for needing a "special and exclusive system of military justice." Chappell v. Wallace, 462 U.S. 296, 300–04 (1983).

[212] *See, e.g.*, U.S. Const. amend. V; U.S. Const. amend. XIV.

[213] Note that the due process clauses of the Fifth and Fourteenth Amendments provide the same protections. The difference is that the Fifth Amendment applies to the federal government and the Fourteenth Amendment applies to state and local governments. The majority of due process issues, however, involve state laws.

[214] Whalen v. Roe, 429 U.S. 589, 599–600 (1977) (citing Roe v. Wade, 410 U.S. 113 (1973)); *see also* Doe v. Bolton, 410 U.S. 179 (1973); Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923); Allgeyer v. Louisiana, 165 U.S. 578 (1897).

[215] Roe, 410 U.S. at 155.

[216] Paul v. Davis, 424 U.S. 693 (1976).

[217] Petition, at 63.

[218] *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 666 (2015) (invalidating several states' laws to the extent they excluded same-sex couples from civil marriage because decisions concerning marriage are among the most intimate

Regardless, Petitioners did lodge a Fifth Amendment due process claim in their domestic litigation.[219] Therefore, Petitioners either exhausted domestic remedies or are not required to exhaust domestic remedies for this portion of their Article V claim.

c. Right to Special Protection During Pregnancy Under Article VII.

The State violated Petitioner Lyman's Article VII rights to special protection, care, and aid because she was pregnant or nursing when a fellow marine raped her and when Command acquitted her rapist of all charges.[220] There is no comparable right to special protection during pregnancy and nursing in U.S. law, and the State offers no example of such a right.[221] Therefore, Petitioners are exempt from the exhaustion requirement as there is no available domestic remedy for their Article VII claim.

d. Right to Inviolability of the Home Under Article IX.

U.S. federal law does not recognize a comparable right to inviolability of the home as defined in Article IX, and the State offers no example of such a right.[222] The military is unique in that it provides housing to service members and thus has a responsibility to protect service members against violence in their homes. There is no mutual obligation for the government to provide such protection to civilians in domestic law. Therefore, Petitioners are exempt from the exhaustion requirement as there is no available domestic remedy for their Article IX claim.

Even if the State was able to show that there are legal bases and avenues in domestic law to pursue the claims mentioned above, the State would not be able to show that there are suitable remedies for the violations alleged. As explained in Subsections B and C of this Section, domestic courts have clearly shown they will not review claims that implicate meddling in the decision making of the military.[223] Therefore, Petitioners either did pursue or are not required to

and private that an individual can make); Lawrence v. Texas, 539 U.S. 558, 562, 567 (2003) (holding that a statute criminalizing homosexual sodomy invades privacy by inviting "unwarranted government intrusions" that "touc[h] upon the most private human conduct, sexual behavior . . . in the most private of places, the home"); Griswold, 381 U.S. at 485–86 (invalidating a criminal law that banned the use of contraceptives because the nature of the ban threatened the intrusion of "the police to search the sacred precincts of marital bedrooms").

[219] Petition, at 22.

[220] *Id.* at 64–65.

[221] State Response, at 24.

[222] *Id.*

[223] *See* Petitioners' Observations, at Section IV(B)–(C).

pursue their Articles VII and IX and portions of their Articles II and V claims under Article 31(2)'s exemption for unavailable, ineffective, and inadequate remedies.

4. Petitioner Bertzikis Pursued a Claim in U.S. Courts That Used Proper Authority to Determine Her Ability to Receive the Requested Relief.

The State incorrectly claims that Petitioner Bertzikis did not pursue any available remedies because she lacked standing in Petitioners' *Bivens* claim against Department of Defense officials.[224] However, both the plaintiffs and defendants in the *Bivens* suit noted that the federal courts did not need to address the standing issue of Petitioner Bertzikis as a Coast Guard plaintiff in considering defendants' motion to dismiss.[225] Similarly, the federal courts did not find a standing issue.[226] The Fourth Circuit stated that judicial abstention in second-guessing military discipline and decision making was a threshold issue that barred Petitioners' claim before jurisdiction needed to be examined.[227] In other words, the Fourth Circuit determined that regardless of jurisdictional issues, it could not adjudicate the *Bivens* claim in light of the *Feres* doctrine because every plaintiff, including Petitioner Bertzikis, alleged injuries that were "clearly" incident to their military service.[228] Therefore, the Fourth Circuit foreclosed the opportunity for Petitioner Bertzikis to bring a *Bivens* claim raising the same issues against officials in any military branch, including the Coast Guard, in the future.

In *Juvenile Offenders Sentenced to Life Imprisonment Without Parole*, the Commission indicated that the exhaustion requirement does not require every petitioner to pursue the same domestic remedy when their claims are largely the same.[229] In that case, the Commission held that all 32 petitioners were exempt from the exhaustion requirement when only one petitioner presented arguments before domestic courts that invoked the main issues alleged in their petition.[230] The Commission reasoned that the State's refusal to remedy the issues brought in the

[224] State Response, at 26.
[225] Supplemental Brief for Plaintiffs-Appellants at 3, Cioca v. Rumsfeld, 720 F.3d 505 (4th Cir. 2013) (No. 12-1065) (Attachment A); Supplemental Brief for Defendants-Appellees at 1–3, Cioca v. Rumsfeld, 720 F.3d 505 (4th Cir. 2013) (No. 12-1065) (Attachment B).
[226] Cioca v. Rumsfeld, 720 F.3d 505 (4th Cir. 2013); Cioca v. Rumsfeld, No. 1:11-cv-151-LO-TCB, 2011 WL 13137348 (E.D. Va. Dec. 9, 2011).
[227] Cioca, 720 F.3d at 508 n.4.
[228] *Id.* at 512.
[229] IACHR, Report No. 18/12, Petition 161-06. Admissibility. Juvenile Offenders Sentenced to Life Imprisonment Without Parole. United States of America. Mar. 20, 2012, paras. 52, 56–57.
[230] *Id.* paras. 56–57.

petitioner's domestic litigation left the remaining petitioners with no reasonable prospect of success to bring similar claims.[231] Therefore, even if Petitioner Bertzikis did not have standing to pursue a *Bivens* claim against the *Cioca* defendants, the Fourth Circuit's dismissal of the other Petitioners' *Bivens* claim left Petitioner Bertzikis with no reasonable prospect of success in bringing a nearly identical claim in exactly the same court as the other Petitioners.

Like the other Petitioners, Petitioner Bertzikis exhausted her domestic remedies under Article 31(1) when the Fourth Circuit dismissed her *Bivens* claim. Further, Petitioner Bertzikis is not required to pursue other domestic remedies under Article 31(2) for the reasons stated above and in Subsections A through C of this Section.[232]

V. THE PETITION MEETS THE REQUIREMENTS OF ARTICLE 34 OF THE INTER-AMERICAN COMMISSION'S RULES OF PROCEDURE.

In arguing that the Petition has failed to meet the requirements of Article 34 of the Honorable Commission's Rules of Procedure, the State repeatedly mischaracterizes the Petition's aims. The allegations within the Petition target systemic failures by the military, interconnected by policies born of complacency. The Commission must hold the State accountable for creating an environment that fosters hostility to survivors of sexual violence and for failing to adequately respond to sexual violence among its service members. The State portrays the events alleged in the Petition as one-off aberrations disconnected from the military's operations. The attempt to mischaracterize the Petition only speaks to the State's unwillingness to meaningfully tackle grave human rights abuses within the military. Throughout its response, the State manages to evade the core of Petitioners assertions—that there are fundamental problems within the military's response to sexual violence.

The State attempts to minimize the instances of sexual assault, harassment, and rape alleged here by separating the crimes from the institution that gave raise to them, arguing that the alleged crimes "[do] not entail State action, but rather, alleged private criminal conduct of active duty service members"[233] and portraying these crimes as products of "individuals in their

[231] *Id.*
[232] *See* Section IV(A)–(C), *supra.*
[233] State Response, at 57.

personal capacities, not human rights violations perpetrated by the State."[234] The State attempts to belittle Petitioners by referring to them as "20 individuals" while failing to acknowledge that the experiences of these 20 Petitioners cannot be isolated from the systemic and pervasive problems in the State's response system that failed these Petitioners and countless other men and women.[235] The State additionally fails to acknowledge that it was complicit in the Petitioners' dehumanization by failing to hold its members accountable for sexual violence and failing to adequately afford Petitioners redress for the sexual violence they experienced.

Despite assertions that these facts entail acts committed outside of the official capacity of the perpetrators, the role that military leadership plays in preventing and responding to crimes committed by its service members falls within the official capacity of that role, and the State is therefore liable for acts committed within that role. Even where these State actors fail to adhere to international human rights standards, these actors operate in a position of power on behalf of the State, and their violations are thus attributable to the State.[236] As the International Law Commission made clear, acts of officials are still attributable to the State even when "the person concerned may have had ulterior or improper motives or may be abusing public power."[237] Even if the Commission construes the military service members committing sexual misconduct as private actors, it has previously held that "the duty of the State to implement human rights obligations in practice can extend to the prevention and response to the acts of private actors."[238] It has further noted that "the rights contained in the American Declaration may be implicated when a State fails to prevent, prosecute and sanction acts of domestic violence perpetrated by private individuals."[239] The Commission recognizes as well that States are responsible where acts or omissions on the part of a State entity lead to the deprivation of an individual's rights, or where a State obligation exists that the State has not fulfilled.[240] In this case, the United States

[234] *Id.* at 53.
[235] *Id.* at 43.
[236] *See* International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), Art. 4 (A/56/10) (Conduct of organs of a State).
[237] *Id.*, commentaries, para. 13.
[238] IACHR, Report No. 80/11, Case 12.626. Merits. Jessica Lenahan (Gonzales). United States of America. July 21, 2011, para 119.
[239] *Id.*
[240] IACHR, Report No. 96/19, Case 11.726. Norberto Javier Restrepo. Colombia. June 14, 2019, para. 81 ("In such circumstances, to establish a violation of the rights enshrined in the Convention one need not determine, as in domestic criminal law, the guilt of its agents or their intent, nor need one individually identify the agents to which the violations are attributed, nor establish 'that the responsibility of the State is proven beyond all reasonable doubt.'").

violated the Petitioners' rights under the American Declaration by failing to act with due diligence to prevent and adequately respond to the sexual violence they experienced while serving in the military.

A) The Petition is Admissible under 34(a) as it Consistently States Facts that Tend to Establish Violations of Rights Set Forth in the American Declaration.

At the admissibility stage, the Commission conducts "a *prima facie* evaluation to determine whether the petition provides grounds for the apparent or potential violation of a right."[241] This determination differs from the standard used to decide on the merits of the complaint as the Commission is not required to determine whether or not the alleged violations took place.[242]

The violations enumerated by the American Declaration can also be understood by the Commission's interpretation of the violations' counterparts in the American Convention on Human Rights. The America Convention on Human Rights "in many instances, may be considered to represent an authoritative expression of the fundamental principles set forth in the American Declaration."[243]

As to all of the violations described below, the Petitioners have stated facts that tend to establish a violation of the American Declaration.[244]

1. Petitioners Have Alleged Facts That Tend to Establish a Violation of the Right to Life, Liberty, and Personal Security Under of Article I of the American Declaration.

The State incorrectly argues that the acts alleged by the Petition do not tend to establish a violation of Article 1 of the American Declaration, which guarantees the right to life, liberty and the security of his person, because those acts are not attributable to the United States.[245] The State also wrongly asserts that the Petition is baseless because it recognizes that the United States

[241] IACHR, Report No. 92/19, Case 11.624. Admissibility and Merits. Jorge Darwin García and family. Ecuador. June 14, 2019, para. 45.
[242] IACHR, Report No. 154/10, Petition 1462-07. Admissibility. Linda Loaiza López Soto and relatives. Venezuela. November 1, 2010, para. 55.
[243] IACHR, Report No. 40/04, Case 12.053. Merits. Maya indigenous communities of the Toledo District. Belize. October 12, 2004, para. 87.
[244] *See* IACHR, Rules of Procedure, art. 34(a); *see also id*. at art. 27.
[245] State Response, at 45.

has "established a system that investigates, prosecutes, and punishes violations of the law, including sexual assault."[246] It further states that there is no evidence that Petitioners' right to life was prejudiced in any way.[247] It also claims the Petitioners fail to state facts that establish a violation of the right to security of person, because the elements of torture and/or cruel, inhuman, and degrading treatment or punishment (CIDTP), if included in this right, have not been met.[248] These arguments are uniformly groundless. The facts presented by the Petitioners are squarely attributable to the United States, in that they reveal a system that is built on the complacency and negligence of military leadership regarding sexual violence. The facts clearly tend to establish violations of the right to life and to personal security under Article I of the Declaration.

a. The Right to Life and Security of Person Requires a System of Justice That is Effective in Order to Protect Those Rights.

The State's position that the Petition is baseless because it recognizes that the United States has "established a system that investigates, prosecutes, and punishes violations of the law, including sexual assault"[249] reveals an impermissibly narrow misinterpretation of the right to life and security of the person. Indeed, the State's insistence that the Petition "acknowledges" that there were investigations, prosecutions, and even a sole conviction among the Petitioners' cases[250] misses the point. The Inter-American Commission and Court have made clear that the right to life and security of person requires the establishment of a system of justice to protect those rights and investigate, prosecute and punish violations when they occur that is effective.[251] The mere existence of a system for investigating, prosecuting, and punishing violations of the law does not guarantee that system's effectiveness or adequacy. Nor does the fact that a case within that system has resulted in a conviction mean that the system is adequate, effective, and consistent with human rights standards. Claiming that such a system is incapable of violating rights simply because it does not fail in all cases is dangerous; it enables and perpetuates impunity; and deprives victims of their right to justice. Furthermore, the State repeats its assertion that "[n]othing in the American Declaration compels a particular sentence in an

246 *Id.*
247 *Id.*
248 *Id.* at 47.
249 *Id.* at 45.
250 *Id*.
251 Inter-American Court, Case of the Pueblo Bello Massacre Vs. Colombia. Merits, Reparations and Costs. Judgment of Jan. 31, 2006, Series C No. 140, paras. 120, 124-30, 140.

individual criminal case."[252] While this is true, it is imperative to recognize that repeated case dismissals, repeated instances of victim-blaming, and repeated sentences that overwhelmingly favor the perpetrator are the mark of a dysfunctional system, not of random individual happenstance.

b. The Petitioners Have Presented Facts That Tend to Establish a Violation of the Right to Life.

The State's claim that "there is no allegation that Petitioners' rights to life have been prejudiced in any way,"[253] fails to recognize that the right to life includes positive as well as negative obligations. The right to life has been consistently interpreted through a broad lens, as imposing both positive and negative duties upon States. As the Inter-American Court of Human Rights has explained, the right to life assumes not only:

> [T]hat no one shall be deprived of life arbitrarily (negative obligation), but also, in light of the State's obligation to guarantee the full and free exercise of human rights, it requires States to adopt all the appropriate measures to protect and preserve the right to life (positive obligation). This active protection of the right to life by the State involves not only its legislators but all State institutions and those responsible for safeguarding security, whether they are members of its police forces or armed forces. Consequently, States must 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 the deprivation of life as a result of criminal acts, but also to prevent and protect individuals from the criminal acts of other individuals and to investigate these situations effectively.[254]

[252] State Response, at 62; *see also id.* at 61.
[253] State Response, at 45.
[254] Inter-American Court, Case of the Pueblo Bello Massacre Vs. Colombia. Merits, Reparations and Costs. Judgment of Jan. 31, 2006, Series C No. 140, para. 120; cf. Inter-American Court, Case of the "Mapiripán Massacre" Vs. Colombia. Merits, Reparations, and Costs. Judgment of September 15, 2005, Series C No. 134, para. 232; Inter-American Court, Case of Huilca Tecse Vs. Peru. Merits, Reparations and Costs. Judgment of March 3, 2005, Series C No. 121, para. 66; Inter-American Court, Case of the "Juvenile Reeducation Institute" Vs. Paraguay. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 2, 2004, Series C No. 112, at para. 136. This standard was also recognized in IACHR, Report No. 48/01, Case 12.067. Admissibility and Merits. Michael Edwards. Bahamas. March 7, 2000 (Commissioner Hélio Bicudo, concurring).

Other positive measures that are required to protect the right to life include "adopt[ing] any measures that may be necessary to create an adequate statutory framework to discourage any threat to the right to life" and "protect[ing] the right of not being prevented from access to conditions that may guarantee a decent life, which entails the adoption of positive measures to prevent the breach of such right."[255]

Regarding the right to life in the context of gender-based violence specifically, the Commission held in *Lenahan (Gonzales) v. United States* that "[t]he 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 . . . ."[256] Thus, along with the obligation not to arbitrarily deprive individuals of life, the State also has the positive obligation under Article I to "adopt all the appropriate measures to protect and preserve the right to life."[257] Drawing from the Inter-American Court's interpretation of the right to life above, it is clear that these measures include, among other duties, obligations to: establish an adequate statutory framework to discourage any threat to the right to life; ensure that all State institutions including its armed forces both respect and actively protect the right to life; create an effective system of justice that protects individuals from criminal acts by either state agents or individuals; and ensure that individuals are not prevented from access to conditions that guarantee a decent life, including protection from sexual assault and retaliation, and access to justice when such violations occur.

c. The Petitioners Have Stated Facts That Tend to Establish a Violation of the Right to Security of Person.

The State contends that it is not responsible for violating Petitioners' right to personal integrity because the events alleged here do not comply with the definition of torture under the United Nations Convention Against Torture (CAT) and the domestic law of the United States.[258] This contention is entirely misguided, however, because the definition of torture underlying

[255] Inter-American Court, Sawhoyamaxa Vs. Paraguay. Merits, Reparations and Costs. Judgement of March 29, 2006, Series C No. 146, para. 153.
[256] IACHR, Report No. 80/11, Case 12.626. Merits. Jessica Lenahan (Gonzales). United States of America. July 21, 2011, para. 128.
[257] Inter-American Court, *Case of the Pueblo Bello Massacre Vs. Colombia.* Merits, Reparations and Costs. Judgment of Jan. 31, 2006, Series C No. 140, para. 120.
[258] State Response, at 46.

Petitioners' claims is rooted in the jurisprudence of the Commission and its understanding of torture. The State even admits that the CAT "is outside the competence of the Commission"[259] but dissects the standards of the CAT at length while ignoring the substantial body of law developed under the Commission that clearly implicates the State's responsibility for acts of torture against Petitioners. While legal standards from other international bodies or domestic legislatures may offer useful guidance, the standards under the CAT and under U.S. law do not displace the well-established jurisprudence of the Commission just because the State does not find its case particularly compelling under the Commission's legal jurisprudence.

While it is not necessary to address the State's contention that the acts alleged here do not fit the definition of torture under the CAT since the Commission's jurisprudence is the more relevant body of law, it is important to acknowledge the way that the State's argument fails in this regard because it is illustrative of the State's pattern of denying and misrepresenting the atrocities committed against Petitioners. The State notes that the CAT recognizes that:

> [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain and suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person *acting in an official capacity.*[260]

The State's contention that the acts alleged by Petitioners do not comply with this standard given that the perpetrators of these crimes are not acting in an official capacity is without merit. The introduction to Section V has already addressed the mistaken contention that members of the U.S. Military are not acting in a State capacity when they fail to act with due diligence to prevent and respond to instances of sexual violence against service members by both State actors and private actors.[261] Commanding officers and other military leaders who foster a culture of sexual harassment and impunity, retaliate against survivors, or refuse to effectively

[259] *Id.*
[260] *Id.*
[261] *See supra* discussion accompanying notes 236–240.

prosecute or remedy acts of sexual violence are acting in an official capacity by acquiescing to, and sometimes inflicting or instigating, the discriminatory acts of sexual violence, harassment, and retaliation that intentionally inflict severe pain and suffering on survivors, amounting to torture under the CAT. Additionally, the State's contention that torture must entail a perpetrator exercising custody or physical control of the victim is based on U.S. domestic law[262] and is irrelevant to proceedings where the State must account to international standards under the American Declaration.

