



United States Department of State

*United States Permanent Mission to the  
Organization of American States*

*Washington, D.C. 20520*

November 4, 2019

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  
Response of the United States**

Dear Dr. Abrão:

The U.S. Government has the honor of submitting to the Inter-American Commission on Human Rights this response to the Petition your office transmitted to us to us on May 14, 2019 via a letter dated May 10, 2019. The Petition, with exhibits, was submitted to the Commission on January 23, 2014, on behalf of Amber Anderson, Amber Yeager, Amy Lockhart, Andrea Neutzling, Andrew Schmidt, Blake Stephens, Elizabeth Lyman, Greg Jeloudov, Hannah Sewell, Jessica Kenyon, Kristen Stark, Mary Gallagher, Myla Haider, Panayoita Bertzikis, Rebekah Havrilla, Sandra Sampson, Sarah Albertson, Stephanie B. Schroeder, Tina Wilson, and Valerie Desautel ("Petitioners") in the above-referenced matter. Please find enclosed the United States' response to the Petition. We trust this information is useful to the Commission and thank the Commission for its attention to this matter.

Please accept renewed assurances of my highest consideration.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Carlos Trujillo'.

Carlos Trujillo  
Ambassador

Enclosures: As stated

Enclosures:

1. U.S. Dep't of Def., Instr. 6495.02, Sexual Assault Prevention and Response (SAPR) Program Procedures (2013, as revised)
2. U.S. Dep't of Def., Instr. 5505.18, Investigation of Adult Sexual Assault in the Department of Defense (2017)
3. U.S. Dep't of Def. Rule on Commander and Management SAPR Procedures, 32 C.F.R. § 105.9
4. Excerpt from Report of the Response Systems to Adult Sexual Assault Crimes Panel (June 2014)
5. Excerpt from Report of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (March 2019)
6. Army Criminal Investigation Command Redacted Report of Investigation into Allegations Made by Petitioner Havrilla
7. Naval Criminal Investigative Service Redacted Report of Investigation into Allegations Made by Petitioner Anderson
8. Coast Guard Investigative Service Redacted Report of Investigation into Allegations Made by Petitioner Bertzikis
9. Naval Criminal Investigative Service Redacted Report of Investigation into Allegations Made by Petitioner Schmidt
10. Naval Criminal Investigative Service Redacted Report of Investigation into Allegations Made by Petitioner Lockhart
11. Army Criminal Investigation Command Redacted Report of Investigation into Allegations Made by Petitioner Sampson
12. Army Criminal Investigation Command Redacted Report of Investigation into Allegations Made by Petitioner Desautel

**AMBER ANDERSON, *ET AL.***  
**P-106-14**  
**RESPONSE OF THE UNITED STATES**

The United States Government has the honor of submitting to the Inter-American Commission on Human Rights (the “Commission”) this response to the Petition your office transmitted to us on May 14, 2019 via a letter dated May 10, 2019 (“The Petition”). The Petition was filed on behalf of Amber Anderson, Amber Yeager, Amy Lockhart, Andrea Neutzling, Andrew Schmidt, Blake Stephens, Elizabeth Lyman, Greg Jeloudov, Hannah Sewell, Jessica Kenyon, Kristen Stark, Mary Gallagher, Myla Haider, Panayoita Bertzikis, Rebekah Havrilla, Sandra Sampson, Sarah Albertson, Stephanie B. Schroeder, Tina Wilson, and Valerie Desautel (“Petitioners”). The Petition was initially submitted to the Commission on January 23, 2014.

The United States respectfully requests that the Commission declare this matter inadmissible because the matter addressed by the Petitioner fails to meet the Commission’s established criteria in Articles 31 and 34 of its Rules of Procedure (“Rules”). In particular, Petitioners have failed to exhaust a variety of domestic remedies available in the United States to redress precisely the types of violations they allege in the Petition, as required by Article 31 of this Commission’s Rules. Moreover, a number of the claims for relief were never presented in U.S. courts, thus rendering them inadmissible.

The Petition is also plainly inadmissible under Article 34 of the Rules because it is “manifestly groundless” under Article 34(b). Additionally, even if evaluated under a *prima facie* standard, most of the allegations set out in the Petition fail to state a claim under Article 34(a). Accordingly, the United States respectfully requests the Commission find the Petition inadmissible. Should the Commission nevertheless declare the Petition admissible and examine its merits, the United States urges it to deny the Petitioners’ requests for relief, as the Petition is entirely without merit.

## I.

### Introduction

The United States military has never tolerated or condoned sexual assaults by or against its members. At all times covered by the Petition, the United States military operated professional, efficient criminal investigation and criminal justice systems and provided effective services to assist service members who were the victims of sexual assault. Moreover, since the date of the last incident alleged by the Petition, the U.S. sexual assault response system has further evolved to become what is almost certainly the most victim-protective criminal investigation and justice system in the United States.

As the United States Supreme Court recognized just last year, the American court-martial system “closely resembles civilian structures of justice.”<sup>1</sup> The Supreme Court expressly stated that the “military justice system’s essential character” is “judicial.”<sup>2</sup> The court also observed that “[t]he procedural protections afforded to a service member are virtually the same as those given in a civilian criminal proceeding,” and “the judgments a military tribunal renders . . . rest on the same basis, and are surrounded by the same considerations, as give conclusiveness to the judgments of other legal tribunals.”<sup>3</sup> The U.S. military justice system is a fair, mature, and professional criminal justice system that plays a vital role in promoting lawful conduct by U.S. service members, including in deployed areas where such a robust system is important to promoting accountability.

The United States military today includes approximately 1.3 million active duty members and more than 800,000 reservists. The Petition collects 20 allegations that service members were sexually assaulted between 2001 and 2010.<sup>4</sup> Together, those allegations relate to 0.0015% of today’s U.S. military population; they comprise a far smaller percentage of U.S. service

---

<sup>1</sup> *Ortiz v. United States*, 138 S. Ct. 2165, 2170 (2018).

<sup>2</sup> *Id.* at 2174.

<sup>3</sup> *Id.* (internal quotation and punctuation marks omitted).

<sup>4</sup> As discussed below, many of the allegations in the Petition are factually erroneous. Additionally, the Petition fails to indicate the date of the alleged sexual assault against Petitioner Lockhart. The Naval Criminal Investigative Service’s investigation of the alleged event reveals that date was February 4, 2010.

members over the time span from which they are drawn. We condemn sexual assault in the U.S. military in the strongest terms, and the robust system of justice in place to protect victims and promote accountability for perpetrators reflects our commitment to preventing and appropriately punishing sexual assault. That there exists some level of crime, including sexual assaults, however, does not constitute a failure of the United States to meet its commitments under the American Declaration of the Rights and Duties of Man (“the American Declaration”). Nor has the U.S. military’s response to those individual cases or incidents of sexual assault in the U.S. military as a whole violated the American Declaration. On the contrary, the U.S. Government’s response has been driven by care for its service members affected by sexual assault and a commitment to the careful investigation and adjudication of such allegations to promote appropriate accountability. This response has also been characterized by steady evolution as the U.S. Government considers and implements additional sexual assault prevention and response measures, as detailed below.

## **II.**

### **Background**

#### **A. The United States’ Sexual Assault Prevention and Response Systems Are Effective and Continually Evolving**

While at all relevant times the U.S. military’s sexual assault response systems were fully compliant with the American Declaration, myriad improvements have been made to the system over the last several years. Many aspects of the United States military’s Sexual Assault Prevention and Response Systems are models for others to emulate, including the following:

1. A service member has the right to make either a restricted or unrestricted report of sexual assault.<sup>5</sup> Providing a service member who has been sexually assaulted with that choice provides her or him with a measure of control over how the case proceeds. Experts in sexual

---

<sup>5</sup> 10 U.S.C.A. § 1565b (West Supp. 2018); *see also* U.S. DEP’T OF DEF., INSTR. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES 35–43, ¶¶ 1–7 (2013) (Attachment 1).

assault response indicate that providing such control is helpful for sexual assault victims' recovery. With limited exceptions to protect others from danger, a restricted report will not result in a law enforcement investigation.<sup>6</sup> It provides the victim with a means to seek services—including medical services—and to have a rape kit prepared and maintained to preserve evidence that may be important if the victim decides to convert the restricted report to an unrestricted report. The U.S. military's policy prefers unrestricted reports, as such reports provide an opportunity to hold alleged offenders appropriately accountable. But the U.S. military nevertheless provides the restricted reporting option to assist all victims, including those who would not report at all without this option. Those who make restricted reports may convert them to unrestricted reports at any time, thereby triggering an investigation by one of the Department of Defense's highly professional and well-trained military criminal investigative organizations.<sup>7</sup> The U.S. military recently instituted a program to allow those who make restricted reports to receive information in the event their alleged perpetrator is implicated in another sexual assault, providing the victim with additional information to consider when deciding whether to convert the restricted report to an unrestricted report. If the victim decides to convert the restricted report to unrestricted, a criminal investigation ensues.<sup>8</sup> The program, titled "Catch a Serial Offender" (CATCH), was implemented to improve identification of repeat offenders in the military.<sup>9</sup>

2. The U.S. military offers every service member who makes either a restricted or unrestricted report of a sexual assault a lawyer, who (if the service member chooses) enters into an attorney-client relationship with the service member and zealously represents the service member's interests throughout the response, investigative, and criminal justice processes. This

---

<sup>6</sup> See U.S. DEP'T OF DEF., INSTR. 6495.02, *supra*, at 40–42, ¶ 5.

<sup>7</sup> See U.S. DEP'T OF DEF., INSTR. 5505.18, INVESTIGATION OF ADULT SEXUAL ASSAULT IN THE DEPARTMENT OF DEFENSE, at 11–13, ¶ 3.6 (2017) (Attachment 2).

<sup>8</sup> See *id.*

<sup>9</sup> Memorandum from Acting Secretary of Defense Patrick M. Shanahan, Actions to Address and Prevent Sexual Assault in the Military (May 1, 2019).

program, usually referred to as the Special Victims' Counsel Program, appears to be the largest victim representation program in the United States.<sup>10</sup>

3. *Every* unrestricted report of a sexual assault—either alleged penetrative offenses or alleged “contact” offenses without penetration—*must* be investigated by a military criminal investigative organization—one of the highly professional law enforcement agencies operated by the Military Departments whose agents receive extensive training in the investigation of sex offenses.<sup>11</sup> Military commanders have no discretion to decide whether an unrestricted report of a sexual assault will be referred to a military criminal investigative organization. Even if a military commander considers an allegation unsupported, untrue, or even facially irrational, it must be referred to a military criminal investigative organization for investigation.

4. In 2011, Congress enacted a law requiring the establishment of the Department of Defense Sexual Assault Prevention and Response Office.<sup>12</sup> That office oversees implementation of the Department of Defense's comprehensive policy for sexual assault prevention and response; serves as the single point of authority, accountability, and oversight for the sexual assault prevention and response program; and provides oversight to ensure the Military Departments comply with the sexual assault prevention and response program.<sup>13</sup>

5. Also in 2011, Congress significantly updated the Uniform Code of Military Justice's sexual assault provisions.<sup>14</sup> Congress again revised the relevant statutory provisions in 2016 to

---

<sup>10</sup> See 10 U.S.C.A. § 1044e (West Supp. 2018); *see also* Dep't of Def. Rule on Sexual Assault Response Coordinator (SARC) and Sexual Assault Prevention and Response Victim Advocates (SAPR VA) Procedures, 32 C.F.R. § 105.10 (2018); *see also* Memorandum from Secretary of Defense Chuck Hagel, Sexual Assault Prevention and Response (Aug. 14, 2013).

<sup>11</sup> See National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1742(b), 127 Stat. 672, 979 (2013); U.S. DEP'T OF DEF., INSTR. 6495.02, *supra*, at 38, ¶ 1(f) (2013); *see also* U.S. DEP'T OF DEF., INSTR. 5505.18, *supra*, at 3, ¶ 1.2(a) (2017) (“MCIOs will initiate a criminal investigation in response to *all* allegations of adult sexual assault, ... of which they become aware that occur within their jurisdiction . . . .”) (emphasis added).

<sup>12</sup> Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1611, 124 Stat. 4137, 4431 (2011).

<sup>13</sup> *Id.*, § 1611(b).

<sup>14</sup> National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 541, 125 Stat. 1298, 1404-05 (2011).

ensure the military's criminal code continues to reflect the best practices among civilian jurisdictions.<sup>15</sup>

6. In 2013, Congress enacted a military crime victims' bill of rights.<sup>16</sup> The President of the United States then issued an Executive Order amending the Rules for Courts-Martial to implement those rights.<sup>17</sup> Victims now have the rights, for example, to be consulted concerning any plea bargain regarding an offense against them,<sup>18</sup> to be notified of and given an opportunity to attend criminal justice proceedings related to their case,<sup>19</sup> and to provide a victim impact statement if the case results in a conviction.<sup>20</sup>

7. Decisions as to whether to pursue criminal prosecution in sexual assault cases have been elevated to higher-level military officers. For penetrative sexual assault allegations (including attempts to commit penetrative sexual assaults), the initial disposition decision has been elevated to a special court-martial convening authority in the grade of at least O-6 (colonel or Navy captain).<sup>21</sup> Additionally, for allegations of penetrative sexual assaults, certain reviews are required if a general court-martial convening authority chooses not to refer charges to be tried by a court-martial. If the convening authority's staff judge advocate recommended against referring the charge for trial and the convening authority agrees, the case must be reviewed by the next senior general court-martial convening authority in the chain of command.<sup>22</sup> If the staff judge advocate recommended referral but the convening authority disagrees, the case must be reviewed by the Secretary of the relevant Military Department.<sup>23</sup> There is also a means by which

---

<sup>15</sup> National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5430, 130 Stat. 2000, 2949-50 (2016).

<sup>16</sup> 10 U.S.C.A. § 806b (West Supp. 2018).

<sup>17</sup> Exec. Order No. 13696, 80 Fed. Reg. 35781 (June 17, 2015).

<sup>18</sup> See RULE FOR COURTS-MARTIAL (R.C.M.) 705(e)(3)(B), Manual for Courts-Martial, United States (2019 ed.) [hereinafter MCM].

<sup>19</sup> See R.C.M. 806(b)(3), MCM; see also MIL. R. EVID. 412(c)(2), MCM.

<sup>20</sup> See R.C.M. 1001(c)(1)–(2), MCM.

<sup>21</sup> Memorandum from Secretary of Defense Leon Panetta, Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases (Apr. 20, 2012).

<sup>22</sup> National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1744(d), 127 Stat. 672, 980 (2013).

<sup>23</sup> *Id.*, § 1744(c)(1), 127 Stat. at 980.



a prosecutor who disagrees with a general court-martial convening authority's non-referral decision may seek review by the Secretary of the Military Department.<sup>24</sup>

8. Preliminary hearings have been drastically restyled to afford more protection to victims.<sup>25</sup> Defense counsel may no longer use such hearings as a discovery tool.<sup>26</sup> The scope of these hearings is now limited to determining whether probable cause exists to believe the accused committed the crime, and to provide the convening authority with more information.<sup>27</sup> The victim also has the right to decline to testify at the hearing.<sup>28</sup> All hearings are recorded, and a victim who chooses to do so may listen to the recording.<sup>29</sup>

9. The statute of limitations has been eliminated for sexual assaults and sexual assaults of a child.<sup>30</sup> This change helps ensure that, prospectively, all such crimes that warrant prosecution can be tried regardless of reporting delays.

10. If an enlisted service member is convicted of rape, a penetrative sexual assault, forcible sodomy, or an attempt to commit any of those offenses, the adjudged sentence must include a dishonorable discharge.<sup>31</sup> If an officer is convicted, the sentence must include a dismissal—the equivalent of a dishonorable discharge for officers.<sup>32</sup> The post-trial power of convening authorities to overturn convictions and to reduce sentences has been sharply constrained.<sup>33</sup>

---

<sup>24</sup> See Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 541, 128 Stat. 3292, 3372 (2014).

<sup>25</sup> National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, §§ 1701–1753, 127 Stat. 672, 950–85 (codified as amended in scattered sections of 10 U.S.C.A. § 832 (West Supp. 2018)).

<sup>26</sup> See 10 U.S.C.A. § 832(a) (West Supp. 2018).

<sup>27</sup> See *id.*

<sup>28</sup> 10 U.S.C.A. § 832(d)(3) (West Supp. 2018).

<sup>29</sup> 10 U.S.C.A. § 832(e) (West Supp. 2018).

<sup>30</sup> 10 U.S.C.A. § 843(a) (West Supp. 2018).

<sup>31</sup> 10 U.S.C.A. § 856(b)(1) (West Supp. 2018).

<sup>32</sup> *Id.*

<sup>33</sup> See National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702(b), 127 Stat. 672, 955 (2013) (codified as amended at 10 U.S.C.A. § 860(c) (West Supp. 2018)).

