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REPORT No. 238/22
PETITION 106-14
REPORT ON ADMISSIBILITY

AMBER ANDERSON ET AL.
UNITED STATES OF AMERICA

Approved electronically by the Commission on September 9, 2022.

Cite as: IACHR, Report No. 238/22, Petition 106-14. Admissibility. Amber Anderson et al.
United States of America. September 9, 2022.

I. INFORMATION ABOUT THE PETITION

Petitioners:	Cornell International Human Rights Clinic ¹ , Elizabeth Brundige, Corey Calabrese, Naureen Shameem, Sharon Hickey
Alleged victims:	Amber Anderson, Amber Yeager, Amy Lockhart, Andrea Neutzling, Andrew Schmidt, Blake Stephens, Elizabeth Lyman, Greg Jeloudov/Jodi Jeloudov, Hannah Sewell, Jessica Kenyon, Kristen Stark, Mary Gallagher, Myla Haider, Panayoita Bertzikis, Rebekah Havrilla, Sandra Sampson, Sarah Albertson, Stephanie B.Schroeder and Tina Wilson, and Valerie Desautel
Respondent State:	United States of America ²
Rights invoked:	Articles I (Right to personal security), II (Right to equality before law), IV (Right to freedom of investigation, opinion, expression and dissemination), V (Right to protection of honor, personal reputation, and private and family life), VII (Right to protection for mothers and children), IX (Right to inviolability of the home), XIV (Right to work), XVIII (Right to a fair trial), and XXIV (Right of petition) of the American Declaration of the Rights and Duties of Man ³

II. PROCEEDINGS BEFORE THE IACHR⁴

Filing of the petition:	January 23, 2014
Notification of the petition to the State:	May 14, 2019
State's first response:	November 5, 2019
Additional observations from the petitioner:	September 17, 2020
Notification of the possible archiving of the petition:	August 14, 2018
Petitioner's response to the notification regarding the possible archiving of the petition:	August 14, 2018

III. COMPETENCE

Competence <i>Ratione personae</i>:	Yes
Competence <i>Ratione loci</i>:	Yes
Competence <i>Ratione temporis</i>:	Yes
Competence <i>Ratione materiae</i>:	Yes, American Declaration (ratification of the OAS Charter on June 19, 1951)

IV. DUPLICATION OF PROCEDURES AND INTERNATIONAL *RES JUDICATA*, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

Duplication of procedures and International <i>res judicata</i>:	No
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¹ Subsequently replaced by the Cornell Gender Justice Clinic.

² Hereafter "United States", "U.S." or "the State".

³ Hereinafter "the American Declaration" or "the Declaration"

⁴ The observations submitted by each party were duly transmitted to the opposing party.

Rights declared admissible	Articles I (Right to personal security), II (Right to equality before law), IV (Right to freedom of investigation, opinion, expression and dissemination), V (Right to protection of honor and private life), XIV (Right to work), XVIII (Right to a fair trial), and XXIV (Right of petition) of the American Declaration
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, in terms of Section VI
Timeliness of the petition:	Yes, in terms of Section VI

V. ALLEGED FACTS

1. This petition involves twenty alleged victims, mostly former members of the United States Military (“U.S. Military”) and its branches: the United States Navy and Marine Corps, the United States Coast Guard, the United States Army, and the United States Air Force. The twenty alleged victims (seventeen women and three men) all claim that they were sexually assaulted, sexually harassed or and/or raped by fellow military personnel between 2000 and 2010 while in military service. The petition claims that the State has violated multiple rights of the alleged victims, including the right to physical security, the right to due process and the right to judicial protection.

2. The petition alleges that the U.S. Military fosters a culture that allows acts of sexual harassment and violence to occur with regularity and impunity. The petition further contends that the State has systemically failed to act with due diligence to prevent and respond to the sexual violence they experienced while serving in the military. Further, it asserts that the U.S. Military system effectively denies survivors of military sexual assault meaningful access to civilian courts to realize their rights. The petitioners allege that in most instances, the claims of the alleged victims were not investigated or when investigated, the perpetrators received no punishment or minimal punishment. In most instances, the petitioners argue that reporting of sexual abuse/rapes led to the termination of the military careers of some of the alleged victims.

Background and context

3. According to the petitioners, the United States Congress has attempted repeatedly to address sexual violence and rape in the military over the past twenty years. However, their laws and policies have not gone far enough to address the problem, and the United States Department of Defense, which directs the U.S. Military’s operations, has refused to implement relevant laws passed by Congress or to enact any effective measures to remedy the epidemic. Former Secretaries of Defense Donald Rumsfeld and Robert Gates were in charge of the United States Department of Defense when the alleged victims experienced abuses of their human rights. During this time- period, incidents of sexual violence and rape rose sharply in the U.S. Military⁵.

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

5. With respect to the military justice system itself, the petitioners state this is “an exceptionally closed system” that investigates, prosecutes, and punishes any criminal allegations by and against its members. Within the U.S. Military, victims are given the option to report incidents of rape and sexual violence through

⁵ In this regard, the petitioners cite Annual Reports on Sexual Assault in the U.S. Military from 2004-2013 (issued by the Department of Defense), showing that reported incidents of sexual abuse in the U.S. Military rose from 1,700 in 2004 to 3,374 in 2012.

either the restricted or unrestricted reporting system. The restricted reporting system is confidential but does not provide a judicial remedy, while the unrestricted reporting system requires the victim to report the incident to his or her supervisors, otherwise known as the “Chain of Command” (or “Command”) but includes an avenue for possible prosecution.

6. The Department of Defense established the restricted reporting system to provide health care on a confidential basis to victims of rape and assault who are not willing to publicly report sexual crimes. However, restricted reporting does not always remain confidential. Instead, the Command learns that a report has been made and is often able to ascertain the identity of the complainant by the description given of the circumstances that gave rise to the report. As a result, even those who chose the restricted route because they were fearful of retaliation are subjected to retaliation. While the restricted reporting system allows victims to receive much needed medical attention, it does so at the expense of giving them any possible avenue to access justice.