Further, as noted above, the State's focus on the CAT obscures the fact that the Inter-American system's interpretation of torture applies in this case, and that the Commission's jurisprudence recognizes that rape is a form of torture.[263] The Inter-American definition of torture differs from the CAT definition in that it does not require instigation, consent, or acquiescence. [264] The Commission interprets Article 1 of the Declaration as maintaining the same protections as Article 5 of the American Convention, which provides that every person has the "right to have his physical, mental, and moral integrity respected. . . . No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment."[265] The Petition additionally highlights the Inter-American Convention to Prevent and Punish Torture's definition of torture:

> [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*. . . .[266]

The Commission has relied on this definition in the past in establishing the scope of torture.[267] It has explained that torture requires three elements: "1) it must be an intentional act through which

[262] State Response, at 46 (citing 18 U.S.C. 2340).
[263] Petition, at 60 (citing IACHR, Report No. 5/96, Case 10.970. Admissibility and Merits. Raquel Martín de Mejía. Peru. March 1, 1996, § 5(B)(3)(a)) ("[R]ape 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.").
[264] Petition, at 58 (citing Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, paras. 154, 155 & n.388 (2002)) (explaining 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).
[265] American Convention on Human Rights, art. 5.
[266] Petition, at 59 (quoting Art. 2 of the Inter-American Convention to Prevent and Punish Torture).
[267] *Id.* (citing IACHR, Report No. 5/96, Case 10.970. Admissibility and Merits. Raquel Martín de Mejía. Peru. March 1, 1996, § 5(B)(3)(a)).

physical and mental pain and suffering is inflicted on a person; 2) it must be committed with a purpose; and 3) it must be committed by a public official or by a private person acting at the instigation of the former."[268] In addition the Inter-American Convention to Prevent and Punish Torture further outlines that those who can be held responsible for the crime of torture include: "[p]ublic employees or officials who acting in that capacity *order, instigate, induce its commission, commit it directly or, when in a position to prevent it, do not do so*," as well as persons who at the instigation of such employees or officials "commit, order, instigate, or induce its commission."[269] Thus, the standards used by the Commission encompass an act of a public employee or official who intentionally inflicts, instigates, orders, induces, or fails to prevent, when in a position to do so, physical, mental pain, or suffering for any purpose. Petitioners' facts relating to the sexual violence and retaliation committed by military service members and the failure of Commanders and other military leaders to prevent such acts when in a position to do so clearly fall within this definition and thus tend to establish a violation of the right to personal security, understood as encompassing the right to be free from torture.

Even if the Commission were to accept the State's argument that the Petitioners have not presented facts that tend to establish a violation of the right to be free from torture, the Petition has presented facts that tend to establish the human rights violation of inhumane or degrading treatment, in violation of the right to security of person.[270] The Commission has recognized that inhumane treatment can consist of acts that inflict mental and emotional suffering, including "trauma and anxiety,"[271] "intimidation" or "panic,"[272] or "emotional trauma."[273] The Petition also highlights that where Petitioners were subject to multiple violations, e.g. physical violence accompanying sexual violence, "individual acts that may not constitute torture or cruel, inhuman or degrading treatment may rise to this level when performed in combination."[274] In addition, the

[268] *Id.* (citing IACHR, Report No. 5/96, Case 10.970. Admissibility and Merits. Raquel Martín de Mejía. Peru. March 1, 1996, § 5(B)(3)(a)).
[269] IACHR, Report No. 5/96, Case 10.970. Admissibility and Merits. Raquel Martin de Mejía. Peru. March 1, 1996, § 5(B)(3)(a) (quoting Art. 3 of the Inter-American Convention to Prevent and Punish Torture) (emphasis added).
[270] Petition, at 61.
[271] *Id.* (citing IACHR, Report No. 32/96, Case No. 10.553. Admissibility and Merits. María Mejía. Guatemala. October 16, 1996, para. 60).
[272] *Id.* (citing IACHR, Report No. 32/96, Case No. 10.553. Admissibility and Merits. María Mejía. Guatemala. October 16, 1996, para. 61).
[273] *Id.* (citing IACHR, Report No. 47/96, Case No. 11.436. Victims of the Tugboat "13 de marzo." Cuba. October 16, 1996, para. 106).
[274] *Id.* (citing Nigel Rodley, The Treatment of Prisoners Under International Law (2d ed. 1999)).

Petition recognizes that violence against women also violates the right to personal integrity and protection under Article 1 of the Declaration.[275]

Given the preceding standards, the State is responsible for depriving Petitioners of the right to life and personal integrity. The Petitioners here have endured brutal sexual violence,[276] some on multiple occasions, at the hands of fellow service members. Petitioner Stephens was repeatedly subjected to sexual violence on the commands of his superior, who believed him to be homosexual.[277] When Petitioner Wilson reported a military doctor for sexual assault, the military did not interview the perpetrator and instead transferred him to Kuwait, where he would eventually assault other service members.[278] Petitioner Neutzling was sexually assaulted on multiple occasions by different service members despite reporting her assaults on all but one occasion.[279] Petitioner Stark's Commander assaulted her three times.[280] When Petitioner Gallagher reported her coworker for sexual assault and stalking, her Command told her they could do nothing about it, and the perpetrator eventually assaulted her again.[281] These assaults, compounded by devastating retaliation, the deeply inadequate response of the military's leadership, and the State's failure to take adequate steps to prevent and respond to military sexual violence, both systematically and in the specific cases of the Petitioners, clearly tend to establish a violation of Petitioners' rights to life and personal integrity.

2. Petitioners Have Alleged Facts That Tend to Establish a Violation of The Right to Equality Under Article II of the American Declaration.

The State asserts that the Petition targets the State's unwillingness to conduct investigations on the basis of gender, sexual orientation, and military status and that Petitioners failed to produce facts that would suggest the State did so on the basis of a protected identity.[282]

[275] *Id.* (citing Inter-American Commission on Human Rights, Report of the Inter-American Commission on Human Rights on the Status of Women in the Americas, Chapter III (C) (2) (1998)).
[276] Inter-American Court, Case of the Miguel Castro-Castro Prison Vs. Peru. Merits, Reparations and Costs. Judgment of November 25, 2006, Series C No. 160, para. 306. (explaining that the Court recognizes 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 that do not imply penetration or even physical contact whatsoever").
[277] Petition, at 18.
[278] *Id.* at 21.
[279] *Id.* at 14.
[280] *Id.*
[281] *Id.* at 6–7.
[282] State Response, at 47.

More accurately, however, the Petition asserts that the State failed to uphold the standards of due diligence in preventing, investigating, prosecuting, sanctioning, and affording redress for sexual misconduct against these Petitioners due to institutionally embedded biases that denigrate and marginalize women and LGBTQI/gender-non-conforming individuals within the military.[283] The facts alleged by Petitioners establish a violation of the right to equality before the law and to the application of the Declaration's rights "without distinction as to race, sex, language, creed, or any other factor," under Article II of the Declaration. The State ignores the substantial facts alleged by the Petitioners that demonstrate blatantly unequal treatment in the adjudication of sexual assault and in the failure to protect Petitioners from sexual violence. The facts alleged by Petitioners speak to the ways that sexual assault survivors must confront misogyny, homophobia, retaliation, and stigma when they endure sexual assault in the military.

a. Petitioners Have Presented Facts That Tend to Show That the United States Discriminated Against Them Based on Their Gender and/or Sexual Orientation.

The facts presented by the Petitioners illustrate the myriad ways in which the United States failed to act with due diligence to prevent and respond to the gender-based sexual violence they experienced, in violation of Article II of the American Declaration. Where a State fails to act with due diligence in protecting individuals from gender-based violence, the Commission considers this a form of discrimination that violates the right to equality.[284] Article II requires States to not only respond to instances of gender-based violence against women, LGBTQI, and gender-non-conforming individuals, but also to create affirmative measures to protect these individuals from the deprivation of their rights under the Declaration.[285] The Commission in *Lenahan* recognized that "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,

[283] *See* Petition, at 53 ("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."); *id*. at 56 ("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.'").
[284] IACHR, Report No. 80/11, Case 12.626. Merits, Jessica Lenahan (Gonzales). United States of America. July 21, 2011, para. 111 (case of inadequate police response to the kidnapping and murder of Lenahan's two young children where police failed to enforce restraining order and failed to uncover truth due to defects in investigation).
[285] *See id.* para. 118.

when these are committed by either State or non-State actors."[286] Moreover, disciplinary proceedings on the basis of sexual orientation are intrinsically groundless and discriminatory.[287]

The facts that Petitioners presented show that the U.S. Military fostered or condoned a culture of misogyny and homophobia that gave rise to the acts of sexual violence that Petitioners experienced and colored the military's response. When Petitioner Kenyon reported her rape to Command, the officer warned her that it may be used against her during promotional review.[288] Petitioner Schroeder's Commander responded to her reporting her rape by stating: "Don't come bitching to me because you had sex and changed your mind."[289] Petitioner Yeager's Command accused her of having "holes" in her story and launched an investigation against her after the rape charges were dropped.[290] When Petitioner Walker's parents sought information about the Navy's handling of her case, a Navy officer told her mother that "the Navy needs men more than they need your daughter."[291] Petitioner Jeloudov's fellow service members harassed her and called her a "commie faggot."[292] Petitioner Stephens was told by associates that "his Command had ordered the harassment because Command believed Petitioner Stephens was homosexual and wanted him out of the military."[293] Petitioner Desautel's investigation halted after she was discharged under the discriminatory "Don't Ask, Don't Tell" policy, impeding her ability to seek justice due to an explicitly homophobic disciplinary proceeding.[294]

As described in the Petition, the events described here are part of a broader problem, in that misogyny and homophobia are endemic in the military. "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" contribute to an environment where derogatory attitudes about women and sexual minorities fuel violence against

[286] Id. para. 122.
[287] Inter-American Court, Case of Atala Riffo and Daughters vs. Chile. Merits, Reparations and Costs. Judgement of February 24, 2012, Series C No. 254, para. 221.
[288] Petition, at 13.
[289] *Id.* at 15.
[290] *Id.* at 16.
[291] Carla Butcher, et al. v. United States, Petition No. P-106-14, January 18, 2015, at 19.
[292] Petition, at 10.
[293] *Id.* at 18.
[294] *Id.* at 22.

these groups.[295] Additionally, "'[a]t 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."[296] Military culture gives rise to sexual violence, and the particular inadequacies of the military response system prevent redress for the victims of this violence.

The Petition also highlights how the United States failed to address the structural impediments to justice for the Petitioners, in violation of its due diligence obligation to provide meaningful remedies for acts of gender-based sexual violence.[297] These impediments include the involvement of the Chain of Command in prosecutorial decisions and adjudications, lack of meaningful access to civilian courts, inadequate protection from retaliation, and unequal access to Veterans benefits.[298] It is irrelevant that these barriers apply to all service members who experience sexual misconduct; the violation of the Declaration arises from the United States' failure to provide meaningful redress for violence that constitutes discrimination based on gender and sexual orientation. In addition, the U.S. Military's dismissal of Petitioners' Jeloudov and Desautel under its former Don't Ask, Don't Tell policy directly discriminated against them on the ground of sexual orientation.[299]

These individual experiences and the systemic conditions in which they arose in highlight the ways that gender-based discrimination burdens survivors of sexual assault. While the State contends that such alleged actions were not based on Petitioners' protected statuses, the experiences detailed in the Petition provide abundant evidence that Petitioners were subjected to sexual violence, primarily by others in the military, on account of their gender and/or sexual

[295] *Id.* at 27 (quoting 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, 271 (2010)).
[296] *Id.* (quoting Turchik & Wilson, *supra*).
[297] Petition, at 53; *see also* IACHR, Report No. 80/11, Case 12.626. Merits. Jessica Lenahan (Gonzales). United States of America. July 21, 2011, para. 122.
[298] Petition, at 33–39.
[299] Although the military subsequently repealed this policy, a party can still seek adjudication by the Commission if the party has not received adequate remediation as a result and the discriminatory policy was in force at the time the Petitioner experienced discrimination. IACHR, Report No. 81/13, Case 12.743. Merits. Homero Flor Freire. Ecuador. November 4, 2013, paras. 78–80. Moreover, the United States has more recently reinstated a discriminatory ban on transgender service members. Presidential Memorandum on Military Service by Transgender Individuals, 82 Fed. Reg. 41319, (Exec. Office of the President August 25, 2017), *available at* https://www.whitehouse.gov/presidential-actions/presidential-memorandum-secretary-defense-secretary-homeland-security; Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security Regarding Military Service by Transgender Individuals, 83 Fed. Reg. 13367 (Exec. Office of the President March 23, 2018), *available at* https://www.whitehouse.gov/presidential-actions/presidential-memorandum-secretary-defense-secretary-homeland-security-regarding-military-service-transgender-individuals.

orientation. The facts alleged not only demonstrate that the State failed to meet its obligation to act with due diligence to prevent and respond to military sexual violence, but also that the State actively prevented Petitioners from accessing justice through retaliation, intimidation, and harassment. Leadership within the military perpetrated and aided these human rights abuses in their capacity as State actors with the authority to hold perpetrators accountable for their misconduct.

b. Petitioners Have Presented Facts That Show That the United States Discriminated Against Them on the Basis of Military Status.

The State contends that "military status would not clearly constitute a protected basis for impermissible discrimination within the meaning of Article II."[300] This argument is misplaced. The American Declaration guarantees equal rights to all people, "without distinction as to race, sex, language, creed *or any other factor*," indicating that the identities protected under this Article can include those outside of these enumerated identities.[301] The Commission has regularly found violations of the right to equality where discrimination was based on a factor other than those enumerated.[302]

The facts alleged in the Petition demonstrate that Petitioners, by virtue of belonging to the military, were subject to a lesser degree of protection from sexual violence and of meaningful access to redress than they would have been entitled to if they had not been military service members. This is supported by statistics cited in the Petition that indicate that women service members experience sexual assault at rates that are higher than those for women outside of the military system.[303] Service members work and live in deeply insular environments where they may feel alienated from civilian life, making them reliant on their superiors and associates for protection and support. In a recent survey of service members' experiences with sexual assault,

[300] State Response, at 47.
[301] American Declaration of the Rights and Duties of Man, Organization of American States, art. II (emphasis added), *available at* https://www.cidh.oas.org/Basicos/English/Basic2.american Declaration.htm (last visited Sep. 8, 2020).
[302] *See* IACHR, Report No. 81/13, Case 12.743. Merits. Homero Flor Freire. Ecuador. November 4, 2013, para. 111 (Commission recognizes sexual orientation as a protected identity where Petitioner was discharged from Ecuadorian military for perceived homosexual sexual conduct on military base.); *see also* IACHR, Report No. 80/11, Case 12.626. Merits. Jessica Lenahan (Gonzales). United States of America. July 21, 2011, para. 113 ("Protection measures are considered particularly critical in the case of girl-children, for example, since they may be at a greater risk of human rights violations based on two factors, their sex and age.").
[303] Petition, at 26 (citing 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, 271 (2010)).

"participants said the victims' vulnerability with other Service members is attributed to the emphasis on brotherhood and sisterhood and trusting fellow Service members."[304] The case of Petitioner Schmidt highlights this dynamic; his 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.'"[305]

At the same time, service members' experiences with sexual misconduct are directly correlated with the normative attitudes accepted by their superiors.[306] Attitudes towards sexual assault in the military prioritize group cohesion and order within a paternalistic, hierarchical culture above the right of Petitioners to be free from sexual assault. According to State reports, "unhealthy workplace climates" within the military contribute to sexual harassment and deter reporting.[307] In particular, a culture of retaliation and impunity for retaliatory behavior regularly denies survivors redress or deters them from reporting the violence they experienced in the first place.[308] For example, after Petitioner Bertzikis reported her assault to her Command, she was labeled a "liar" and "whore," threatened with prosecution, and told that she would "pay for snitching."[309] Petitioner Schroeder did not report the attempted rape that she experienced at the hands of a co-worker because of a fear of reprisal that was well-justified in light of the devastating social and professional retaliation she had been subjected to after reporting past incidents of sexual violence to Command.[310]

Additionally, since the military grants Commanders the power to prosecute and investigate allegations of sexual misconduct, conflicts of interest and biases on the part of the Commander can impede meaningful redress. In a civilian system, independent and impartial

[304] Lisa Davis et al., *2019 Military Service Gender Relations Focus Groups: Active Duty*, 2019 Office of People Analytics, 43.
[305] *See* Petition, at 12.
[306] Anne G. Sadler et al., *Factors Associated with Women's Risk of Rape in the Military Environment*, 43 AM. J. INDUS. MED. 262, 268 (2003).
[307] DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2018, 7, 11–12 (2019), *available at* https://www.sapr.mil/sites/default/files/DoD_Annual_Report_on_Sexual_Assault_in_the_Military.pdf. (2019) (recognizing the contribution of "unhealthy workplace climates" on the prevalence of sexual assault); *see also* DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2019, 16 (2020) (sharing a focus group finding that "unhealthy command climate" can deter service members from reporting sexual assault), *available at* https://media.defense.gov/2020/Apr/30/2002291660/-1/-1/1/1_DEPARTMENT_OF_DEFENSE_FISCAL_YEAR_2019_ANNUAL_REPORT_ON_SEXUAL_ASSAULT_IN_THE_MILITARY.PDF.
[308] *See* discussion at Section III(D), *supra*.
[309] Petition, at 11.
[310] *Id*. at 15–16.

prosecutors bring cases to trial, whereas military Commanders lack impartially, often do not have legal training or guidance, and are primarily concerned with the operational logistics required by their roles.[311] As a result, the military's prosecution rates for rape and sexual assault are far lower than the rates in the civilian system.[312] The degree of power the military exerts over service members can have devastating consequences when those in positions of power abuse their authority for their own ends or fail to address serious misconduct by those under their control. This is exacerbated by the fact that the United States' federal jurisprudence prevents survivors of military sexual assault from suing the military for violating their constitutional rights under the "*Feres* doctrine."[313] By failing to prevent sexual violence against service members and by limiting access to meaningful remedies, the military deprives service members of the right to equality under Article II.

3. Petitioners Have Alleged Facts That Tend to Establish a Violation of the Right to the Protection of Honor, Personal Reputation, and Private and Family Life Under Article V of the American Declaration.

The State incorrectly claims that the Petitioners have not stated facts that tend to establish a violation of the right to family and private life under Article V of the American Declaration.[314] Article V provides that "every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life."[315] The State argues that a violation of this right requires a direct and abusive act of the State and argues that such action is not present here.[316]

As previously discussed, however, a State may be held accountable for the actions of private actors.[317] There is nothing in the language of Article V that suggests that States cannot be held accountable in certain circumstances for abusive attacks by private actors. Indeed, the right

311 *Id*. at 34–35.
312 *Id*. at 33 (citing American Association of University Women, "STOP Act Aims to End Sexual Assault in the Military," April 24, 2013 and Bill Brigges, Civil Rights *Commission urged to order audit of military sex-assault cases*, NBCNEWS.com, Jan. 11, 2013).
313 Petition, at 36 ("[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 [military] service.") (citing to Feres v. United States, 340 U.S. 135, 146 (1950)).
314 State Response, at 48.
315 American Declaration of the Rights and Duties of Man, Organization of American States, art. V, https://www.cidh.oas.org/Basicos/English/Basic2.american%20Declaration.htm (last visited Sep. 8, 2020).
316 *Id.*
317 *See* introduction to Section V, *supra*.

is framed in terms of the State's responsibility to guarantee "*the protection of the law* against abusive attacks."[318] A violation reflects the failure of the State to afford meaningful protection against abusive attacks to honor, reputation, or private and family life, regardless of whether the perpetrator of these acts is a State or private actor.

Further, direct State action was present in the form of military officials abusing their positions to actively harass and retaliate against Petitioners and to discourage the pursuit of justice. Petitioners' private and family lives continue to be affected not only by the assaults they suffered, but also by the military's deeply inadequate and often hostile and revictimizing response. For example, Command told Petitioner Schmidt, "Don't make us deal with you in a physical way," and "the Marine Corp know where your mother is."[319] These statements cannot be construed in any other way but as direct threats to the private and family life of both Schmidt and his mother.

The State also incorrectly claims that allegations of retaliation, such as through reduction in rank, denial of promotion, or discharge from service, are refuted by the facts of Petitioners' cases.[320] The Petitioners strongly contest the State's claims, as discussed in Section V(B).[321] Further, the Commission has made clear that an analysis of essential factual disputes cannot be considered at the admissibility stage, where only a prima facie case is called for.[322]

Notably, while focusing on the facts that are in dispute, the State does not suggest that professional retaliation, such as that alleged by the Petitioners, cannot violate the right to honor under Article 5.[323] Moreover, the State's argument fails to address the wide range of actions by Command and others that constituted attacks upon Petitioners' honor. These include for example, being called various sexually and discriminatory names such as "bitch, pussy, fag, and

[318] American Declaration of the Rights and Duties of Man, Organization of American States, art. V (emphasis added).
[319] Petition at 12.
[320] State Response, at 49.
[321] *See* Section V(B), *infra*.
[322] IACHR, Report No. 160/20, Case 524-10. Admissibility. Tanimbu Guiraendy Estremadoiro Quiroz. Bolivia. July 2, 2020, para. 20 (admitting the petition of an indigenous journalist who alleged that a mob including State officials had violated her rights while the State categorically denied that State agents of any level took part in the assault).
[323] *See also* IACHR, Case 11.500. Tomas Eduardo Cirio. Uruguay. October 27, 2006 (finding a violation of Article 15 where the military had stripped the petitioner of rank and benefits as punishment for criticizing the military).

cunt"[324] or "liar and a whore,"[325] or circulating a video of a rape to fellow soldiers.[326] This verbal shame and social abuse only deepened the violation of honor that Petitioners suffered.