11. U.S. law requires the Secretary of Defense to provide for a “timely determination” on a request for transfer made by a victim of sexual assault in the armed forces.<sup>34</sup> Service members who make an unrestricted report of sexual assault must be informed of the option “to request a temporary or permanent expedited transfer from their assigned command or installation.”<sup>35</sup> Once a credible report of sexual assault is filed and a request has been made, a presumption in favor of the transfer is established.<sup>36</sup> The commanding officer (CO) must make a decision within 72 hours from receipt of the request.<sup>37</sup> During that period, the CO must “request and take into consideration the service member’s input” regarding the transfer destination.<sup>38</sup> If the request is disapproved by the CO, the service member will have an opportunity to request a review.<sup>39</sup> The intent of the policy is to provide an option to leave a military installation if a victim feels uncomfortable there.<sup>40</sup> It is a priority that the Military Departments make all “reasonable effort(s) to minimize disruption” to the victim’s career throughout the process.<sup>41</sup>

12. Retaliation against a service member who files a report of sexual assault is prohibited by law.<sup>42</sup> In 2016, Congress enacted a specific military offense of retaliation,<sup>43</sup> which took effect on January 1, 2019.<sup>44</sup> Even a threat to take an adverse personnel action against a person who has not yet filed a report, but intends to file one, is prohibited by statute.<sup>45</sup> Service members who

---

<sup>34</sup> National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 582(a), 125 Stat. 1298, 1432 (2011) (codified as amended at 10 U.S.C.A. § 673 (West Supp. 2018)).

<sup>35</sup> U.S. Dep’t of Def. Rule on Commander and Management SAPR Procedures, 32 C.F.R. § 105.9(f)(2) (2018) (Attachment 3); *see also* Memorandum from Deputy Secretary of Defense Ash Carter, Expedited Transfer of Military Service Members Who File Unrestricted Reports of Sexual Assault (Dec. 16, 2011).

<sup>36</sup> 32 C.F.R. § 105.9(f)(2)(i).

<sup>37</sup> 32 C.F.R. § 105.9(f)(2)(v); *see also* Memorandum from Deputy Secretary of Defense Ash Carter, *supra*.

<sup>38</sup> 32 C.F.R. § 105.9(f)(2)(iv); *see also* Memorandum from Deputy Secretary of Defense Ash Carter, *supra*.

<sup>39</sup> 32 C.F.R. § 105.9(f)(2)(vi); *see also* Memorandum from Deputy Secretary of Defense Ash Carter, *supra*.

<sup>40</sup> 32 C.F.R. § 105.9(f)(1)(ii).

<sup>41</sup> 32 C.F.R. § 105.9(f)(2)(vii); *see also* Memorandum from Deputy Secretary of Defense Ash Carter, *supra*.

<sup>42</sup> 10 U.S.C.A. § 932 (West Supp. 2018).

<sup>43</sup> National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5450, 130 Stat. 2000, 2957-58 (2016) (codified at 10 U.S.C. § 932).

<sup>44</sup> Exec. Order No. 13825, § 3, 83 Fed. Reg. 9889 (Mar. 1, 2018).

<sup>45</sup> 10 U.S.C.A. § 932 (West Supp. 2018).

violate that prohibition may be tried by court-martial.<sup>46</sup> Maximum punishments for violations of the retaliation statute include a dishonorable discharge, forfeiture of all pay and allowances, and confinement for three years.<sup>47</sup> Retaliation occurs when an adverse personnel action is wrongfully taken or threatened against a person who intends to file, or has filed, a sexual assault report.<sup>48</sup> It can also occur when a favorable personnel action is wrongfully withheld or threatened to be withheld against someone in the relevant class of individuals.<sup>49</sup> In addition to those categories, the Secretary of Defense and the Secretaries of the Military Departments are empowered to proscribe “other types or categories of prohibited retaliatory actions by regulation,”<sup>50</sup> and service members who violate such regulations may be criminally prosecuted.

13. Every sexual assault committed by a service member in the United States is subject to potential prosecution not only by court-martial, but also in United States district court and/or a state, district, or territorial court, depending on the jurisdictional status of the location where the incident occurred. Victims have the right to express their preference as to whether the incident is prosecuted by military or civilian authorities.<sup>51</sup> While not binding, the victim’s preference will be considered by the convening authority.<sup>52</sup> If a victim prefers prosecution by a civilian authority, the military will inform the relevant civilian authority of that preference. In such cases, the convening authority will inform the victim of the civilian authority’s decision regarding whether to prosecute.<sup>53</sup>

14. Congress enacted special sexual assault protections for military recruits and service members in basic training.<sup>54</sup>

---

<sup>46</sup> *Id.*

<sup>47</sup> Pt. IV, ¶ 89.d, MCM.

<sup>48</sup> 10 U.S.C.A. § 932(a)(1) (West Supp. 2018).

<sup>49</sup> *Id.* § 932(a)(2) (West Supp. 2018).

<sup>50</sup> Pt. IV, ¶ 89.c.(7), MCM.

<sup>51</sup> Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 534(b)(1), 128 Stat. 3292, 3367 (2014); R.C.M. 306(e)(2), MCM.

<sup>52</sup> Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 534(b)(2), 128 Stat. at 3367 (2014); R.C.M. 306(e)(2), MCM.

<sup>53</sup> Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 534(b)(3)-(4), 128 Stat. at 3367 (2014); R.C.M. 306(e)(3), MCM.

<sup>54</sup> National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1741, 127 Stat. 672, 977 (2013); Uniform Code of Military Justice art. 93a, 10 U.S.C.A. § 893a (West Supp. 2018).

15. Congress enacted a requirement that, upon request, a general or flag officer must review the circumstances of any service member recommended for involuntary separation within a year of making an unrestricted report of a sexual assault; this statute also prohibited the member's separation unless the general or flag officer concurs.<sup>55</sup> This provides an important protection for military sexually assault victims by ensuring a senior officer examines the basis for any involuntary separation to ensure it is sound and is not the result of retaliation or any other inappropriate motive.

16. Among many other measures implemented in recent years, Congress has also enacted provisions that: (1) expand sexual trauma counseling and treatment for affected members of the U.S. military's Reserve Components;<sup>56</sup> (2) require discharge review boards to give "liberal consideration" to former service members for whom "military sexual trauma" may have contributed to post-traumatic stress disorder or traumatic brain injury;<sup>57</sup> (3) require establishment of a confidential process by which an individual who was the victim of a sex-related offense during service in the armed forces may challenge the terms or characterization of his or her discharge before a board of correction of military/naval records;<sup>58</sup> (4) broaden the definition of "sexual harassment" in a military context;<sup>59</sup> and (5) establish standards to ensure the armed forces' sexual assault forensic examiners are appropriately qualified.<sup>60</sup>

---

<sup>55</sup> National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 578, 126 Stat. 1632, 1763 (2013).

<sup>56</sup> National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 707, 131 Stat. 1283, 1436 (2017).

<sup>57</sup> National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 535, 130 Stat. 2000, 2123 (2016).

<sup>58</sup> Carl Levin and Howard P. "Buck" McKeon National Defense Authorization for Fiscal Year 2015, Pub. L. No. 113-291, § 547, 128 Stat. 3292, 3375-76 (2014).

<sup>59</sup> National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 548, 130 Stat. 2000, 2129 (2016).

<sup>60</sup> Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 539, 128 Stat. 3292, 3375-76 (2014).

In October 2016, in accordance with a statutory requirement,<sup>61</sup> the Department of Defense issued a “Plan to Prevent and Respond to Sexual Assault of Military Men.”<sup>62</sup> Then, in January 2017—again in accordance with a statutory requirement<sup>63</sup>—the Department issued the “DoD Retaliation Prevention and Response Strategy Implementation Plan.”<sup>64</sup>

Further demonstrating the United States Government’s ongoing efforts in this area, in 2019, the Department of Defense (DoD) created a Sexual Assault Accountability and Investigation Task Force, which produced a report on April 30, 2019, recommending further reforms.<sup>65</sup> On May 1, 2019, the Acting Secretary of Defense adopted the Task Force’s recommendations and ordered their implementation, along with other measures to continue to improve the Department of Defense’s sexual assault prevention and response programs.<sup>66</sup>

Collectively, these measures demonstrate that both the United States Congress and Executive Branch are deeply committed to eradicating the scourge of sexual assault from the United States military, ensuring effective criminal investigative and justice systems are in place to deal with alleged offenses, and providing compassionate care for victims of sexual assault. Congress and the Executive Branch continue to develop and implement innovative means to further those goals. 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 Government

---

<sup>61</sup> National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 538, 129 Stat. 726, 817-18 (2015).

<sup>62</sup> U.S. DEP’T OF DEF., PLAN TO PREVENT AND RESPOND TO SEXUAL ASSAULT OF MILITARY MEN (2016), available at [https://www.sapr.mil/sites/default/files/DoD-Plan-to-Prevent-and-Respond-to-Sexual-Assault-of-Military-Men\\_Aproved.pdf](https://www.sapr.mil/sites/default/files/DoD-Plan-to-Prevent-and-Respond-to-Sexual-Assault-of-Military-Men_Aproved.pdf).

<sup>63</sup> National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 539, 129 Stat. 726 (2015).

<sup>64</sup> Dep’t of Defense, “DoD Retaliation and Response Strategy Implementation Plan” (Jan. 2017), available at [https://www.sapr.mil/sites/default/files/DoD\\_RPRS\\_Implementation\\_Plan.pdf](https://www.sapr.mil/sites/default/files/DoD_RPRS_Implementation_Plan.pdf).

<sup>65</sup> Report of the Sexual Assault Accountability and Investigation Task Force (April 30, 2019), available at [https://media.defense.gov/2019/May/02/2002127159/-1/-1/1/SAAITF\\_REPORT.PDF](https://media.defense.gov/2019/May/02/2002127159/-1/-1/1/SAAITF_REPORT.PDF).

<sup>66</sup> Acting Secretary of Defense Patrick M. Shanahan, Actions to Address and Prevent Sexual Assault in the Military (May 1, 2019), available at <https://www.sapr.mil/sites/default/files/ACTIONS%20TO%20ADDRESS%20AND%20PREVENT%20SEXUAL%20ASSAULT%20IN%20THE%20MILITARY%20OSD004373-19.pdf>.

continues to strengthen its already extensive efforts to address sexual assault in the United States military.

B. Many of Petitioner's Proposed Remedies Were Already in Place When the Petition Was Filed, or Have Since Been Adopted by the United States

The United States has already adopted many of the remedies proposed by Petitioners, some of which were already in place before the Petition was filed. Specifically:

1. The Petition urges “the creation of a reporting mechanism that is independent of the Chain of Command for reporting incidents of sexual violence.”<sup>67</sup> Such a system already exists (and, in fact, long predated the Petition). Reports of sexual assault may be made to, among others, law enforcement personnel, sexual assault response coordinators, sexual assault victim advocates, and medical personnel.<sup>68</sup>

2. The Petition urges “removal of the decision whether to investigate . . . from the victims’ or perpetrator’s Chain of Command.”<sup>69</sup> As previously noted, U.S. law already requires that all sexual assault reports be investigated; no one in the chain of command has any discretion to decide not to investigate such a report. That legal requirement was already in place when the Petition was filed.<sup>70</sup>

3. The Petition complains that “moral waivers” have been granted to recruits with histories of committing sexual assaults.<sup>71</sup> In fact, before the Petition was filed, Congress had already enacted legislation prohibiting moral waivers for any individual convicted of a felony sexual offense.<sup>72</sup> The Department of Defense has included this prohibition in its regulation

---

<sup>67</sup> Petition at 6.

<sup>68</sup> See U.S. DEP’T OF DEF., INSTR. 6495.02, *supra*, at 3, ¶ 4(b)(1).

<sup>69</sup> Petition at 78.

<sup>70</sup> See National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1742, 127 Stat. 672 (2013); U.S. DEP’T OF DEF., INSTR. 6495.02, *supra*, ¶ 1(f) (2013); *see also* U.S. DEP’T OF DEF., INSTR. 5505.18, *supra*, ¶ 1.2(a) (2017).

<sup>71</sup> Petition at 28.

<sup>72</sup> National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 523 (2012).

governing accessions, including a juvenile adjudication for any felony sex offense as a non-waivable bar to entering the military as well.<sup>73</sup>

4. The Petition argues that U.S. military law “must be amended to include laws that prevent retaliation.”<sup>74</sup> In 2016, Congress amended the Uniform Code of Military Justice to create an express punitive article prohibiting retaliation.<sup>75</sup>

5. The Petition cites a recommendation from the Inter-American Commission on Human Rights that legislative measures be adopted “to make sexual harassment a punishable offense in the criminal, civil and administrative jurisdictions.”<sup>76</sup> In fact, the U.S. military has long been one of the few jurisdictions in the world where sexual harassment is prosecuted as a criminal offense<sup>77</sup> (in addition to the availability of administrative remedies<sup>78</sup>). Such cases are sometimes prosecuted as violations of one of the Military Departments’ robust general orders prohibiting sexual harassment.<sup>79</sup> One military appellate court reiterated just this year that sexual harassment

---

<sup>73</sup> U.S. DEP’T OF DEFENSE, DOD INSTRUCTION 1304.26, QUALIFICATION STANDARDS FOR ENLISTMENT, APPOINTMENT, AND INDUCTION, at encl. 3, ¶ 2.h.(3) (March 23, 2015, as revised).

<sup>74</sup> Petition at 5.

<sup>75</sup> National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5450, 130 Stat. 2000, 2957 (2016) (codified at 10 U.S.C. § 932).

<sup>76</sup> Petition at 66 (citing Inter-American Commission on Human Rights, “The Work, Education and Resources of Women: The Road to Equality in Guaranteeing Economic, Social and Cultural Rights,” Thematic Report OEA/Ser.L/V/II.143, ¶ 169 (2011)).

<sup>77</sup> See generally L. Camille Hebert, *Dignity and Discrimination in Sexual Harassment Law: A French Case Study*, 25 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 4 (2018) (discussing France’s criminalization of sexual harassment); Karen Musalo, *El Salvador – A Peace Worse than War: Violence, Gender and a Failed Legal Response*, 30 YALE J.L. & FEMINISM 3, 44 (2018) (discussing El Salvador’s criminalization of sexual harassment by a superior).

<sup>78</sup> See, e.g., 10 U.S.C. § 1561 (West Supp. 2018); U.S. DEP’T OF DEFENSE, DOD INSTRUCTION 1020.03, HARASSMENT PREVENTION AND RESPONSE IN THE ARMED FORCES, at ¶ 4.4 (Feb. 8, 2018).

<sup>79</sup> See, e.g., *United States v. Shields*, 77 M.J. 621 (N-M. Ct. Crim. App. 2018) (affirming conviction for violating SECNAVINST 5300.26D, the Department of the Navy’s order prohibiting sexual harassment); *United States v. Bannister*, No. 201600056, 2018 CCA LEXIS 441 (N-M. Ct. Crim. App. Sept. 12, 2018) (same); *United States v. Jeter*, 78 M.J. 754 (N-M. Ct. Crim. App. 2019); *United States v. Rosario*, 76 M.J. 114 (C.A.A.F. 2017); *United States v. Dunbar*, No. 201600121, 2016 CCA LEXIS 715 (N-M. Ct. Crim. App. Dec. 15, 2016) (per curiam); *United States v. Quichocho*, No. 201500297, 2016 CCA LEXIS 667 (N-M. Ct. Crim. App. Nov. 29, 2016) (per curiam); *United States v. Riggins*, No. NMCCA 201400046, 2016 CCA LEXIS 442 (N-M. Ct. Crim. App. July 28, 2016) (per curiam); *United States v. Cobb*, No. ARMY 20140631, 2016 CCA LEXIS 366 (A. Ct. Crim. App. May 27, 2016) (per curiam); *United States v. Johnson*, No. NMCCA 201500196, 2016 CCA LEXIS 266 (N-M. Ct. Crim. App. Apr. 28, 2016) (per curiam); *United States v. Marrero-Alvarez*, No. NMCCA 201600011, 2106 CCA LEXIS 258 (Apr. 26,

within the Department of the Navy may be criminally prosecuted as a violation of the U.S. Navy Regulations.<sup>80</sup> Some sexual harassment cases are tried under Article 93 of the Uniform Code of Military Justice, which prohibits “Cruelty and maltreatment” of subordinates.<sup>81</sup> The Manual for Courts-Martial expressly notes that “sexual harassment may constitute this offense.”<sup>82</sup> Notwithstanding the military’s well-established track record of prosecuting and obtaining conviction under those punitive articles for sexual harassment offenses, in May 2019, the Acting Secretary of Defense directed the Department to take “steps to seek a stand-alone military crime of sexual harassment.”<sup>83</sup> Thus, the U.S. military has not merely adopted laws and policies embodying this Commission’s recommendation cited by the Petition, but has been zealous in the criminalization of sexual harassment.