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

8. Ultimately, the petitioners contend that the military justice system failed to protect the alleged victims or to provide appropriate relief. The following paragraphs set out the factual allegations of each of the twenty alleged victims.

a) *Amber Anderson*: served in the United States Navy from December 2000 to December 2005. In August 2001, she was raped by two shipmates while on port of call in Thailand. She reported the incident to the military police on the following day. A medical exam uncovered bruises and injuries all over her body. However, Amber Anderson’s Command did not court martial the persons who raped her. Instead, the Command imposed a “non-judicial punishment” of docking their pay for six months and reducing the rank of one of the rapists. Amber Anderson also complains that she became a target for retaliation and on one occasion, was placed in a medical ward and denied food. The petition states that Amber Anderson now suffers from post-traumatic stress disorder.

b) *Amber Yeager*: served in the United States Army from 1999 to 2007. Amber Yeager was raped by her sergeant while on deployment over Memorial Day weekend in 2001. She ultimately filed a formal complaint with her Command and with the military police. An investigation was initiated by the Army Criminal Investigation Division (CID), but ultimately (a) the CID declared that the assault did not amount to rape, and as a result, did not pursue any charges; and (b) the Command accused Amber Yeager having “holes” in her story and launched an investigation against her. The petition states that because of her experience, Amber Yeager has been diagnosed with post-traumatic stress disorder, anxiety, and depression.

c) *Amy Lockhart*: joined the Navy in 1997 and is still on active duty. Amy Lockhart was raped by a co-worker after attending a party at the end of a two-week training program. The Navy Criminal Investigative Service initiated an investigation, but ultimately Amy Lockhart’s Command took no action against her perpetrator. The petition indicates that Amy Lockhart’s Command threatened to charge her with fraternization with a co-worker, saying that he had a sworn statement from her perpetrator claiming that he and Amy Lockhart had consensual sex. Amy Lockhart denied this allegation. According to the petition, the Command demoted Amy Lockhart; and ultimately no action was taken against the perpetrator. The petition indicates that because of her experience, Amy Lockhart now suffers from post-traumatic stress disorder and major depressive disorder.

d) *Andrea Neutzling*: served in the United States Army from 2000 until 2004 and the United States Army Reserve from August 2004 to April 2010. Andrea Neutzling was subjected to multiple sexual assaults/rape in 2002, June 2005 and August 2005. In 2002, Andrea Neutzling was sexually assaulted by a co-worker outside a latrine. She reported the incident to her Command, but the Command only sentenced the perpetrator to five days of “base restriction.” Andrea Neutzling was sexually assaulted again in June 2005, but she did not report it because of the inadequate outcome of the first incident. In August 2005, Andrea Neutzling was deployed to Iraq, where she was raped by two soldiers. She reported the rape to her Command after learning that the soldiers were circulating a video of the rape. Her Command told her that she did not act like a rape victim because she “did not struggle enough.” The petition states that because of these incidents Andrea Neutzling now suffers from post-traumatic stress disorder.

e) *Andrew Schmidt*: served in the United States Navy from 1999 until 2001. Starting in 2001, he was subjected to multiple incidents of sexual abuse from fellow military colleagues. The first incident took place in the Spring of 2001, when a Marine corporal shoved his fingers into the anus of Andrew Schmidt. He objected but did not report the incident. The same individual assaulted Andrew Schmidt in the same manner later that year. However, on this occasion, a sergeant saw the incident and made the perpetrator apologize. Andrew Schmidt was subsequently transferred to a different ship, where, on occasion, he was sexually assaulted by several Marines. Andrew Schmidt attempted to report the incident, but his Command refused to take any action. Instead, the Command issued a threat to Andrew Schmidt saying, “Don’t make us deal with you in a physical way,” and “the Marine Corps know where your mother is.” Andrew Schmidt was subsequently able to raise his complaints with the Commanding General of Fort Lejeune. However, the Commanding General said that Andrew Schmidt’s experiences did not rise to the level of sexual harassment or assault. The petition states that Andrew Schmidt now suffers from extreme emotional distress because of the incidents of sexual assault.

f) *Blake Stephens*: served in the United States Army from 2001 to 2003. During this time, Blake Stephens was repeatedly subjected to sexual assault by other men in his unit. These men would grab and fondle his testicles, spit on him, and slide their hands between his buttocks. On one occasion, the perpetrators stole his clothes of Blake Stephens while he was showering and took photographs of him. Andrew Schmidt reported the incident to his Command who took no action. The Command referred to Andrew Schmidt as a “chick” and a “bitch.” In a subsequent incident, Blake Stephens was assaulted by fellow service members who forcibly shoved a can of soda up his rectum. On reporting the incident to his Command, the Command simply made the perpetrators do extra push-ups (as punishment). Andrew Schmidt gave a sworn statement to the Inspector General (IG) at Headquarters about the assaults and Command’s response, but the IG told him he would not interfere. Blake Stephens was told by his fellow service members that his Command had ordered the harassment because Command believed that Blake Stephens was gay and wanted him out of the military. After a failed suicide attempt, Blake Stephens was informed by Command that he was being discharged from the military a year and a half early due to anxiety and depression. The petition state that because of the incidents, Blake Stephens has been diagnosed with post-traumatic stress disorder, anxiety, and depression.

g) *Elizabeth Lyman*: served in the United States Marine Corps from March 2008 to January 2010. On October 18, 2008, Elizabeth Lyman was raped in her barracks by a fellow service member. She was eleven weeks pregnant at the time. A medical examination and rape kit revealed signs of force, bruising, and lacerations in the vaginal area consistent with a sexual assault. The rapist was ultimately court-martialed. However, at the trial (court-martial), the Command allowed six witnesses to testify to Elizabeth Lyman’s character, while Elizabeth Lyman was limited to calling only one witness. The Command cleared the perpetrator of all charges. In the process, the Command also threw out the rape kit evidence and pictures taken of bruises and lacerations after the assault. The Command also denied Elizabeth Lyman’s request for a transfer, and she was forced to work daily next to those who had testified against her. The petition states that because of the incident, Elizabeth Lyman now suffers from post-traumatic stress disorder, depression, and anxiety.

h) *Greg Jeloudov/ Jodi Jeloudov*⁶: served in the United States Army from February 2009 until June 2009. On May 17, 2009, Jeloudov was raped in his/her barracks by soldiers in his unit. Prior to this incident

⁶ The petitioners indicate that Greg Jeloudov changed his name to Jodi Jeloudov (after the filing of the petition) and now uses the pronoun “her”.

Jeloudov had been harassed by fellow soldiers and called a “commie faggot.” When Jeloudov reported the incident to his Command, the Command forced him/her to sign a statement stating falsely that he/she was a “practicing homosexual.” Subsequently, the Command then discharged Jeloudov under the military’s “Don’t Ask, Don’t Tell” policy. The petitioner states that Jeloudov now suffers from post-traumatic stress disorder because of the rape.

i) *Hannah Sewell*: served in the United States Navy from October 2008 to July 2009. In 2009, Hannah Sewell was raped by a male classmate at a hotel while attending a training off-base. Subsequently, she reported the rape to her Command, and pressed charges with a civilian police department. She also went to hospital for a medical examination and rape kit. Hannah Sewell also sustained a back injury because of the rape. Ultimately, an investigation was launched, but the perpetrator was never questioned or held to account. According to the petition, the Command withdrew Hannah Sewell from the training course, while allowing the perpetrator to complete it. The Command also denied Hannah Sewell’s request for a transfer to another military base. Two years after the rape occurred, the Command scheduled a hearing to determine whether to pursue a court martial. However, the Command told Hannah Sewell that the evidence from her rape kit, testimony from the nurse who examined her, and pictures from her exam were “lost.” Ultimately, the perpetrator was not court-martialed, and Hannah Sewell was medically discharged because of the injury to her back. The petition states that Hannah Sewell suffers from panic attacks and nightmares because of the rape.