Thus, the facts presented by the Petitioners that describe the sexual assaults, harassment, threats, and retaliation to which they were subjected, as well as the structural problems that contributed to these harms and denied the Petitioners access to justice, tend to establish the State's failure to ensure their right to the protection of the law from abusive attacks on their honor, reputation, and private and family life under Article V.

4. Petitioners Have Alleged Facts That Tend to Establish a Violation of the Right to Protection for Mothers and Children Under Article VII of the American Declaration.

The State argues that the Petition does not identify a special protection entitled to Petitioner Lyman under Article VII that was denied by the United States.[327] The Petition argues that the United States failed to enforce the heightened degree of protection Petitioner Lyman was entitled to as a pregnant woman, as required by Article VII. Article VII should be construed as requiring States to ensure that pregnant women do not incur the particularized trauma of experiencing sexual assault while pregnant, potentially causing psychological stress and physical injuries that can harm the mother and the unborn child. The *Case of the Miguel Castro-Castro Prison v. Peru* illustrates the ways that pregnant woman are particularly vulnerable to psychological and physical harm as a result of sexual assault, as the pregnant women in that case feared not only for themselves but for the lives and dignity of their potential children as a result of dehumanizing violence directed at female prisoners by military police.[328]

Additionally, the State misconstrues Petitioner Lyman's claim as targeting the outcome of a criminal proceeding and states that "Article VII cannot be construed to guarantee the outcome of legal process and dissatisfaction with the outcome of a criminal trial does not substantiate an allegation of a violation."[329] In actuality, the Petitioner argues that the State failed

[324] Petition, at 8.
[325] *Id*. at 11.
[326] *Id*. at 14.
[327] State Response, at 50.
[328] Inter-American Court, *Case of the Miguel Castro-Castro Prison Vs. Peru*. Merits, Reparations and Costs. Judgment of November 25, 2006, Series C No. 160, para. 292 ("The pregnant women who lived through the attack experimented an additional psychological suffering, since besides having seen their own physical integrity injured, they had feelings on anguish, despair, and fear for the lives of their children.").
[329] State Response, at 50.

her by failing to protect her from sexual assault and by failing to provide meaningful redress in compliance with the principle of due diligence, as it is obligated to do. Her status as a pregnant woman compounds these failures further because pregnant individuals require a heightened degree of protection due to the potential trauma specific to those carrying a child.[330]

5. Petitioners Have Alleged Facts That Tend to Establish a Violation of the Right to Inviolability of the Home Under Article IX of the American Declaration.

The State argues that the Petitioners have not presented facts that tend to establish a violation of Article IX of the American Declaration, which guarantees the right of every person to the "inviolability of his home,"[331] because there is no evidence that the United States allowed sexual violence and harassment to occur.[332] Here, the State once again misrepresents the Petitioners' claims as being about no more than private offenses.

As discussed in the introduction to this Part, this Petition concerns not merely private action, but also human rights violations committed by the State.[333] The Petitioners' claims target the State's responsibility for multiple and systemic failures to prevent and respond to sexual violence, in violation of Petitioners' right to inviolability of the home. Moreover, in the aftermath of the violence, the U.S. Military exercised its control over Petitioners' homes to further violate their rights.

The State incorrectly claims that "homes" as such were not involved, because most of the Petitioners were not in their homes at the time of the alleged acts.[334] This claim fails to recognize the nature of the right to inviolability of the home, as applied to a military setting. Like other rights that concern privacy, the right to inviolability of the home must be interpreted broadly. The home is not merely a house, but any space meant for personal habitation and safety and used as such; the rhetoric of sanctuary that surrounds the concept of inviolability of the home "signals

330 *See, e.g.*, Inter-American Court, *Case of the Miguel Castro-Castro Prison Vs. Peru*, para. 187 (explaining Thomas Wenzel's expert opinion that "the tension suffered by the mother could have great impact on the development and life of a child, especially if this tension occurs in the last three months of the pregnancy").
331 Organization of American States, American Declaration of the Rights and Duties of Man, art. IX, OEA/Ser.L./V.II.23, doc. 21, rev. 6 (1948), reprinted in Basic Documents Pertaining to Human Rights in the InterAmerican System, OEA/Ser.L.V./II.82, doc. 6, rev. 1 at 17.
332 State Response, at 50.
333 *See* introduction to Section V, *supra*.
334 State Response, at 50.

that the home is a refuge for persons and their intimate relationships against invasion and intrusion, either by government or by others."[335]

Petitioners, as members of the United States military, are in a unique situation. Military members are often required to work and live on base in United States military-provided housing, so the military bases are their homes.[336] Their homes are places of refuge, rest, and habitation. The military—as owner and landlord of the Petitioners' residences—controlled where and with whom the Petitioners would live, and so was under a heightened obligation to ensure that Petitioners were protected from violence within their homes and able to enjoy the sanctuary that a home should provide. The military failed to meet this obligation.

Petitioners describe how the United States failed to act with due diligence to protect their right to the inviolability of the home. Petitioner Gallagher's abuser stalked her by breaking into her room; when she reported the incident, Command told her that "there was nothing they could do about it."[337] Petitioner Jeloudov and Petitioner Lyman were each raped in their barracks.[338] Petitioner Stephens's abusers stole his clothes while he was in the shower and took naked pictures of him when he went out into the snow to retrieve them.[339] Petitioner Schroeder's superior entered her room at night and sexually assaulted her. The next day, Petitioner Schroder's Commander disciplined her for having a man in her room.[340] Furthermore, in the aftermath of the attacks, the military used its control over Petitioners' homes to make the situations even less safe and protective. In particular, Petitioner Albertson's Commander refused to allow her to change housing, and she was therefore forced to live one floor below her rapist for two years,[341] Petitioner Bertzikis was "forced to live on the same floor as and work alongside her rapist so that, according to Command, they could 'work out their differences.'"[342] Petitioner Stephens was denied a transfer to a safe location,[343] and Petitioner Sewell's "perpetrator was

[335] Linda C. McClean, *Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, 7 YALE J.L. & HUMAN. 195, 203 (recognizing that the concept of the inviolability of the home has been used to sanction the abuse of women by men but arguing for a feminist reinterpretation rather than the abandonment of this concept).
[336] For Petitioners in the Navy or Coast Guard, a military ship also sometimes served as their home.
[337] Petition, at 7.
[338] *Id*. at 10, 19.
[339] *Id.* at 17–18.
[340] *Id*. at 15.
[341] *Id*. at 9.
[342] Petition at 11.
[343] *Id*. at 18.

moved to the barracks across from hers."[344] In all of these cases, the United States contributed to the transformation of Petitioners' homes from places of refuge, rest, and habitation to locations of distress, danger, and violence.

Therefore, Petitioners have stated ample facts that tend to establish a violation of Article IX of the American Declaration, because their right to the inviolability of their homes was not adequately protected or ensured.

6. Petitioners Have Alleged Facts That Tend to Establish a Violation of the Right to Work and to Fair Remuneration Under Article XIV of the American Declaration.

The State argues that the Petitioners have failed to present facts that tend to establish a violation of their rights under Article XIV of the American Declaration "to work, under proper conditions, and to follow his vocation freely, insofar as existing conditions of employment permit."[345] Incredibly, the State claims that Petitioners fail to establish facts that could support their allegations that they were denied access to work under proper conditions or that they were subjected to a hostile and discriminatory work environment.[346] The State's argument is misplaced, as physical and verbal harassment, sexual assaults, stalking, and discriminatory slurs, as well as Command's decisions not to address these issues, clearly implicate the right of access to work under proper conditions.

Addressing women's right to work, the Commission has stated that "[i]t 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."[347] The Commission went on to cite the penalization of workplace harassment against women—especially sexual harassment—as a priority issue related to the exercise of the right to work.[348] The importance of addressing sexual harassment and violence at the workplace, as part of ensuring the right to work, also should be

[344] *Id*. at 21.
[345] Organization of American States, American Declaration of the Rights and Duties of Man, art. XIV, OEA/Ser.L./V.II.23, doc. 21, rev. 6 (1948), reprinted in Basic Documents Pertaining to Human Rights in the InterAmerican System, OEA/Ser.L.V./II.82, doc. 6, rev. 1 at 17.
[346] State Response, at 52.
[347] Inter-Am. Comm'n H.R., Thematic Report, *The Work, Education and Resources of Women: The Road to Equality in Guaranteeing Economic, Social and Cultural Rights*, OEA/Ser/L/V/II.143 para. 84 (2011).
[348] *Id.* para. 85.

understood in light of the right to equality under Article II of the Declaration, discussed in Section V(A)(2), which obligates States to protect Petitioners from gender-based violence in any setting, including the workplace.

This approach to the right to work is supported by that of other international bodies. The UN Committee on Economic, Social and Culture Rights has confirmed that ensuring "freedom from violence and harassment, including sexual harassment," is fundamental to guaranteeing the international human right to "just and favorable conditions of work" under the International Covenant on Economic, Social, and Culture Rights.[349] The International Labour Organization has further explained that "[s]exual 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 imposes costs on firms and organizations."[350] Moreover "[f]or the International Labour Organization, workplace sexual harassment is a barrier towards its primary goal of promoting decent working conditions for all workers."[351]

None of the harassment, abuse, violence, discrimination, or disregard imposed upon Petitioners, as described in the facts, can therefore be described as proper in any regard, let alone proper conditions in the context of a working environment. Most of the Petitioners were sexually harassed, assaulted, or raped by a co-worker or supervisor.[352] Petitioner Schmidt was sexually assaulted by a shipmate while he was lining up to receive gear.[353] Petitioner Haider's supervisor regularly sexually harassed her, slapping her bottom whenever he walked by.[354] Petitioner Schroeder's co-worker masturbated in front of her while they were moving supplies.[355] Petitioner Havrilla's Commander equated being female with being weak and used terms like "bitch," "pussy," "fag," and "cunt."[356] Petitioner Schmidt's higher ranked shipmates held him down while they sexually assaulted him; Command later discouraged Petitioner Schmidt from

[349] U.N. Committee on Economic, Social, and Cultural Rights, General Comment No. 23 (2016) on the Right to Just and Favorable Conditions of Work, para. II (2) (interpreting Article 7 of the International Covenant on Economic, Social, and Cultural Rights).
[350] Deirdre McCann, International Labour Organization, *Sexual Harassment at Work: National and International Responses*, vii (2005), *available at* https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_travail_pub_2.pdf.
[351] *Id.*
[352] *See generally* Petition at 6–22.
[353] *Id*. at 12.
[354] *Id*. at 8.
[355] *Id*. at 16.
[356] *Id*. at 8.

"reporting against one of your own."[357] Command forced Petitioner Albertson to closely work with and report to her abuser for two years.'"[358] As these examples reveal, Petitioners have presented abundant facts of the sexual harassment, violence, and retaliation they faced in the U.S. Military that clearly tend to establish a violation of the right to work under proper conditions under Article XIV of the American Declaration.

7. Petitioners Allege Facts that Tend to Establish a Violation of the Right to Freedom of Investigation Under Article IV of the American Declaration.

The State misleadingly contends that because the "United States *did* conduct investigations in both of [Petitioners Lockhart and Desautel's] cases," it did not violate the right to freedom of investigation.[359] In fact, the Petitioners in this case, including both Petitioner Lockhart and Petitioner Desautel, present facts that show that while investigations did take place, they were grossly inadequate and violated the requirements of Article IV of the Declaration.[360]

Article IV requires that the investigations undertaken by the State are serious, prompt, thorough, impartial, and conducted in accordance with international standards of investigation.[361] International standards emphasize respect and dignity for the victim as crucial to an investigation.[362] The State must demonstrate that the investigation "was not the product of a mechanical implementation of certain procedural formalities without the State genuinely seeking the truth."[363] Additionally, the Commission highlights the importance of the victim's right to information and updates regarding the case.[364]

As to the two Petitioners highlighted in the State's reply, Petitioner Desautel and Petitioner Lockhart both endured investigations that failed to uphold standards required by the Commission. The initial investigation into Petitioner Desautel's assault indicated signs of sexual violence and DNA evidence was collected, but instead of pursuing the investigation further and

[357] *Id*. at 12.
[358] *Id*. at 8.
[359] State Response, at 52 (emphasis in original).
[360] Petition, at 69–70.
[361] IACHR, Report No. 80/11, Case 12.626. Merits. Jessica Lenahan (Gonzales). United States of America. July 21, 2011, para. 181.
[362] The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. res. 40/34, annex, 40 U.N. GAOR Supp. (No. 53) at 214, U.N. Doc. A/40/53 (1985), para. 4.
[363] IACHR, Report No. 80/11, Case 12.626. Merits. Jessica Lenahan (Gonzales). United States of America. July 21, 2011, para. 181 (quoting IACHR, Report No. 55/97, Case 11.13. Admissibility and Merits. Juan Carlos Abella et al. Argentina. November 18, 1997, para. 412).
[364] *Id.* para. 193.

providing the Petitioner with the truth, the military dismissed her under the blatantly discriminatory "Don't Ask, Don't Tell" policy.[365] Petitioner Lockhart's investigation was saddled with bias. Her commanding officer openly referred to her as a "slut" and threatened to charge her with adultery if she pursued reporting.[366]

There are ample examples of defects in the investigations conducted by the military in the facts presented by other Petitioners as well. After Petitioner Lyman was assaulted, her Command threw out rape kit evidence and pictures of bruises and lacerations from the assault.[367] Command failed to inform Petitioner Wilson properly about her ability to testify and she missed the hearing against her perpetrator as a result.[368] Petitioner Anderson's investigation was demonstrably biased, in that the documentation provided by the military indicates that it was possible for Petitioner Anderson to consent to her sexual assault despite the fact that she had indicated that she was intoxicated, a narrative commonly used to stigmatize and cast doubt on survivors of sexual assault.[369] Additionally, the military failed to treat Petitioner Anderson with respect and dignity when she was forced to stay aboard her ship after her assault, forced to remain on call for 24 hours a day, and on one occasion was confined to a medical ward and denied food.[370] The military consistently failed to uphold the standards of a serious, prompt, thorough, and impartial investigation by making flagrant mistakes in handling crucial evidence, exhibiting bias by blaming victims for their assaults, subjecting victims to degrading treatment, and failing to inform and update victims on the progress of trials.

8. Petitioners Allege Facts that Tend to Establish Violations of The Rights to Resort to the Courts and to Petition the Government and Receive a Prompt Decision Under Articles XVIII and XXIV, Respectively.

The State misconstrues the facts presented by the Petitioners when it argues that the Petition does not tend to establish violations of Petitioners' right to resort to the courts to ensure

365 Petition, at 22.
366 *Id.* at 17.
367 *Id.* at 19.
368 *Id.* at 21.
369 State Response, Attachment 7 at 245. Criminal Investigative Service Redacted Report of Investigation into Allegations Made by Petitioner Anderson. The military's current definition of "consent," adopted several years after Petitioner Anderson's experiences, recognizes that incapacitated individuals cannot consent to sexual acts. Memorandum for Secretaries of the Military Departments, (Office of the Under Secretary of Defense, Dec. 13, 2004), *available at* http://www.ncdsv.org/images/DoDDefSexAssaultJTF-SAPR-006.pdf.
370 Petition, at 10.

respect for their legal rights under Article XVIII of the Declaration and their right to petition the government and obtain a prompt response under Article XXIV of the Declaration. The State insists that Petitioners have not presented facts tending to show that it violated their right to resort to the courts and to a fair trial because the facts entail "private criminal violations not attributable to the State."[371] It further argues that the Petitioners were not denied their right to petition when the U.S. federal courts refused to hear their case on its merits.[372]

In the military context, however, sexual assaults implicate State responsibility because they are systematically enabled by the military's actions and inactions that foster, condone and fail to reflect due diligence in addressing sexual violence committed by and against its own members.[373] Moreover, regardless of whether the handling of sexual assault cases by a military criminal legal system a *per se* violation of Declaration rights, the facts alleged by the Petitioners tend to establish that the U.S. Military's handling of their cases, as well as the cases of other military sexual assault survivors, violated the United States' fair trial obligations. In addition, the Petitioners in this case were not only required to submit their claims of sexual violence through the military system but they were also denied their rights to resort to the courts and petition the government to seek redress for the constitutional and human rights violations committed by the United States through its deeply inadequate and abusive response to the Petitioners' sexual violence claims.

9. Petitioners Have Alleged Facts That Tend to Establish That the United States Violated Their Right to a Fair Trial Under Article XVIII of the American Declaration.

Regardless of whether the American Declaration requires survivors of military sexual assault to be afforded the right to resort to civilian courts, in this case the Petitioners have

371 State Response, at 53.
372 *Id.* at 57.
373 *See* International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), Art. 4 (A/56/10) (Conduct of organs of a State) (explaining that intentional actions by State actors fall within their official capacity even when those actions constitute abuses of power or otherwise unethical behavior); IACHR, Report No. 80/11, Case 12.626. Merits. Jessica Lenahan (Gonzales). United States of America. July 21, 2011, paras. 114–19 (discussing States' obligation under the American Declaration to protect individuals from gender-based violence or provide a meaningful remedy when such violence occurs).

presented abundant facts that tend to show that the military criminal legal system violated their right to a fair trial under Article XVIII of the American Declaration.[374]

Under Article XVIII, the right to a fair trial provides that "every person may resort to the courts to ensure respect for his legal rights" and that "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." The Commission has articulated the right to a fair trial under Article XVIII in light of the similar right to judicial protection under Article 25 of the Convention, which includes the right to go to a tribunal when rights have been violated; the right to a purposeful investigation by a competent, impartial, and independent tribunal that establishes whether the violation took place; and the right to receive reparations for the harm suffered.[375] Defects in the right to a purposeful investigation can include a State's failure to protect victims and witnesses from threats which arose from the investigations; delays, obstacles and obstructions during the proceedings; and grave omissions in the development of logical lines of investigation.[376] Moreover, "if the State apparatus acts in such a way that the violation remains unpunished and the victim's full rights are not restored to him to the extent possible, it can be affirmed that the State has failed to perform its duty."[377]

Petitioners present abundant facts that tend to show that the military criminal legal system violated their rights to resort to the courts. Their facts reveal deeply inadequate investigatory, judicial, and remedial proceedings that create and entrench a system of impunity within the military, and that specifically denied them meaningful redress. For example, the military retaliated against several Petitioners who reported their sexual assaults to leadership. After Petitioner Albertson reported her rape to Command, her Command threatened to charge her with "Inappropriate Barracks Conduct" for consuming alcohol.[378] Her superiors later openly harassed and ostracized her, and Command forced her to disclose the medications she took to

[374] Here, the Reply focuses on Article XVIII's right to a fair trial in response to the State's Response, but Petitioners do not abandon their Article XXIV right to petition claim with respect to the military criminal legal process.
[375] IACHR, Report No. 80/11, Case 12.626. Merits. Jessica Lenahan (Gonzales). United States of America. July 21, 2011, para. 172 (discussing Article 25 of the Inter-American Convention of Human Rights, which the Commission explained is similar in scope).
[376] Inter-American Court, *Case of the Rochela Massacre Vs. Colombia.* Merits, Reparations and Costs. Judgment of May 11, 2007, Series C No. 163, para. 155.
[377] IACHR, No. 5/96, Case 10.970. Admissibility and Merits. Raquel Martín de Mejía. Peru. March 1, 1996, § 5(B)(3)(b) (quoting Inter-American Court, *Case of Velásquez Rodríguez Vs. Honduras*. Merits, Reparations and Costs. Judgment of July 29, 1988, Series C No. 4, para. 176).
[378] Petition, at 9.

cope with her trauma, then revoked her security clearance and downgraded her assignments.[379] As mentioned earlier, Petitioner Anderson was subject to retaliation upon reporting her assault, where she was forced to stay aboard the ship and remain on call for 24 hours a day, and on one occasion was confined to the medical ward while being denied food.[380] After Petitioner Sewell reported her assault, Command removed her from training and required her to perform cleaning duty full time while allowing her perpetrator to finish the training course.[381] These facts provide a strong indication of the State's failure to protect victims from retaliation arising from the sexual assault reports and investigations, as required by the right to resort to the courts under Article XVIII.

In many other ways too, the State failed to afford meaningful redress to the Petitioners. When Petitioner Sampson's assault was substantiated by Army CID, Command only issued a "letter of reprimand and a negative counseling statement."[382] Petitioner Wilson's perpetrator was found responsible of sexual misconduct and sentenced to 24 months in prison, but Command suspended his sentence after a single week.[383] After Petitioner Stark and several other servicewomen came forward with allegations against her Commander, the Commander was jailed and charged with sexual assault, but the military dropped the charges and forced the Commander to resign, only for the Commander to join the Army Reserves two years later.[384] Not only does the military fail to provide redress in the form of reparations or sanctions, but in many cases sexual assault survivors struggle to receive disability benefits after leaving the military due to the trauma they have endured.[385] The pattern of apathy and antagonism directed at service members who report sexual misconduct demonstrates a broad unwillingness on the part of the military to punish violations and provide meaningful remedy to Petitioners, in violation of their right to resort to the courts.