The most significant proposed remedy the United States has declined to adopt is the removal of prosecutorial discretion from commanders in sexual assault cases. The United States government has carefully studied that suggestion over a number of years, including, in accordance with acts of Congress, forming independent Federal Advisory Committees to conduct detailed analyses, and concluded it would not improve sexual assault prevention or response.<sup>84</sup> On the contrary, the United States Government has concluded that removing prosecutorial discretion from commanders may actually impede sexual assault prevention by depriving

---

2016) (per curiam); *United States v. Bass*, 74 M.J. 806 (N-M. Ct. Crim. App. 2015); *United States v. Bushnell*, No. NMCCA 201400364, 2015 CCA LEXIS 136 (N-M. Ct. Crim. App. Apr. 9, 2015); *United States v. Doyle*, No. NMCCA 201300442, 2014 CCA LEXIS 806 (N-M. Ct. Crim. App. Oct. 28, 2014) (per curiam).

<sup>80</sup> *United States v. Olivares*, No. 201800125, 2019 CCA LEXIS 97 (N-M. Ct. Crim. App. Mar. 7, 2019).

<sup>81</sup> 10 U.S.C. § 893 (2012). *See, e.g., United States v. Anderson*, 78 M.J. 727 (A. Ct. Crim. App. 2019); *United States v. Miles*, No. ARMY 20150415, (A. Ct. Crim. App. Jan. 17, 2017); *United States v. Caldwell*, 75 M.J. 276 (C.A.A.F. 2016).

<sup>82</sup> Pt. IV, ¶ 19.c.(2), MCM.

<sup>83</sup> Memorandum of Acting Secretary of Defense Patrick M. Shanahan, “Actions to Address and Prevent Sexual Assault in the Military” (May 1, 2019), available at <https://www.sapr.mil/sites/default/files/ACTIONS%20TO%20ADDRESS%20AND%20PREVENT%20SEXUAL%20ASSAULT%20IN%20THE%20MILITARY%20OSD004373-19.pdf>.

<sup>84</sup> *See, e.g.,* REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL at 22-23 (June 2014) (Attachment 4); DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES, ANNUAL REPORT 28-31 (March 2019) (Attachment 5).



military leaders of a significant tool to influence the conduct of their subordinates.<sup>85</sup> It also bears emphasizing that such prosecutorial discretion does not in any way prejudice the extensive system of military justice described above; prosecutorial discretion is, moreover, a feature of developed criminal justice systems around the world.

## II.

### Discussion

#### **A. The Petition Is Inadmissible Because Petitioners Have Failed to Pursue and Exhaust a Variety of Domestic Remedies.**

The Commission should declare the Petition inadmissible because Petitioners have not satisfied their duty to demonstrate they have “invoked and exhausted” domestic remedies under Article 20(c) of the Commission’s Statute and Article 31 of the Rules.

A petitioner before this Commission has the duty to pursue all available domestic remedies. As Article 31(1) of the Rules states, “In order to decide on the admissibility of a matter, the Commission shall verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law.” The requirement for exhaustion of domestic remedies stems from customary international law and promotes respect for State sovereignty. It ensures the State within whose jurisdiction a human rights violation allegedly occurred has the opportunity to redress the allegation by its own means within the framework of its own domestic legal system.<sup>86</sup> A State has the sovereign right to be given the opportunity to determine the merits of a claim and decide the appropriate remedy before the dispute falls within the competence of an international body. The Inter-American Court of Human Rights has remarked that the exhaustion requirement is of particular importance “in the international jurisdiction of human rights, because the latter

---

<sup>85</sup> For a particularly compelling analysis of this point, see Transcript of the January 30, 2014, Response Systems Panel Meeting, at 263-72 (statement of the Honorable Elizabeth Holtzman), available at [https://responsesystemspanel.whs.mil/public/docs/meetings/20140130/20140130\\_Transcript\\_Final.pdf](https://responsesystemspanel.whs.mil/public/docs/meetings/20140130/20140130_Transcript_Final.pdf).

<sup>86</sup> See, e.g., *Interhandel Case* (Switzerland v. United States) [1959] I.C.J. 6, 26–27; *Panevezys Saldutiskis Railway Case* (Estonia v. Lithuania), 1939 P.C.I.J., Ser. A/B, No. 76.

reinforces or complements the domestic jurisdiction.”<sup>87</sup> Petitioners have the duty to pursue *all* available domestic remedies.<sup>88</sup> Exhaustion is only realized where such a remedy has been pursued to the highest appellate level, resulting in a final judgment.<sup>89</sup> The arguments raised in the domestic proceedings must be the same as those intended to be raised in international proceedings.<sup>90</sup> In short, “for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success.”<sup>91</sup> And, as the Commission has stated, “[m]ere doubt as to the prospect of success in going to court is not sufficient to exempt a petitioner from exhausting domestic remedies.”<sup>92</sup>

This Petition fails to satisfy those exhaustion requirements. Petitioners pursued only one narrow avenue of relief under U.S. law: a federal tort claim action against a Secretary of Defense and former Secretary of Defense.<sup>93</sup> Petitioners inexplicably failed to seek relief from the only U.S. court that was empowered to grant the relief it sought. Moreover, even if the single remedy pursued by Petitioners had been exhausted, such exhaustion would be insufficient to satisfy the Commission’s exhaustion requirement with respect to many of the claims in the Petition because they were never presented to any competent administrative or judicial authority

---

<sup>87</sup> Velásquez Rodríguez Case, Judgment of July 29, 1988, ¶ 61, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988).

<sup>88</sup> See, e.g., Páez García v. Venezuela, Petition No. 670-01, Report No. 13/13, Mar. 20, 2013, Analysis § B(1) & Conclusions ¶ 35 (finding petition inadmissible for failure to exhaust because petitioner did not avail himself of remedies available to him in the domestic system).

<sup>89</sup> See also Draft Articles on State Responsibility, [2001] 2 Y.B. Int’l L. Comm’n 26, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), art. 44; Draft Articles on Diplomatic Protection, [2006] 2 Y.B. Int’l L. Comm’n 24, U.N. Doc. A/CN.4/SER.A/2006/Add.1 (Part 2), art. 14, para. 1–2; cmt. 4.

<sup>90</sup> Draft Articles on Diplomatic Protection, [2006] 2 Y.B. Int’l L. Comm’n 24, U.N. Doc. A/CN.4/SER.A/2006/Add.1 (Part 2), art. 14, cmt. 6 (quoting *Elettronica Sicula S.p.A. (ELSI)*, Judgment, I.C.J. Reports 1989, p. 15, at p. 46, para. 59) (“In order to satisfactorily lay the foundation for an international claim on the ground that local remedies have been exhausted, the foreign litigant must raise the basic arguments he intends to raise in international proceedings in the municipal proceedings. In the *ELSI* case, the Chamber of the ICJ stated that ‘for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success.’”).

<sup>91</sup> *Elettronica Sicula S.p.A. (ELSI)* (United States v. Italy), [1989] I.C.J. 15, 46.

<sup>92</sup> Sánchez et al. v. United States (“Operation Gatekeeper”), Petition No. 65/99, Inadmissibility (“Operation Gatekeeper Inadmissibility Decision”), ¶ 67.

<sup>93</sup> Defendant Robert Gates was the Secretary of Defense when the complaint was originally filed in U.S. district court on February 15, 2011. He had left office before the Amended Complaint attached to the Petition was filed on September 6, 2011.

in the United States for any relief in the first instance, providing an additional ground for their inadmissibility. And Petitioners have apparently not pursued multiple other avenues for relief under U.S. law. Each of these bases for inadmissibility under Article 31 of the Rules is addressed in turn.

i. Petitioners Failed to Exhaust the Domestic Remedy Pursued for their Articles I, II, IV, V, XIV, XVIII, and XXIV claims by not seeking review by the United States Supreme Court

Petitioners failed to exhaust the one remedy they did pursue in the U.S. legal system by neglecting to pursue that remedy to the highest appellate level, rendering the Petition inadmissible. Moreover, for the reasons discussed below, only the United States Supreme Court could have granted the narrow form of relief Petitioners sought. But, despite having a clear legal right to seek review from the Supreme Court, Petitioners failed to do so. The fact that Petitioners failed to exhaust this remedy by neglecting to seek review before the *only* U.S. court empowered to grant the relief they were seeking compounds this defect in the Petition that renders it inadmissible.

Petitioners brought a tort action for damages in the United States District Court for the Eastern District of Virginia.<sup>94</sup> As required by Supreme Court precedent including *Chappell v. Wallace*, 462 U.S. 296 (1983), and *United States v. Stanley*, 483 U.S. 669 (1987), the District Court dismissed the complaint.<sup>95</sup> Under this precedent, the Supreme Court foreclosed tort actions by service members for injuries suffered incident to military service. The United States Court of Appeals for the Fourth Circuit affirmed, again relying on well-established Supreme Court case law.<sup>96</sup>

In the United States, Supreme Court precedent is “binding on lower courts in our hierarchical system of absolute vertical *stare decisis*.”<sup>97</sup> Thus, neither the United States Court of

---

<sup>94</sup> See First Amended Complaint, *Cioca v. Rumsfeld*, C.A. 1:11cv00151 (E.D. Va. Sept. 6, 2011).

<sup>95</sup> *Cioca v. Rumsfeld*, No. 1:11-cv-151-LO-TCB, 2011 WL 13137348 (E.D. Va. Dec. 9, 2011).

<sup>96</sup> *Cioca v. Rumsfeld*, 720 F.3d 505 (4th Cir. 2013).

<sup>97</sup> *Klayman v. Obama*, 805 F.3d 1148, 1149 (D.C. Cir. 2015).

Appeals for the Fourth Circuit nor the United States District Court for the Eastern District of Virginia could grant the narrow form of relief Petitioners requested due to Supreme Court precedent. Petitioners acknowledge as much in their Petition: “their claims were dismissed before the District Court and Court of Appeal because of case law from the United States Supreme Court.”<sup>98</sup> Even so, Petitioners decided not exercise their statutory right to seek Supreme Court review of their case, despite apparently recognizing that it was the only U.S. court that could provide their requested relief.

The Supreme Court can, and sometimes does, overrule its own precedent.<sup>99</sup> As the Supreme Court has observed, “Our precedents are not sacrosanct, for we have overruled prior decisions where the necessity and propriety of doing so has been established.”<sup>100</sup> The Court has similarly observed, “When convinced of former error, this Court has never felt constrained to follow precedents.”<sup>101</sup> Even without overruling a precedent, the Supreme Court sometimes narrows its previous case law.<sup>102</sup> Asking the Supreme Court to reverse or narrow the precedent on which the lower courts relied was the *only* means of realizing the narrow form of relief Petitioners pursued in U.S. courts. Moreover—unlike its efforts to obtain relief in the lower courts—such a means to seek relief was viable: Petitioners had a clear statutory right to file a

---

<sup>98</sup> Petition at 77.

<sup>99</sup> See, e.g., *Knick v. Township of Scott, Pa.*, 139 S. Ct. 2162 (2019) (overruling *Williamson Cty. Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)); *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485 (2019) (overruling *Nevada v. Hall*, 440 U.S. 410 (1979)); *Janus v. AFSCME*, 138 S. Ct. 2448 (2018) (overruling *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977)); *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018) (overruling *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), and *Nat’l Bellas Hess, Inc. v. Dep’t of Revenue of Ill.*, 386 U.S. 753 (1967)); *Hurst v. Florida*, 136 S. Ct. 616 (2016) (overruling, in part, *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Hildwin v. Florida*, 490 U.S. 638 (1989)); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) (overruling *Agins v. City of Tiburon*, 477 U.S. 255 (1980)); *Lawrence v. Texas*, 539 U.S. 558 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)); *Payne v. Tennessee*, 501 U.S. 808 (1991) (overruling *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989)); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (overruling *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976)); *Perez v. Campbell*, 402 U.S. 637 (1971) (overruling *Kesler v. Dep’t of Pub. Safety of Utah*, 369 U.S. 153 (1962)); *Brown v. Board of Education*, 347 U.S. 483 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

<sup>100</sup> *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989).

<sup>101</sup> *Smith v. Allwright*, 321 U.S. 649, 665 (1944).

<sup>102</sup> See, e.g., *Raines v. Byrd*, 521 U.S. 811, 821-24 (1997) (narrowing holding in *Coleman v. Miller*, 307 U.S. 433 (1939)); *Johnson v. Texas*, 509 U.S. 350, 365 (1993) (narrowing holding in *Penry v. Lynaugh*, 492 U.S. 302 (1989)); *Perry v. Leeke*, 488 U.S. 272, 280-85 (1989) (narrowing holding in *Geders v. United States*, 425 U.S. 80 (1976)).

petition with the United States Supreme Court seeking review.<sup>103</sup> They could have filed such a petition asking the Supreme Court to either reconsider its case law concerning tort actions by service members or sought an exception to that case law in cases such as theirs. But Petitioners failed to exhaust that lone viable avenue to obtain the narrow form of relief they were seeking: a tort claim against certain senior government officials.

Failure to seek Supreme Court review must result in a determination of inadmissibility before this Commission. Under U.S. law, Supreme Court review is not an “extraordinary” remedy. Rather, U.S. law provides that seeking Supreme Court review is part of “[d]irect review.”<sup>104</sup> It is an ordinary remedy. To the extent any previous decision by the Commission suggests otherwise, the Commission should revisit the question.<sup>105</sup> It would be inconsistent with respect for an OAS Member State’s sovereignty for an international body to consider a petition filed without ever having given the Member State’s highest court an opportunity to consider the issue where there was no bar in domestic law to seeking such review. As this Commission has observed, “the rule which requires the prior exhaustion of domestic remedies is designed for the benefit of the State, for that rule seeks to excuse the State from having to respond to charges before an international body for acts imputed to it, before it has the opportunity to remedy them by internal means.”<sup>106</sup> In this case, by failing to seek relief from the United States Supreme Court, Petitioners never gave the only U.S. court with the authority to grant the narrow remedy

---

<sup>103</sup> See 28 U.S.C. § 1254 (2012) (providing a direct path for cases decided by a Court of Appeals to be reviewed by the Supreme Court upon petition for writ of certiorari).

<sup>104</sup> See, e.g., *Beard v. Banks*, 542 U.S. 406, 408 (2004) (“Direct review ended when this Court denied certiorari on October 5, 1987.”); *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983) (“the process of direct review . . . , if a federal question is involved, includes the right to petition this Court for a writ of certiorari”).

<sup>105</sup> Significantly, the Commission misconstrued a Supreme Court rule in its Report No. 18/12, Petition 161-06, Admissibility “Juvenile Offenders Sentenced to Life Imprisonment Without Parole” v. United States (Mar. 20, 2012). The Commission stated that “consideration of a request for a writ of certiorari is not a matter of right, but of judicial discretion,” citing the Supreme Court’s rules in support of that proposition. *Id.*, ¶ 58. The Supreme Court’s rules actually state that “Review *on* a writ of certiorari is not a matter of right,” S. Ct. R. 10 (emphasis added), not that “review *of* a writ of certiorari is not a matter of right.” In fact, Petitioners had a statutory right to file a petition for writ of certiorari, which the Supreme Court would have been considered had it been timely filed.

<sup>106</sup> *Guillermo Patricio Lynn v. Argentina*, Case 681-00, Report No. 69/08, Inter-Am. C.H.R., OEA/Ser.L/V/II.130 Doc. 22, rev. 1, ¶ 40 (2008) (quoting I/A Court H.R., *Matter of Viviana Gallardo et al.* Series A No.G 101/81, para. 26).

sought an opportunity to do so. The Petition is, therefore, inadmissible. Moreover, in marked contrast to the “Juvenile Offenders Sentenced to Life Imprisonment Without Parole” Report,<sup>107</sup> the Petition contains no indication that the United States Supreme Court has *ever* been given the opportunity to rule on the issue now being brought before the Commission. In “Juvenile Offenders,” the Supreme Court received a certiorari petition “which presented substantially similar questions to those advanced in the petition received by the Commission, including the allegation that life imprisonment without parole represents cruel or unusual punishment, and the allegation of the necessity of differential treatment for adults and persons below the age of 18.”<sup>108</sup> Here, on the other hand, Petitioners fail to demonstrate—or even allege—the Supreme Court has *ever* been given an opportunity to rule on the availability of tort remedies in the military sexual assault context. Moreover, Petitioners mischaracterize the decision in “Juvenile Offenders.” According to Petitioners, “[i]n that submission, the petitioners’ [sic] did not appeal their case to the Supreme Court of the United States . . . .”<sup>109</sup> Actually, in that case, the Commission emphasized that one of the petitioners *did* seek review by the United States Supreme Court, giving that court an opportunity to address the matter.<sup>110</sup> Here, on the other hand, none of the Petitioners sought Supreme Court review and there is no demonstration that court has had any opportunity to rule on the particular issue presented by the Petition in any other case.

ii. Petitioners Failed to Pursue any Domestic Remedy for their Claims under Articles VII and IX of the American Declaration and Portions of their Article II and V Claims.