j) *Jessica Kenyon*: served in the United States Army from August 2005 to August 2006. During this time, she was subjected to sexual harassment, assault, and rape. During her initial training, Jessica Kenyon’s training sergeant touched her and made sexual jokes and comments to her. In December 2005, she was raped by a member of the United States Army National Guard. Jessica Kenyon reported both the sexual harassment and rape to an Army assault response coordinator and to her Command. Ultimately her Command told her that if she continued with her complaint, that this would be used against her during any subsequent promotional review. In 2006, Jessica Kenyon was subjected to another incident of sexual assault by a squad leader, who grabbed her breasts and tried to make her touch his penis. Jessica Kenyon reported the incident. The perpetrator initially denied the charge, but eventually admitted to it after failing a lie detector test. The perpetrator was given a non-judicial punishment consisting of a demotion and 45 days of extra duty. The petition states that Jessica Kenyon suffers from post-traumatic stress disorder because of these incidents.

k) *Kristen Stark*: served in the United States Ohio Army National Guard from July 1998 to July 2004. In July 2001, Kristen Stark’s was sexually assaulted three times by a superior officer. Kristen Stark reported the incident to her Command. She also discovered this perpetrator had done the same thing to a friend. Subsequently, Kristen Stark learned that local police had arrested and charged the perpetrator with two counts of criminal sexual assault. However, the charges were later dropped, and the perpetrator was forced to resign from the National Guard. Subsequently, Kristen Stark discovered that the perpetrator had been allowed to join the United States Army Reserves. The petition states that Kristen Stark suffers from depression because of the incidents.

l) *Mary Gallagher*: served in the United States Air National Guard. Following deployment to Iraq in 2009, she was subject to multiple incidents of sexual assault/sexual harassment by a co-worker. The incidents took place in November 2009. On November 5, her co-worker tried to kiss her. Mary Gallagher reported the incident to her Command who told her there was nothing that could be done about it. Another incident took place on November 7, 2009, when the same co-worker began to stalk Mary Gallagher, which included breaking into her room and telephoning her. Once again, Mary Gallagher reported the incident, but was told by her Command that there was nothing that could be done. On November 12, 2009, the same co-worker sexually assaulted Mary Gallagher in the restroom by pulling her pants and underwear down, running his hand on her vagina, and grinding his penis up against her. Mary Gallagher did not immediately report the incident to Command because of the poor results she received after reporting the first two incidents. Two weeks later, her Command called her in and questioned her about the previous two incidents. At this time, Mary Gallagher reported the most recent incident. The Command’s only response was to reassign Mary Gallagher’s assailant and order him to refrain from any contact with her. The petition states that Mary Gallagher now suffers from post-traumatic stress disorder because of these incidents.

m) *Myla Haider*: served in the United States Army from 1994 to 1999 and November 2000 to October 2005. Petitioner Haider was raped by a co-worker after a social event in 2002. At the time, Myla Haider was interning with the Army Criminal Investigation Division (CID) in Korea. The CID is the military unit charged with investigating crimes, including rape and sexual assault. Myla Haider did not report the rape at the time because she had witnessed firsthand the attitude that the CID had towards rape victims, and she did not believe she would receive justice. However, two years later, a CID investigator contacted Myla Haider because he had heard she had been raped, and because her rapist was being investigated for serial sex offenses. Myla Haider subsequently testified at a trial of her perpetrator.

n) *Panayoita Bertzikis*: served in the United States Coast Guard from November 2005 to May 2007. On May 30, 2006, Petitioner Bertzikis was raped by a shipmate while on a hike. Panayoita Bertzikis reported the rape to her Command. However, her Command told her to keep quiet or she would be charged with the military crime equivalent to slander. Command failed to take any substantial steps to investigate the matter or punish her perpetrator in any way. Subsequently Panayoita Bertzikis was instead forced to live on the same floor as and work alongside her rapist so that, according to Command, they could “work out their differences.” The petition states that Panayoita Bertzikis was diagnosed with post-traumatic stress disorder because of the incident.

o) *Rebekah Havrilla*: served in the United States Army from January 2004 until September 2009. Following deployment to Afghanistan in 2006, she was the victim of sexual harassment by her immediate supervisor, and subsequently the victim of rape by another co-worker. Rebekah Havrilla reported the sexual harassment and the rape (to her Command). The petition states that because of these incidents, Rebekah Havrilla now suffers from post-traumatic stress disorder and chronic depression.

p) *Sandra Sampson*: began serving in the United States Army National Guard in 2008. In 2008, Sandra Sampson was subjected to sexual harassment and sexual abuse by a superior officer. Initially, the superior officer sent sexually explicit emails to Sandra Sampson. Sandra Sampson complained to her Command but was “treated badly and harassed.” Subsequently, the same superior officer grabbed and touched Sandra Sampson in a gym. Sandra Sampson reported the attack to her Command, resulting in the opening of an investigation. The investigation concluded that the complaint was unfounded, Sandra Sampson was told to “stop causing trouble.” The case was later reopened, and the claims of Sandra Sampson were substantiated. However, the Command took no action against the perpetrator. The petition states that Sandra Sampson suffers from posttraumatic stress disorder and anxiety because of her experience.

q) *Sarah Albertson*: served in the United States Marine Corps from 2003 until 2008. On August 27, 2006, a fellow Marine of superior rank raped Sarah Albertson. When Sarah Albertson reported the rape to her Command, the Command told her that she would be charged with “Inappropriate Barracks Conduct” because she had been consuming alcohol. Ultimately, the Command failed to take any steps to have the matter adjudicated within the military justice system, and accordingly, the perpetrator was never prosecuted or brought to justice. For a period of two years, the Command forced Sarah Albertson to work closely with the perpetrator and to report to him daily. Sarah Albertson lived one floor below her rapist (for two years) because the Command also refused to allow her to change housing. As a result of the rape, the petition states that Sarah Albertson suffers from post-traumatic stress disorder.

r) *Stephanie B. Schroeder*: served in the United States Marine Corps from 2001 to 2003. During this time, Stephanie B. Schroeder was the victim of various incidents of rape, sexual abuse, and sexual harassment. On April 20, 2002, she was physically abused and raped by a co-worker in a woman’s bathroom while socializing with fellow Marines off base. When Stephanie B. Schroeder reported the rape to her Command, she was told, “Don’t come bitching to me because you had sex and changed your mind.” The Command took no steps to investigate the complaint or to punish the rapist. Instead, the Command disciplined Stephanie B. Schroeder for talking to a fellow Marine about the incident. This disciplinary measure included the forfeiture of pay and being placed on restriction for two weeks.