Additionally, the Petition describes the multiple ways in which the military criminal legal system presents systematic barriers to justice that violated the Petitioners' right to resort to the

379 *Id.*
380 *Id.* at 10. *See* discussion in Section V(B)(7), *supra*.
381 Petition, at 20.
382 State Response, at 40.
383 Petition, at 21. Additionally, the perpetrator was only questioned after additional reports of sexual assault were filed against him. When Petitioner Wilson filed a report alongside three other servicewomen, the military did not question him and instead transferred him to Kuwait.
384 *Id.* at 14.
385 *Id.* at 38.

courts. These barriers include the involvement of the accused service member's Chain of Command in prosecutions and adjudications, lack of access to civilian courts, inadequate protection from the retaliation described above, and a pervasive culture of impunity.[386] Thus, contrary to the State's claims,[387] the Petitioners' facts support a case-specific determination that the United States violated their rights under Article XVIII of the American Declaration.

a. Petitioners Have Alleged Facts That Tend to Establish That by Limiting Petitioners to the Military Criminal Legal System, the United States Violated Their Right to a Fair Trial.

Although the Petitioners' allegations support a determination that the United States violated their right to fair trial regardless of whether the handling to sexual assault cases by the military criminal legal system is a *per se* violation of Declaration rights, the events alleged by the Petitioners illustrate exactly why the Commission has consistently criticized military tribunals as unfit to resolve human rights abuses.

The State attempts to deny the applicability of this criticism by asserting that the abuses alleged in the Petition do not rise to the level of abuses committed in *Márcio Lapoente da Silveira v. Brazil.*[388] In *Silveira*, the Petitioners alleged that the Brazilian military subjected their deceased kin, a soldier in training, to brutal treatment by military officials, leading to his death, which the State initially failed to take accountability for.[389] The military investigation failed to provide the deceased's next-of-kin with an adequate remedy due to the military's entrenched interests in the outcome of the trial. The Petitioners here, despite the State's willful denials, allege facts that share important similarities with the events in *Silveira*. The Petitioners experienced brutal assaults in the course of their careers due to the military's latent acceptance of

[386] *Id.* at 26–36.
[387] State Response, at 53.
[388] *Id.* at 54. The State also argues at length that the cases of La Cantúta and Rochela Massacre, which the Petition cites briefly, are inapposite to the facts alleged by Petitioners. Id. at 56–57 (discussing Inter-American Court, Rochela Massacre Vs. Colombia. Merits, Reparations, and Costs. Judgement of May 11, 2007, Series C No. 163, paras. 200, 204; and Inter-American Court, La Cantúta Vs. Peru. Merits, Reparations and Costs. Judgment of November 29, 2006, Series C No. 162, paras.142). The State's observations about the cited cases and the events alleged here rest on the inaccurate insistence that the facts alleged by the Petition do not concern State action. In reality, the Petition is centrally concerned with State action, and the Petitioners allege facts that share similarities to the cited cases, as they establish that State actors committed human rights abuses with the belief that their positions of power granted them impunity.
[389] IACHR, Report No. 74/08, Case 4524-02. Admissibility. Márcio Lapoente da Silveira. Brazil. October 16, 2008, para. 15.

sexual assault and the military responded by denying the existence of these assaults, retaliating against Petitioners, and conducting incompetent investigations that failed to provide Petitioners with meaningful relief.

Additionally, the State attempts to discount these similarities by referring to the facts alleged by Petitioners as "private criminal conduct by active-duty service members" that "is not analogous as a legal matter to the serious human rights violations identified [including torture]."[390] While the State characterizes sexual assault by military service members as private conduct, it also quotes language from the Commission that explains that the jurisdiction of military tribunals should only apply to "crimes that are purely military in nature" or offenses by military service members "pertaining to their function."[391] In other words, the State appears to argue that military sexual assault is private conduct that is nonetheless military in nature and pertains to service members' military functions.

The State's argument fails to acknowledge that the Commission has recognized that rape is a form of torture when committed by public officials or private persons acting at their instigation[392] or that it has specifically condemned adjudication of rape by military tribunals, emphasizing that such violence does not pertain to service members' legitimate military functions.[393] As the Commission explained in *González Pérez v. Mexico*:

> The acts of abuse committed by members of the Armed Forces that deprived four victims of their liberty and the rape of the González Pérez sisters . . . cannot in any way be considered acts that affect the legal assets of the military, nor does this case pertain to offenses committed while military officers were discharging legitimate functions entrusted to them under Mexican legislation . . . . In other words, even if there was no evidence of common offenses that constitute human rights violations (and this is not the case here), there is no link to an activity by the Armed Forces that can justify the involvement of the military courts. The Inter-American Convention stresses that torture in all its forms is categorically

390 State Response, at 54.
391 *Id.* at 55.
392 IACHR, No. 5/96, Case 10.970. Admissibility and Merits. Raquel Martín de Mejía. Peru. March 1, 1996, § 5(B)(3)(b) ("[R]ape 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.").
393 IACHR, Report No. 53/01, Case 11.565. Merits. Ana, Beatriz and Celia González Pérez. Mexico. April 4, 2001, para. 82.

> prohibited by international law, and, for this reason, the investigation into the facts related to this case by the military courts is completely inappropriate.[394]

Thus, contrary to the State's argument, the Commission has recognized that rape by military service members is not private conduct that is military in nature but instead is a human rights violation that does not pertain to legitimate military functions.

In addition, shortly after this Petition was filed, the U.N. Committee Against Torture specifically raised concern about the U.S. Military's "high prevalence of sexual violence, including rape, and the alleged failure of the Department of Defense to adequately prevent and address military sexual assaults of both men and women serving in the armed forces (arts. 2, 12, 13, and 16)." The Committee thus recognized that the prevalence of sexual assault and the failure to address it implicated the State obligations to prevent, investigate, adjudicate, and ensure meaningful redress for torture under the Convention Against Torture. [395] It is clear, therefore, that rape and sexual assault in the U.S. Military can be form of torture, and that both this violence and the United States' failure to act with due diligence to adequately respond to it are serious human rights violations that give rise to a right to resort to ordinary civilian courts.

b. The Jurisprudence of the United States Shields the Military from Liability and Deprives Petitioners of Their Right to a Fair Trial and Right to Petition.

Not only were the Petitioners limited to the closed military criminal legal system, they were also denied their right to resort to the courts and to petition the government—under Articles XVIII and XXIV of the Declaration—to seek a remedy for the constitutional and human rights violations committed against them by the United States. The State contends that the Petitioners have failed to present facts that tend to support this claim because they are actually alleging rights violations based on an undesired outcome in federal court.[396] In actuality, Petitioners are alleging a violation of the right to petition and resort to the courts based on the fact that both the federal district and appellate courts dismissed Petitioners' claims without even considering the merits of the case due to their application of the well-established *Feres* doctrine.[397] Under this

[394] *Id.*
[395] U.N. Committee Against Torture, *Concluding observations on the third to fifth periodic reports of United States of America*, CAT/C/USA/CO/3-5, para. 30 (2014).
[396] State Response, at 57.
[397] Petition, at 25 ("[T]he Government is not liable under the [Federal Tort Claims Act] for injuries to service men where the injuries arise out of or are in the course of activity that is incident to service.") (citing Feres v. United States, 340 U.S. 135, 146 (1950)).

doctrine, the Supreme Court has held that military service members may not pursue a federal tort action against the United States for injuries or civil rights violations that are incident to military service.[398] This effectively precludes Petitioners from holding the military accountable in domestic courts for even the most grievous human rights violations. As discussed in Section IV(B), *supra*, any attempt to petition to the Supreme Court would be futile and any other conceivably available remedies are not practically available, adequate, and/or effective. Therefore, Petitioners have stated facts that tend to establish a violation of their rights to resort to the courts and petition the government for meaningful redress.

10. The Petition States Facts that Tend to Establish Violations of Rights Set Forth in the American Declaration as to All of the Petitioners, Including Those Specified in Section II(E) of the State's Response.

The State asserts that facts alleged by Petitioners Sarah Albertson, Rebekah Havrilla, Myla Haider, Amber Anderson, Kristen Stark, Amy Lockhart, Elizabeth Lyman, Hannah Sewell, and Tina Wilson do not constitute conduct that would tend to establish violations of Petitioners' rights under the American Declaration.[399] The facts stated by the Petition, however, clearly tend to show that the State has impeded the rights of every Petitioner by discriminating against them on protected bases, hindering their access to justice, and refusing to provide meaningful remedies.

The fact that the military has failed to exercise due diligence in adequately preventing and responding to sexual violence among service members, leading to such assaults against Petitioners, in and of itself demonstrates that the State has failed to protect women from sexual violence, in violation of the right to equality[400] as well as the right to personal security.[401] The entrenched culture of impunity and denial is compounded by deeply held misogynistic attitudes about women in the military. Petitioner Havrilla's Command made use of derogatory words like "bitch, pussy, fag, and cunt" to conflate womanhood with incompetence and degradation, and

[398] *See* Feres, 340 U.S. at 146.
[399] State Response, at 58–62.
[400] *See* IACHR, Report No. 80/11, Case 12.626. Merits. Jessica Lenahan (Gonzales). United States of America. July 21, 2011, para. 111 ("[T]he international and regional systems have pronounced on the strong link between discrimination, violence and due diligence, emphasizing 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.").
[401] *See* discussion in Subsection 1(c).

refused to take sexual assault prevention trainings seriously.[402] Petitioner Stark was sexually assaulted three times by her Commander.[403] Petitioner Haider, who had interned in a unit that investigated crimes like sexual assault, was so dissuaded by her experiences in the unit that she did not report her rape, and her perpetrator was pursued largely because he had become a serial offender at that point.[404]

The State contends that several of these particular Petitioners argue only that the State violated their rights by producing an undesired outcome in adjudicating such crimes.[405] The State attempts to obscure the fact that Petitioners have asserted that the investigatory, judicial, and remedial proceedings in their cases were appallingly inadequate and far from the accepted norms of judicial remedy and investigation under the Declaration's right to petition under Article XXIV, the right to a fair trial under XVIII, and the right to freedom of investigation under Article IV.

In regard to these Petitioners, the State has failed to uphold the standards of due diligence required under the right to a fair trial on numerous occasions, in that Petitioners were frequently retaliated against and demeaned for reporting their rapes. Petitioner Albertson's Command retaliated against her after she reported her assault by threatening her with the charge of "Inappropriate Barracks Conduct" and telling her that her rapist would be charged only with the same offense.[406] With the support of Command, her superiors ostracized and harassed her, while Command forced her to work closely with and report to her rapist for two years.[407] When Petitioner Lockhart reported her rape, her commanding officer admonished her, denied her promotion, threatened her with prosecution for adultery if she went forward with her case, and asked her Victim Advocate "How could I look at a slut like that with a straight face?"[408] The military's treatment of Petitioner Anderson after she was repeatedly raped by two shipmates, documented above in Section V(A)(G), was also deeply retaliatory, effectively forcing her to remain on her ship and be on call for 24 hours a day and at one point placing her in a medical

[402] Petition, at 8.
[403] *Id.* at 14.
[404] *Id.* at 8–9.
[405] The State argues that the Declaration does not compel a specific outcome in response to Petitioners Albertson, Lockhart, Lyman, Wilson, and Sewell's claims. State Response, at 59–62.
[406] Petition, at 9.
[407] *Id.* Petitioner Albertson's Command also forced her to disclose the medication she was taking for her military-sexual-assault-related trauma, and then revoked her security clearance and downgraded her work assignments as a result. *Id.*
[408] *Id.* at 17.

ward and denying her food.[409] The State claims that these facts do not implicate the United States' obligations under the American Declaration,[410] reflecting a serious underestimation of both the harms suffered by Petitioner Anderson and of its regional human rights obligations.

Additionally, the State failed to pursue and enforce sanctions against the perpetrators of these crimes to the fullest extent possible, as required under the principle of due diligence, effectively depriving Petitioners of an adequate remedy.[411] After Petitioner Stark and several other servicewomen came forward with allegations against her Commander, the Commander was jailed and charged with sexual assault, but the military dropped the charges and forced the Commander to resign, only for the Commander to join the Army Reserves two years later.[412] Petitioner Albertson's Command declined to bring criminal charges against her abuser after subjecting Petitioner Albertson to extensive retaliation,[413] highlighting the systemic problem of giving Commanders authority over prosecutorial decisions in sexual assault cases. Petitioner Wilson's perpetrator was sentenced to 24 months in prison only to have his sentence suspended after one week. The State contends that since Petitioner Havrilla reported her rape under the restricted reporting procedures, they did not violate her right to a fair trial. The Commission, however, recognizes that States must conduct purposeful investigations on their own volition where there are potential human rights violations, instead of relying on a victim's initiative.[414]

The investigations and prosecutions undertaken also failed to comply with the standards of a serious, prompt, thorough, and impartial investigation as required by the right to freedom of investigation and the right to a fair trial. Petitioner Sewell's Command lost crucial evidence related to her assault, including rape kit evidence, testimony from the nurse who examined her, and pictures from the exam.[415] The military also mishandled evidence relating to Petitioner

[409] *Id.* at 10. *See* discussion in Section V(B)(7), *supra*.
[410] State Response, at 59.
[411] IACHR, No. 5/96, Case 10.970. Admissibility and Merits. Raquel Martín de Mejía. Peru. March 1, 1996, § 5(B)(3)(b) ("[I]f the State apparatus acts in such a way that the violation remains unpunished and the victim's full rights are not restored to him to the extent possible, it can be affirmed that the State has failed to perform its duty. . . .").
[412] Petition, at 14.
[413] *Id.* at 9.
[414] IACHR, Report No. 5/96, Case 10.970. Admissibility and Merits. Raquel Martín de Mejía. Peru. March 1, 1996, § 5(B)(3)(b) ("[The obligation to investigate must be understood] 'as a specific juridical duty and not as a simple matter of management of private interests that depends on the initiative of the victim or of his family in bringing suit or on the provision of evidence by private sources, without the public authority effectively seeking to establish the truth.'") (quoting IACHR, Report No. 28/92, Case 10.147, 10.181, 10.240, 10.262, 10.309, 10.311. Merits. Consuelo et al. Argentina. Oct. 2, 1992, para. 40).
[415] Petition, at 20.

Lyman's assault.[416] During the trial against her perpetrator, the State allowed Petitioner Lyman's perpetrator to bring six witnesses to offer testimony while the State, acting as the prosecution, only brought one witness forward.[417] Additionally, the military failed to inform Petitioner Wilson properly about her ability to testify at the hearing against her perpetrator, [418] violating the State's obligations to inform Petitioners of proceedings and developments related to their assaults.[419] These cumulative discrepancies are not aberrations in the workings of the military but instead the product of an institution that makes no purposeful effort to protect service members and remedy heinous human rights violations. The assertion that these specific Petitioners suffered no human rights violations at the hands of the military is clearly without merit.

B) The Petition is Admissible as it Plainly Meets the Requirements of Article 34(b) of the Rules of Procedure.

1. The Petition's Arguments Are Not Manifestly Groundless.

Petitioners have clearly met the admissibility requirements of Article 34(b) of the Rules of Procedure. The Petition easily meets the *prima facie* standard required at the admissibility stage to show it is not "manifestly groundless" as described in Article 34(b). A Petition is not "manifestly groundless" if it establishes an apparent or possible violation of a right guaranteed by the American Declaration.[420] When there are essential factual disputes at the admissibility stage, the Commission has explained that "[s]uch an analysis [on the essential factual dispute] cannot be performed in the current admissibility stage, during which a *prima facie* evaluation is called for, and where no prejudgments on the factual or legal merits of the matter are made."[421] When there are essential factual disputes at the merits stage, the Commission generally consults

[416] *Id.* at 19.
[417] *Id.*
[418] *Id.* at 21.
[419] IACHR, Report No. 80/11, Case 12.626. Merits. Jessica Lenahan (Gonzales). United States of America. July 21, 2011, para. 193.
[420] IACHR, Report No. 69/08, Case 681-00, Admissibility, Guillermo Patricio Lynn, Argentina, Oct. 16, 2008, para. 48.
[421] IACHR, Report No. 160/20, Case 524-10, Admissibility, Tanimbu Guiraendy Estremadoiro Quiroz, Bolivia, July 2, 2020, para. 20 (admitting the petition of an indigenous journalist who alleged that a mob including State officials had violated her rights while the State categorically denied that State agents of any level took part in the assault).

public knowledge and records, and attaches more credibility to the account that is more consistent both in itself and in the broader context.[422]

The State claims the Petition is manifestly groundless by listing alleged inconsistencies between the Petitioners' testimony and the State's record. In actuality, however, the Petition is clearly well-grounded and articulates many potential violations of the American Declaration. As outlined below, the State in its Response manufactures inconsistencies, overemphasizes minor discrepancies, or incorrectly characterizes expanded information as incompatible with the initial Petition.[423] We ask the Commission to note the frequency with which the State challenges encompassing introductory statements in the first pages of the Petition to portray a multitude of discrepancies, often when there is no actual dispute as to the central facts.

The following sections, numbered to mirror the State's assertions, show that the Petition is well-grounded and provides further information and clarification to assist the Commission:

1. The State notes, as does the Petition, that 2010 and 2012 estimates of incidents of sexual violence were lower than the estimated number of incidents in 2006.[424] The State uses the 2010 and 2012 estimates to challenge the Petition's introductory statement that during the time period covered by the Petition, "incidents of sexual violence and rape rose sharply in the United States Military."[425] The Petition's assertion is not manifestly groundless as the only objective measure available—reports of sexual violence—shows an increase in sexual violence.

The Department of Defense has estimated the prevalence of sexual violence in the Military through surveys conducted in 2006, 2010, 2012, 2014, 2016, and 2018. The Department of Defense itself has cautioned against making direct statistical comparisons between sexual

[422] IACHR, Report No. 80/11, Case 12.626, Merits, Jessica Lenahan (Gonzales), United States, July 21, 2011, paras. 92–100. In *Lenahan,* the Petitioners claimed that the State had consistently failed to respond to the Petitioner's repeated requests for help in protecting the Petitioner and her daughters from domestic violence. The State argued that the Petitioners' allegations were not supported by the evidentiary records of the Police Department. The Commission found that the petitioners' allegations were supported by statistics of the alarming rates of domestic violence in Colorado and newspaper evidence of rising numbers of domestic-violence related fatalities. *Id*. at paras. 99–100.

[423] Indeed, the State's extensive arguments in and of themselves suggest that the Petitioners' allegations are not manifestly groundless. *See* IACHR, Report No. 128/01, Case 12.367, Admissibility, Newspaper "La Nación", Dec. 3, 2001, para. 51 (rejecting the State's claim that the petition was manifestly groundless and noting that "[t]he extensive arguments presented by the State on this point demonstrate in and of themselves that the petition is not 'manifestly groundless.'").

[424] Petition, at 31; State Response, at 27.

[425] Petition, at 3.

violence estimates in its older and more recent surveys "due to changes during the intervening years to its measures and survey content."[426] Nevertheless, survey estimates are still valuable to show the continued widespread prevalence of sexual violence in the military.

It is instructive to note that the number of **reports** of sexual violence filed by service members have risen annually and dramatically from 2007 to 2019.[427] Indeed, while the State pointed to estimates from 2010 and 2012 to imply that rates of sexual violence are dropping, this is simply not true. The reports of sexual violence in 2010 and 2012 were higher than in 2006—information that the State excluded.[428]

In 2019, the Department of Defense logged 6236 reports of sexual violence.[429] Included below is a chart created by the Department of Defense indicating the rising numbers of reports of sexual violence,[430] showing how sexual violence remains a pervasive human rights violation against service members in the U.S. Military.