Consistent with customary international law, to satisfy the Commission’s admissibility requirements, claims raised before this Commission must also be the same as those raised in

---

<sup>107</sup> IACHR, Report No. 18/12, Petition 161-06, Admissibility “Juvenile Offenders Sentenced to Life Imprisonment Without Parole” v. United States, ¶¶ 54, 56 (March 20, 2012).

<sup>108</sup> *Id.*, ¶ 54.

<sup>109</sup> Petition at 43.

<sup>110</sup> IACHR, Report No. 18/12, Petition 161-06, Admissibility “Juvenile Offenders Sentenced to Life Imprisonment Without Parole” v. United States, ¶¶ 54, 56.

domestic proceedings.<sup>111</sup> It is insufficient for Petitioners to pursue some domestic remedies for only some claims raised in the Petition: Petitioners must pursue and exhaust all available domestic remedies for all claims, and failure to do so necessarily renders inadmissible those claims for which domestic remedies have not been pursued. Most of the claims included in the Petition were not raised by Petitioners in the United States and are raised against the United States for the first time in the Petition, rendering them inadmissible:

1. Petitioners assert the United States discriminated against them on the basis of their military status and sexual orientation because the United States allegedly declined to investigate allegations of sexual violence and assault on the basis of the military status and sexual orientation of Petitioners.<sup>112</sup> Petitioners raised no such claim before competent authorities in the United States, including in their litigation in U.S. courts.<sup>113</sup> Accordingly, those portions of Petitioners' claim under Article II of the American Declaration are inadmissible before this Commission.

2. Petitioners assert their right to private family life was violated because they were subject to pain and suffering as a result of sexual violence and abuse.<sup>114</sup> Petitioners raised no such claim before competent authorities in the United States, including in their litigation in U.S. courts.<sup>115</sup> Accordingly, those portions of Petitioners' claim under Article V of the American Declaration are inadmissible before this Commission.

---

<sup>111</sup> Draft Articles on Diplomatic Protection, [2006] 2 Y.B. Int'l L. Comm'n 24, U.N. Doc. A/CN.4/SER.A/2006/Add.I (Part 2), art. 14, cmt. 6 (quoting *Elettronica Sicula S.p.A. (ELSI)*, Judgment, I.C.J. Reports 1989, p. 15, at p. 46, para. 59) ("In order to satisfactorily lay the foundation for an international claim on the ground that local remedies have been exhausted, the foreign litigant must raise the basic arguments he intends to raise in international proceedings in the municipal proceedings. In the *ELSI* case, the Chamber of the ICJ stated that 'for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success'.").

<sup>112</sup> Petition at 49, 53-57.

<sup>113</sup> See First Amended Complaint, *Cioca et al. v. Rumsfeld et al.*, C.A. 1:11cv00151 (E.D. Va. Sept. 6, 2011).

<sup>114</sup> Petition at 62-63.

<sup>115</sup> See First Amended Complaint, *Cioca et al. v. Rumsfeld et al.*, C.A. 1:11cv00151 (E.D. Va. Sept. 6, 2011).

3. Petitioner Lyman asserts that her right to special protection during pregnancy was violated because she was pregnant when her alleged abuser was acquitted of the charges against him.<sup>116</sup> She raised no such claim before competent authorities in the United States, including in her litigation in U.S. courts.<sup>117</sup> Accordingly, Petitioner Lyman's claim under Article VII of the American Declaration is inadmissible before this Commission.

4. Petitioners assert their right to the inviolability of the home was violated because, in some cases, incidents of alleged sexual assault and abuse occurred on or near military facilities.<sup>118</sup> Petitioners raised no such claim before competent authorities in the United States, including in their litigation in U.S. courts.<sup>119</sup> Accordingly, Petitioner's claim under Article IX of the American Declaration is inadmissible before this Commission.

iii. Petitioners Failed to Demonstrate They Sought Relief from the U.S. Veterans Benefits Program

Apart from the remedy that Petitioners pursued but failed to exhaust, there are remedies available to Petitioners that they do not appear to have pursued, much less exhausted. One such avenue of relief is the U.S. Veterans Benefits Program. U.S. courts have expressly held that service members who suffer injuries during military service have "a general alternative" to the kind of tort relief Petitioners sought.<sup>120</sup> Petitioners have failed to demonstrate they pursued and exhausted that alternative form of relief.

As the United States Supreme Court has observed, "[T]he Veterans' Benefits Act establishes, as a substitute for tort liability, a statutory 'no fault' compensation scheme which provides generous pensions to injured servicemen, without regard to any negligence attributable to the Government."<sup>121</sup> The effects described by the Petition on several of the Petitioners likely

---

<sup>116</sup> Petition at 64-65.

<sup>117</sup> See First Amended Complaint, *Cioca et al. v. Rumsfeld et al.*, C.A. 1:11cv00151 (E.D. Va. Sept. 6, 2011).

<sup>118</sup> Petition at 65.

<sup>119</sup> See First Amended Complaint, *Cioca et al. v. Rumsfeld et al.*, C.A. 1:11cv00151 (E.D. Va. Sept. 6, 2011).

<sup>120</sup> E.g., *Schoenfeld v. Quamme*, 492 F.3d 1016, 1019 (9th Cir. 2007).

<sup>121</sup> *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 671 (1977).



would, if proven,<sup>122</sup> warrant veterans' benefits under U.S. law.<sup>123</sup> Additionally, the Department of Veterans Affairs operates a counseling and treatment program specifically for veterans who suffer from sexual trauma.<sup>124</sup> The Petition even cited the statutory provision requiring such a program,<sup>125</sup> yet failed to indicate whether the Petitioners had sought relief under that provision or other veterans' benefits provisions and, if so, the results of the requests. Because the veterans' benefits program and 38 U.S.C. § 1720D provide unexhausted means of redress to Petitioners, Petitioners' claims are inadmissible pursuant to Article 31 of the Rules.

iv. Petitioners Failed to Demonstrate They Sought Non-Tort Relief from U.S. Courts

Petitioners failed to pursue alternative remedies available under U.S. domestic law, such as injunctive or declarative relief, which are comparable to some of the remedies Petitioners now seek from the Commission. Some United States Courts of Appeals have ruled that the case law on which the United States Court of Appeals for the Fourth Circuit and United States District Court for the Eastern District of Virginia relied in *Cioca* does not bar claims for injunctive or declaratory relief.<sup>126</sup> The availability of such relief in a military context appears to be unresolved by the United States Court of Appeals for the Fourth Circuit, the Circuit in which Petitioners brought their claim.<sup>127</sup> Therefore, Petitioners could have pursued this avenue of relief in U.S. courts but failed to do so.

The Petition incorrectly states, "The Supreme Court and other federal courts have repeatedly made clear that the federal judiciary will not adjudicate military issues, regardless of whether its citizens' rights are being violated."<sup>128</sup> Actually, the Supreme Court has merely

---

<sup>122</sup> As discussed later in this filing, many of the allegations in the Petition are inaccurate.

<sup>123</sup> See, e.g., 38 U.S.C. §§ 1101–04, 1110–18, 1121–22, 1131–35, 1137, 1141–42, 1151–63 (2012).

<sup>124</sup> 38 U.S.C. § 1720D (2012).

<sup>125</sup> The Petition, however, erroneously cited that provision as "38 U.S.C. 1720(D)." Petition at 36.

<sup>126</sup> See, e.g., *Wigginton v. Centracchio*, 205 F.3d 504, 512 (1st Cir. 2000) ("Taken together, *Chappell* and *Stanley* . . . make it clear that intramilitary suits alleging constitutional violations but not seeking damages are justiciable."); *Jorden v. Nat'l Guard Bureau*, 799 F.2d 99 (3d Cir. 1986).

<sup>127</sup> See *Middlebrooks v. Leavitt*, 525 F.3d 341, 350 n.5 (4th Cir. 2008) ("Our sister circuits have divided on the question of whether an individual can seek equitable relief for alleged constitutional violations arising in the context of military personnel decisions. . . . Since the district court did not address the question . . . we do not address the issue now.").

<sup>128</sup> Petition at 43.

foreclosed one particular potential vehicle for relief—a tort action. It has not ruled that the federal judiciary will not adjudicate military issues in non-tort cases.<sup>129</sup> On the contrary, the Supreme Court itself has ruled on and found a violation of service members’ constitutional rights when appropriate.<sup>130</sup> Having failed to seek relief on such alternative bases in U.S. courts—bases that are comparable to portions of the relief Petitioners now seek from the Commission—Petitioners’ claims are inadmissible pursuant to Article 31 of the Rules.

v. Petitioner Bertzikis Has Never Pursued Any Claim Against a Defendant in U.S. Courts with the Authority to Provide the Requested Relief

As to Petitioner Panayoita Bertzikis, relief has never been sought against any relevant official of the United States Government. Both Petitioner Bertzikis and the individual she alleged sexually assaulted her were members of the United States Coast Guard. At no time during or since her service was the Coast Guard part of the Department of Defense. Yet Petitioner Bertzikis was a plaintiff in a case in which the only two defendants were the then-current Secretary of Defense and a former Secretary of Defense, neither of whom had any authority over any of the incidents alleged about Petitioner Bertzikis in her complaint filed in U.S. district court.<sup>131</sup> The Petition contains no information suggesting Petitioner Bertzikis ever pursued any claim in any United States court in a proceeding involving any officials with authority over the Coast Guard. Accordingly, the portion of the Petition concerning Petitioner Bertzikis is inadmissible under Article 31 of the Rules for failure to pursue *any* available remedies.

**C. The Petition Is Inadmissible Because It Is Manifestly Groundless under Article 34(b) of the Rules**

---

<sup>129</sup> See *Chappell v. Wallace*, 462 U.S. 296, 304 (1983) (“This court has never held, nor do we hold now, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service.”).

<sup>130</sup> See, e.g., *Frontiero v. Richardson*, 411 U.S. 677 (1973) (finding equal protection violation due to disparate treatment of male and female service members regarding certain allowances and benefits for dependents).

<sup>131</sup> See *Cioca v. Rumsfeld*, 720 F.3d 505, 508 n.4 (4th Cir. 2013).

In addition to being inadmissible due to failure to exhaust domestic legal remedies, under Article 34 of the Rules, a Petition is inadmissible where claims raised by a Petitioner are manifestly groundless.

The Petition repeatedly offers incorrect statements regarding both the law and the facts. It appears to have been prepared and submitted without the exercise of due diligence to determine its accuracy. The Petition's inaccuracies include the following<sup>132</sup>:

1. The Petition asserts that during the time period covered by the Petition, "incidents of sexual violence and rape rose sharply in the United States Military."<sup>133</sup> However, as the Petition itself acknowledges, surveys of U.S. service members in 2010 and 2012 estimated that in both of those years, there were fewer sexual assaults than in 2006.<sup>134</sup>

2. The Petition asserts the Petitioners "were sexually assaulted and/or raped by their United States Military colleagues."<sup>135</sup> An investigation that was completed after the Petition was filed disclosed that, in the case of Petitioner Desautel, the alleged offender was a civilian over whom the U.S. military had no jurisdiction.<sup>136</sup> The Petition erred by assuming that the unidentified alleged offender was in the military at the time of the offense.

3. The Petition inaccurately uses the terms "rape" and "rape victims."<sup>137</sup> A number of the incidents as described in the Petition, even if true, would not constitute rape under U.S. law, but rather would be non-penetrative contact offenses. That distinction is far from trivial or a technicality. Under U.S. military law, any unwelcome touching—directly or through the clothing—of certain areas of the body with a specific prohibited intent constitutes a non-

---

<sup>132</sup> This is not an exhaustive list of the inaccuracies in the Petition. The United States does not concede the accuracy of any statement in the Petition as a result of not including it in this representative list of inaccuracies.

<sup>133</sup> Petition at 3.

<sup>134</sup> Petition at 31. Note there is no actual empirical basis to support the 2005, 2007, 2008, 2009, or 2011 estimated numbers of actual offenses set out in the Petition. Survey data support only the 2006, 2010, and 2012 figures.

<sup>135</sup> Petition at 1.

<sup>136</sup> See Army Criminal Investigation Command RedactedROI 001002002CID0220230256E1E1/6F6A/5L2D2/9G2A/9G2B/9G2D/9T2 (Attachment 12).

<sup>137</sup> See, e.g., Petition at 1, 2.

penetrative form of sexual assault.<sup>138</sup> There is a non-trivial legal distinction between, for example, the unwelcome touching of a clothed buttocks and a penetrative sexual assault. The former carries a maximum sentence that includes confinement for seven years, the latter confinement for life without eligibility for parole.<sup>139</sup> The Petition elides that distinction by broadly referring to the Petitioners as “rape victims”<sup>140</sup> when several of them alleged contact offenses, not rape.<sup>141</sup>

4. The Petition asserts that “[i]n the majority of instances, reporting the rapes led to the termination of the petitioners’ military careers.”<sup>142</sup> Yet the Petition does not even claim that most of the Petitioners’ military careers were terminated by the military because they reported alleged sexual assaults; nor would any such allegation be accurate. Only three of the Petitioners allege their careers were ended because of such a report.<sup>143</sup> The United States expressly rejects the premise that any of Petitioners’ military careers ended because they reported a sexual assault.

5. The Petition asserts 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.”<sup>144</sup> This is false. Not only may a rape victim in the military call the police, the Petition acknowledges that several of the Petitioners did.<sup>145</sup> Additionally, military members who report being the victim of sexual assault may request expedited transfers. In regulations adopted before the Petition was filed, the Department of Defense created an expedited transfer system under which such requests are almost invariably granted within 48 hours.<sup>146</sup>

---

<sup>138</sup> See 10 U.S.C.A. § 920(g)(2).

<sup>139</sup> Pt. IV, ¶ 60.d.(1), (4), MCM.

<sup>140</sup> See, e.g., Petition at 1, 2.

<sup>141</sup> Petitioners Gallagher, Stark (Reuss), and Sampson do not allege they were raped.

<sup>142</sup> Petition at 1.

<sup>143</sup> Petitioners Jeloudov, Stephens, and Desautel. See Petition at 10, 18, 22. As to Petitioner Desautel, the Petition alleges her career was ended because the investigation resulted in the disclosure of her sexual orientation. Sexual orientation is no longer a basis for discharge from the U.S. military.

<sup>144</sup> Petition at 1.

<sup>145</sup> Petitioners Anderson, Yeager, and Sewell. Petition at 15, 16, 20.

<sup>146</sup> See Memorandum from Deputy Secretary of Defense Ash Carter, *supra*; see also U.S. DEP’T OF DEF., INSTR. 6495.02, *supra*, at 51–56, ¶¶ 1–14 (2013).

6. The Petition claims that “Petitioner Amy Lockhart was demoted and lost the rank of Captain.”<sup>147</sup> Petitioner Lockhart was never a Captain in the U.S. Navy or any other branch of the U.S. military. She did engage in misconduct that led her command to withdraw a recommendation for her promotion to the grade of E-7 (chief petty officer). Disciplinary proceedings against her were initiated before she made an allegation of sexual assault; neither those proceedings, the discipline imposed against her, nor the withdrawal of the promotion recommendation occurred because she made such an allegation.

7. The Petition states the Department of Defense “has refused to implement relevant laws passed by Congress or to enact any effective measures to remedy the epidemic.”<sup>148</sup> Those claims are false. The Department of Defense works diligently to implement all applicable laws. As the discussion in Section II.A above demonstrates, the Department has instituted myriad effective measures in the realms of sexual assault prevention and response.

The Petition claims that “the United States Congress passed United States Public Law 105-85 in 2004, which directed the Secretary of Defense, then Donald Rumsfeld, to establish a commission to investigate policies and procedures with respect to the military investigation of reports of sexual misconduct.”<sup>149</sup> The Petition goes on to claim that Secretary Rumsfeld “refused to appoint any members to the commission.”<sup>150</sup> It is an easily discerned matter of public record that Congress enacted Public Law No. 105-85 in 1997, not 2004. President Clinton signed the bill into law on November 18, 1997.<sup>151</sup> The Secretary of Defense at the time was William Cohen, not Donald Rumsfeld. The statute did not require the creation of a commission to study the military investigation of sexual assaults; rather, it required a study “by the National Academy of Public Administration.”<sup>152</sup> The National Academy of Public Administration was

---

<sup>147</sup> Petition at 1.

<sup>148</sup> Petition at 2.

<sup>149</sup> Petition at 3; *see also* Petition at 28-29.

<sup>150</sup> Petition at 3; *see also* Petition at 28-29.

<sup>151</sup> *See* Presidential Statement on Signing the National Defense Authorization Act for Fiscal Year 1998, 33 WEEKLY COMP. PRES. DOC. 1861 (Nov. 18, 1997).

<sup>152</sup> National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, § 1072, 111 Stat. 1629, 1898 (1997).

founded in 1967 and was congressionally chartered in 1984<sup>153</sup>; no action by the Secretary of Defense was required to bring it into existence.