Upon being transferred to a new location, Stephanie B. Schroeder was subjected to sexual harassment by a superior officer. She made a complaint to the Command but was ignored. A month later, the same superior

officer entered Stephanie B. Schroeder's room and sexually assaulted her. The next morning, the Command disciplined Stephanie B. Schroeder for having a male in her room and she was ordered to perform menial labor throughout the night in addition to her normal work during the day. In November 2002, Stephanie B. Schroeder and a coworker were moving some supplies to a warehouse. On the way to the warehouse, the co-worker took a detour in the woods and attempted to have sex with Stephanie B. Schroeder. When she refused, he proceeded to masturbate in front of her. She did not report this incident for fear of reprisal. The petition states that as result of her experiences, Stephanie B. Schroeder now suffers from depression and anxiety.

s) *Tina Wilson*: served in the United States Navy from 2005 to 2009. While stationed in Japan she was the victim of a sexual assault by a naval doctor. Tina Wilson reported the sexual assault to the Naval Criminal Investigative Service (NCIS), which launched an investigation. During this investigation, three other victims were identified. The investigation was closed without the perpetrator being interviewed. The Command transferred the perpetrator to Kuwait. However, following reported incidents of sexual assault in Kuwait (by the perpetrator), he was subsequently returned to Japan to face court-martial (for incidents that took place in Japan). Tina Wilson was not properly notified about the court-martial, and therefore was not able to testify at the court-martial. The perpetrator was ultimately found guilty of two counts of "Wrongful Sexual Misconduct" and two counts of "Conduct Unbecoming of an Officer. He was sentenced to a term of twenty-four months of imprisonment, but the Command subsequently suspended his sentence after one week. While his sentence required him to be listed with the National Sex Offender Registry, he failed to register after being released.

t) *Valerie Desautel*: served in the United States Army. On March 31, 2002, she was raped at a hotel on her base. She reported the rape to her Command. She was also taken to hospital for a rape kit/medical examination. Based on forensic evidence collected, the Criminal Investigation Division of the Army indicated that they should be able to find and convict the rapist. However, one of the agents investigating the complaint insinuated that Valerie Desautel was lying about being raped. In response, she revealed that she was gay and that she had not consented to sexual intercourse. Subsequently, Valerie Desautel's entire platoon found out about the rape and her sexual orientation. She was then discharged by her Command then discharged under the "Don't Ask Don't Tell" policy. The Command subsequently and closed the investigation into Valerie Desautel's two months after her discharge.

Exhaustion of domestic remedies

9. The petitioners argue that the alleged victims exhausted domestic remedies upon dismissal of a civil lawsuit by the United States Court of Appeal for the Fourth Circuit on July 23, 2013. According to the petitioners, the alleged victims filed what is called a "Bivens claim" before the U.S. District Court for the Eastern District of Virginia (on February 15, 2011). This Bivens claim was filed against two former Secretaries of Defense. The petitioners indicate that a Bivens claim is a particular type of cause of action that permits a plaintiff to recover damages against a federal official for violation of constitutional rights. On December 9, 2011, the U.S. District Court dismissed the lawsuit, ruling that the military was immune from Bivens claims. In this regard, the U.S. District Court noted that the U.S. Supreme Court had previously counseled against the exercise of judicial authority in cases relating to the military's disciplinary structure and that "where the Supreme Court has so strongly advised against judicial involvement, not even the egregious allegations within the Plaintiff's Complaint will prevent dismissal." The alleged victims appealed the case to the United States Court of Appeals for the Fourth Circuit. On July 23, 2013, the Court of Appeals dismissed the appeal and affirmed the District Court's reasoning, finding that there was no Bivens civil cause of action against the U.S. military for its violations of constitutional rights. The Court of Appeals reasoned that "judicial abstention from sanctioning a Bivens claim in the military context is, at its essence, a function of the separation of powers under the Constitution which delegates authority over military affairs to Congress and to the President as Commander in Chief" and that it "contemplates no comparable role for the judiciary."

10. The petitioners submit that the ruling of the Court of Appeals signified the exhaustion of domestic remedies. The petitioners state that while the alleged victims did not seek review by the U.S. Supreme Court, the rule of exhaustion does not require this step, given that such a step represents an extraordinary remedy which need not be pursued for the purpose of exhausting domestic remedies.

11. In the alternative, the petitioners argue that the alleged victims are entitled to an exception to the requirement of exhaustion of domestic remedies pursuant to Article 31 (2) of the Commission's Rules of Procedure. The petitioners contend firstly, that the Commission has long held that military justice systems in general, investigations and trials, have been considered to be ineffective remedies to address human rights violations, thus those with access only to the military justice system have not necessarily been required to exhaust domestic remedies before submitting cases to the Commission.⁷

12. Secondly the petitioners submit that the Commission has previously found that an exception to the requirement of domestic remedies arises where a remedy is ineffective because of lack of prospects for success. In this case, the petitioners submit that based on strong Supreme Court case law cited to in both the District Court and Circuit Court dismissals, that there was no reasonable prospect of success before the Supreme Court. The petitioner add that precedents established in 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 violated⁸. Accordingly, an appeal to the Supreme Court would have been futile in this case and the petitioners have thus met the exception to the exhaustion of domestic remedies requirement.

Response to State

13. The petitioners reject the State's observations. The petitioners maintain that the State has failed to act with due diligence to prevent sexual violence and that the U.S. military continues to foster a culture of sexual harassment and violence⁹. In this context the petitioners further submit that the chain of command structure within the U.S. military criminal legal system continues to impede survivors of sexual violence from obtaining redress. Further, the petitioners contend that the State continues to deny such survivors from access to civilian courts.

14. In response to the State's claim that the petition is inadmissible for failure to exhaust domestic remedies, the petitioners maintain that they have satisfied the requirement to exhaust domestic remedies by way of litigation before the federal courts. Additionally, and alternatively, the petitioners also submit that the petition is exempt from exhausting any unpursued domestic remedies as they were inadequate, unavailable, or ineffective. In this regard the petitioners expressly reject the State's claim that they were obliged to exhaust remedies such as (a) non-tort/equitable relief in federal court (declaratory and injunctive relief); and (b) relief from the U.S. Veterans Benefits Program.

15. Regarding non-tort/equitable relief, the petitioners submit that there was no reasonable prospect of success in pursuing this relief. In this regard, the petitioners state that the vast majority of circuit courts including the Fourth Circuit have adopted the position that intra-military immunity bars most claims for non-tort/equitable relief in civilian courts¹⁰. In any event, the petitioners assert that even if the alleged victims were able to bring a claim for non-tort/equitable relief, such relief is inadequate to remedy the violations alleged in the petition. In this regard, the petitioners submit that the alleged victims seek monetary compensation for the violation of their rights and sweeping changes to the military criminal legal system

⁷ In this regard, the petitioners cite IACHR Report N° 72/08 Petition 1342-04 Márcio Lapoente Da Silveira Admissibility, Brazil October 16, 2008, para. 64.

⁸ In this regard, the petitioners cite the U.S Supreme Court decision of *Chappell v. United States*, 462 U.S. 296, 303-304 (1983), and in particular, the following excerpt: "The special status of the military has required, the Constitution has contemplated, Congress has created, and this Court has long recognized two systems of justice, to some extent parallel: one for civilians and one for military personnel. The special nature of military life—the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel—would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command," and further that, "the unique disciplinary structure of the Military Establishment and Congress' activity in the field constitute 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens*-type [civil] remedy against their superior officers."

⁹ In this regard, the petitioners cite various data to support this contention. For example, the petitioners cite the 2018 Report on Sexual Assault in the Military in which the U.S. Department of Defense estimated that 20,500 service members, representing 13,000 women and 7,500 men, were subjected to sexual violence in fiscal year 2018, a 38% increase from 2016.