[426] DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2016, 13 (2017), *available at* https://www.sapr.mil/public/docs/reports/FY16_Annual/FY16_SAPRO_Annual_Report.pdf.
[427] DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2019, app. B: Statistical Data on Sexual Assault, at 10 (2020), *available at* https://media.defense.gov/2020/Apr/30/2002291671/-1/-1/1/3_APPENDIX_B_STATISTICAL_DATA_ON_SEXUAL_ASSAULT.PDF.
[428] *Id.*; *See generally*, State Response.
[429] DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2019, app. B: Statistical Data on Sexual Assault, at 10 (2020), *available at* https://media.defense.gov/2020/Apr/30/2002291671/-1/-1/1/3_APPENDIX_B_STATISTICAL_DATA_ON_SEXUAL_ASSAULT.PDF.
[430] *Id.*

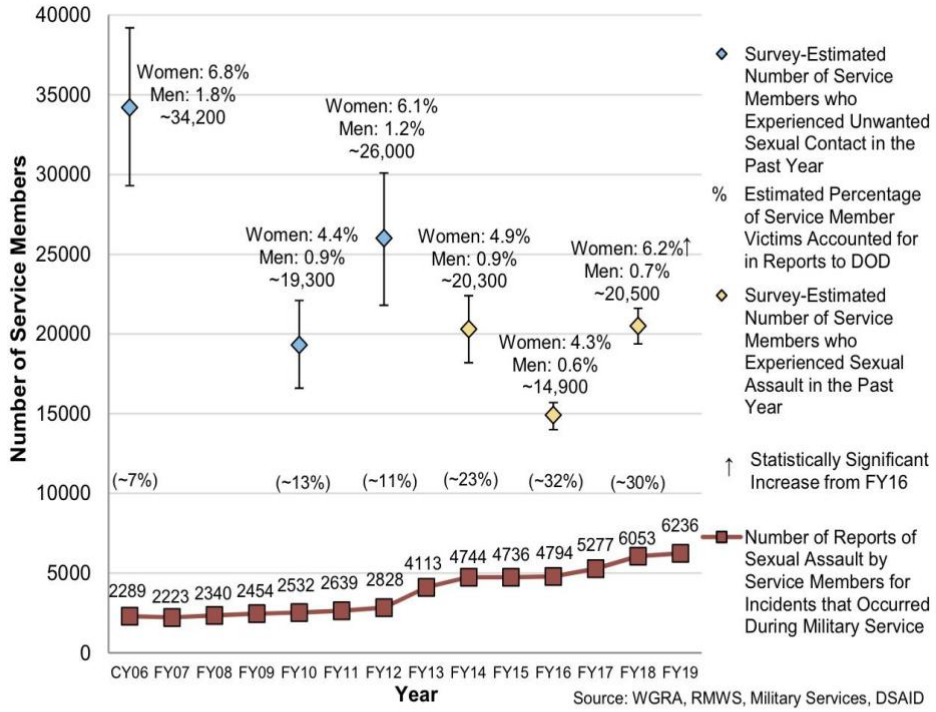

Figure 3. Estimated Number of Service Members who Indicated an Experience of Sexual Assault in the Past Year Compared to the Number of Service Members who Made Reports of Sexual Assault for Incidents that Occurred during Military Service, CY04 – FY19

Note: The "unwanted sexual contact" measure refers to the survey administered by Office of People Analytics (OPA) in CY06, FY10, and FY12. The "sexual assault" measure used in FY14, FY16, and FY18 was designed to align more closely with legal language from the UCMJ. While the measures use different methods to estimate the past-year occurrence of penetrating and contact sexual crime, they have been shown to generate statistically comparable estimates.

While rates of sexual assault in the military have increased, it is important to note that rates of prosecution, conviction and punishment have remained extremely low, as described in Section III(A), *supra*.[431] The military continues to fail in affording meaningful redress to victims of sexual violence, illustrating systemic failures by the United States to meet its obligations under the American Declaration.

2. The State asserts the Petition inaccurately reported that Petitioners "were sexually assaulted and/or raped by their United States Military colleagues" because one Petitioner's abuser was later identified as "a civilian over whom the U.S. military had no jurisdiction."[432]

[431] Press Release, Service Women's Action Network, *SWAN Responds to Pentagon's Report on Sexual Assault in the Military* (May 5, 2019), *available at* https://www.servicewomen.org/press-releases/2019-pentagons-report-on-sexual-assault-in-the-military/.
[432] State Response, at 27.

This Petitioner's claim is not manifestly groundless because it is untrue that these incidents would be outside of the military's jurisdiction or that the United States had no human rights obligations in this case.

Given the nature of what Petitioner Desautel described, it was reasonable for her to assume at the time of the crime that the perpetrator was a military colleague. In her public statements, Petitioner Desautel has explained that the perpetrator referred to his military rank as "X-92Y instructor," a higher rank than Petitioner Desautel's.[433] If the perpetrator had been a member of the military charged with a crime on a military base, as Petitioner Desautel was reasonably led to believe, then the military would have had jurisdiction over the case. The military also did in fact exercise jurisdiction over her case.[434]

The documentation provided by the State indicates that the identity of the perpetrator only came to light in March 2017.[435] This was nearly 15 years after he sexually assaulted Petitioner Desautel, when his DNA was submitted for testing as part of a separate investigation and found to be a match with DNA that had been stored in the government's DNA database in Petitioner Desautel's case.[436] The documentation notes that the perpetrator was found to be "not an Active Duty Soldier at the time of the offense,"[437] suggesting that he may have been an active duty soldier at other times.

Moreover, even after it was discovered that the alleged perpetrator was not an active duty soldier, this does not mean that the military was completely divorced of jurisdiction. When a service member is sexually assaulted by a civilian, the Army Criminal Investigation Department (CID) will typically conduct a joint investigation with civilian police authorities, and "[e]ach investigative agency conducts complimentary [sic] investigative tasks to prepare a complete final report that can be provided to the appropriate judicial authority (military or civilian)."[438] Indeed, the United States' documentation suggests that when a civilian prosecutor declined to prosecute the 16-year-old case in 2018, the FBI relinquished investigative responsibility to the CID, which

[433] Lynn Arditi, *A Soldier's Story – A Nightmare That Lasted Nine* Years, THE PROVIDENCE JOURNAL, (July 24, 2001), *available at* http://lynnarditi.com/sexual-assault/2011/07/a-soldiers-story-a-nightmare-that-lasted-nine-years.
[434] Petition, at 21–22.
[435] State Response, Appendix 12, at 9–10.
[436] *Id.*
[437] *Id.* at 10.
[438] U.S. Army SHARP, Sexual Harassment/Assault Response & Prevention, *FAQs:* 14. *What happens when sexual assault occurs across the Services*, *available at* https://www.sexualassault.army.mil/faqs.aspx (last visited Sept. 13, 2020).

declined to investigate further, noting: "There is sufficient evidence to provide to command for consideration of action."[439] The documentation does not reveal whether any further action was taken, but presumably CID then closed the case.[440] It therefore appears that the military did retain jurisdiction over the case even after the perpetrator was found not to be an active duty soldier at the time of the offense.

In any event, the perpetrator's military status, as identified 15 years after the offense, does not change the fact that the State had a duty to act with due diligence to prevent and respond to the sexual violence that Petitioner Desautel experienced nor that it has violated her human rights under the Declaration. The Commission has held that to establish a violation of rights under the Inter-American Convention on Human Rights, it is not necessary to identify the agents to which the violations are attributed;[441] this principle applies equally to rights under the Declaration. The State's duty to render an "immediate and exhaustive response" is independent of whether the sexual violence Petitioner Desautel experienced occurred at the hands of a private citizen or state agent, or whether the military status of her assailant was unknown.[442]

The actions taken by the State do not show diligent conduct to protect Petitioner Desautel's rights following the report of rape by Petitioner Desautel. On the contrary, Petitioner Desautel was retaliated against and discharged for revealing that she was a lesbian in the process of the investigation.[443] The investigation into her rape was closed two months after her separation.[444] This conduct is a clear violation of the United States' duty to ensure Petitioner Desautel's human rights.

3. The State asserts the Petition inaccurately used the terms "rape" and "rape victims."[445] The Petition clearly states that Petitioners "were sexually assaulted and/or raped" and uses the term "assaulted."[446] While statements regarding rape victims and subsequent treatment by the military often apply to all Petitioners, the Petition uses the terms "rape" and "raped" with certain

[439] State Response, Appendix 12, at 10. ("On 22 Mar 18, Ms. [redacted] Assistant United States Attorney, Office for the Eastern District of Virginia, Richmond, VA declined to prosecute this incident. The FBI subsequently relinquished sole investigative responsibility to CID.").
[440] *Id*.
[441] IACHR, Report No. 96/19, Case 11.726, Merits, Norberto Javier Restrepo, Colombia, June 14, 2019, para. 81.
[442] See *id.* para. 87.
[443] Petition, at 21–22.
[444] *Id*. at 22.
[445] State Response, at 27.
[446] Petition, at 1.

Petitioners; however, the Petition does not allege that every Petitioner is a victim of rape. We trust the Commission will see past these attempts to sow doubt when the Petitioners have provided ample proof of their horrific abuse.

4. The State "expressly rejects the premise that any of Petitioners' military careers ended because they reported a sexual assault."[447] This is clearly and demonstrably inaccurate. Petitioners Jeloudov and Desautel were both explicitly dismissed for being gay under the military's "Don't Ask Don't Tell" policy after reporting their assaults.[448] Petitioner Stephens, who experienced retaliation after reporting his assault, was denied a transfer request.[449] He was ultimately chaptered out of the military after he attempted suicide.[450]

Further, by interpreting termination narrowly as to mean only direct termination, the State willfully omitted indirect termination of Petitioners' military careers resulting from professional and social retaliation, including harassment, ostracism, and retaliatory punishment for minor infractions. For example, Petitioner Bertzikis was forced to live on the same floor as her rapist and work alongside him so that, according to Command, they could "work out their differences."[451] While papers were initiated for Petitioner Bertzikis to be medically discharged, she was administratively discharged for "failing to adapt to military life," a common category of other-than-honorable discharge used by Commands in retaliation for sexual assault reports.[452] Besides its stigmatizing nature, such administrative separations can make veterans ineligible for benefits, including access to VA healthcare and veterans' disability compensation.[453] As a result, Petitioner Bertzikis had to explain the circumstances of her discharge and assault repeatedly when applying for veterans' benefits. After reporting sexual violence, Command refused to let Petitioner Anderson leave the ship and forced her to be on call 24-hours a day until the ship's

[447] State Response, at 28.
[448] Petition, at 10, 22.
[449] *Id.* at 18.
[450] *Id.*
[451] Petition, at 11.
[452] Human Rights Watch, *Booted: Lack of Recourse for Wrongfully Discharged U.S. Military Rape Survivors* 64 (May. 19, 2016), *available at* https://www.hrw.org/report/2016/05/19/booted/lack-recourse-wrongfully-discharged-us-military-rape-survivors.
[453] A veteran with an "Other than Honorable" discharge is qualified for veterans' health care benefits for service-incurred or service-aggravated disabilities unless he or she is subject to one of the statutory bars to benefits set forth in Title 38 United States Code §5303(a).

chaplain intervened.[454] She was on one occasion placed in the medical ward and denied food.[455] Petitioner Stephens was told by fellow service members that Command had ordered life-threatening harassment because Command believed Petitioner Stephens was homosexual and wanted him out of the military.[456] Petitioner Schroeder was sexually and verbally assaulted by her superior multiple times and reported the harassment to Command.[457] Petitioner Schroeder was disciplined in retaliation by her Command 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.[458]

These experiences are not unique. Victims of sexual assault across military branches have reported retaliatory behavior such as punishment for minor infractions and change in work assignments from high-level military tasks to menial tasks like picking up garbage following their report of sexual violence.[459] Moreover, military retaliation is not limited to a 9-to-5 work day, and victims cannot leave with two weeks' notice[460] as in an employment setting. In fact, leaving the military without permission can constitute a crime. As reported by Human Rights Watch, "survivors fearing further violence and retaliation have left duty stations seeking safety and found themselves later court-martialed and imprisoned for going AWOL (absent without leave)."[461]

This pattern is corroborated by recent reports. The existence of retaliation remains prevalent in the military, with the latest Department of Defense report noting that victims fear retaliation for reporting sexual violence, which includes concern about punishment for collateral offenses.[462] The State tries to use narrow semantics to obfuscate clear violations of the Declaration: that Petitioners' military careers were ended directly or indirectly as a consequence of reporting sexual violence.

[454] Petition, at 10.
[455] *Id.*
[456] *Id.* at 18.
[457] *Id.* at 15.
[458] Human Rights Watch, *EMBATTLED: Retaliation Against Sexual Assault Survivors in the U.S. Military* 38 (May 2015), *available at* https://www.hrw.org/sites/default/files/report_pdf/us0515militaryweb.pdf.
[459] *Id.* at 7.
[460] *Id.* at 8.
[461] *Id.*
[462] DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2019, 7 (2020), *available at* https://www.sapr.mil/sites/default/files/1_Department_of_Defense_Fiscal_Year_2019_Annual_Report_on_Sexual_Assault_in_the_Military.pdf.

5. The State asserts the Petition inaccurately stated that "[t]he 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."[463] This claim is not manifestly groundless as the Petitioners faced limitations on their ability to seek protections and justice that are available to civilian survivors.

Although two Petitioners sought help from the military police and one from the civilian police,[464] this does not change the fact that the Petitioners were effectively limited to pursue redress within the closed system of the military. The U.S. military's criminal legal system has authority over service members who commit sexual assault,[465] and it almost always retains that authority.[466] While civilian courts theoretically have parallel jurisdiction over such cases, they typically exercise that authority only rarely, for example, where a civilian accuses a service member of sexual assault or when a foreign State holds primary jurisdiction over the location of the alleged offense.[467] Although legislative changes in 2015 now require commanders to solicit survivors' preference regarding whether the offense is prosecuted by a military or civilian court, that preference is not binding, and many survivors do not know about their right to be consulted or that some cases may be brought before a civilian judge.[468] Moreover, these changes were not available to the Petitioners.

The State relies on the contention that "military members who report being the victim of sexual assault may request an expedited transfer," which the State claims is "almost invariably granted within 48 hours."[469] This is clearly inaccurate as multiple Petitioners were denied the transfers they requested after reporting their assaults. Petitioner Stephens, who reported the negative response from his Command following the report of his assaults to the Inspector

[463] State Response, at 28.
[464] Petition, at 10, 16, 20.
[465] DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2019, app. B: Statistical Data on Sexual Assault, at 16 (2020), *available at* https://media.defense.gov/2020/Apr/30/2002291671/-1/-1/1/3_APPENDIX_B_STATISTICAL_DATA_ON_SEXUAL_ASSAULT.PDF
[466] *See id.* at 5–6 (noting that Commanders retain initial disposition authority and take disciplinary action when they have jurisdictional authority and evidence).
[467] *Id*. at 6.
[468] *See* Tom Vanden Brook, *Military Fails to Advise Victims of Sexual Assault of Civilian Court Option, Advocates Say*, USA Today, June 10, 2018, *available at* https://www.usatoday.com/story/news/politics/2018/06/10/military-sex-assault-victims-not-told-right-civilian-trial/686503002.
[469] State Response, at 28.

General (IG) at headquarters,[470] was then denied a transfer request by his Command.[471] Petitioner Lyman, whose request for a transfer was also denied by her Command, was forced to work daily alongside individuals who testified against her and in support of her perpetrator.[472] Additionally, Petitioner Sewell was denied a transfer request by her Command while her perpetrator was promoted twice during the investigation and then was granted a transfer himself.[473] These experiences demonstrate the military's failure to protect survivors of sexual violence from unhealthy work environments in the aftermath of reporting and the way in which retaliation may include the denial of transfer requests.[474] Victims of sexual violence do not have the ability to seek shelter or find a safe haven elsewhere if they are denied transfers. This is extremely problematic when victims are forced to live near their perpetrators during or following investigations.

In addition, expedited requests for transfers are only available to victims who file unrestricted reports.[475] There are many reasons why an individual would prefer to file a restricted report, with a primary reason being a longstanding culture of tolerance of sexual assault in the military. Expedited transfers are not available to victims who wish to remain anonymous due to fear of retaliation. Further, expedited transfers are not effective where, within the closed environment of the military, victims face the same retaliative environment in their new workplace. For example, Petitioner Schroeder's former Commander informed her new supervisor that she was a "troublemaker,"[476] and Petitioner Kenyon's former Commander likewise "warned" her new supervisor about her.[477] These retaliatory actions destroyed Petitioners' reputations and helped ensure that the discrimination, harassment, and violence they had experienced would continue in their new workplace. Furthermore, even if expedited transfers

[470] Petition, at 18 (noting that the Inspector General (IG) chose not to get involved after Petitioner Stephens gave a sworn statement on the incident).
[471] *Id.*
[472] *Id.* at 19.
[473] *Id.* at 20.
[474] *See generally*, Human Rights Watch, *BOOTED: Lack of Recourse for Wrongfully Discharged U.S. Military Rape Survivors* (May 19, 2016), *available at* https://www.hrw.org/report/2016/05/19/booted/lack-recourse-wrongfully-discharged-us-military-rape-survivors; Karisa King, *Assault victims struggle to transfer to other posts*, MYSA (May 20, 2013), *available at* https://www.mysanantonio.com/twice-betrayed/article/Assault-victims-struggle-to-transfer-to-other-4532717.php.
[475] 32 CFR § 105.9(f)(2).
[476] Petition, at 15.
[477] *Id.* at 13.

were available in a meaningful way, survivors of military sexual assault face far greater constraints in this area than civilians do.

The Petitioners' experiences reflect that the military perpetuated a culture of misogyny and impunity, both of which contributed to the sexual violence to which they were subjected. The United States and its military have and continue to deny Petitioners, and other victims of sexual violence, meaningful access to justice and services more common in the civilian world, such as shelters and the ability to freely relocate their homes or freely quit their jobs. These failures continue to this day and are amplified by the United States' unwillingness to afford adequate redress to the Petitioners for the human rights violations inflicted upon them.

6. The State asserts that 1) Petitioner Lockhart engaged in misconduct that resulted in a withdrawal of a recommendation for her promotion to the grade of E-7 (chief petty officer) and 2) disciplinary proceedings against her were initiated before she made an allegation of sexual assault.[478] This claim is not supported by the record the State provided.[479] In that regard, even though the State might argue that the evidence presented by the Petition was insufficient to establish professional retaliation, it has not categorically denied that fact or presented proof to show otherwise. Furthermore, by not providing the alleged record on Petitioner Lockhart's misconduct and her disciplinary proceeding, the State has prevented the Commission from evaluating the statements denying the demotion of Petitioner Lockhart or attaching with it any credibility. An analysis of the factual disputes on this matter is more appropriate for the merits stage.[480]

It is undisputed, however, that Lockhart's Command threatened her twice after learning of the sexual assault incident.[481] Her Command first threatened to charge her with fraternization with a co-worker, and later threatened to charge Petitioner Lockhart with adultery if she pressed forward with the case. Command also asked her Victim Advocate, "How could I look at a slut like that with a straight face?"[482] Even if Petitioner Lockhart's disciplinary proceeding was

[478] State Response, at 29.
[479] *See id*. at Appendix 10 (NCIS Report of Investigation, Case Number 23FEB10NFLC0040). This document is a redacted copy of the report of investigation. However, it does not provide any information on Petitioner Lockhart's alleged misconduct or disciplinary proceedings against her that could support the State's arguments.
[480] IACHR, Report No. 160/20. Petition 524-10. Admissibility. Tanimbu Guiraendy Estremadoiro Quiroz. Bolivia, July 2, 2020, para. 1.
[481] *See* Petition, at 17.
[482] *Id*.

scheduled prior to the reporting of her sexual assault, this does not negate the possibility that she was punished in retaliation for minor infractions stemming from her decision to report her assault.

Misconduct and disciplinary proceedings are common punishments in the aftermath of a military sexual assault report.[483] Although punishment for minor infractions is not included in the Department of Defense's formal definition of retaliation, it has become a major obstacle to reporting for many service members. Many survivors have reported that disciplinary actions against them became a daily part of life after they reported, and would often impact career advancement of a victim of sexual assault.[484] The military criminal legal system allows Commanders to "[e]nsure good order and discipline,"[485] which leads to potential abuse of authority through retaliatory behavior directed against service members for reporting sexual assault.[486]

In light of the above information, the Commission should find Petitioner Lockhart's account satisfactory in presenting a sufficiently well-grounded claim that she faced retaliation at the hands of her Command, was threatened after reporting sexual assault, and was eventually demoted. The State has chosen not to provide any evidence to the contrary.

7. The State asserts that the Petition inaccurately stated that the Department of Defense "has refused to implement relevant laws passed by Congress or to enact any effective measures to remedy the epidemic."[487] This statement is not manifestly groundless as it merely presents a strong version of Petitioners' essential claim, supported by their experiences and the continued high prevalence of military sexual violence, that the U.S. Department of Defense had not adequately implemented relevant laws or taken effective measures to combating sexual assault. As discussed in Section III, *supra*, the Petitioners recognize that the United States and its Department of Justice have taken steps to improve their response to military sexual assault in the years since they were sexually assaulted, but these measures continue to be deeply ineffective

[483] *See* Human Rights Watch, *EMBATTLED: Retaliation Against Sexual Assault Survivors in the U.S. Military* 25 (May 2015), *available at* https://www.hrw.org/sites/default/files/report_pdf/us0515militaryweb.pdf.
[484] *See id.*
[485] *See id.* at 43.
[486] *See id.* (noting that these proceedings often result in a reduction in rank).
[487] State Response, at 29.

and inadequate in preventing and responding to military sexual violence or ensuring justice for survivors.

According to the Department of Defense and Human Rights Watch, there are various reporting barriers to victims reporting sexual violence, including fear of confidentiality breaches[488] or retaliation,[489] not being granted advancement or clearances,[490] and reasonable concerns related to potentially being re-victimized. There are also various aspects of the military criminal legal system that may deter victims reporting sexual assault, including but not limited to fear of prosecution of other military offenses that occurred during the time of the assault (i.e., adultery, fraternization, underage drinking).[491] Collateral misconduct, which encompasses the aforementioned offenses could impact promotion or the ability to stay in service during military downsizing.[492] Furthermore, during the time of some of the Petitioners' experiences, being labeled a homosexual or reporting sexual-orientation based violence could lead to the end of their careers through discharge.