The Petition also alleges that Secretary of Defense Robert Gates “was required by United States law to develop a database that would centralize all reports of rape and sexual assault, but he failed to meet his statutorily mandated deadline of January 2010. The database was not created until mid-2012.”<sup>154</sup> The Petition fails to note that, in 2011, Congress enacted a law requiring the Department of Defense to submit “a revised implementation plan” for “completing implementation of the database,” including “the date by which the database will be operational.”<sup>155</sup> Moreover, the initial January 2010 deadline was after the date of the alleged sexual assaults for all of the Petitioners except Petitioner Lyman, whose alleged incident occurred the following month.<sup>156</sup> There 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.

8. The Petition states that “the unrestricted reporting system requires the victim to report the incident to his or her supervisors, otherwise known as the ‘Chain of Command’ . . . .”<sup>157</sup> The Petition repeatedly makes similar assertions.<sup>158</sup> But that assertion was not true when the Petition was filed in 2014 and is not true today. The U.S. military provides service members with a variety of avenues for making an unrestricted report of sexual assault. Authorized recipients of unrestricted reports include law enforcement personnel outside the service member’s chain of command (in other words, a report may be made directly to police or military criminal investigative organization personnel).<sup>159</sup> Victims may also make reports to multiple other

---

<sup>153</sup> See generally An Act to Charter the National Academy of Public Administration, Pub. L. No. 98-257, 98 Stat. 127 (1984).

<sup>154</sup> Petition at 3.

<sup>155</sup> Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1613, 124 Stat. 4137, 4432 (2011).

<sup>156</sup> That date is not provided in the Petition. The Naval Criminal Investigative Service’s investigation reveals the date of the alleged incident was February 4, 2010.

<sup>157</sup> Petition at 3.

<sup>158</sup> See, e.g., Petition at 6, 33, 71, 78.

<sup>159</sup> See U.S. DEP’T OF DEF., INSTR. 6495.02, *supra*, at 3, ¶ 4(b)(1).

individuals outside the chain of command, including sexual assault response coordinators, sexual assault victim advocates, and medical personnel.<sup>160</sup>

9. The Petition incorrectly states 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.”<sup>161</sup> On the contrary, as the relevant Department of Defense regulation expressly provides, “a victim may convert a Restricted Report to an Unrestricted Report at any time.”<sup>162</sup> The 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.<sup>163</sup> The restricted reporting program does not remove “any possible avenue to access justice”; rather, it gives the reporter control over whether and when to access the criminal justice system.

10. The Petition states that “the Chain of Command possesses the authority to overturn a verdict or to grant a different punishment from the one recommended by the judge at trial.”<sup>164</sup> There are multiple inaccuracies in that assertion, but most fundamentally, in 2013—before the Petition was filed—Congress enacted a law removing convening authorities’ power to overturn the conviction in a sexual assault case.<sup>165</sup>

In addition to those representative errors, the Petition’s descriptions of many of the individual cases it recounts contain inaccuracies and/or omit material facts. Again, illustrative examples are provided below. The United States does not concede the accuracy of any allegation in the Petition concerning individual Petitioners merely because it is not expressly refuted below. Additionally, in some instances this filing provides documentation to

---

<sup>160</sup> *Id.*

<sup>161</sup> Petition at 4.

<sup>162</sup> U.S. DEP’T OF DEF., INSTR. 6495.02, *supra*, at 36, encl. 4, ¶ 1.b.

<sup>163</sup> *See generally* Memorandum from Acting Secretary of Defense Patrick M. Shanahan, *Actions to Address and Prevent Sexual Assault in the Military*, *supra*.

<sup>164</sup> Petition at 4.

<sup>165</sup> National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702(b), 127 Stat. 672, 955 (2013) (codified as amended at 10 U.S.C.A. § 860(c) (West Supp. 2018)).

demonstrate the inaccuracy of statements in the Petition. Many of these inaccuracies concern sensitive facts involving multiple people, law enforcement information, or information the disclosure of which is limited by the Privacy Act.<sup>166</sup> Thus, while the United States Government possesses documentation to support all of the factual assertions in the section below, the United States Government was necessarily selective in appending that documentation to this filing. In some instances, documents are appended with appropriate redactions.

#### 1. Petitioner Mary Gallagher

Certain assertions in the Petition are inconsistent with a previous statement Petitioner Gallagher made under oath. Moreover, there are additional relevant facts that were omitted from the Petition. Petitioner Gallagher maintained—and an independent investigation by the U.S. military confirmed—that one of her fellow airmen in the same grade as she—Technical Sergeant (TSgt) F—attempted to kiss her against her will. The Petition also states that TSgt F, on another day, broke into her room. According to a sworn statement Petitioner Gallagher made to a Provost Investigator in the same month as the incident, however, TSgt F asked to enter her housing unit and she said no. Petitioner Gallagher did not allege TSgt F broke into the unit. After that incident and after receiving repeated calls from TSgt F, Petitioner Gallagher told a supervisory senior non-commissioned officer—Senior Master Sergeant (SMSgt) B—about the incident. When SMSgt B was interviewed by an investigator, SMSgt B said she asked Petitioner Gallagher if she wanted the incident involving TSgt F reported up the chain of command and Petitioner Gallagher repeatedly said she did not. Both Petitioner Gallagher and SMSgt B agree that SMSgt B spoke to TSgt F about his misconduct. According to SMSgt B, that counseling session occurred three days after Petitioner Gallagher told SMSgt B about the incident. SMSgt B emphasized to TSgt F that sexual harassment would not be tolerated. TSgt F responded, “Yes, ma’am.”

Eighteen days after the incident, Petitioner Gallagher’s 1st Sergeant, Master Sergeant (MSgt) L, learned of it from Petitioner Gallagher. MSgt L then took Petitioner Gallagher to see their commanding officer, Lieutenant Colonel (Lt Col) V. Lt Col V issued a no-contact order to

---

<sup>166</sup> 5 U.S.C. § 552a (2012).



TSgt F, removed TSgt F from Petitioner Gallagher's immediate unit, and moved TSgt F to a housing unit further from Petitioner Gallagher's housing unit. Five days later, MSgt L—at the direction of the command's judge advocate—alerted military police to the incident. The military police began a sexual assault investigation that same day.

## 2. Petitioner Rebekah Havrilla

The Petition alleges Petitioner Havrilla made a restricted report of sexual assault.<sup>167</sup> U.S. law provides service members with the option of making an unrestricted report or a restricted report of a sexual assault. The former results in a mandatory criminal investigation. The latter provides the service member with an opportunity to receive services without a criminal investigation. The restricted reporting option is an important means to provide control to a sexual assault victim and to provide help to those sexual assault victims who choose not to make a formal complaint. As described above, a restricted report can be converted to an unrestricted report at the request of the victim.

The Petition fails to reveal that Petitioner Havrilla subsequently converted her restricted report of rape to an unrestricted report. The Army Criminal Investigation Command ("Army CID")—a highly professional law enforcement agency—conducted an investigation.<sup>168</sup> Administrative action was subsequently taken against the alleged offender.

## 6. Petitioner Amber Anderson<sup>169</sup>

The Naval Criminal Investigative Service—a highly professional civilian-led law enforcement agency—investigated the allegations in this case.<sup>170</sup> During the investigation, Petitioner Anderson stated that neither of the alleged perpetrators used physical force or verbal threats during the alleged incident. She also stated she may have consented to the sexual acts.

---

<sup>167</sup> Petition at 8.

<sup>168</sup> ROI 0241-2009-CID045-70215-6E. A redacted portion of the report of investigation is appended to this filing. Attachment 6.

<sup>169</sup> For ease of reference, this submission retains the numbering of the Petitioners' cases from the Petition.

<sup>170</sup> File Identification # 31AUG01FESNO131. A redacted copy of the report of investigation is appended to this filing. Attachment 7.

As a result of that investigation, the command declined to charge the alleged perpetrators with rape or any form of sexual assault. The two alleged perpetrators received nonjudicial punishment for disorderly conduct and failure to obey an order, not for rape.

#### 7. Petitioner Panayoita Bertzikis

Contrary to erroneous factual assertions in the Petition, the Coast Guard Investigative Service (CGIS) conducted an extensive investigation of the allegations made by Petitioner Bertzikis.<sup>171</sup> That investigation was initiated when the Deputy Sector Commander of Sector Northern New England sent a request to CGIS on July 13, 2006, stating that Petitioner Bertzikis had, on that same day, reported being sexually assaulted. The CGIS 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. Approximately eight months after the investigation began, and while the investigation was still ongoing, Petitioner Bertzikis sent an email to a Coast Guard lawyer at the Coast Guard District One Legal Office, copied to the CGIS special agent in charge of the investigation, with the subject “my investigation,” stating, “Due to the emotional strain I no longer have an interest in discussing this matter any further. I thank you very much for your time and hard work.” The investigation was closed 32 days later. A senior Coast Guard lawyer (a captain, O-6) reviewed the investigation and concluded there was insufficient evidence to support charging the individual identified by Petitioner Bertzikis. Petitioner Bertzikis was obviously aware that a months-long investigation was conducted in response to her report. Yet she filed a petition with this Commission falsely stating, “Command failed to take any substantial steps to investigate the matter . . . .”<sup>172</sup>

The Petition also inaccurately states Petitioner Bertzikis “was denied a promotion because of the ‘pending investigation’ even though she met all the necessary requirements.”<sup>173</sup>

---

<sup>171</sup> CGIS Report of Investigation, CCN 0126-06 GNE 0476 8D (GE). A redacted copy of the report of investigation is attached to this filing. Attachment 8. The Petition further demonstrates the lack of due diligence in its preparation by twice using male pronouns to refer to Petitioner Bertzikis. Petition at 1, 69.

<sup>172</sup> Petition at 11.

<sup>173</sup> *Id.*

(That claim itself is in considerable tension with the Petition’s false assertion that “Command failed to take any substantial steps to investigate the matter . . .”). Petitioner Bertzikis was serving in the grade of E-3 when she reported being sexually assaulted and the CGIS investigation began. At no point in her Coast Guard career did she satisfy the prerequisites for promotion to the grade of E-4. She therefore could not have been, and was never, denied a promotion due to the pendency of an investigation.

#### 8. Petitioner Andrew Schmidt

The Petition’s allegations regarding Petitioner Schmidt differ in important respects from previous statements he made, including statements he made under oath.

The Petition alleges “a Marine corporal shoved his fingers up Petitioner Schmidt’s anus until they penetrated him.”<sup>174</sup> Petitioner Schmidt offered numerous previous accounts of the incident in which he did not allege penetration. For example, in a sworn statement he made to NCIS special agents, he stated that a Marine corporal “stuck two fingers in my butt crack.”<sup>175</sup> At another point, he described the incident as a Marine corporal slapping him on the buttocks, later stating the corporal attempted to place a finger between his buttocks.<sup>176</sup>

The Petition also alleges that, after Petitioner Schmidt was transferred to a different ship,<sup>177</sup> “several different Marines held Petitioner Schmidt while they fondled, squeezed, and tickled his testicles.”<sup>178</sup> This conflicts with numerous other statements by Petitioner Schmidt, including a statement under oath to NCIS special agents, in which he described a single incident of a Marine who “pushed me up against the wall and fondled my testicles.”<sup>179</sup>

---

<sup>174</sup> Petition at 10.

<sup>175</sup> NCIS Report of Investigation, File Identification # 04DEC03002300298DCR, Exhibit 1. A redacted copy of the report of investigation is appended to this filing. Attachment 9.

<sup>176</sup> *Id.*, Exhibit 2, Section 2, para. b.7, 8.

<sup>177</sup> According to Petitioner Schmidt’s sworn statement, the first incident did not occur aboard a ship and he was assigned to 3d Battalion, 6th Marine Regiment at all pertinent times. *Id.*, Exhibit 1.

<sup>178</sup> Petition at 12.

<sup>179</sup> NCIS Report of Investigation, File Identification # 04DEC03002300298DCR, Exhibit 1.

Petitioner Schmidt's allegations were investigated at least twice. When his company's commanding officer learned of the allegations, he initiated an investigation and interviewed Petitioner Schmidt on multiple occasions.<sup>180</sup> A Marine captain was subsequently assigned to investigate Petitioner Schmidt's allegations that he was sexually assaulted on four occasions, as well as unrelated complaints by Petitioner Schmidt.<sup>181</sup> (Under current law, the sexual assault allegations would be referred to the Naval Criminal Investigative Service for investigation.) The investigating officer found that Petitioner "Schmidt's accounts of who molested him and how have changed numerous times during the course of his interviews."<sup>182</sup> Additionally, "the investigation by Lima Company into two of the four harassment incidents correctly proved that there was no malicious intent."<sup>183</sup> Petitioner Schmidt did not notify his chain of command of two of the incidents, "which did not allow them to properly investigate his allegations in a timely manner."<sup>184</sup> The investigating officer also concluded Petitioner "Schmidt's chain of command was responsive to his allegations of sexual assault."<sup>185</sup>

At Petitioner Schmidt's request, the Commanding General, 2d Marine Division subsequently personally met with him.<sup>186</sup> Petitioner Schmidt complained about sexual harassment by Marines in 3d Battalion, 6th Marine Regiment, and the command's alleged failure to take appropriate action. The Commanding General directed his Division Staff Judge Advocate to review the previously conducted investigation into the allegations. Following that review, the Commanding General had a second meeting with Petitioner Schmidt. The Commanding General told Petitioner Schmidt he had concluded that Marines in 3d Battalion, 6th Marine Regiment had acted inappropriately, but their behavior did not meet the legal definition of sexual harassment. He also determined that "the behavior found did not rise to the level of criminal culpability requiring punitive action," and "believed counseling was the appropriate first step in addressing this behavior." The Commanding General also informed Petitioner Schmidt

---

<sup>180</sup> *Id.*, Exhibit 2, Section 2, para. b.27.

<sup>181</sup> *Id.*, Exhibit 2, Section 2.

<sup>182</sup> *Id.*, Exhibit 2, Section 2, para. c.3.a.

<sup>183</sup> *Id.*, Exhibit 2, Section 2, para. c.3.b.

<sup>184</sup> *Id.*, Exhibit 2, Section 2, para. c.3.c.

<sup>185</sup> *Id.*, Exhibit 2, Section 2, para. c.5.a.

<sup>186</sup> *Id.*, Exhibit 2, Section 2, Marine Corps Request Mast Application.

that “when the command did act decisively to counsel, the behavior ceased, but I believed the command could, and should have acted sooner.” Petitioner Schmidt was honorably discharged the month after that second meeting with the Commanding General due to his completion of required active service. The Commanding General of the 2d Marine Division treated Petitioner Schmidt’s allegations seriously, carefully determined the optimal exercise of prosecutorial discretion in the case, and respectfully interacted with Petitioner Schmidt personally to apprise him of his decision.

The Petition fails to reveal that the Marine corporal involved in two of the incidents was given a formal counseling entry that was entered into his service record book, a fact that Petitioner Schmidt knew.<sup>187</sup> Petitioner Schmidt also wrote in an email to the office of Senator Dodd that, as a result of their misconduct, the Marines involved in the incidents received negative recommendations for promotion.

#### 9. Petitioner Jessica Kenyon

Petitioner Kenyon’s command conducted an informal investigation of one of her allegations, but found insufficient information to substantiate the claim. (Under current law, the allegations would be referred to Army CID for investigation.) Petitioner Kenyon was referred to the Fort Eustis Sexual Assault Response Coordinator for assistance.

#### 12. Petitioner Stephanie B. Schroeder

It does not appear that Petitioner Schroeder reported to anyone in the military or any military law enforcement agency that she was raped until she made the assertion to a discharge review board three to four years after the alleged incident and three years after being discharged from the Marine Corps. Petitioner Schroeder was involved in an investigation while on active duty for having sex with an instructor, but—after initially claiming the two did not have sex at all—repeatedly asserted the sexual intercourse was consensual.

---

<sup>187</sup> *Id.*, Exhibit 2, Section 2, para. b.17.

The Petition states, “When Command found out that Petitioner Schroeder talked to a fellow Marine about the incident, Command accused her of lying and issued her a non-judicial punishment for ‘Conduct Unbecoming.’”<sup>188</sup> That statement includes several inaccuracies. Petitioner Schroeder did not receive nonjudicial punishment for “conduct unbecoming” (an offense that does not even apply to enlisted members such as Petitioner Schroeder<sup>189</sup>) and the nonjudicial punishment did not occur because her command learned she spoke to a fellow Marine about the alleged incident. Rather, she received nonjudicial punishment for violating an order by having an inappropriate relationship with staff personnel; making a false official statement during an investigation (Petitioner Schroeder untruthfully denied riding in the vehicle of a particular noncommissioned officer); and providing alcohol to a minor. (She received nonjudicial punishment on another occasion for a week-long unauthorized absence and willful disobedience of a direct order from a non-commissioned officer.)