¹⁰ The petitioners cite cases from various circuit courts including: *Dibble v. Fenimore*, 339 F.3d 120 (2d Cir. 2003); *Guerra v. Scruggs*, 942 F.2d 270 (4th Cir. 1991); *Crawford v. Tex. Army Nat'l Guard*, 794 F.2d 1034 (5th Cir. 1986); *Knutson v. Wis. Air Nat'l Guard*, 995 F.2d 765 (7th Cir. 1993); *Watson v. Ark. Nat'l Guard*, 886 F.2d 1004 (8th Cir. 1989).

applicable to all service members. Further, they argue that neither injunctive relief nor declaratory relief can provide monetary compensation because they are equitable, and not tort relief.

16. The petitioners contend that the State incorrectly claims that Panayoita Bertzikis did not pursue any available remedies because she lacked standing in *Bivens* claim against Department of Defense officials. In this respect, the petitioners submit that the Fourth Circuit stated that judicial abstention in second-guessing military discipline and decision making was a threshold issue that barred the claims of all the alleged victims (including Panayoita Bertzikis). Accordingly, the Fourth Circuit determined that regardless of jurisdictional issues, it could not adjudicate the *Bivens* claim because every plaintiff, including Panayoita Bertzikis, alleged injuries that were “clearly” incident to their military service. The petitioners further submit that even if Panayoita Bertzikis did not have standing to pursue a *Bivens* claim, the Fourth Circuit’s dismissal (of the *Bivens* claims made by the other alleged victims) signified that Panayoita Bertzikis had no reasonable prospect of success in bringing a nearly identical claim in exactly the same court as the other alleged victims. Accordingly, the petitioners conclude that Panayoita Bertzikis (like the other alleged victims) exhausted domestic remedies or alternatively is not required to pursue other domestic remedies (as mentioned above).

17. Contrary to the State’s contention, the petitioners insist that the petition complies with Article 34 (a) and 34 (b) of the Commission’s Rules of Procedure. Accordingly, the petitioners submit that the petition does state facts that tend to establish violations of the American Declaration, and that the petition is not manifestly groundless. More specifically, the petitioners submit that the facts stated by the petition clearly tend to show that the State has impeded the rights of every alleged victim by discriminating against them on protected bases, hindering their access to justice, and refusing to provide meaningful remedies. In relation to the alleged victims (including the thirteen mentioned specifically by the State), the petitioners maintain that there remains no dispute as to the central facts, which constitute *prima facie* violations of the American Declaration.

18. The petitioners reject the State’s claim that the petition is manifestly groundless because of alleged inconsistencies between the petition and the State’s record (regarding some of the alleged victims). The petitioners submit that, the petition is clearly well-grounded and articulates many potential violations of the American Declaration. The petitioners provide some elaboration of this submission as follows.

19. Contrary to the State’s claim, the petitioners insist that some of the alleged victims suffered termination of their military assault following reports of sexual assault. In this regard, the petitioners mention that both Greg Jeloudov/Jodi Jeloudove and Valerie Desautel were explicitly dismissed for being gay under the military’s “Don’t Ask Don’t Tell” policy after reporting their assaults. The petitioners further submit that the State has interpreted termination narrowly to mean only direct termination. In this regard, the petitioners assert that the State has willfully omitted indirect termination of military careers of some of the alleged victims resulting from professional and social retaliation, including harassment, ostracism, and retaliatory punishment for minor infractions. For example, in the case of Panayoita Bertzikis, the petitioners mention that she was forced to live on the same floor as her rapist and work alongside him. Further that while papers were initiated for Panayoita Bertzikis to be medically discharged, she was administratively discharged for “failing to adapt to military life,” a common category of other-than-honorable discharge used by Commands in retaliation for sexual assault reports.

20. Contrary to the State’s position, the petitioners reaffirm that the alleged victims were unable to take any of the actions available to civilians to protect themselves from sexual predators (such as calling the police, going to a shelter, changing housing or jobs, or relocating). Accordingly, the petitioners insist that the claims made in this regard are not manifestly groundless. In this respect, the petitioners assert that although two of the alleged victims sought help from the military police and one from the civilian police, this does not change the fact that the alleged victims were effectively limited to pursue redress within the closed system of the military. The U.S. military’s criminal legal system has authority over service members who commit sexual assault, and it almost always retains that authority. The petitioners also assert that legislative changes in 2015 now require commanders to solicit survivors’ preference regarding whether the offense is prosecuted by a military or civilian court. However, that preference is not binding, and in any event these changes were not available to the alleged victims.

21. The petitioners address the State's argument that the claims are manifestly groundless because the acts alleged were not committed within the official capacity of the perpetrators. The petitioners contend that the State is liable for the acts of perpetrators, given (a) the official role that military leadership plays in preventing and responding to crimes committed by its service members; and (b) these service members operate in a position of power on behalf of the State, and therefore, any violations committed by them are attributable to the State.

State's position

22. The State rejects the petition as inadmissible. The State contends that (a) there has been a failure to exhaust domestic remedies (pursuant to Article 31 of the Commission's Rules of Procedure; (b) the petition's claims fail to state facts that tend to establish a violation of the rights (pursuant to Article 34 (a) of the Commission's Rules of Procedure; and (c) the petition is manifestly groundless pursuant to Article 34 (b) of the Commission's Rules of Procedure. The State also contends that several the claims for relief were never presented in U.S. courts, rendering them inadmissible.

Background/context

23. As part of its response to the petition, the State sets out a legal and policy context with respect to the United States military justice system that, in some respects, controverts the narrative presented by the petitioners.

24. According to the State, the United States military (or "U.S. 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. 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. Some of these examples are set out in the following paragraphs.

25. A service member has the right to make either a restricted or unrestricted report of sexual assault. 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. With limited exceptions to protect others from danger, a restricted report will not result in a law enforcement investigation. 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 measures of control over how the case proceeds 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.

26. 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 an attorney-client relationship with the service member and zealously represents the service member's interests throughout the response, investigative, and criminal justice processes. 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. Military commanders have no discretion to decide whether an unrestricted report of a sexual assault will be referred to a military criminal investigative organization.

27. In 2011, Congress enacted a law requiring the establishment of the Department of Defense Sexual Assault Prevention and Response Office. 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. In 2013, Congress enacted a military crime victims' bill of rights. The President of the United States then issued an Executive Order amending the Rules for Courts-Martial to implement those rights. Victims now have the rights, for example, to be consulted concerning any plea bargain regarding an offense against them, to be notified of and given an opportunity to attend criminal justice proceedings related to their case, and to provide a victim impact statement if the case results in a conviction. Decisions as to whether to pursue criminal prosecution in sexual assault cases have been elevated to higher-level military officers.

28. 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. While not binding, the victim's preference will be considered by the convening authority. 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. 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. If an officer is convicted, the sentence must include a dismissal the equivalent of a dishonorable discharge for officers. The post-trial power of convening authorities to overturn convictions and to reduce sentences has been sharply constrained.