In response to the State's lengthy exposition regarding Public Law 105-85, it is apparent that the Petition inadvertently cited the wrong law and intended to cite Public Law 108-16.[493] The only inaccuracy in the Petition's assertions regarding this point is the accidental citation, as each claim stated remains undisputed as it relates to Public Law 108-16. We thank the State for noting this corrected citation. Furthermore, we thank the State for pointing out that Public Law 105-85 affirms how sexual harassment against service members has been an ongoing and unresolved problem for nearly 25 years.[494]

[488] *See* DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2019, 6, 16 (2020), *available at* https://www.sapr.mil/sites/default/files/1_Department_of_Defense_Fiscal_Year_2019_Annual_Report_on_Sexual_Assault_in_the_Military.pdf.
[489] *Id.* at 16.
[490] *See* Human Rights Watch, *EMBATTLED: Retaliation Against Sexual Assault Survivors in the U.S. Military* 27 n.28, 39–42 (May 2015), *available at* https://www.hrw.org/sites/default/files/report_pdf/us0515militaryweb.pdf.
[491] *See* Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, Fourth Annual Report, at G-26 (March 2020), *available at* https://dacipad.whs.mil/images/Public/08-Reports/06_DACIPAD_Report_20200331_Final_Web.pdf (Citing evidence that individuals were discharged for collateral offenses). https://dacipad.whs.mil/images/Public/08-Reports/06_DACIPAD_Report_20200331_Final_Web.pdf.
[492] *See* Human Rights Watch, *EMBATTLED: Retaliation Against Sexual Assault Survivors in the U.S. Military* 57–59 (May 2015), *available at* https://www.hrw.org/sites/default/files/report_pdf/us0515militaryweb.pdf.
[493] National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 526, 117 Stat. 1392 (2003), *available at* https://www.congress.gov/108/plaws/publ136/PLAW-108publ136.pdf.
[494] State Response, at 29.

The State's assertion that "[t]here is thus no nexus between any purported delay in the date on which the Defense Sexual Assault Incident Database became operational and any of the incidents alleged by the Petition" does not pose any genuine issue of material fact and is spurious in nature.[495] Above all, the fact that Congress wanted a revised implementation plan for the database in 2011 was because the database was not completed by its legislatively-imposed deadline of January 2010, again showing the military's lack of will to address sexual violence in its ranks.

The failure to remedy this epidemic continues to this day. The latest Department of Defense report states that participants referred to sexual assault prevention training as "vague" or "incomplete" and some participants believed leaders were "checking the box" when conducting the trainings.[496] Participants further believed that a mission-first mentality can sidetrack response to victims and noted the need for more reliable trainings.[497] The policies and programs that the United States has adopted more recently to improve the military's response to sexual assault have failed to address cultural problems. In the Department of Defense's 2018 and 2019 reports, the Department recognized the contribution of unhealthy workplace "climates" on the prevalence of sexual assault.[498] Notably, that sexual harassment and gender discrimination substantially contribute to the risk of sexual assault in a unit.[499]

Recent events illustrate that the Department of Defense failed to remedy this epidemic. The prevalence of sexual violence in the military is so substantial that the acting Secretary of Defense released a memorandum in May 2019 addressing the need for institutional change.[500] In June 2020, the dismembered remains of service member Vanessa Guillen were found near Fort

[495] *Id.* at 30.
[496] DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2019, 23 (2020), *available at* https://www.sapr.mil/sites/default/files/1_Department_of_Defense_Fiscal_Year_2019_Annual_Report_on_Sexual_Assault_in_the_Military.pdf
[497] *Id.*
[498] *See* DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2018, 7, 11–12 (2019), *available at* https://www.sapr.mil/sites/default/files/FY18_DOD_Annual_Report_on_Sexual_Assault_in_the_Military.pdf; *see also* DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2019, 16 (2020), *available at* https://www.sapr.mil/sites/default/files/1_Department_of_Defense_Fiscal_Year_2019_Annual_Report_on_Sexual_Assault_in_the_Military.pdf.
[499] *Id.*
[500] Memorandum from Acting Secretary Patrick M. Shanahan, *Actions to Address and Present Sexual Assault in the Military*, *available at* https://www.sapr.mil/sites/default/files/ACTIONS TO ADDRESS AND PREVENT SEXUAL ASSAULT IN THE MILITARY OSD004373-19.pdf.

Hood, Texas. Investigators believe that she was killed by a soldier who killed himself as he was being taken into custody.[501] Ms. Guillen's family reported that she had told them a few months earlier that she was being sexually harassed by a superior but did not report it because of fear of retaliation.[502] In August 2020, the body of another missing Fort Hood soldier, Elder Fernandes, was found about 30 miles from his base at Fort Hood, Texas. According to his family's lawyer, he had been a victim of sexual violence by his sergeant. The army found Mr. Fernandes' claim to be unsubstantiated and he was subsequently bullied and hazed for reporting the assault.[503] These events, combined with the military's own surveys and metrics, corroborate the experiences of the Petitioners and point to a broken system that presents deep structural and cultural impediments to justice for survivors.[504]

8. The State takes issue with the Petitioners' statement that survivors are required to report the sexual assault they experienced to the Chain of Command. Although it is true that assault victims may report sexual misconduct to actors outside of the service members' Chain of Command,[505] Petitioners adopt a broader understanding of the reporting requirement, meaning that in practice it is not possible for Commanders not to be informed of an unrestricted report of sexual assault given the exceptionally closed nature of the military system. As stated in the Department of Defense Instructions cited by the United States, "SARC shall provide the installation commander and the immediate commander of the sexual assault victim . . . with information regarding all Unrestricted Reports" within 24 or in some cases 48 hours of the report.[506]

[501] *Fort Hood Soldier Vanessa Guillen's Murder a "Tipping Point," Army Secretary Says*, CBS NEWS, Aug. 7, 2020, *available at* https://www.cbsnews.com/news/fort-hood-vanessa-guillen-murder-tipping-point-army-secretary/.
[502] Ignacio Torres et al., *Vanessa Guillen Didn't Report Harassment Because She Says She Wouldn't Be Believed, Her Mom Says*, ABC NEWS, July 16, 2020, *available at* https://abcnews.go.com/US/vanessa-guillen-didnt-report-harassment-wouldnt-believed-mom/story?id=71780670.
[503] Rachel Treisman, *Body of Missing Fort Hood Soldier Elder Fernandez Found a Week After Disappearance*, NPR WSKG, Aug. 26, 2020, *available at* https://www.npr.org/2020/08/26/906396032/body-of-missing-fort-hood-soldier-elder-fernandes-found-a-week-after-disappearance.
[504] Ella Torres, *Military Sexual Assault Victims Say the System is Broken*, ABC News, Aug. 29, 2020, *available at* https://abcnews.go.com/US/military-sexual-assault-victims-system-broken/story?id=72499053; Meghan Myers, *A Culture that Fosters Sexual Assault and Sexual Harassment Persists Despite Prevention Efforts*, a New Pentagon Study Shows, Military Times, April 30, 2020, *available at* https://www.militarytimes.com/news/your-military/2020/04/30/a-culture-that-fosters-sexual-assaults-and-sexual-harassment-persists-despite-prevention-efforts-a-new-pentagon-study-shows/.
[505] State Response, at 30; U.S. DEP'T OF DEF., INSTR. 6495.02, para. 4(b)(1).
[506] U.S. DEP'T OF DEF., INSTR. 6495.02, 40, Encl. 4, para. 4(b).

Moreover, as noted in Section III(C), *supra*, individuals within a victim's Chain of Command have the ability to influence the victim's decision about whether to report. The DoD's 2019 Military Sexual Assault Report noted that focus group participants suggested that an "unhealthy command climate" can deter survivors from reporting.[507] Commanders have discouraged victims from reporting by warning them about the risk of collateral punishment or even directly telling them not to report.[508] Initial avenues of reporting accessible to a victim do not negate the fact that Commanders continue to receive reports of military sexual violence and to wield substantial influence over the reporting process.

9. The State alleges that the Petition inaccurately asserts that "the restricted reporting system allows victims to receive much needed medical attention," but "does so at the expense of giving them any possible avenue to access justice."[509] This claim is not manifestly groundless as the State has not provided adequate proof of effective access to justice through the restricted reporting system. In support of its claim, the State argues that the restricted reporting system allows victims to convert their restricted report to an unrestricted report at a later time. [510] However, as the Petitioners' experiences reveal, this may lead to hostility and retaliation that revictimize the reporting service member and threaten their continued military career. Moreover, the deeply flawed military criminal legal system does not afford survivors meaningful access to justice for all of the reasons discussed in the Petition.

The fact that "[t]he Department of Defense encourages such conversion and launched a program in 2019 to provide those who make restricted reports with an opportunity to learn if the alleged perpetrator in their cases allegedly assaulted another person, thereby allowing some victims to find strength in numbers,"[511] in and of itself acknowledges that are serial perpetrators

[507] In DoD 2019 Military Service Gender Relations Focus Groups' feedback, participants indicated that "an unhealthy command climate may ... lead to feelings of discomfort and concern related to reporting". DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2019, 16 (2020), *available at* https://www.sapr.mil/sites/default/files/1_Department_of_Defense_Fiscal_Year_2019_Annual_Report_on_Sexual_Assault_in_the_Military.pdf

[508] Protect Our Defenders, *Nine Roadblocks to Justice* (last updated 2018), *available at* https://www.protectourdefenders.com/roadblocks-to-justice/.

[509] State Response, at 31.

[510] *Id.*

[511] State Response, at 31 (Referencing Memorandum from Acting Secretary Patrick M. Shanahan, *Actions to Address and Present Sexual Assault in the Military*, *available at*

of sexual violence in the military that victims have not felt comfortable reporting in the unrestricted system.

According to the most recent SAPRO report, of women who reported a penetrative sexual assault, 59% were assaulted by someone with a higher rank than them, and 24% were assaulted by someone in their chain of command.[512] In a system where perpetrators can fall anywhere in the chain of command, the overwhelming power that commanders possess during the reporting and investigating process by itself contributes to a culture that tolerates and fosters sexual violence and impunity.

It is therefore not surprising that many victims of military sexual assault do not wish to convert restricted reports to unrestricted reports, regardless of any programs that may now encourage them to do so,[513] as this change denies them of anonymity and leads to an investigation. For them, staying anonymous is an attempt to keep safe. If a victim does not feel comfortable with the conversion from a restricted to unrestricted report, there is no possible avenue for a criminal investigation against the accused.[514]

10. The State asserts the Petition inaccurately states that "the Chain of Command possesses the authority to overturn a verdict or to grant a different punishment from the one recommended by a judge at trial."[515] While it is true that the National Defense Authorization Act for Fiscal Year 2014 removed Commanders' ability to overturn convictions, this Act was not in force when the Petitioners experienced human rights violations. Moreover, Commanders' involvement in dispositions remains problematic, and stymies Petitioners' ability to access justice. Commanders still receive enormous deference in the decision of whether or not to prosecute the accused in sexual assault cases, and whether to enforce sentences post-conviction.[516]

https://www.sapr.mil/sites/default/files/ACTIONS%20TO%20ADDRESS%20AND%20PREVENT%20SEXUAL%20ASSAULT%20IN%20THE%20MILITARY%20OSD004373-19.pdf).

[512] Protect Our Defenders, *Facts on United States Military Sexual Violence* (last updated 2019), *available at* https://www.protectourdefenders.com/wp-content/uploads/2019/12/MSA-Fact-Sheet-191205.pdf.

[513] State Response, at 31.

[514] Kathleen Gilberd, A Guide to Sexual Assault and Sexual Harassment Policies in the US Armed Forces for Servicemembers, MSV Survivors and Their Advocates, Military Law Task Force of The National Lawyers Guild 4 (July, 2017), *available at* https://nlgmltf.org/wp-content/uploads/2017/10/MSV-Guide-201707.pdf.

[515] State Response, at 31.

[516] *See* 10 U.S.C.A. § 822 (West 2019); Manual for Courts-Martial, 49 Fed. Reg. 17152 at 17155.

2. The Undisputed Facts of the Petition Establish Many Prima Facie *Violations of the American Declaration.*

As illustrated above, the Petition's claims are well grounded. The Petitioners' claims likewise clearly establish *prima facie* violations of the American Declaration, and are consistent with well-documented patterns of human rights violations in the military: 1) a masculine, fraternal, and hierarchical system that foments the conditions for service members to commit widespread sexual violence targeting women and sexual minorities with impunity for such violence; 2) investigation and trial procedures rife with conflicts of interest that often turn against victims and elevate military expediencies over victims' human rights; 3) a punishment regime that considers extra push-ups and temporary letters of reprimand appropriate and sufficient recompense for sexual violence; and 4) the habitual occurrence and tolerance of professional and personal retaliation against victims of sexual violence who dare report against "one of their own," which often leads to the end of victims' military careers.

In *Lenahan,* at the merits stage, the State contended that the overall description of the facts alleged by the Petitioners presented a "misleading, and in some instances, manifestly inaccurate portrayal of the facts" because they were not supported by the government's evidentiary record.[517] The Commission found that the undisputed facts alone manifested that the United States was responsible for the violation of Ms. Lenahan's and her three daughters' rights because it had failed to act with "due diligence" to protect them by taking "reasonable measures" to prevent, investigate, or remedy the rights-violations at issue in her Petition.[518]

In its Response to this current case, the United States likewise listed alleged inaccuracies in the Petition concerning thirteen petitioners. The State wishes to focus on peripheral details in an attempt to "prove" that Petitioners' cases were processed through regular military procedure, without addressing the fact that regular military procedure has the potential to violate myriad human rights. Moreover, similar to the strategy used by the United States in *Lenahan*, the State's allegations attempt to divert attention from the essential factual assertions in the Petition, which by themselves establish likely violations of the American Declaration.

[517] IACHR, Report No. 80/11, Case 12.626, Merits, Jessica Lenahan (Gonzales), United States, July 21, 2011, para. 46.
[518] *Id.*

Since the State has chosen "illustrative examples" of alleged inaccuracies or omissions in the Petition concerning 13 individual Petitioners, we can only presume that the State selected the cases it felt most advantageous to its position. The State claims that it has documents to support all its factual assertions, but that it cannot provide these documents because of the Privacy Act. The State further asserts that it does not concede any facts that it does not mention or refute. The State cannot simply refuse to engage fully and comprehensively with the Commission and be permitted to cast a shadow on the clearly elucidated facts in the Petition. This is especially important in this case as the State in its Response was not moved to concede many, even objective, facts. Without providing further information and documentation, the State has deprived the Commission of the ability to independently evaluate the evidence, and the State cannot be permitted to use its own omissions as a basis to prevent the Commission from fulfilling its mandate.

Nevertheless, while the State's rationale for its selection of Petitioners, attempted rebuttals, and provided documentation is unclear, the Commission will take note that the foundational, undisputed, and conceded facts outlined below form a solid basis to proceed on the merits. In many cases, the documentation provided by the State in fact bolsters Petitioners' accounts of human rights violations. Specifically, the undisputed facts alone establish *prima facie* violations of Articles I, II, IV, V, VII, VIII, IX, XIV, and XXIV of the American Declaration, which necessitates a finding that Petitioners' arguments are not manifestly groundless and should proceed to consideration on the merits.

We urge the Commission to "scrape off" the government's artfully alleged "inaccuracies" on peripheral details and to evaluate the systemic and widespread violations of human rights, exemplified by the Petitioners' cases.

Petitioner Mary Gallagher

In its response, the United States admits that Petitioner Mary Gallagher was sexually harassed and stalked.[519] Petitioner Gallagher reported her co-worker's behavior—including his attempt to kiss her against her will—to her Command twice after November 5 and November 7.[520] Command responded by saying that there was nothing they could do about it because it was

[519] State Response, at 32–33.
[520] Petition, at 7.

a "he said she said" situation.[521] Even though Command was on notice of the sexual harassment, it did not prevent further escalation, when on November 12, 2009, the co-worker sexually assaulted Petitioner Gallagher for a third time by pulling her pants and underwear down, running his hand on her vagina, and grinding his penis up against her.[522] The State did not contest any of the above facts that establish sexual assaults.

The State attaches disproportionate weight to whether the perpetrator broke into Petitioner Gallagher's room but does not clarify the location of the assault.[523] It is likely that the State is referring to two separate incidents, as Petitioner Gallagher has clarified that the perpetrator, who lived in the same unit with her, broke into the women's restroom and assaulted her.[524] This clarification should remedy the State's contention that there is any inconsistency between the Petition and Petitioner Gallagher's previous statement.

There is no dispute that the perpetrator's only "punishment" for sexually violating Petitioner Gallagher was reassignment and a no-contact order.[525] While the State says that the military police began a sexual assault investigation, it is noteworthy that the State failed to cite any investigation report to support its position, or provide the outcome of this investigation.

Nevertheless, there remains no dispute as to the central facts, which constitute *prima facie* violations of the Declaration: the State failed to prevent multiple and escalating incidents of sexual aggression against Petitioner Gallagher and did not meaningfully hold her perpetrator accountable.

Petitioner Rebekah Havrilla

The State does not dispute that Petitioner Havrilla was subject to intense sexual violence that has led to her suffering post-traumatic stress disorder. Petitioner Havrilla was raped by a co-worker and consistently sexually harassed and assaulted by her supervisor when she was deployed to Afghanistan in 2006.[526]

[521] *Id.*
[522] *Id.*
[523] State Response, at 32.
[524] Mary Gallagher, Email from Petitioner Gallagher to Counsel, Sep. 11, 2020 (on file with Counsel) (clarifying, "The TSgt who assaulted me did not break into my unit he was from my unit and broke into the women's restroom that is where the assault took place."); *see* Petition, at 7.
[525] Petition, at 7; State Response, at 33–33.
[526] Petition, at 8.

The State provides documentation for one incident and attempts to manufacture an inconsistency by stating that the Petition omits how Petitioner Havrilla converted her restricted report of sexual assault to an unrestricted report.[527] The State implies that this omission is important because it excludes how the Army Criminal Investigation Command (CID), which the State characterizes as "a highly professional law enforcement agency," conducted an investigation.[528] By providing this information that Petitioners' Counsel did not previously have access to, the State has in fact proven the wholly inadequate State response to unrestricted reports of sexual violence. The documentation provided by the State shows that for three counts of sexual violence under UCMJ Article 120—Rape, Indecent Acts, and Indecent Exposure—the perpetrator received only a written reprimand as "punishment."[529] While letters of reprimand for sexual offenses are now added to a perpetrator's permanent record,[530] at the time of the offense, the letter of reprimand was filed locally rather than in the Official Military Personnel File (now called the Army Military Human Resource Record).[531] This is very significant: a locally filed letter is temporary, lasting a maximum of three years or until the perpetrator moves to the jurisdiction of another general court martial jurisdiction (usually by moving to a new duty station)—whichever is sooner.[532] Moreover, it has little-to-no impact on the perpetrator's career in the Army.[533]

The State fails to provide any information on what actions, if any, were taken against the supervisor who continuously sexually harassed Petitioner Gallagher: who grabbed her waist from behind and kissed and bit her neck in front of her peers, and slapped her bottom whenever he passed.[534]

These facts, including the undisputed facts, clearly establish *prima facie* violations of the American Declaration.

[527] State Response, at 33.
[528] *Id*.
[529] *Id.* Appendix 6, at 1–3.
[530] U.S. DEP'T OF ARMY. REG. 600-37, UNFAVORABLE INFORMATION p. 4, s. 3–4 (10 April 2018) (Update).
[531] State Response, at Appendix 6.
[532] U.S. DEP'T OF ARMY. REG. 600-37, UNFAVORABLE INFORMATION p. 4, s. 3–4(a)(3) (19 December 1986).
[533] *See* Jocelyn C. Stewart, *What Are the Consequences of a Letter of Reprimand?* https://www.ucmj-defender.com/consequences-letter-reprimand/ (last visited Sep. 11, 2020) (stating, "If that particular reprimand is filed locally, there will not be a future impact on the service member's career."); *see also*, San Diego Military *Defense Can I Get Chaptered for a GOMOR?, available at* https://armycourtmartialdefense.info/2019/11/can-i-get-chaptered-for-a-gomor/ (Nov. 15, 2019) (stating, "A local filing is less likely to hurt the soldier's military career.")
[534] Petition, Attachment A, Petitioners' First Amended Complaint, at 11, para. 43; Petition, at 8.