#### 14. Petitioner Amy Lockhart

The Petition alleges Petitioner Lockhart’s “Command threatened to charge her with fraternization with a co-worker.”<sup>190</sup> The Petition creates the impression this concerned the alleged incident that led to her sexual assault allegation. It did not. Rather, it concerned an inappropriate sexual relationship between Petitioner Lockhart and one of her subordinates.<sup>191</sup>

The Petition incorrectly states, “Command demoted Petitioner Lockhart and she lost her Captain status.”<sup>192</sup> Petitioner Lockhart was never a captain in the U.S. Navy or any other branch of the U.S. military. Rather, she was a petty officer first class who had been selected for promotion to chief petty officer, but never was promoted. Before she made a sexual assault

---

<sup>188</sup> Petition at 15.

<sup>189</sup> See 10 U.S.C. § 933 (2012).

<sup>190</sup> Petition at 17.

<sup>191</sup> See NCIS Report of Investigation, Case Number 23FEB10NFLC0040. A redacted copy of the report of investigation is appended to this filing. (Attachment 10).

<sup>192</sup> Petition at 17.

allegation, she was already the subject of disciplinary proceedings.<sup>193</sup> As a result of that misconduct, her planned promotion was canceled.

Naval Criminal Investigative Service (NCIS)—a highly professional civilian-led law enforcement agency—conducted a thorough investigation of her allegation that she was sexually assaulted.<sup>194</sup> That investigation revealed considerable evidence inconsistent with the allegation. The allegation was referred to an Article 32 preliminary investigation—a formal legal proceeding. The Article 32 investigating officer—a Navy judge advocate—concluded the allegations were not supported by probable cause. Following that proceeding, charges against the alleged perpetrator were dismissed without prejudice.

#### 16. Petitioner Elizabeth Lyman

The Petition fundamentally misrepresents the military criminal justice process in describing Petitioner Lyman’s case. As the Petition acknowledges, after Petitioner Lyman alleged she was raped, NCIS conducted a thorough investigation, the alleged perpetrator was placed in pretrial confinement, and the case was referred for trial by a general court-martial.<sup>195</sup> The Petition then incorrectly states, “At trial, Command allowed six witnesses to testify to the character of Petitioner Lyman’s perpetrator, while Petitioner Lyman was limited to only one witness.”<sup>196</sup> Petitioner Lyman’s “Command” made no such ruling. General courts-martial are presided over by highly trained independent military judges who do not report to the chain of command.<sup>197</sup> Rather, they are selected by the Judge Advocate General for their armed force.<sup>198</sup> They are assigned to preside over particular cases by an independent supervisory judicial official.<sup>199</sup> They play precisely the same role that judges do in civilian criminal trials in the United States. It was a military judge who determined what witnesses would be allowed to

---

<sup>193</sup> Specifically, Petitioner Lockhart was the subject of disciplinary proceedings for violating a lawful order and indecent exposure.

<sup>194</sup> NCIS Report of Investigation, Case Number 23FEB10NFLC0040

<sup>195</sup> Petition at 19.

<sup>196</sup> *Id.*

<sup>197</sup> *See, e.g.*, 10 U.S.C.A. § 826 (West Supp. 2018); *Weiss v. United States*, 510 U.S. 163, 180 (1994).

<sup>198</sup> 10 U.S.C.A. § 826(b) (West Supp. 2018).

<sup>199</sup> R.C.M. 503(b)(1), MCM.

testify at trial, not Petitioner Lyman's command. Additionally, Petitioner Lyman was not "limited to only one witness."<sup>200</sup> Petitioner Lyman had no ability to call any witnesses. As in every other criminal justice system in the United States, in the military justice system, the alleged victim of the offense is not a party at a trial. Rather, the parties are the prosecution and the accused. Any witness who testified as to Petitioner Lyman's character was not her witness and was not called by her; rather, such witnesses were called by either the United States or the defense. The Petition similarly errs when it asserts at various points that "Command" "threw out" various pieces of evidence.<sup>201</sup> The admissibility of such evidence is determined not by "Command," but rather by the independent military judge who presides over the trial. The Petition errs yet again when it states, "Command cleared Petitioner Lyman's perpetrator of all charges . . . ."<sup>202</sup> The general court-martial in the case was tried before a panel of officer and enlisted members—the functional equivalent of a jury in a court-martial case. That panel returned a finding of not guilty. The law insulates a members panel from any influence by the chain of command in arriving at its verdict.<sup>203</sup> The defendant's acquittal was not an act of "Command"; rather, it was the result of a fair trial conducted in accordance with due process protections.

#### 17. Petitioner Sandra Sampson

The Petition fails to acknowledge that Petitioner Sampson's allegations were thoroughly investigated by Army CID, a highly professional law enforcement agency.<sup>204</sup> That investigation concluded there was probable cause to believe the alleged perpetrator grabbed Petitioner Sampson's buttock and kissed her without her consent. The Petition incorrectly states, "Command took no action against the perpetrator."<sup>205</sup> In fact, the command issued a letter of reprimand and a negative counseling statement to the perpetrator.<sup>206</sup>

---

<sup>200</sup> Petition at 19.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> See, e.g., 10 U.S.C. 837.

<sup>204</sup> Army CID Report of Investigation 0039-2010-CID609-17424 - 6C6. A redacted portion of the report of investigation is appended to this filing. (Attachment 11).

<sup>205</sup> Petition at 20.

<sup>206</sup> Army CID Report of Investigation 0039-2010-CID609-17424 - 6C6, at 000003.



#### 18. Petitioner Hannah Sewell

As the Petition indicates, a thorough investigation of Petitioner Sewell's allegations was conducted and the accused's command convened an Article 32 investigation—a formal legal proceeding. The Article 32 investigating officer—a Coast Guard lawyer—concluded that “reasonable grounds do NOT exist to believe EM3 [T] committed the crime of Aggravated Sexual Contact.” After noting evidence of digital penetration and oral sex performed by the accused, he concluded, “I do NOT believe there are reasonable grounds to believe the accused committed these acts without Ms. Sewell's consent.”

#### 19. Petitioner Tina Wilson

NCIS investigated this case. The accused, a Navy doctor, was convicted of sexual assault offenses and sentenced to confinement for two years, a fine of \$28,000, forfeiture of all pay and allowances, and a dismissal (the officer equivalent of a dishonorable discharge). Under the terms of a plea bargain, the service of confinement in excess of seven days was suspended for a period of 12 months. The petition asserts that “Petitioner Wilson was not informed properly about her ability to testify and missed the hearing as a result.”<sup>207</sup> At the time, a victim had no right to testify at a court-martial sentencing hearing, though such a right has since been adopted.

The petition also asserts the perpetrator's “sentence requires him to be listed with the National Sex Offender Registry,” but “he failed to register after being released.”<sup>208</sup> Military officials do not operate the National Sex Offender Registry, which is operated by civilian officials. The offender was reportedly arrested and jailed by Oregon state officials as a result of not properly registering as a sex offender when he moved to that state.<sup>209</sup> NCIS alerted civilian authorities to the apparent failure to register.<sup>210</sup>

#### 20. Petitioner Valerie Desautel

---

<sup>207</sup> Petition at 21.

<sup>208</sup> *Id.*

<sup>209</sup> See “Navy doctor arrested at Bangor for failing to register as sex offender,” *Olympian* (Aug. 6, 2010), available at <https://www.theolympian.com/news/local/article25260841.html>.

<sup>210</sup> *Id.*

Army CID—a professional law enforcement agency—conducted an extensive investigation when Petitioner Desautel reported on March 30, 2002 that she had been raped.<sup>211</sup> That extensive investigation included conducting a crime scene analysis; seizing and examining physical evidence, including latent fingerprint analyses; taking, analyzing, and preserving DNA evidence; conducting multiple interviews with individuals with possible knowledge of the offense; creating a composite sketch of the suspect; and obtaining a grand jury subpoena for wireless communication subscriber information. That investigation continued through January 13, 2003. Despite its thoroughness, the investigation failed to reveal the identity of the alleged offender.

In April 2014, Army CID reopened the investigation due to advances in DNA technology.<sup>212</sup> That investigation was again extensive, identifying a number of possible suspects. In 2017, a match was made between the DNA sample taken as part of Petitioner Desautel’s rape kit and an individual whose DNA was submitted into CODIS by a civilian law enforcement agency as part of an unrelated investigation. That suspect, however, was not a member of the United States military on either the date of the alleged offense against Petitioner Desautel or when military investigators learned of the match. With certain limited exceptions that did not apply in this instance, the United States military justice system does not have jurisdiction over civilians. Due to the suspect’s civilian status, the Federal Bureau of Investigation agreed to conduct a joint investigation with Army CID. For the next four months, the FBI and Army CID—with the help of other law enforcement agencies, including the Postal Inspector’s Office and Virginia state law enforcement entities—completed a thorough joint investigation, including an interrogation of the suspect. The results of that joint investigation were considered by the Office of the United States Attorney for the Eastern District of Virginia. In March 2018, that office declined to bring a prosecution.<sup>213</sup> Far from suggesting any violation of the American Declaration, a review of the report of investigation in this case is a testament to Army CID’s professionalism, thoroughness, and perseverance.

---

<sup>211</sup> Army CID ROI 001002002CID0220230256E1E1/6F6A/5L2D2/9G2A/9G2B/9G2D/9T2. A redacted copy of the report of investigation is appended to this filing. (Attachment 12).

<sup>212</sup> Attachment 12 at 000169.

<sup>213</sup> *Id.*, 000010.

**D. The Petition Is Inadmissible as to Most of the Claims and Many of the Petitioners Under Article 34(a) of the Rules for Failure to State Facts that Tend to Establish Violations of Rights Set Forth in the American Declaration.**

In addition to the various defects noted above, most of the claims stated by the Petition overall are inadmissible pursuant to Article 34(a) of the Rules because the Petition does not state facts that—even if true (and, as noted above, many factual assertions in the Petition are untrue)—would tend to establish violations of the applicable portions of the American Declaration. Additionally, as to most of the Petitioners, the Petition fails to state facts that would tend to establish a violation of *any* of their rights as set forth in the American Declaration.

The Petition is filed on behalf of 20 individuals. The Commission has competence to review particularized claims only with respect to these 20 individuals. As it has explained on numerous occasions, the Commission has competence to review individual petitions that allege “concrete violations of the rights of specific individuals, whether separately or as part of a group, in order that the Commission can determine the nature and extent of the State’s responsibility for those violations . . . .”<sup>214</sup> The Commission’s governing instruments “do not allow for an *actio popularis*.”<sup>215</sup> Consequently, the Commission may not consider any alleged violations outside the context of the particular Petitioners.

Petitioners allege the sexual violence and harassment set out in the Petition is attributable to the United States. This allegation is, however, unsupportable as a matter of international law because the act of a State official or employee acting in a private capacity is not attributable to the State for purpose of State responsibility.<sup>216</sup>

---

<sup>214</sup> *Operation Gatekeeper* Inadmissibility Decision, Petition No. 65/99, Report No. 104/05, ¶ 51 (Oct. 27, 2005); accord, e.g., Undocumented Migrant, Legal Resident, and U.S. Citizen Victims of Anti-Immigrant Vigilantes v. United States, Case No. 12.720, Admissibility, Aug. 5, 2009, ¶¶ 41–44 (dismissing claims relating to unidentified group of alleged victims of anti-immigrant violence for lack of competence *ratione personae*).

<sup>215</sup> *Operation Gatekeeper* Inadmissibility Decision, *supra* n. 213, at ¶ 51. Accord *International Abductions*, Petition No. 11.082, Inadmissibility, Nov. 7, 2014, ¶ 27.

<sup>216</sup> 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).

The principle that unauthorized conduct of a State officer or employee is not attributable to the State is clearly established under international law.<sup>217</sup> The award of the Mexico-United States General Claims Commission in the *Mallén* case is informative in this regard. The case involved, on the one hand, the act of an official acting in a private capacity and, on the other, another act committed by the same official in his official capacity (though abusive in character).<sup>218</sup> While the latter conduct—committed by the official in his official capacity—was found to be attributable to the State, the act of the same official in his private capacity was not. Similarly, in the *Caire* case, the French-Mexican Claims Commission excluded responsibility in cases where “the act had no connexion with the official function and was, in fact, merely the act of a private individual.”<sup>219</sup> The same distinction appears in cases of excess of authority by organs of a State.<sup>220</sup> As then-Special Rapporteur Crawford noted in the commentaries to the ILC Articles on State Responsibility:

The central issue to be addressed in determining the applicability of article 7 to unauthorized conduct of official bodies is whether the conduct was performed by the body in an official capacity or not. Cases where officials acted in their capacity as such, albeit unlawfully or contrary to instructions, must be distinguished from cases where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State. In the words of the Iran-United States Claims Tribunal, the question is whether the conduct has been “carried out by persons cloaked with governmental authority.”<sup>221</sup>

It is beyond question that the allegations of sexual violence and harassment underlying Petitioners’ claims constitute private conduct, as such conduct is so far removed from the scope of the official functions of the alleged perpetrators (where those perpetrators were also U.S. service members) that it should be assimilated to that of private individuals, not attributable to

---

<sup>217</sup> *Id.*, commentaries, para. 13.

<sup>218</sup> *Id.* (citing *Mallén*, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 173, at p. 175 (1927)).

<sup>219</sup> *Id.* (citing 125 UNRIAA, vol. V (Sales No. 1952.V.3), p. 516, at p. 531 (1929)). See also commentaries, para. 13, n. 125 (citing the *Bensley* case in Moore, *History and Digest*, vol. III, p. 3018 (1850) (“a wanton trespass ... under no color of official proceedings, and without any connection with his official duties”); and the *Castelain* case *id.*, p. 2999 (1880)). See further article 7 and commentary.

<sup>220</sup> International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), Art. 7 (A/56/10).

<sup>221</sup> *Id.*, Art. 7, commentaries, para. 7 (quoting *Petrolane, Inc. v. The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 27, p. 64, at p. 92 (1991)).

the State. There are no facts in the Petition to suggest that the accused perpetrators were acting with “apparent authority” when carrying out alleged acts of sexual violence or harassment.<sup>222</sup> Therefore, the alleged incidents of sexual violence and harassment contained in the Petition cannot be attributed to the United States under international law and, as such, cannot constitute violations by the United States of its commitments under the American Declaration.

i. Right to Life and Personal Integrity (Article I)

Article I of the American Declaration provides that “[e]very human being has the right to life, liberty and the security of person.” Petitioners allege that the United States has violated Petitioners’ rights to life and security under Article I of the American Declaration. As an initial matter, as explained above, the alleged acts in question—to the extent they are substantiated—are not attributable to the United States and, as such, do not constitute violations of Article I of the American Declaration.<sup>223</sup> Moreover, there is no allegation that Petitioners’ rights to life have been prejudiced in any way (even if the conduct at issue could be attributed to the State, which it cannot be). In sum, the Petition does not set out facts that, even if true, would tend to establish a violation of Article I and, as such, the claim is inadmissible under Article 34(a) of the Rules.

Moreover, in the context of the American Convention (to which the United States is not a party), the Petition emphasizes that this Commission has stated that States are required to “adopt the necessary measures, not only at the legislative, administrative and judicial level, by issuing penal norms and establishing a system of justice to prevent, eliminate and punish [...] and protect individuals from the criminal acts of other individuals and to investigate these situations effectively.”<sup>224</sup> As the Petition acknowledges, the United States has established a system that investigates, prosecutes, and punishes violations of the law, including sexual assaults. The Petition even includes many examples of cases being investigated, examples of cases being prosecuted, and an example of a case being prosecuted that resulted in a conviction and a

---

<sup>222</sup> *Id.*, Article 7, commentaries, para. 8.

<sup>223</sup> See discussion *supra*, text accompanying nn. 215-221.

<sup>224</sup> Petition at 57 (quoting Application before the Inter-American Court of Human Rights, Claudia Ivette González et. al. v. United Mexican States, Cases Nos. 12.496, 12.497 and 12.498, Inter-Am. C.H.R. ¶156 (2007) (citing to Case of the Pueblo Bello Massacre, Judgment, Series C No. 140, Inter-Am. Ct. H.R., ¶120 (Jan. 31, 2006))).

sentence. The Petition is, therefore by its own terms, baseless under Article 34(b) of the Rules, and this claim under Article I of the Declaration must be rejected.

Alternatively, Petitioners attempt to construe allegations of sexual assault and violence contained in the Petition as violations of their rights to security of person under Article I of the Declaration, with particular respect to the Commission's interpretation of Article I to include the prohibition of torture or other cruel, inhuman, or degrading treatment or punishment (CIDTP).<sup>225</sup>

Although the Convention Against Torture (CAT) is outside the competence of the Commission, the well-accepted definition of torture contained in the CAT is instructive for the definition of torture. Article 1 of the CAT, to which the United States is a party, defines torture as "any 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*" (emphasis added). The United States ratified the CAT with the understanding that the definition of torture in Article 1 is intended to apply only to acts directed against persons in the offender's custody or physical control. "Torture" is similarly defined at 18 U.S.C. 2340 as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain and suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control."