29. 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; (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; (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; (4) broaden the definition of "sexual harassment" in a military context; and (5) establish standards to ensure the armed forces' sexual assault forensic examiners are appropriately qualified.

30. 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. 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 several 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.

Lack of exhaustion of domestic remedies

31. The State contends that the alleged victims have failed to pursue and exhaust a variety of domestic remedies. In relation to the claims made pursuant to Articles I, II, IV, V, XIV, XVIII, and XXIV of the American Declaration, the State contends that the alleged victims failed to seek review by the United States Supreme Court, and thus failed to exhaust this remedy. According to the State, the alleged victims 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. In this respect, the State contends that the alleged victims failed to seek relief from the only U.S. court that was empowered to grant the relief it sought. The State also argues that seeking relief from the U.S. Supreme Court is not an "extraordinary remedy," and that failure to invoke this remedy renders the petition inadmissible. The State further contends that the alleged victims failed to pursue any domestic remedy

in relation to claims made under Articles VII and IX of the American Declaration and portions of their claims made under Article II and V of the American Declaration. Based on the foregoing, the State makes several submissions that are set out in the following paragraphs.

32. Firstly, the State submits that in relation to the claims of discrimination based on military status and sexual orientation, the State contends that these claims were never raised before the domestic courts and that accordingly, these claims are inadmissible with respect to Article II of the American Declaration. Secondly, the State submits that the claim of violation of the right to private family life, arising out of alleged to pain and suffering because of sexual violence and abuse, was not raised before the competent domestic authorities. Accordingly, the State contends that the portions of the petition relating to Article V of the American Declaration are inadmissible.

33. Thirdly, the State rejects the claim of Elizabeth Lyman 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. In this regard, the State contends this claim was never raised before the competent domestic authorities, and accordingly, the claim (under Article VII of the American Declaration) is inadmissible. Fourthly, the State rejects the claim that the 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. In this regard, the State contends that this claim was not raised before the competent domestic authorities. Accordingly, the State concludes that this claim (made under Article IX of the American Declaration) is inadmissible.

34. Regarding the claims of Panayoita Bertzikis, the State contends that relief has never been sought against any relevant official of the United States Government. In this respect, the State acknowledges that both Panayoita Bertzikis and her alleged assailant were members of the United States Coast Guard. However, the State maintains that at no time during or since her service was the Coast Guard part of the Department of Defense. The State notes that Panayoita 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. The State contends that neither of these officials had any authority over any of the incidents alleged by Panayoita Bertzikis in her complaint filed in U.S. district court. The State further contends that the petition contains no information suggesting that Panayoita Bertzikis ever pursued any claim in any United States court in a proceeding involving any officials with authority over the Coast Guard. Accordingly, the State concludes that the portion of the petition concerning Panayoita Bertzikis is inadmissible under Article 31 of the Rules for failure to pursue any available remedies.

35. The State further contends that the alleged victims failed to pursue alternative domestic remedies available such as injunctive or declarative relief. According to the State, rulings by some United States Courts of Appeals have confirmed that injunctive or declaratory relief is available, but that the alleged victims failed to pursue this avenue of relief. The State also argues that the alleged victims also failed to seek relief from the U.S. Veterans Benefits Program. In this regard the State maintains that 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 that was sought by the alleged victims. The State concludes that it was open to the alleged victims to pursue and exhaust this remedy, but that they failed to do so.

Petition is manifestly groundless

36. The State contends that the petition is manifestly groundless. In this regard, the State argues that the petition contains several incorrect statements and inaccuracies. The State provides general submissions as well as specific rebuttals to allegations made by some of the alleged victims. With respect to the general submissions, the State expressly rejects the petitioners’ claim that any of the military careers of the alleged victims was terminated because they reported a sexual assault. Secondly, the State rejects the petition’s claim that 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. The State insists that this is false, and that a rape victim in the military may call the police. The State also contends that, military members who report being the victim of sexual assault may request expedited transfers. The State further indicates that pursuant to 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. The State also rejects the claim 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.” In this respect, the State affirms that in 2013, before the petition was filed, Congress enacted a law removing convening authorities’ power to overturn the conviction in a sexual assault case.

37. The State challenges or rebuts allegations made by some of the alleged victims. The State also indicates that in some cases, the accounts of some of the alleged victims omits relevant information. The State provides some illustrative examples, emphasizing that it does not concede the accuracy of any allegation in the petition concerning individual alleged victims merely because they are not expressly mentioned by the State by name). The illustrative examples are set out in the following paragraphs.

Amber Anderson (a): The State contends that the Naval Criminal Investigative Service investigated the allegations in this case. Further, the State indicates that during the investigation, Amber 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. 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 non-judicial punishment for disorderly conduct and failure to obey an order, not for rape.

Amy Lockhart (c): The State asserts that the Naval Criminal Investigative Service conducted a thorough investigation of Amy Lockhart’s allegation that she was sexually assaulted. That investigation revealed considerable evidence inconsistent with the allegation. The State further argues that the allegation was also the subject of an investigation pursuant to Article 32 of the Uniform Code of Military Justice. 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. The State submits that the petition gives the misleading impression that Amy Lockhart’s allegation of sexual assault led to a threat from her Command threatened to charge her with fraternization. The State contends that this is incorrect, and that Amy Lockhart was already the subject of disciplinary proceedings (prior to her complain of sexual assault). The State refutes the claim that Amy Lockhart was demoted resulting in the loss of her Captain status. The State asserts that Amy Lockhart was never a Captain (in the U.S. Navy or any other branch of the U.S. military) but a petty officer first class. She had been selected for promotion but was not promoted because of the disciplinary proceedings against her.

Andrew Schmidt (d): The State contends allegations in the petition regarding Andrew Schmidt contradict previous statements that he made, including statements made under oath. One of the examples given by the State is as follows. The State notes that the petition’s claim that “a Marine Corporal shoved his fingers up Petitioner Schmidt’s anus until they penetrated him.” However, the State contends that Andrew Schmidt offered numerous accounts of the incident in which he did not allege penetration. In this regard, the State maintains that Andrew Schmidt made a sworn statement to Naval Criminal Investigative Service special agents that a Marine Corporal “stuck two fingers in my butt crack.” On another occasion, the State contends that Andrew Schmidt described the incident as a Marine Corporal slapping him on the buttocks, but then later stating that the Marine Corporal attempted to place his finger between his buttocks.

The State affirms that Andrew Schmidt’s allegations were investigated at least twice. The State indicates that with one of the investigations, the investigating officer found that Andrew Schmidt’s accounts of who molested him and how changed numerous times during the course of his interviews. The State affirms that Andrew Schmidt ultimately met with the Commanding General, 2d Marine Division when he 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 Andrew Schmidt. The Commanding General told Andrew 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 State asserts that the Commanding General of the 2d Marine Division treated

Andrew Schmidt's allegations seriously, and carefully determined the optimal exercise of prosecutorial discretion in the matter.