Petitioner Amber Anderson

The Military and State's Response to Petitioner Anderson's rape is a textbook example of victim blaming and perpetuation of impunity for sexual violence. Nevertheless, the undisputed facts present *prima facie* violations of the American Declaration. It is undisputed that two of Petitioner Anderson's shipmates engaged in vaginal and oral sex with her—and photographed and videotaped this—when Petitioner Anderson was intoxicated to the extent that she could not recall whether she consented to sexual contact.[535] It is also undisputed that Petitioner Anderson went to military police the day after she was raped, and a medical report (mentioned in the State's documentation) noted bruises on her upper back and chest.[536] By stressing Petitioner Anderson's statement during investigation that "neither of the alleged perpetrators used physical force or verbal threats during the alleged incident"[537] and that she "may have consented to the sexual acts"[538] the State avoided the undisputed fact that Petitioner Anderson was intoxicated to the extent that she could not recall the details of the incident and was incapable of giving consent.[539] This state insistence on Petitioner Anderson's supposed "consent" is puzzling, since the Department of Defense, like in most modern legal systems, explicitly excludes the necessity of physical resistance to disprove consent.[540] The Department of Defense further clarifies via the SAPRO that like in this case, "[c]onsent is also not given...when the victim is asleep, incapacitated (due to drugs, alcohol, or other foreign substances) or unconscious."[541]

The investigation report provided by the State reveals other troubling facts that support Petitioner Anderson's case: 1) Petitioner Anderson reported that she told the two men to stop numerous times during the incident; 2) the perpetrators took photos and videos of the rape, but hid them from investigators while denying knowledge of their whereabouts; 3) the perpetrators likely circulated a video of the incident, since a witness had viewed the video.[542] Also, according

[535] State Response, Appendix 7 at 7–8.
[536] *Id.* Appendix 7 at 7.
[537] *Id.* at 33.
[538] *Id*.
[539] *Id.* Appendix 7 at 7.
[540] Today, most jurisdictions in the United States have formally abandoned the requirement for physical resistance to prove rape, acknowledging it to be ill-suited to measure lack of consent. *See generally*, Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981, 987–989 (2008) (discussing the change in the requirement of "resistance to the utmost," suggesting that most states have officially rejected the physical resistance standard); UCMJ art. 120(a)(5) (2012).
[541] Department of Defense, SAPRO, *Need Assistance? Victim Support Comes First: Sexual Assault and Consent*, *available at* https://www.sapr.mil/need-assistance (last visited, Sep. 15, 2020).
[542] State Response, Appendix 7, at 7–8.

to the record provided by the State, at no time during the investigation did the State elicit evidence of Petitioner Anderson's intoxication level, nor did investigators ask the perpetrators anything about Petitioner Anderson's level of intoxication or capacity for consent. The State further did not acknowledge the injuries suffered by the Petitioner during the incident. These facts could be important evidence in convicting the alleged perpetrators. The irregularities and omissions produced during the investigation by themselves constitute *prima facie* violations of the rights to a fair trial and judicial protection. As a result of this substandard investigation, Command declined to charge the perpetrators with rape or any form of sexual assault, and Petitioner Anderson suffered severe retaliation.[543]

The State does not deny that Command failed to court martial Petitioner Anderson's perpetrators. Instead, it gave them an UCMJ Article 15 "non-judicial punishment" of docking their pay for six months and reducing the rank of one of the perpetrators.[544] It appears that Command did find the perpetrators' behavior repugnant, but gave punishments usually reserved for minor offenses, and did not grant Petitioner Anderson access to justice.[545]

Petitioner Panayiota Bertzikis

In contending the factual assertions in the Petition to be "erroneous,"[546] the State relied solely on an investigation that was terminated halfway through, and was conducted under the influence of the Command of Petitioner Bertzikis, the same Command who threatened Petitioner Bertzikis to keep quiet and forced her to live on the same floor as and work alongside her perpetrator to "work out their differences."[547] Although the State tenaciously claims the four-page report to be the result of an "extensive investigation,"[548] the investigation report failed to include any statements from Petitioner Bertzikis, or any discussion of the incident of Petitioner Bertzikis being punched in the face and raped by a shipmate on May 30, 2006.[549]

[543] *See* Petition, at 10.
[544] *Id.*
[545] Article 15 provides military Commanders an alternative to court-martial for addressing "minor offenses," where the Commander generally agrees to lower limits on punishment. *See* 10 U.S.C. § 815(b) (2007).
[546] State Response, at 34.
[547] Petition, at 11.
[548] State Response, at 34; see Appendix 8.
[549] State Response, at 34 (the State contended that the "investigation discovered no independent evidence that Petitioner Bertzikis had been sexually assaulted but did discover compelling evidence starkly inconsistent with the allegations made by Petitioner Bertzikis."). However, they failed to cite any support for the "compelling evidence" other than the Petitioner's request to terminate the investigation. It is noteworthy that the Petitioner was retaliated against and threatened by her Command after her report.

In effect, according to Petitioner Bertzikis's testimony during interviews with *Human Rights Watch* and *Radio Boston*, the investigation was by no means conducted in a timely manner with due diligence.[550] When Petitioner Bertzikis first reported the rape to her Command, he told her to "shut up about it," for fear that a rape report would bring out other previous rape incidents that he had covered up.[551] Petitioner Bertzikis reached out to both Coast Guard Investigative Service (CGIS) and the Office of Work-Life (CG-111) but received no response.[552] Eventually, CGIS launched an investigation a month after the incident.[553] The investigation lasted for eleven months, during which Petitioner Bertzikis was "assigned to sit in a cubicle with nothing to do" and unable to advance her career.[554] Petitioner Bertzikis also learned that even after her perpetrator's confession about the incident, the CGIS was unable to secure a conviction because of "insufficient evidence."[555] Because of social and professional retaliation she was suffering, Petitioner Bertzikis asked to close the investigation.[556] CGIS threatened Petitioner Bertzikis with false reporting charges when they closed the case.[557] It is not hard to imagine why Petitioner Bertzikis did not have confidence in the long but sporadic investigation, and so why the emotional strain at its futility caused her to withdraw.

The investigation report provided by the State is heavily redacted to the point that it is almost incomprehensible, but does reveal that Petitioner Bertzikis experienced frequent harassment and ostracization.[558] Nevertheless, regardless of the categorical denial by the State that was poorly supported by its investigation report, a witness also testified in the report that he remembered Petitioner Bertzikis talking about sexual and verbal harassment she received throughout her service at Station Burlington.[559]

[550] *See* Human Rights Watch, *Booted: Lack of Recourse for Wrongfully Discharged U.S. Military Rape Survivors* 64 (May 19, 2016), *available at* https://www.hrw.org/report/2016/05/19/booted/lack-recourse-wrongfully-discharged-us-military-rape-survivors; see *Radio Boston: Soldiers Say Military Doesn't Protect Them From Sexual Assault* (Boston's NPR News Station Feb. 22, 2011), *available at* https://www.wbur.org/radioboston/2011/02/22/military-sexual-assault.
[551] *Radio Boston: Soldiers Say Military Doesn't Protect Them From Sexual Assault* (Boston's NPR News Station Feb. 22, 2011), *available at* https://www.wbur.org/radioboston/2011/02/22/military-sexual-assault.
[552] *Id*.
[553] *Id*.
[554] *Radio Boston: Soldiers Say Military Doesn't Protect Them From Sexual Assault* (Boston's NPR News Station Feb. 22, 2011), *available at* https://www.wbur.org/radioboston/2011/02/22/military-sexual-assault.
[555] *Id.*
[556] Petition, at 11; State Response, at 34.
[557] Petition, at 11.
[558] State Response, Attachment 8, at 2.
[559] *Id*.

Moreover, the State does not dispute that Petitioner Bertzikis was retaliated against and further harassed after her report. 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.[560] She was also informed by a (so-called) Victim Advocate not to report the assault because she would be seen as difficult, and she was questioned by her assigned attorney that "if [her rapist] did not have a history of sexual assault, why would he assault anyone now?"[561] Everything in Petitioner Bertzikis' case points to multiple *prima facie* violations of the American Declaration.

Petitioner Andrew Schmidt

Even though the State provides several paragraphs about Petitioner Schmidt in an attempt to prove that the State acted stalwartly in his case, the State's account in actuality provides undisputed facts that establish *prima facie* violations of the American Declaration.

For context, Petitioner Schmidt was subjected to relentless homophobic, sexual harassment at the time when the "Don't Ask Don't Tell" policy was in place. In Spring 2001, a Marine Corporal shoved his fingers between Petitioner Schmidt's buttocks,[562] and repeated the same behavior later that year.[563] The second time, a sergeant saw the incident and made the perpetrator apologize.[564] The State claims that there were variations on the specifics of this incident,[565] but does not account for the repeated actions of this perpetrator. When Petitioner Schmidt was transferred to a different ship, he was subjected to yet more sexual violence, when a group of marines "fondled, squeezed, and tickled his testicles."[566] The State picked on peripheral facts of the incident, for example, the number of offenders who sexually assaulted Petitioner Schmidt on a single incident; yet the State did not deny the frequent homophobic incidents of sexual assault that Petitioner Schmidt suffered.

It is undisputed that Petitioner Schmidt experienced harassment that he reported several times to Command. The State also does not dispute that Petitioner Schmidt was threatened

[560] Petition, at 11.
[561] *Id*.
[562] *Id.* at 12; State Response, at 35.
[563] Petition, at 12.
[564] *Id.*
[565] State Response, at 35. The State cites numerous times to Exhibits that it does not provide in the Appendix, namely NCIS Report of Investigation, File Identification # 04DEC03002300298DCR, Exhibits 1 and 2.
[566] Petition, at 12. *Cf.* State Response, at 35.

physically when he pressed forward with complaints, or that he was told "the Marine Corps know where your mother is."[567]

According to the State, a Commanding General conceded to Petitioner Schmidt that "command could, and should have acted sooner"[568] to stop the abuse. Nevertheless, the overall tone of the military's response to Petitioner Schmidt's ordeal was the insidious military culture of "boys will be boys." It is not surprising therefore, that the Navy continuously refused to class the sexual harassment as sexual harassment, but instead found "no malicious intent" in two incidences of harassment.[569] It is also not surprising, as outlined by the State, that a Commanding General told Petitioner Schmidt that while "Marines in 3d Battalion, 6th Marine Regiment had acted inappropriately," he concluded that their actions didn't meet the "*legal definition* of sexual harassment", and that "the behavior found did not rise to the level of *criminal culpability* requiring punitive action."[570] This is a curious conclusion, since the conceded incidences clearly meet the Navy and Marine definition of sexual harassment.[571]

The State tries to attach meaning to the fact that Petitioner Schmidt knew that "the Marine corporal involved in two of the incidents was given a formal counseling entry that was entered into his service record book."[572] The State also implies that sufficient punishment was meted out since the Marines involved received negative recommendations for promotion.[573]

[567] Petition, at 12.
[568] State Response, at 37.
[569] *Id* at 36.
[570] *Id.* [emphasis added].
[571] United States Navy, *Definitions: 3. Sexual Harassment*, Department of the Navy (Don) Policy on Sexual Harassment, ("Sexual harassment is conduct that:
a. Involves unwelcome sexual advances, requests for sexual favors, and deliberate or repeated offensive comments or gestures of a sexual nature when: (1) submission to such conduct is made either explicitly or implicitly a term or condition of a person's job, pay, or career; (2) submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person; or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive working environment.
b. Is so severe or pervasive that a reasonable person would perceive, and the victim does perceive, the environment as hostile or offensive,
c. Any use or condonation, by any person in a supervisory or command position, of any form of sexual behavior to control, influence, or affect the career, pay, or job of a member of the armed forces or a civilian employee of the DoD,
d. Any deliberate or repeated unwelcome verbal comment or gesture of a sexual nature by any member of the Military Services or civilian employee of the DoD."), *available at* https://www.secnav.navy.mil/doni/Directives/05000%20General%20Management%20Security%20and%20Safety%20Services/05-300%20Manpower%20Personnel%20Support/5300.26D.pdf.
[572] State Response, at 37.
[573] *Id*.

These facts simply underscore the ineffectiveness of the military's investigation and justice system. Petitioner Schmidt himself instigated the negative recommendations by seeking the support of U.S. Senator Dodd's office.[574] Otherwise, the perpetrators may have been promoted without any consideration of their predatory behavior. The State cannot now claim as a victory for the military criminal legal system Petitioner Schmidt's own attempts to gain acknowledgement from outside the military for the abuse he suffered within.

Petitioner Jessica Kenyon

The State glosses quickly over Petitioner Kenyon's case but confirms undisputed facts that establish multiple *prima facie* violations of the American Declaration. The State does not deny that Petitioner Kenyon suffered three incidents of sexual harassment and violence in a short period of time. When she was just a new recruit, Petitioner Kenyon's teaching sergeant initiated her into the culture of sexual violence by touching her and making sexual jokes.[575] After this, a member of the United States Army National Guard raped Petitioner Kenyon, and another time a sergeant grabbed her breasts and tried to make her touch his penis.[576]

The State does not deny this relentless sexual violence, nor that Petitioner Kenyon was discouraged from reporting these incidents, including being explicitly told that pushing forward with a report on the rape would impact her chance for promotion.[577] The State further doesn't deny that when Petitioner Kenyon reported sexual violence, Command called her new supervisor to warn him about her, after which a sergeant made an announcement to her new unit that they "should be careful who you talk to because they might report you."[578]

Further, the State concedes in their response that Command conducted only an "informal investigation" of just one of the incidents of sexual violence.[579] The State tacitly admits that this "informal investigation" was wholly inadequate by stating that if they happened now, these incidents would be referred to Army CID for investigation.[580] The State does not deny that it failed to protect Petitioner Kenyon from repeated sexual violence, that it failed to initiate an

574 *Id*.
575 Petition, at 12–13.
576 *Id.* at 13.
577 *Id.*
578 *Id.*
579 State Response, at 37.
580 *Id.*

adequate or sufficient investigation into her reports of sexual violence, and failed to protect her from retaliation.

Petitioner Stephanie B. Schroeder

The State categorically denied that Petitioner Schroeder reported any incidents of sexual violence during her active duty service with the Marine Corps, confining her reports to an application for a change in her discharge status.[581] This is untrue, as Petitioner Schroeder followed the direction of her Commands by reporting two instances of sexual violence to two different Commands. Furthermore, the State failed to provide the Commission with existing documentation which corroborates Petitioner Schroeder's experiences. There exists medical documentation from Petitioner Schroeder's active duty service, which was a key piece of evidence in Petitioner Schroeder's application for change in discharge. The State also chose not to include documentation regarding a lie detector test Petitioner Schroeder passed before being charged with adultery.[582]

The State refers to an investigation during Petitioner Schroeder's active duty service, referencing "consensual sex" between Petitioner Schroeder and her instructor;[583] however, this reference is inaccurate as the investigation was in response to Petitioner Schroeder being raped by her instructor. In its response, the United States admits that Petitioner Schroeder was charged with multiple non-judicial punishments[584] and does not dispute that these charges include the aforementioned incident with her instructor and events following.[585] What followed was a pattern of retaliatory behavior, both highlighted by the Petition and through the list of non-judicial punishments provided by the State.[586] The State does not dispute that Petitioner Schroeder's Command accused her of lying about the incident, informed her new Command that she was a "troublemaker," or the discipline she received following the two reports she made to two different Commands.[587] The State does not dispute any of the Petition's assertions regarding Petitioner Schroeder's command transfer, outside of denying that she reported sexual violence

581 *Id.*
582 While the Petition inaccurately categorized Petitioner Schroeder's non-judicial punishment as "conduct unbecoming," she was in fact charged with "adultery" after being raped by her married instructor.
583 State Response, at 37.
584 *See id.* at 37–38.
585 *Id.* at 38.
586 *Id.*; *See* Petition at 15–16.
587 Petition, at 15–16.

while she was an active duty service member.[588] Petitioner Schroeder's Commands failed to properly document or handle her reports effectively, and in doing so, failed to protect her from further harm.

Petitioner Amy Lockhart

The State claims that Petitioner Lockhart was threatened with the charge of "fraternization with a co-worker" as a separate incident from her rape.[589] The State's inaccurate depiction of Petitioner Lockhart's case is a disservice to the military criminal legal system's alleged zero tolerance for sexual assault. Specifically, the State does not dispute that Petitioner Lockhart was informed that her perpetrator provided a sworn statement claiming to have had sex with her or that Petitioner Lockhart denied the charges because she was unable to consent to sex due to being unconscious at the time of the rape.[590] A statement from a perpetrator admitting to having sex with Petitioner Lockhart is moot.

It is not relevant that the Petition inaccurately reported Petitioner Lockhart's rank. Further, her denied promotion following this incident is essentially a demotion. While the State alleges Petitioner Lockhart was subject to disciplinary hearings before she reported her rape, the State fails to provide information regarding this disciplinary hearing.[591] It appears that the disciplinary hearing the State is referring to is the alleged "inappropriate sexual relationship between Petitioner Lockhart and one of her subordinates,"[592] also known as, Petitioner Lockhart's rape case.

The State does not dispute that Petitioner Lockhart's Command threatened to charge her with adultery or that a statement was made by a member of her Command to her Victim Advocate referring to her as a "slut." While the Article 32 proceeding led to charges being dropped against the perpetrator,[593] if her promotion was canceled due to this incident, that strongly implies the decision was an act of retaliation for Petitioner Lockhart's report.

[588] State Response, at 37.
[589] *Id.* at 38.
[590] Petition, at 17.
[591] State Response, at 38–39.
[592] *Id*. at 38.
[593] *Id*. at 39.

Petitioner Elizabeth Lyman

The State disagrees with the Petition's characterization of the military criminal legal system in Petitioner Lyman's case, but the State does not dispute the horrific details of Petitioner Lyman's case that constitute *prima facie* violations of the American Declaration. The State failed to exercise due diligence to prevent sexual violence when Petitioner Lyman was violently raped in her barracks by a fellow service member while eleven weeks pregnant.[594] The State further does not deny that a medical exam and rape kit documenting signs of force, bruising, and lacerations in the vaginal area consistent with a sexual assault were thrown out at trial.[595] The inadmissibility of this evidence surely contributed to the court-martial finding the perpetrator "not guilty." After the trial, Petitioner Lyman's Command denied her request for a transfer.[596] She was forced to work daily next to six individuals who had testified against her,[597] while Command told her to "let the past die."[598] The undisputed facts in this case establish *prima facie* violations of the American Declaration.

Petitioner Sandra Sampson

The State Response confirms the breakdown in investigation and punishment of sexual violence in the military. The State outlines that Army CID thoroughly investigated Petitioner Sampson's allegations and found probable cause to believe that "the alleged perpetrator grabbed Petitioner Sampson's buttock and kissed her without her consent."[599] Even though this "highly professional law enforcement agency" substantiated Petitioner Sampson's claims, Command found "not enough evidence to proceed with UCMJ actions" and instead issued a "letter of reprimand and a negative counseling statement",[600] which is an administrative punishment more synonymous with a "slap on the wrist." The State cannot have it both ways: either the investigation was flawed or Command response was flawed. Either way, the undisputed facts prove that the State did not protect Petitioner Sampson from sexual violence, and that the

[594] Petition, at 19.
[595] Petition, at 19; State Response, at 40.
[596] Petition, at 19.
[597] *Id*.
[598] Petition, Attachment A, Petitioners' First Amended Complaint, at 39 para. 247.
[599] State Response, at 40.
[600] *Id*.

perpetrator was not adequately punished, constituting *prima facie* violations of the American Declaration.

Petitioner Hannah Sewell

The State does not address nor dispute any of the extremely distressing facts in Petitioner Sewell's case: that she was raped and suffered a severe back injury during the assault such that she could no longer sleep lying down; that she did not get proper medical care; that Command pulled her out of training and put her on cleaning duty after launching an investigation into her rape; that Command told Petitioner Sewell that important evidence from her rape kit, testimony from the nurse that examined her, and pictures from her exam were "lost;" that her perpetrator was promoted *twice* during the investigation into her rape; that Command denied Petitioner Sewell's request to transfer.[601]

The State alleges that because there was "evidence of digital penetration and oral sex performed by the accused," a Coast Guard lawyer was correct in finding there were not "reasonable grounds to believe the accused committed these acts without Ms. Sewell's consent" in an Article 32 investigation proceeding.[602] This "evidence" is not consistent with consent, nor is this "evidence" provided by the State.

In fact, the mention of "evidence" is questionable as the State does not dispute that pertinent evidence was "lost" in the process of Petitioner Sewell's investigation and hearing.[603] The "lost" evidence includes evidence from Petitioner Sewell's rape kit, testimony from the nurse who examined her, and pictures from her exam.[604] The State does not dispute other significant events that transpired during the investigation. Namely, the State does not dispute that the perpetrator was never questioned and declined to provide statements.[605] This fact alone proves that the investigation into Petitioner Sewell's case was flawed as it is difficult to comprehend how a suspect can be found not responsible without being a significant party in the investigation.