An essential element of torture committed outside the context of armed conflict is that the act be committed by, or with the consent or acquiescence of, an official or person *acting in an official capacity*. Another key element of torture is that the acts in question occurred while the

---

<sup>225</sup> Petition at 58 (citing Report on Terrorism and Human Rights, Inter-Am. Comm'n H.R. OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr., ¶ 154 (2002), at ¶ 155 & n.388 (noting that while the American Declaration lacks a general provision on the right to humane treatment, the Commission has interpreted Article I as containing a prohibition similar to that of Article 5 of the American Convention)); *see also*, e.g., Juan Antonio Aguirre Ballesteros, Case 9437, Annual Report of the Inter-Am. C.H.R. 43, OEA/ser. L/V/II.66, doc. 10 rev. 1 (1985).

victim was in the offender's custody or physical control. Neither of these elements is established by the facts set out in the Petition, even if they are accepted as true, because the conduct alleged in the Petition was not carried out by individuals acting in an official capacity<sup>226</sup> or while the alleged victims were in the custody or control of State actors. Therefore, even if Petitioners are correct in reading the right to physical security under Article I of the Declaration to contain prohibition of torture and/or CIDTP—which the United States does not concede—Petitioners fail to state facts that establish the elements of torture and/or CIDTP. Therefore, again, Petitioners' claims under Article I of the Declaration are inadmissible under Article 34(a) and baseless under Article 34(b) of the Rules.

ii. Right to Equality (Article II)

Article II of the American Declaration provides that “[a]ll persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.” Petitioners allege that they have been discriminated against on the basis of military status, gender, and sexual orientation, and specifically, that investigations into allegations of sexual violence and harassment were not conducted by the military because of the military status, male and female gender, and sexual orientation of Petitioners.<sup>227</sup> While military status would not clearly constitute a protected basis for impermissible discrimination within the meaning of Article II, there are simply no facts to support Petitioners' threadbare allegations that they have been subject to discrimination of any kind. Even assuming, *arguendo*, that Petitioners' claims that allegations of sexual violence and harassment were not investigated—facts which are definitively refuted in this submission—Petitioners have not provided any facts that suggest the State declined to conduct investigations on the basis of a protected status of the accusers. Such spurious allegations are insufficient to satisfy a petitioner's burden under Article 34(a) of the Rules to state facts that tend to establish a violation of the American Declaration, rendering this claim inadmissible. Moreover, Petitioners' claim under Article II should be dismissed as manifestly groundless under Article 34(b).

---

<sup>226</sup> See discussion *supra*, text accompanying nn. 215-221.

<sup>227</sup> Petition at 47-57.

iii. Right to protection of honor, personal reputation, and private and family life  
(Article V)

Article V of the American Declaration provides that “[e]very person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life.” Petitioner alleges that the United States failed to uphold its commitment under Article V in two ways: because the “sexual violence inflicted on petitioners also constitutes a violation of the right to protection of private life in Article V of the Declaration,”<sup>228</sup> and because Petitioners were allegedly retaliated against for reporting allegations of sexual violence or harassment by being “downgraded in rank, denied promotions or discharged.”<sup>229</sup>

Petitioners’ claims fail because the right related to family and private life established by Article V does not apply to the allegations described in the Petition. The language of Article V makes clear that it is intended to ensure that persons are not subject to direct action by the state. The words “abusive attacks upon” in Article V require a degree of state action directly aimed at harming honor, reputation, or private family life, and which is “abusive,” *i.e.*, that involves a misuse of state power.

The Commission’s jurisprudence bears out this textually supported interpretation of Article V and related rights. For example, in a case regarding the persecution of the Ache people in Paraguay, the Commission noted that the sale of children constitutes a “very serious” violation of the right to a family and to receive protection therefor.<sup>230</sup> More recently, in *Eduardo Cirio v. Uruguay*, the Commission found that the State violated a petitioner’s right to honor when it presented the military officer “as lacking in moral and military honor, by stripping him of his status and benefits as punishment for criticizing the activities of the armed forces, and by degrading him both in rank and status.”<sup>231</sup> Conversely, in *Radyo Koulibwi v. Saint Lucia*, the Commission found a petitioner’s claim alleging that the State had violated his right to honor and

---

<sup>228</sup> Petition at 62.

<sup>229</sup> Petition at 64.

<sup>230</sup> *Ache Tribe v. Paraguay*, Case 1802, Inter-Am. Comm’n H.R (1977).

<sup>231</sup> *Eduardo Cirio v. Uruguay*, Case 11.500, Inter-Am. C. H.R., Report No. 124/06, OEA/Ser.L/V/II.127, doc. 4 rev. 1 (2006), para. 95.



personal reputation by denying him a permanent radio broadcast license, which allegedly “exposed him to ridicule and speculation about his reputation,” inadmissible under Article 34 of the Rules.<sup>232</sup>

First, the incidents of sexual violence and harassment alleged in the petition cannot constitute a violation of the right to private family life within the meaning of Article V because there is no direct state action. As previously discussed, the alleged sexual violence perpetrated against Petitioners was non-state-sanctioned private criminal behavior. That criminal behavior could not violate the Declaration, as it did not constitute acts by the United States, but rather, as discussed above, constituted private conduct not attributable to the United States.<sup>233</sup> Similarly, even if the facts alleged in the Petition are assumed to be true, the sexual trauma alleged by the Petition,<sup>234</sup> while tragic and decried by the United States, is the result of non-state-sanctioned private criminal behavior not attributable to the State. Moreover, even if the conduct at issue were attributable to the United States, which it is not, such conduct would not contravene Article V because the conduct was not a misuse of state power directly aimed at harming private family life within the meaning of Article V.

Second, Petitioners’ allegations that some Petitioners were retaliated against for reporting allegations of sexual violence or harassment—including through reduction in rank, denial of promotion, or discharge from service—are refuted by the facts of their respective cases, as documented above.<sup>235</sup>

Petitioner has provided no facts to suggest that the United States failed to uphold its commitments under Article V of the American Declaration and therefore Petitioner’s claim is inadmissible under Article 34(a). Moreover, Petitioners’ claims under Article V are baseless and must be rejected under Article 34(b) of the Rules.

---

<sup>232</sup> *Radyo Koulibwi v. Saint Lucia*, Case 11.870, Report No. 87/01, OEA/Ser./L/V/II.114 Doc. 5 rev. at 282 (2001), paras. 15, 36.

<sup>233</sup> See discussion *supra*, text accompanying nn. 215-221.

<sup>234</sup> Petition at 63.

<sup>235</sup> See *supra* Section II.C.

iv. Right to Protection for Mothers and Children (Article VII)

Article VII provides that “[a]ll women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid.” Petitioners claim that the United States violated Petitioner Lyman’s right to special protection under Article VII because her accuser was acquitted of the charges against him following a court-martial trial. The claimed violation of Article VII is frivolous.<sup>236</sup> Petitioner Lyman has not identified any special protection within the meaning of Article VII to which she had a right that was denied by the United States. Moreover, 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 of Article VII of the Declaration. Petitioners have therefore failed to state facts that evidence a violation of Article VII under Article 34(a) of the Rules, and therefore the claim is baseless under Article 34(b).

v. Right to Inviolability of the Home (Article IX)

Article IX provides that “[e]very person has the right to the inviolability of his home.” Petitioners allege that the United States violated Article IX “when it allowed petitioners to be sexually assaulted and raped” and when it allegedly denied requests for transfer.<sup>237</sup> The premise of Petitioners’ allegation in this respect is entirely without basis as there is no indication that the United States “allowed” the conduct at issue. Rather, the underlying conduct at issue constitutes private conduct not authorized in any way by the State. In fact, although private conduct could not be attributable to the United States as a threshold matter,<sup>238</sup> Petitioners’ implication that their homes were involved in the conduct alleged is generally baseless. For the vast majority of the Petitioners, the Petition does not allege they were in their homes at the time of the alleged offenses.<sup>239</sup> As such, Petitioners have plainly failed to state facts that tend to establish a violation

---

<sup>236</sup> Petition at 64. Although the Petition refers to “Violation of Petitioners’ Rights to Special Protections under VII,” it alleges only one Petitioner was pregnant.

<sup>237</sup> Petition at 65.

<sup>238</sup> See discussion *supra*, text accompanying nn. 215-221.

<sup>239</sup> See Petition at 6-21: Petitioner Gallagher was allegedly sexually assaulted in a car and a restroom. Petitioner Havrilla was allegedly raped in her assailant’s bed. Petitioner Anderson was allegedly raped in a hotel in Thailand. Petitioner Bertzikis was allegedly raped on a hike. Petitioner Schmidt was allegedly sexually assaulted in an area where training gear was being distributed; the Petition fails to state where a

of the inviolability of the home even under their own expansive theory of Article IX, including with respect to those few Petitioners for whom the Petition alleges the crimes occurred in housing areas. Moreover, the Petition does not include facts that suggest the United States failed in any way to respect the inviolability of Petitioners' homes. As such, Petitioners have not alleged facts that evidence a failure of the United States to live up to its commitments under Article IX, and Petitioners' claims in this respect must be rejected as inadmissible under Article 34(a) of the Rules. Petitioner's claim under Article IX must also be rejected as baseless under Article 34(b) of the Rules.

vi. Right to Employment (Article XIV)

Petitioners' claims that their rights to employment under Article XVI of the American Declaration have been violated by the United States are baseless, and Petitioners have plainly failed to establish facts that could support a violation of these provisions of the Declaration.

Article XIV provides that "[e]very person has the right to work, under proper conditions, and to follow his vocation freely, insofar as existing conditions of employment permit. Every person who works has the right to receive such remuneration as will, in proportion to his capacity and skill, assure him a standard of living suitable for himself and for his family." It bears noting at the outset that the right to work under Article XIV is qualified by "under proper conditions," and the protection "to follow his vocation freely" is similarly qualified "insofar as existing conditions of employment permit." Petitioners have not been deprived of their rights to work, under proper conditions, and to follow their vocation freely, insofar as existing conditions of employment permit. "Under proper conditions" in Article XIV is most reasonably understood

---

second assault allegedly occurred. Petitioner Kenyon was allegedly raped "while she was home for the holidays" – which, in context, appears to suggest that she was in her hometown. Petitioner Neutzling was allegedly sexually assaulted outside a latrine; the Petition fails to state where another alleged sexual assault and an alleged rape occurred. Petitioner Schroeder was allegedly raped in a woman's bathroom off of any military installation. Petitioner Sampson was allegedly grabbed and touched in a gym. Petitioner Sewell was allegedly raped at a hotel off of any military installation. The Petition suggests Petitioner Wilson was sexually assaulted in a doctor's office. Petitioner Desautel was allegedly raped in a hotel. The Petition fails to state where Petitioners Haider, Albertson, Stark, Yeager, or Stephens were allegedly raped or sexually assaulted.

to denote the material conditions of performance, i.e., “working conditions”, and Petitioners have no cause to complain about these. Although Petitioners allege that they were subject to sexual violence and harassment while enlisted in the military, they have failed to substantiate allegations that they have been denied access to a safe workplace and subjected to a hostile and discriminatory work environment.<sup>240</sup> While Petitioners further allege that the United States violated their rights under Article XIV “through widespread retaliation and harassment,” and by “preventing them from working all together,”<sup>241</sup> Petitioners have failed to substantiate these allegations, which are refuted by the facts of the respective cases identified in the Petition. As such, this claim is inadmissible under Article 34(a) and baseless under Article 34(b) of the Rules.

vii. Right to Freedom of Investigation (Article IV)

Article IV of the American Declaration provides that “[e]very person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any means whatsoever.” Petitioners have plainly failed to state facts that establish that the United States has failed to uphold its commitment under Article IV and their claim must be rejected under Article 34(a) of the Rules.

Moreover, Petitioners’ theory of such a violation is entirely baseless. The Petition’s claim that the United States violated the “right to truth”—which is purportedly encompassed by the right to freedom of investigation—is premised on the proposition that “the United States refused to carry out investigations” of the alleged rapes of Petitioners Lockhart and Desautel.<sup>242</sup> Yet, as the Petition itself acknowledges, the United States *did* conduct investigations in both of those cases.<sup>243</sup> As to Petitioner Lockhart, the Petition expressly states, “Navy [sic] Criminal Investigative Service completed an investigation into the case and a hearing was held.”<sup>244</sup> The Petition also refers to the rape kit and investigation in Petitioner Desautel’s case.<sup>245</sup> In fact, in

---

<sup>240</sup> Petition at 69.

<sup>241</sup> *Id.*

<sup>242</sup> Petition at 70.

<sup>243</sup> Petition at 17, 21-22; NCIS Report of Investigation #5580/4a(1)(b); Army CID ROI 001002002CID0220230256E1E1/6F6A/5L2D2/9G2A/9G2B/9G2D/9T2.

<sup>244</sup> Petition at 17.

<sup>245</sup> Petition at 21-22.

each of those cases, a military criminal investigative organization conducted a thorough investigation; redacted versions of the resulting reports of investigation are appended to this filing.<sup>246</sup> The Petition’s claim to a violation of the right to truth, which is refuted by the Petition itself, must be rejected as baseless under Article 34(b) of the Rules.

viii. Rights to Resort to a Fair Trial and to Petition (Articles XVIII and XXIV)

Article XVIII provides that “[e]very person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.” Article XXIV provides that “[e]very person has a right to submit respectful petitions to any competent authority, for reasons of either general or private interest, and the right to obtain a prompt decision thereon.” The Petition fails to state facts that establish a failure of the United States to live up to its commitments under either provision and, as such, these claims must be dismissed under Article 34(a) of the Rules; Petitioners’ claims are also baseless under Article 34(b) of the Rules.

The Petition’s claim to a violation of the right to resort to the courts for violations of human rights is an unpersuasive attempt at bootstrapping. The Petition argues that military justice systems “are considered ineffective remedies to address human rights violations.”<sup>247</sup> But the acts allegedly committed against the Petitioners were crimes by individuals in their personal capacities, not human rights violations perpetrated by the State. Thus, where the Petitioners made reports, the military justice system was not “sit[ting] in judgment of human rights violations.”<sup>248</sup> Rather, it was investigating and adjudicating claims of private criminal violations not attributable to the State. The Commission’s prior reports addressing the use of military courts to adjudge human rights violations perpetrated by a State’s military apparatus are therefore inapposite.

---

<sup>246</sup> Attachments 10, 12.

<sup>247</sup> Petition at 71.

<sup>248</sup> Petition at 71-72 (quoting Inter-American Commission for Human Rights, Annual Report 1992-1993, OEA/Ser.L/V/II.83 Doc. 14 (Mar. 12, 1993), Chapter V(VII), ¶ 6.

Moreover, Petitioners' citations to the Commission's prior reports are in many instances misleading or erroneous. For example, Petitioners place great weight on the Commission's report in *Márcio Lapoente da Silveira v. Brazil*.<sup>249</sup> However, the Commission only decided in that case that a Petitioner subject to human rights violations by the military of Brazil was excused from the requirement to exhaust domestic remedies where the only remedies available were before that military's justice system.<sup>250</sup> The Commission did not opine, as Petitioners suggest, that a State's use of a military justice system constitutes a violation of the right to a fair trial under Article XVIII of the American Declaration. Nor did the Commission conclude that a State's utilization of a military justice system constitutes a violation of due process under Article XXIV, nor could it: whether an individual's right to due process is satisfied is a fact-dependent, case-by-case assessment that cannot be simply interposed from a different matter before the Commission.

Selective excerpts by Petitioners of recommendations by the Working Group on the Administration of Justice are similarly misleading.<sup>251</sup> For example, with respect to the use of military tribunals to adjudicate serious violations of human rights, the full quotation excerpted from *Márcio Lapoente da Silveira v. Brazil* reads:

[I]n all circumstances, the competence of military tribunals should be abolished in favor of those of the ordinary courts, for trying persons responsible for serious human rights violations, *such as extrajudicial executions, enforced disappearances, torture and so on.*"<sup>252</sup>

However, the alleged private criminal conduct by active-duty service members (or, in the case of Petitioner Desautel, a civilian) at issue in the Petition is not analogous as a legal matter to the serious human rights violations identified by the Working Group.

---

<sup>249</sup> Petition at 71.

<sup>250</sup> *Márcio Lapoente da Silveira v. Brazil*, Case 4524-02 Report No. 74/08, Inter-Am. C.H.R., OEA/Ser.L/V/II.130, Doc. 22, rev. 1 (2008), ¶¶ 64, 73.

<sup>251</sup> See Petition at 72.

<sup>252</sup> *Márcio Lapoente da Silveira v. Brazil*, Case 4524-02 Report No. 74/08, Inter-Am. C.H.R., OEA/Ser.L/V/II.130, Doc. 22, rev. 1 (2008), ¶ 65 (emphasis added).