Elizabeth Lyman (g): According to the State the petition fundamentally misrepresents the military criminal justice process in describing Elizabeth Lyman's case. The State indicates that the Naval Criminal Investigation Service conducted a thorough investigation into the rape allegations, following which an alleged perpetrator was identified, arrested, and placed before a court-martial. The State submits that the petition incorrectly alleges that the Command allowed six witnesses to testify to the character of the perpetrator, while Elizabeth Lyman was limited to only one witness. The State asserts that the Command made no such ruling. In this regard, the State indicates that court-martials are presided over by military judges who do not report to the chain of command. Accordingly, it was a military judge who determined what witnesses would be allowed to testify at trial, not Elizabeth Lyman's Command. Additionally, the State submits that Elizabeth Lyman was not "limited to only one witness," that she had no ability to call any witness. In this regard, the State asserts that witnesses are called by the prosecution and the accused, and not the complainant. The State also rejects the petition's claim that at various points, the Command threw out various pieces of evidence, contending that the admissibility of evidence is determined not by Command but by the presiding military judge. Finally, the State rejects the petition's claims that the Command cleared the perpetrator of all charges. In this regard, the State indicates that the court-martial 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. Accordingly, the defendant's acquittal was not an act of the Command; rather, it was the result of a fair trial conducted in accordance with due process protections.

Hannah Sewell (i): According to the State, a thorough investigation was conducted into the allegations of sexual abuse made by Hannah Sewell. Ultimately, the investigating officer (a Coast Guard lawyer) concluded that there were no reasonable grounds to believe that the accused committed the crime of "aggravated sexual contact". After noting evidence of digital penetration and oral sex performed by the accused, the investigating officer also concluded that there were no reasonable grounds to believe that the accused committed these acts without Hannah Sewell's consent.

Jessica Kenyon (j): According to the State, Jessica Kenyon's Command conducted an informal investigation of one of her allegations but found insufficient information to substantiate the claim. The State also indicates that Jessica Kenyon was referred to the Fort Eustis Sexual Assault Response Coordinator for assistance.

Mary Gallagher (l): According to the State, certain assertions in the petition are inconsistent with a previous statement that Mary Gallagher made under oath. Moreover, there are additional relevant facts that were omitted from the petition. The State indicates that Mary Gallagher's claim that her alleged assailant broke into her room is contradicted by a sworn statement (made to a Provost Investigator) in which (a) she did not say that the alleged assailant broke into her room and (b) she said the alleged assailant asked to enter her housing unit and she said no. The State also contends that after the incident, Mary Gallagher reported the matter to a senior non-commissioned officer who asked Mary Gallagher if she wanted the matter reported up the chain of command. The State says that Mary Gallagher repeatedly said she did not want the matter reported up the chain of command.

Eighteen days after the incident, the State says that Mary Gallagher's Master Sergeant), learned of the incident (from Mary Gallagher) and subsequently took her to see their commanding officer, a Lieutenant Colonel. The Lieutenant Colonel then issued a V issued a no-contact order to the alleged assailant and removed him from Petitioner Gallagher's immediate unit. Five days later, the incident was reported to the military police who then began a sexual assault investigation that same day.

Panayoita Bertzikis (n): The State submits that contrary to the claims set out in the petition (regarding Panayoita Bertzikis), the the Coast Guard Investigative Service (CGIS) conducted an extensive investigation of the allegations made by Panayoita Bertzikis. In the regard, the State asserts that the CGIS investigation discovered no independent evidence that Panayoita Bertzikis had been sexually assaulted but did discover compelling evidence starkly inconsistent with the allegations made by Panayoita Bertzikis. In this regard, the

State contends that eight months after the investigation began, and while the investigation was still ongoing, Panayoita 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.

The State also submits that a senior Coast Guard lawyer reviewed the investigation and concluded there was insufficient evidence to support charging the individual identified by Panayoita Bertzikis. Accordingly, the State rejects the claim that no substantial steps were taken to investigate the complaint of Panayoita Bertzikis. The State also rejects the claim that Panayoita Bertzikis was denied a promotion because of the pending investigation. The State indicates that at the time of her complaint, Panayoita Bertzikis was serving in the grade of E-3; and that at no point in her Coast Guard career did she satisfy the prerequisites for promotion to the grade of E-4.

Rebekah Havrilla (o): The State notes that the petition alleges that Rebekah Havrilla made a restricted report of sexual assault. The State contends that the petition fails to reveal that Rebekah Havrilla subsequently converted her restricted report of rape to an unrestricted report. Subsequently, the Army Criminal Investigation Command conducted an investigation and administrative action was subsequently taken against the alleged offender.

Sandra Sampson (p): The State contends that the petition fails to acknowledge that Sandra Sampson’s allegations were thoroughly investigated by the Army Criminal Investigation Command (known as “Army CID”). That investigation concluded there was probable cause to believe the alleged perpetrator grabbed Sandra Sampson’s buttock and kissed her without her consent. The State refutes the petition’s claim that no action was taken against the perpetrator, stating that the Command issued a letter of reprimand and a negative counseling statement¹¹ to the perpetrator.

Stephanie B. Schroeder (r): The State asserts that it does not appear that Stephanie B. 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. The State denies the claim that Stephanie B. Schroeder received a non-judicial punishment for talking about the alleged sexual assault. Instead, the State contends that Stephanie B. Schroeder was investigated for having sex with an instructor. The State affirms that (arising out of the investigation) she received a non-judicial punishment for having an inappropriate relationship with staff personnel; and making a false official statement during the investigation.

Tina Wilson (s): The State asserts that the allegations made by Tina Wilson were investigated by the Naval Criminal Investigative Service. This investigation led to the court martial and conviction of a Navy doctor for sexual assault offenses. This Navy doctor was sentenced to confinement for two years, a fine of \$28,000, forfeiture of all pay and allowances, and a dismissal. Under the terms of a plea bargain, the service of confinement in excess of seven days was suspended for a period of twelve months. Regarding the claim that Tina Wilson was not informed properly about her ability to testify (and missed the hearing as a result), the State indicates that at that time a victim had no right to testify at a court-martial sentencing hearing, though such a right has since been adopted. Regarding the petition’s claim that the perpetrator was required to be listed with the National Sex Offender Registry, the State submits that this Registry is operated by civilian officials and not military officials. The State adds that the perpetrator was reportedly arrested and jailed by Oregon state officials for failing to register as a sex offender (after the perpetrator moved to Oregon).

Valerie Desautel (t): The State contends that the United States Army Criminal Investigation Command (“Army CID”) conducted an extensive investigation into the rape complaint made by Valerie Desautel (in March 2002). In this regard, the State asserts that the investigation included a crime scene analysis; taking and preserving forensic evidence, including DNA evidence; and conducting multiple interviews with individuals

¹¹ A negative counseling statement is a record of a conversation between a soldier and a superior officer, in which the superior officer has spoken to the soldier to correct an incident of misbehavior.

with possible knowledge of the offence. The investigation continued until January 13, 2003 but failed to identify the identity of the alleged offender.