Further, the State does not dispute that during the investigation, Petitioner Sewell's perpetrator was moved to the barracks across from her, was able to continue his training course

601 Petition, at 20.
602 State Response, at 41.
603 Petition, at 20.
604 *Id.*
605 *Id.*

while Petitioner Sewell was removed from the training and put on full-time cleaning duty, and importantly, that her perpetrator was promoted *twice*.[606] Nor does the State dispute that Petitioner Sewell was injured during her rape, did not receive proper medical attention, and was medically discharged due to her assault.[607] Petitioner Sewell's military career ended as a result of the sexual violence she experienced as a service member. While her investigation was ongoing, her perpetrator was able to advance in his career while the military in effect punished Petitioner Sewell by stopping her training and giving her menial tasks. This is more consistent with retaliation and victim-blaming rather than due diligence and vindication for individuals in need of the military's support and protection, and it establishes clear *prima facie* violations of the American Declaration.

Petitioner Tina Wilson

The facts in Petitioner Wilson's case illustrate a stark example of military impunity for sexual violence: a Navy doctor sexually assaulted Petitioner Wilson and three others in Japan. Petitioner Wilson reported the assault, but Command closed the investigation without interviewing the perpetrator.[608] While the Navy was on notice that the doctor was a serial sexual predator, he was nevertheless transferred to Kuwait, where he sexually assaulted more people and was eventually returned to Japan for investigation.[609]

It is undisputed that Petitioner Wilson was not at the court-martial hearing, because she was misinformed about the hearing. The State contends that at the time, victims did not have a right to testify at court-martials,[610] which underscored the State's lack of commitment to victim-centered processes in cases of sexual violence.

The State does not dispute that, even after being found guilty of two counts of sexual misconduct and two counts of "conduct unbecoming," the Navy doctor's 24-month prison sentence was suspended after just one week.[611] For victims of sexual violence, this undisputed fact is hardly a vindication of the pain they suffered, and does not inspire confidence in the military criminal legal system.

606 *Id.*
607 *Id.* at 20–21.
608 Petition, at 21.
609 *Id*.
610 State Response, at 41.
611 *Id*.; Petition at 21.

The State and Petition both agree that Petitioner Wilson's rapist violated his sentence by failing to register with the National Sex Offender Registry.[612] However, it is questionable why the Military would not ensure individuals found guilty in the military criminal legal system properly complete their sentences. While in this instance NCIS alerted civilian authorities to the perpetrator's failure to register, it is not sustainable for the military to provide civilian punishments unless they intend on ensuring the completion of these sentences through collaborative work with civilian law enforcement agencies in every instance.

The State mentions "Catch a Serial Offender" (CATCH) throughout their reply, a program implemented to improve the identification of repeat offenders; however, in this instance when the perpetrator failed to register and was also able to continue service, the registration was useless in preventing future crime within the military criminal legal system. Furthermore, CATCH does not transfer into civilian life and perpetrators suffer minimal consequences post-service. This further speaks to the military's culture of impunity as there was a serious lack of due diligence and protection for Petitioner Wilson and other potential victims.

Petitioner Valerie Desautel

The State confirms Petitioner Desautel's rape and the subsequent investigation.[613] The State is quick to mention the thoroughness of its investigation; however, the undisputed facts in Petitioner Desautel's case establish multiple *prima facie* violations of the American Declaration. While the State references the "thoroughness" of this investigation, the State does not dispute that a CID agent accused the Petitioner of lying[614] and that Petitioner Desautel's response led to her unfair discharge from the Army.[615] Namely, Petitioner Desautel informed CID that her rape was not consensual sex due to her sexual orientation, only to have that used against her. The State does not dispute that Petitioner Desautel was discharged under the military's "Don't Ask Don't Tell" policy after reporting her sexual orientation in an attempt to protect herself from victim blaming or that her investigation was closed two months after her separation from the military.[616] Rather than vindicating Petitioner Desautel for her vulnerability in reporting her sexual assault, she was persecuted due to her sexual orientation and her report led to the end of

[612] *Id.*
[613] State Response, at 42.
[614] Petition, at 21.
[615] *Id.* at 22.
[616] *Id.* at 21–22.

her military career. Furthermore, due to Petitioner Desautel's discharge of "Other than Honorable," she was prevented from receiving veterans' benefits for eight years following her separation from the military.

The State contends that the military did not have jurisdiction over the civilian later determined to be the formerly unidentified rapist of Petitioner Desautel, discussed in detail in Subsection B(2) of this Section.[617] implying that they did in fact have jurisdiction.

VI. CONCLUSION

The Commission should declare the Petition admissible given that it meets the criteria of Article 31 and 34 of the Rules of Procedure. The Petition is admissible under Article 31 because Petitioners have exhausted domestic remedies and are exempt from pursuing the extraordinary, ineffective, inadequate, and unavailable remedies demanded by the State. The Petition also complies with Article 34 because it alleges well-grounded facts that tend to establish violations of rights under the Declaration. The State's response fails to consider the weight of the military's abuses by extensively targeting supposed "defects" in the Petition that are only ancillary to the core substance of the Petitioners' claims. The United States has plainly failed its service members though its acts and omissions: by subjecting them to horrific human rights violations and by refusing to recognize the irredeemable harm done to Petitioners and all other survivors of sexual assault in the military. The United States' immunity from accountability in domestic courts has allowed the military to close its eyes to the truth—that the military apparatus sustains the violence that it allegedly condemns. Throughout the Response, the State contends that the conditions that gave rise to this violence have been eradicated, which is patently false. Not only has the United States failed to resolve the systemic problems that foster military sexual violence and deny justice to survivors, but it also has not remedied the harms done to individual Petitioners, who continue to live with long-term trauma and extensive personal, emotional, physical, professional and financial harms resulting from their experiences in the military.

[617] State Response, at 42.

VII. ATTACHMENTS

A) Supplemental Brief for Plaintiffs-Appellants

B) Supplemental Brief for Defendants-Appellees

AMBER ANDERSON, ET AL. P-106-14
Observations on Response of the United States
Dated November 4, 2019

ATTACHMENTS

A

No. 12-1065

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

KORI CIOCA *et al.*

Plaintiffs-Appellees,

v.

DONALD RUMSFELD *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
For The Eastern District of Virginia, Alexandria Division
Case No. 1:11-cv-00151
The Honorable Liam O'Grady, United States District Judge

APPELLANTS' SUPPLEMENTAL BRIEF

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By Order of February 12, 2013, the Court directed the parties to file supplemental briefs addressing "[w]hether the plaintiffs who allege injuries arising in the course of their service in the United States Coast Guard possess standing to pursue claims against the defendants, former Secretaries of Defense, when the Coast Guard operates within the Department of Homeland Security."

Two plaintiffs, Kori Cioca and Panayiota Bertzikis, brought claims against the former Secretaries of Defense, but not for claims that arose when the Coast Guard operated within the Department of Homeland Security. Rather, both Plaintiffs brought claims for events that occurred when this nation was at war.

During time of war, the Coast Guard reports to the Secretary of the Navy, not to Secretary of Homeland Security. *See* 14 U.S.C.A. § 3, stating "Upon the declaration of war if Congress so directs in the declaration or when the President directs, the Coast Guard shall operate as a service in the Navy, and shall so continue until the President, by Executive order, transfers the Coast Guard back to the Department of Homeland Security. While operating as a service in the Navy, the Coast Guard shall be subject to the orders of the Secretary of the Navy who may order changes in Coast Guard operations to render them uniform, to the extent he deems advisable, with Navy operations." *See Louisville & N.R. Co. v. U.S.*, 258 U.S. 374 (1922) (those in the Coast Guard should be considered military "troops" during time of war); *Edmond v. United States*, 117 S.Ct. 1573, 137

L.Ed2d. 917 (1997) ("Congress has established the Coast Guard as a military service and branch of the Armed Forces that, except in time of war (when it operates as a service within the Navy), is part of the Department of Transportation. 14 U.S.C. §§ 1–3.")

This nation has been at war. *See* Public Law 107-40, 115 Stat. 224 (September 18, 2001). For that reason, Plaintiffs Cioca and Bertzikis joined the litigation against the former Department of Defense officials.

Plaintiffs note, as did Defendants, that the Court need not address the standing issue raised by the two Coast Guard plaintiffs light of the standing enjoyed by the other Plaintiffs.

CERTIFICATE OF SERVICE

I hereby certify that on this 6 day of March, 2013, I caused a true copy of the foregoing to be filed through the Court's electronic case filing system, and served through the Court's electronic filing system on the counsel of record:

Lowell Vernon Sturgill, Jr.
US Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 205030-0111

/s/Susan L. Burke
Susan L. Burke

B

No. 12-1065

IN THE UNITED STATES COURT OFAPPEALS
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

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Introduction

By Order of February 12, 2013, the Court directed the parties to file supplemental briefs addressing "[w]hether the plaintiffs who allege injuries arising in the course of their service in the United States Coast Guard possess standing to pursue claims against the defendants, former Secretaries of Defense, when the Coast Guard operates within the Department of Homeland Security." As we explain below, two plaintiffs, Kori Cioca and Panayiota Bertzikis, fall within that category, and neither has standing to bring this action.

Preliminarily, however, we note that the Court need not address this question to affirm the judgment below. While courts generally may not pass over standing issues in order to reach the merits, see *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998), the Supreme Court also has held that where one party has standing, the Court need not consider whether other parties in the same case also have standing to raise the same issues. See *Horne* v. *Flores*, 557 U.S. 433, 445-46 (2009); *Watt* v. *Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981); *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 264 & n.9 (1977). See also *Jersey City* v. *Consolidated Rail Corp.*, 668 F.3d 741, 744 (D.C. Cir. 2012).

There is no reason apparent on the face of the complaint why the other plaintiffs would not have Article III standing to raise the same issues that plaintiffs Cioca and Bertzikis assert. Thus, this Court will have to address those issues regardless of whether Cioca and Bertzikis have standing. As a result, pursuant to the cases cited above, this Court does not need to consider whether plaintiffs Cioca and Bertzikis have standing in order to resolve this appeal. See also *Steel Co.*, 523 U.S. at 98-99 (noting other cases in which the Supreme Court similarly passed over a jurisdictional question that could have had no effect on the outcome).

This Court also need not address Cioca's and Bertzikis's standing for a second, independent reason. The district court dismissed all the plaintiffs' claims based on the threshold principle of judicial deference to military judgments, see Order at 2 (JA 62), which bars plaintiffs' claims because they would require second-guessing military decisions regarding the supervision and control of service members. See *id.*; Brief for Appellees at 5-6, 10-13, discussing, *e.g.*, *United States* v. *Stanley*, 483 U.S. 669, 679-80 (1987); *Chappell* v. *Wallace*, 462 U.S. 296, 300-02 (1983); *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973).

The principle of judicial deference on which the district court relied represents the kind of prudential, discretionary threshold concern the

Supreme Court has held that courts may consider without first addressing Article III issues. See, *e.g.*, *Tenet* v. *Doe*, 544 U.S. 1, 6 & n.4 (2005) (prudential rule that forbids courts from entertaining suits against the government based on a covert espionage agreement "represents the sort of 'threshold question' we have recognized may be resolved before addressing jurisdiction"), *citing Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 585 (1999). Thus, the Court also does not need to consider whether plaintiffs Cioca and Bertzikis have Article III standing here for this additional reason.

A. Statutory and Procedural Background

1. Statutory Background

On January 28, 1915, Congress established the United States Coast Guard, by merging the Revenue Cutter Service and the Life Saving Service. In so doing, Congress placed the Coast Guard under the control of the Treasury Department except in times of war or when the President so directed, when the Coast Guard would be subject to the orders of the Secretary of the Navy.[1] See Act of Jan. 28, 1915, Pub. L. No. 63-239, ch. 20, § 1, 38 Stat. 800-801 (1915).

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[1] For example, on November 1, 1941, President Roosevelt transferred the Coast Guard to the control of the Department of the Navy. See Executive Order 8929, 6 Fed. Reg. 5581 (Nov. 1, 1941). The Coast Guard returned to the control of the Department of Treasury on January 1, 1946, see Executive Order 9666, 11 Fed. Reg. 1 (Dec. 28, 1945), and was later transferred to the

On March 1, 2003, the Coast Guard was transferred to the Department of Homeland Security, under whose authority the Coast Guard still remains. See Department of Homeland Security Reorganization Plan, set out as a note to 6 U.S.C. 542. See also 14 U.S.C. 1; 10 U.S.C. 101(a)(9)(D).[2]

2. Factual Background

Two of the plaintiffs, Kori Cioca and Panayiota Bertzikis, allege they were members of the Coast Guard during the period relevant to the claims they assert in this case. Ms. Cioca asserts that she served in the Coast Guard from August 2005 to June 2007. See First Amended Complaint (R9), ¶ 8 (Joint Appendix ("JA") 5). Ms. Bertzikis avers that she served in the Coast Guard from November 2005 until May 2007. See *id.*, ¶ 85 (JA 17).

Ms. Cioca alleges that while she was in the Coast Guard, one of her superiors harassed, threatened, and raped her. See First Amended Complaint, ¶¶ 9-20 (JA 5-7). She alleges that she notified her chain of command about those incidents and that her command did nothing to stop

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control of the Department of Transportation. See Act of Oct. 15, 1966, Pub. L. No. 89-670, § 6, 80 Stat. 931, 937, 938 (Oct. 15, 1966).

[2] The Coast Guard still operates as a service in the United States Navy if Congress (in a declaration of war) or the President so directs, see 14 U.S.C. 3; 14 U.S.C. 1; 10 U.S.C. 101(a)(9)(D), but neither of those conditions existed during the times relevant to this case. See also 14 U.S.C. 5 (noting that the term "Secretary" used in this title "means the Secretary of the respective department in which the Coast Guard is operating"); 14 U.S.C. 4 (addressing various matters applicable when the Coast Guard is operating under the U.S. Navy).

that behavior; refused to grant her a transfer; discouraged her from reporting those incidents; imposed inadequate punishment on her superior; permitted other personnel to harass her; and wrongly discharged her on the ground that she had engaged in inappropriate relationships with members of the Coast Guard. See *id.*, ¶¶ 11-27 (JA 5-8).

Ms. Bertzikis alleges that while she was in the Coast Guard, she was raped by a shipmate. See First Amended Complaint, ¶ 86 (JA 17). She contends that when she reported the rape to her command, she was told she would be charged with a military crime if she did not stop talking about it; that her command failed to take any steps to investigate the incident or have it prosecuted; that her command forced her to work with and live on the same barracks floor as the rapist; that her command failed to stop other Coast Guard personnel from assaulting her; and that a Coast Guard victim advocate told her not to report this assault and other harassment. See *id.* ¶¶ 87-91 (JA 17-18).

B. Argument

1. Legal Background

Article III of the Constitution limits federal courts' jurisdiction to certain "Cases" and "Controversies." U.S. Const. Art. III. "One element of the case-or-controversy requirement' is that plaintiffs 'must establish that

they have standing to sue.'" *Clapper* v. *Director of National Intelligence*, 2013 WL 673253 *7 (S. Ct. Feb. 26, 2013) (citation omitted). To establish Article III standing, a plaintiff must be able to demonstrate an injury that is "'concrete, particularized, and actual or imminent; fairly traceable to the challenged action, and redressable by a favorable ruling.'" *Id.* (citation omitted).

2. Application of Law

The two plaintiffs who served in the Coast Guard, Kori Cioca and Panayiota Bertzikis, assert similar claims as all the other plaintiffs in this case. See pp. 7-10, *infra* (discussing those claims). Cioca and Bertzikis lack Article III standing to bring those claims against defendants Rumsfeld and Gates, however, because Cioca and Bertzikis both served in the Coast Guard. See p. 4, *supra*. The Coast Guard is not a part of the Department of Defense, see p. 4, *supra* and 10 U.S.C. 101(a)(6) & (8) (defining the Department of Defense as including the Army, Navy, and Air Force), nor was the Coast Guard subject to the orders of the Secretary of Defense during the period of Cioca's and Bertzikis's service with that organization. See p. 4, *supra* and 10 U.S.C. 113(b) (noting that the Secretary of Defense has "authority, direction, and control over the Department of Defense). As a

result, Cioca and Bertzikis cannot prove that these defendants, who are both former Secretaries of Defense, caused the injuries they allege.

a. Plaintiffs' principal contention in the First Amended Complaint is that former Defense Secretaries Rumsfeld and Gates "failed to take reasonable steps to prevent Plaintiffs from being repeatedly raped, sexually assaulted and sexually harassed by federal military personnel, and by impeding Plaintiffs' exercise of their First Amendment rights." First Amended Complaint, ¶ 319 (JA 52) (Rumsfeld); ¶ 334 (JA 55) (Gates). As explained above, however, the Secretary of Defense had no authority over the Coast Guard at the time in question here. Thus, plaintiffs Cioca and Bertzikis cannot prove that Rumsfeld or Gates caused the violation of plaintiffs' rights as alleged above or the injuries that are described at pp. 4-5, *supra*, as Article III requires.

b. Plaintiffs also allege that defendant Rumsfeld ignored a requirement in Public Law 105-85 that the Secretary of Defense establish a commission to investigate policies and procedures with respect to the military investigation of reports of sexual misconduct. See Complaint, ¶ 321 (JA 52). Again, however, plaintiffs served in the Coast Guard, not in any of the military departments that reported to the Secretary of Defense during the

times relevant to the claims plaintiffs Cioca and Bertzikis allege here.[3] As a result, Cioca and Bertzikis cannot prove that defendants Rumsfeld or Gates caused them any Article III injury in this respect.

c. Plaintiffs allege that defendant Gates failed to ensure that the Department of Defense met its statutorily mandated deadline of January 2010 for implementing the database of reports of rapes and sexual assaults that was prescribed by the National Defense Authorization Act for Fiscal Year 2009. See First Amended Complaint, ¶ 337 (JA 56). Plaintiffs Cioca and Bertzikis lack standing to bring this claim, however, because the statutory deadline to which they refer did not apply to the Coast Guard, which is not a part of the Department of Defense did not report to the Secretary of Defense at the times in question. See p. 6, *supra*.[4]

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[3] Thus, the section of Public Law 105-85 to which plaintiffs refer defines military criminal investigative organizations as including the Army Criminal Investigative Command, the Naval Criminal Investigative Service, the Air Force Office of Special Investigations, and the Defense Criminal Investigative Service. See National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, § 1072(d), 111 Stat. 1629, 1898, 1899. That section does not mention the Coast Guard Investigative Service.

[4] Plaintiffs' contention that defendant Gates 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, see First Amended Complaint, ¶ 338 (JA 56), fails for the same reason. Plaintiffs Cioca and Bertzikis did not belong to the Army or to any military department that reported to former Defense Secretary Gates at the time of the events they allege.

Moreover, neither Cioca nor Bertzikis were serving with the Coast Guard at the time referred to in the Act mentioned above. Thus, plaintiffs Cioca and Bertzikis also cannot satisfy the Article III requirement of causation with respect to this contention for this additional reason.

d. Finally, plaintiffs allege that defendants "sent a message that the military was resisting Congressional oversight efforts designed to change a military culture where rape, sexual assault and sexual harassment were not prosecuted or otherwise deterred." First Amended Complaint, ¶¶ 322 (JA 52-53) (Rumsfeld); *id.* ¶ 336 (JA 55-56) (Gates). Again, however, defendants had no authority over the Coast Guard during the time plaintiffs Cioca and Bertzikis served in that department. Thus, as we have already demonstrated, plaintiffs cannot demonstrate that their alleged injuries are "fairly traceable" to defendants' official activities as Secretaries of Defense. The Complaint's vague references to asserted "messages" that defendants' activity allegedly sent does not change that key fact. [5] *See Clapper*, *supra*,

[5] For example, under the Uniform Code of Military Justice, the Secretary concerned for the Coast Guard is the Secretary of Homeland Security, not the Secretary of Defense, see 10 U.S.C. 101(a)(9), and the Coast Guard's reporting requirements to its Congressional oversight committees are separate and independent from the Department of Defense's reporting requirements. See, *e.g.*, Coast Guard and Maritime Transportation Act of 2012, Pub. L. No. 112-213, § 205, 126 Stat. 1540, 1543 (requiring Commandant of the Coast Guard to direct Superintendent of the Coast Guard Academy "to prescribe a policy on sexual harassment and sexual

2013 WL 673253 at **9, 11 (noting that a plaintiff cannot prove Article III standing by relying on a "highly attenuated chain of possibilities"); *id.* at 10 (declining to "abandon our usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors").

Conclusion

For the foregoing reasons, the Court should conclude that plaintiffs Cioca and Bertzikis lack standing in this case, if the Court reaches that issue.

Respectfully submitted,

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violence applicable to the cadets and other personnel of the Academy," and directing reporting requirements).

Certificate of Compliance

I hereby certify that this brief has been prepared in a proportionally spaced typeface using Word, Times New Roman, 14-point type.

/s/ Lowell V. Sturgill Jr.

Certificate of Service

I hereby certify that on this 5th day of March, 2013, I filed the foregoing Supplemental Brief for Appellees by use of the Court's CM/ECF system. Service on counsel listed below will be made by that system:

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