Petitioners' excerpting of the recommendations by the Commission in its 1992-1993 Annual Report is similarly misleading. The full recommendation excerpted by Petitioners reads as follows:

That *pursuant to Article 2 of the Convention*, the member States undertake to adopt the necessary domestic legal measures to confine the competence and jurisdiction of military tribunals *to only those crimes that are purely military in nature*; under no circumstances are military courts to be permitted to sit in judgment of human rights violations.<sup>253</sup>

Because the United States is not party to Article 2 of the Convention, the United States undertook no such obligation. Moreover, even if it had, to the extent that the military justice system was engaged in matters underlying Petitioners' claims, the private conduct of active-duty service members is appropriate for submission to the jurisdiction of a military justice system and therefore consistent with the Commission's recommendation quoted above.

Petitioners' reference to the Commission's 1997 Annual Report is also misleading. Petitioners excerpt only that "this special jurisdiction [of military justice systems] must exclude the crimes against humanity and human rights violations."<sup>254</sup> The full recommendation cited by Petitioners reads:

With regard to jurisdictional matters, the Commission reminds the member States that their citizens must be judged pursuant to ordinary law and justice and by their natural judges. Thus, civilians should not be subject to Military Tribunals. Military justice has merely a disciplinary nature and can only be used to try Armed Forces personnel in active service for misdemeanors or offences pertaining to their function. In any case, this special jurisdiction must exclude the crimes against humanity and human rights violations.<sup>255</sup>

---

<sup>253</sup> Inter-American Commission for Human Rights, Annual Report 1992-1993, OEA/Ser.L/V/II.83 Doc. 14 (Mar. 12, 1993), Chapter V(VII), ¶ 6 (emphasis added); *see contra* Petition at 72. *See similarly*, Inter-American Commission for Human Rights, Annual Report 1993, OEA/Ser.L/V/II.85 Doc. 8 rev. (Feb. 11, 1994), Chapter V(IV), Final Recommendations, ¶ 4.

<sup>254</sup> Petition at 72 (quoting Inter-American Commission for Human Rights, Annual Report 1997, OEA/Ser.L/V/II.98 Doc. 6 (Feb. 17, 1998), Chapter VII, ¶ 1).

<sup>255</sup> Inter-American Commission for Human Rights, Annual Report 1997, OEA/Ser.L/V/II.98 Doc. 6 (Feb. 17, 1998), Chapter VII, ¶ 1.

The recommendation by the Commission clearly addressed the use of military justice systems to adjudge ordinary citizens rather than members of a State's armed forces. Moreover, the Commission affirmatively recognized the role of military justice systems as a disciplinary mechanism by which a State may prosecute members of its armed forces for misdemeanors or offences (but not crimes against humanity or human rights violations). The investigation and, where appropriate, prosecution of active-duty service members for alleged sexual violence and sexual harassment is therefore entirely consistent with the recommendation in the Commission's 1997 Annual Report.<sup>256</sup>

The Petition erroneously cites the Commission's decisions in *Rochela Massacre v. Colombia* and *La Cantúta v. Peru* for the proposition that a military justice system "is not competent for the investigation, prosecution and punishment of military perpetrators of human rights violations that include rape."<sup>257</sup> This quotation does not reflect a recommendation by the Commission—it appears in neither of the reports cited by Petitioners—and, in fact, neither report so much as refers to the crime of rape. Moreover, analogy to these petitions is inapposite because State conduct is not at issue in the Petition. Notwithstanding this fundamental distinction, the circumstances of the reports cited bear no resemblance to the Petition in this case. For example, the *La Cantúta* case involved an operation carried out by members of the Peruvian Army, who kidnapped and killed victims from a university in La Cantuta, Lima; investigations into the operation were "fraudulently referred to the military courts," which lacked jurisdiction, "with the aim of securing impunity for those responsible" including through "fake prosecutions instituted against several people in order to prevent them from being tried by the ordinary courts."<sup>258</sup> The *Rochela Massacre* case concerned an operation by a Colombian paramilitary group to kill a group of judicial officers carrying out an investigation in "the Rochela district" in Bajo Simacota; the investigation of a military officer for collaboration with the paramilitary group was apparently transferred to military courts which lacked jurisdiction over the case under

---

<sup>256</sup> The United States does not agree with the Commission's recommendation that military justice cannot be used to address allegations of serious violations of international law.

<sup>257</sup> Petition at 73 (citing Inter-American Court, *Rochela Massacre vs. Colombia*, (ser. C), No. 163, ¶¶200, 204 (May 11, 2007); *La Cantúta vs. Peru* (ser. C) No. 162, ¶142 (Nov. 2, 2006)).

<sup>258</sup> *La Cantúta vs. Peru* (ser. C) No. 162, ¶ 141-144 (Nov. 2, 2006).



domestic law. The unique facts and procedural history of the *La Cantúta* and *Rochela Massacre* cases are profoundly dissimilar to the claims contained in the Petition. The conduct at issue in the Petition does not entail State action, but rather, alleged private criminal conduct of active-duty service members (or, in the case of Petitioner Desautel, a civilian); there is no indication that the military justice system was unlawfully seized with the matters under domestic law; the military justice system duly investigated and prosecuted the matters as appropriate. Thus, the Commission’s rationale for finding military tribunals to be inappropriate in *La Cantúta* and *Rochela Massacre* are entirely inapposite to the present Petition.

Finally, Petitioners allege that they were denied the right to petition in federal courts in the United States because their “claims were dismissed before the District Court and Court of Appeal because of case law from the United States Supreme Court.”<sup>259</sup> As an initial matter, the right to petition does not entitle a petitioner to a particular outcome, and so the lack of success in U.S. courts does not constitute an independent human rights violation. “[T]he fact that the outcome [of a domestic proceeding] was unfavorable ... does not constitute a violation.”<sup>260</sup> Moreover, while Petitioners acknowledge the obstacle posed by a U.S. Supreme Court decision,<sup>261</sup> their decision not to seek the Supreme Court’s review of the dismissal of their tort claim raises serious questions. Petitioners’ attempt to transform their litigation strategy not to seek Supreme Court review into a human rights claim is disingenuous: a decision not to petition a court cannot be equated with a denial of the right to petition such a court. Moreover, as previously indicated, the U.S. judicial system provides service members who are the victims of sexual assault with multiple avenues outside the military justice system to vindicate their rights. The unavailability of one particular form of tort relief (or rather, the failure to exhaust one avenue for relief) does not violate a right to “resort to the courts” where, as here, other forms of judicial relief are available.<sup>262</sup>

---

<sup>259</sup> Petition at 77.

<sup>260</sup> *Maldonado Manzanilla v. Mexico*, Petition No. 733-04, Report No. 87/07, Inadmissibility, Oct. 17, 2007, ¶ 58 (quoting and citing *Rodríguez v. Argentina*, Case No. 10.382, Report No. 6/98, Inadmissibility, Feb. 21, 1998, ¶ 71).

<sup>261</sup> Petition at 77.

<sup>262</sup> Declaration, Art. XVIII.

Taken together, the Petition fails to state facts that establish a failure of the United States to live up to its commitments under Articles XVIII and XXIV of the American Declaration and, as such, these claims must be dismissed under Article 34(a) of the Rules; Petitioners' claims are also baseless under Article 34(b) of the Rules.

**E. The Petition Fails to State Facts that Tend to Establish Violations of Rights Set Forth in the American Declaration as to Many of the Petitioners**

**2. Petitioner Rebekah Havrilla<sup>263</sup>**

According to the Petition, Petitioner Havrilla was the victim of certain sexual misconduct, including rape, and she chose to make a restricted report.<sup>264</sup> Under DoD policy, a service member may make either an unrestricted report of a sexual assault--which will result in a mandatory investigation by a military criminal investigative organization--or a restricted report, which will not result in a criminal investigation. According to the Petition, Petitioner Havrilla chose the latter. Thus, according to the Petition, Petitioner Havrilla was the victim of crimes but consciously chose not to report them in a manner that would result in criminal investigations.<sup>265</sup> That does not tend to establish the violation of any rights under the American Declaration. Therefore, nothing in the petition is admissible as to Petitioner Havrilla.

**3. Petitioner Myla Haider**

According to the Petition, Petitioner Haider was raped but chose not to report it because she did not believe the Army Criminal Investigative Division [sic] (CID) would take the allegation seriously.<sup>266</sup> Yet the Petition itself disproves that fear. Even without Petitioner Haider having reported the offense, the Petition indicates, CID conducted a thorough investigation of Haider's alleged offender at a later date, at which time CID contacted Haider after identifying

---

<sup>263</sup> For ease of reference, the Petition's numbering as to each of the individual Petitioners is maintained.

<sup>264</sup> Petition at 8.

<sup>265</sup> As previously noted, Petitioner Havrilla did subsequently make an unrestricted report that was investigated. But that fact was not included in the Petition.

<sup>266</sup> *Id.*

her as a potential victim.<sup>267</sup> The Petition indicates the alleged assailant was then prosecuted for the offense and Petitioner Haider testified at the trial.<sup>268</sup> None of those facts tend to establish a violation of the American Declaration. Therefore, nothing in the petition is admissible as to Petitioner Haider.

#### 4. Petitioner Sarah Albertson

The Petition alleges that Petitioner Albertson was raped.<sup>269</sup> The Petition acknowledges that the Naval Criminal Investigative Service investigated the incident.<sup>270</sup> The incident did not result in a criminal prosecution. It is not a violation of the American Declaration for a prosecutorial authority to decline to bring criminal charges following a criminal investigation. Therefore, nothing in the petition is admissible as to Petitioner Albertson.

#### 6. Petitioner Amber Anderson (DeRoche)

According to the Petition, Petitioner Anderson was raped by two sailors during a port call.<sup>271</sup> After reporting the rape, according to the Petition, she was compelled to remain aboard her ship and was, “on one occasion,” placed in the ship’s medical ward and denied food.<sup>272</sup> With the help of a Navy chaplain, she was subsequently transferred to a different ship.<sup>273</sup> The alleged offenders were not court-martialed.<sup>274</sup> The events as described in the Petition, while troubling, do not constitute a failure of the United States to live up to any of its commitments under provisions of the American Declaration. Therefore, nothing in the petition is admissible as to Petitioner Anderson.

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

---

<sup>267</sup> *Id.* at 9.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

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

<sup>271</sup> *Id.* at 10.

<sup>272</sup> *Id.* The denial of food could be warranted for numerous medical reasons. Moreover, the Petition alleges no facts that would suggest her placement in the medical ward or the denial of food there had any nexus to her report of a sexual assault.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

Petitioner Stark alleged she was sexually assaulted by her Army National Guard commander.<sup>275</sup> A local police department jailed the alleged perpetrator, and filed criminal charges against him.<sup>276</sup> Those charges were later dropped and the alleged perpetrator was forced to resign from the National Guard.<sup>277</sup> The alleged perpetrator later joined the United States Army Reserve.<sup>278</sup> None of those facts tend to establish a violation of the American Declaration. Therefore, nothing in the petition is admissible as to Petitioner Stark.

#### 14. Petitioner Lockhart

Petitioner Lockhart alleged she was raped.<sup>279</sup> The Petition acknowledges that the “Navy [sic] Criminal Investigative Service completed an investigation into the case and a hearing was held.”<sup>280</sup> Nothing in the American Declaration compels a particular outcome of an investigation or hearing. As the Commission has stated, “[T]he fact that the outcome [of a domestic proceeding] was unfavorable . . . does not constitute a violation . . . .”<sup>281</sup> None of the facts alleged by the Petition tends to establish a violation of the American Declaration as to Petitioner Lockhart. Therefore, nothing in the petition is admissible as to Petitioner Lockhart.

#### 16. Petitioner Lyman

The Petition alleges that Petitioner Lyman was raped.<sup>282</sup> The Petition acknowledges that the Naval Criminal Investigative Service conducted an investigation, which included DNA analysis.<sup>283</sup> The Petition acknowledges the U.S. military jailed the alleged offender for six

---

<sup>275</sup> Petition at 14.

<sup>276</sup> *Id.* Members of the National Guard are subject to the military justice system under the Uniform Code of Military Justice only for offenses committed when they are in federal service. State civilian criminal justice systems typically handle offenses allegedly committed by National Guard members when in state service.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *Id.* at 17.

<sup>280</sup> *Id.*

<sup>281</sup> *Maldonado Manzanilla v. Mexico*, Petition No. 733-04, Report No. 87/07, Inadmissibility, Oct. 17, 2007, ¶ 58 (quoting and citing *Rodríguez v. Argentina*, Case No. 10.382, Report No. 6/98, Inadmissibility, Feb. 21, 1998, ¶ 71).

<sup>282</sup> Petition at 19.

<sup>283</sup> *Id.*

months awaiting court-martial.<sup>284</sup> The Petition also acknowledges a trial was held.<sup>285</sup> Nothing in the American Declaration compels a particular outcome of a criminal trial. As the Commission has stated, “the fact that the outcome [of a domestic proceeding] was unfavorable ... does not constitute a violation . . . .”<sup>286</sup> None of the facts alleged by the Petition tends to establish a violation of the American Declaration as to Petitioner Lyman. Therefore, nothing in the petition is admissible as to Petitioner Lyman.

#### 18. Petitioner Sewell

Petitioner Sewell alleged she was raped.<sup>287</sup> The Petition acknowledges the alleged offense was investigated by both the Naval Criminal Investigative Service and civilian police.<sup>288</sup> The Petition also acknowledges that an Article 32 hearing on the case was held.<sup>289</sup> As the Commission has stated, “the fact that the outcome [of a domestic proceeding] was unfavorable ... does not constitute a violation . . . .”<sup>290</sup> None of the facts alleged by the Petition tends to establish a violation of the American Declaration as to Petitioner Sewell. Therefore, nothing in the petition is admissible as to Petitioner Sewell.

#### 19. Petitioner Wilson

Petitioner Wilson alleged she was sexually assaulted by a doctor.<sup>291</sup> The Petition acknowledges the case was investigated by the Naval Criminal Investigative Service.<sup>292</sup> The Petition acknowledges the offender was prosecuted by court-martial and convicted of two

---

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Maldonado Manzanilla v. Mexico*, Petition No. 733-04, Report No. 87/07, Inadmissibility, Oct. 17, 2007, ¶ 58 (quoting and citing *Rodríguez v. Argentina*, Case No. 10.382, Report No. 6/98, Inadmissibility, Feb. 21, 1998, ¶ 71).

<sup>287</sup> Petition at 20.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Maldonado Manzanilla v. Mexico*, Petition No. 733-04, Report No. 87/07, Inadmissibility, Oct. 17, 2007, ¶ 58 (quoting and citing *Rodríguez v. Argentina*, Case No. 10.382, Report No. 6/98, Inadmissibility, Feb. 21, 1998, ¶ 71).

<sup>291</sup> Petition at 21.

<sup>292</sup> *Id.* The complaint alleges the investigation was closed without the perpetrator being interviewed. *Id.* U.S. law prohibits law enforcement agents from interviewing a criminal suspect in certain instances, including where the alleged offender has invoked his right to remain silent.

offenses.<sup>293</sup> The Petition acknowledges he received a sentence that included confinement for 24 months, with service of all but a week of the confinement suspended.<sup>294</sup> Nothing in the American Declaration compels a particular sentence in an individual criminal case. As the Commission has stated, “the fact that the outcome [of a domestic proceeding] was unfavorable . . . does not constitute a violation . . . .”<sup>295</sup> None of the facts alleged by the Petition tends to establish a violation of the American Declaration as to Petitioner Wilson. Therefore, nothing in the petition is admissible as to Petitioner Wilson.

### III.

#### Conclusion

The Commission should declare the Petition to be inadmissible because it fails to meet the Commission’s established criteria in Articles 31 and 34 of the Rules of Procedure. Petitioners have not exhausted various domestic remedies available in the United States, as required by Article 31 of the Rules. The Petition is also plainly inadmissible under Article 34 of the Rules. In particular, the entire petition is manifestly groundless under Article 34(b). Large portions of the Petition also fail to state facts that tend to establish violations of rights set forth in the American Declaration. Moreover, the Petition is rife with clear misstatements of fact with regard to the individual Petitioners on whose behalf the Petition was filed. The Petition also evidences a profound lack of familiarity with the military justice system with which it takes issue. Further, the unorthodox arguments submitted on behalf of Petitioners should give the Commission pause. The United States does not downplay the seriousness of Petitioners’ allegations or otherwise suggest that such alleged conduct is permissible or acceptable. Instead, defects in the Petition call into question whether the Commission’s limited resources are best allocated to consideration of a Petition that is not only inadmissible as a procedural matter, but also fundamentally and fatally flawed as a matter of substance. Moreover, many of the

---

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> *Maldonado Manzanilla v. Mexico*, Petition No. 733-04, Report No. 87/07, Inadmissibility, Oct. 17, 2007, ¶ 58 (quoting and citing *Rodríguez v. Argentina*, Case No. 10.382, Report No. 6/98, Inadmissibility, Feb. 21, 1998, ¶ 71).

recommendations Petitioners seek from the Commission were either in effect at the time of the relevant conduct or have since been implemented by the United States. Should the Commission nevertheless declare the Petition admissible and examine its merits, the United States urges it to find the Petition without merit and deny Petitioners' request for relief.