The State indicates that the Amy CID reopened the investigation in April 2014, due to advances in DNA technology. In 2017, a DNA sample taken as part of Valerie Desautel's rape kit was matched with an individual whose DNA was part of data base operated by a civilian law enforcement agency. The State asserts that this individual was not a member of the military on the date of the alleged offense against Valerie Desautel or when military investigators learned of the match. In this regard, the State submits that 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. The results of that joint investigation were considered by the Office of the United States Attorney for the Eastern District of Virginia, which in March 2018, declined to bring a prosecution.

Petition fails to state facts that tend to establish violations of rights

38. The State contends that most of the claims stated by the petition overall are inadmissible (pursuant to Article 34(a) of the Commission's Rules of Procedure) because the petition does not state facts that, even if true, would tend to establish violations of the applicable portions of the American Declaration.

39. The State rejects the claim of the petitioners that the alleged acts of sexual violence and harassment are attributable to the State. For the State, this claim is unsupported 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. The State submits that the allegations of sexual violence and harassment constitute private conduct. Accordingly, the State asserts that 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 the State. In this regard, the State argues that there are no facts in the petition to suggest that the accused perpetrators were acting with "apparent authority" when committing alleged acts of sexual violence or harassment. Accordingly, the State submits that the alleged incidents of sexual violence and harassment 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.

VI. ANALYSIS OF EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

40. The parties are at variance on the issue of exhaustion of domestic remedies. The petitioners argue that domestic remedies were exhausted with the decision of the United States Court of Appeal for the Fourth Circuit on July 23, 2013. The petitioners also submit that the remedies mentioned by the State are ineffective; and that the remedies are need not be exhausted because they are either extraordinary or have no prospect of success. Additionally, or alternatively, the petitioners submit that the petition is exempt from the requirement of prior exhaustion of domestic remedies principally because of the ineffectiveness of military justice systems in addressing human rights violations. In this case, the petitioners submit that such remedy is ineffective, and therefore, there is no requirement to exhaust such a remedy. On the other hand, State claims that alleged victims failed to exhaust remedies provided for in domestic law, such as an appeal to the U.S. Supreme Court and non-tort relief like injunction or declaration.

41. The Commission has long held that military jurisdiction is inadequate to address serious human rights violations, such as violations of the right to physical integrity.¹² The Commission recalls that the military jurisdiction only provides adequate remedies to prosecute members of the forces for the commission of offenses and misdemeanors that, by their very nature, affect legal interests specific to the military. The Commission notes that this petition deals with allegations sexual abuse which *prima facie* would fall within the

¹² See for example: IACHR, Report No. 154/17, Petition 239-07. Admissibility. Nicanor Alfonso Terreros Londoño and family. Colombia. November 30, 2017, para. 10 and IACHR, Report No. 78/18, Petition 1025-07. Admissibility. Gregorio Cunto Guillén and others. Peru. June 28, 2018, para. 15.

category of serious human rights violations/violations of the right to physical integrity. In this regard, the Commission has also established that the State has an international obligation to undertake criminal investigations aimed at clarifying the facts and identifying and prosecuting the persons responsible for those violations. The Commission emphasizes that such criminal investigations should be undertaken by the civil organs such as the criminal courts and should be conducted promptly in order to protect the interests of the victims, preserve the evidence, and also safeguard the rights of anyone deemed a suspect in the framework of the investigations. Accordingly, the Commission considers that the domestic remedies that must be taken into account for the purposes of the petition's admissibility are those related to the criminal investigation and punishment of the persons responsible for the violations alleged by the alleged victims.

42. Based on the record, it appears that, no steps were taken to undertake or complete any civil criminal investigations into the complaints made by the alleged victims. Broadly, this qualifies the petition for exemption from the requirement to exhaust domestic remedies pursuant to Article 31 (2) (b) of the Commission's Rules of Procedure¹³.

43. The record suggests that civilian law enforcement agencies were partially or tangentially involved in the complaints of Hannah Sewell and Valerie Desautel. In the case of Hannah Sewell, it appears that a complaint was made to both military authorities and to the police. However, based on the record, it does not appear that the police conducted or completed an investigation that served to clarify the facts or to identify or prosecute the perpetrator. In the Commission's view, this would bring Hannah Sewell's complaint within the exceptions prescribed by Article 31 (2) (b) and (c) of the Commission's Rules of Procedure. In the matter of Valerie Desautel, the State mentions that the military authorities reopened the investigation in 2014 more than a decade after closing it. After reopening the investigation, the military authorities coopted the help of the Federal Bureau of Investigation, so as to make it joint investigation. However, the Office of the United States Attorney for the Eastern District of Virginia, which in March 2018, declined to bring a prosecution. In the Commission's view, there was no intervention by the civil authorities until more than a decade after Valerie Desautel's initial complaint. This denotes a delay or lack of promptitude in conducting an investigation, which would serve to bring Valerie Desautel's complaint within the exception prescribed by Articles 31 (2) (b) and (c) of the Commission's Rules of Procedure.

44. Regarding Myla Haider, the record shows that she did not report her alleged rape because of her perception that the rape victims were generally denied justice by the military authorities, including the Army Criminal Investigation Division. However, it appears undisputed that the alleged rape subsequently came to the attention of an investigator attached the Army Criminal Investigation Division, who was investigating the alleged perpetrator for other sex offenses. Based on the foregoing, the Commission considers it reasonable to infer that the State was on notice of the alleged rape, which in turn, generated an obligation to conduct an investigation by civil authorities aimed at clarifying the facts, and, if possible, identifying and prosecuting the alleged perpetrator¹⁴. There is no indication that this step was taken. Accordingly, the Commission considers that Myla Haider's complaint also qualifies for the exception prescribed by Article 31 (2) (b) of the Commission's Rules of Procedure.

45. Having found that the petition qualifies for an exception to the requirement of exhaustion of domestic remedies, the Commission must now determine whether the petition was presented within a reasonable time, in conformity with Article 32(2) of the Commission's Rules of Procedure. In this regard, the Commission considers the following: (a) the allegations (made by the alleged victims) took place between 2000 and 2010; (b) that alleged victims took legal action ("Bivens claims") that culminated in the decision of the United States Court of Appeal for the Fourth Circuit on July 23, 2013; (c) that this decision dismissed the claims of the alleged victims, principally on the ground that the military is legally immune from Bivens claims; (d) the

¹³ See IACHR, Report No. 107/17, Petition 535-07. Admissibility. Vitelio Capera Cruz. Colombia. 7 September 2017, para. 8; IACHR, Report No. 154/17, Petition 239-07. Admissibility. Nicanor Alfonso Terreros Londoño and family. Colombia. 30 November 2017, para. 10; IACHR, Report No. 157/17, Petition 286-07. Admissibility. Carlos Andrade Almeida et al. Ecuador. 30 November 2017, para. 19.

¹⁴ See IACHR Report No. 101/20, Petition 760-10. Admissibility. Zoilo de Jesús Rojas Ortíz and family. Colombia. April 24, 2020, para. 8 where the Commission observed that "...when crimes are committed that involve a violation of the right to life and physical integrity, once the State becomes aware of them, it has the obligation to promote and move forward a criminal proceeding and that such a proceeding is the suitable means to clarify the facts and establish the appropriate criminal punishment..."

petition was filed on January 23, 2014; and (e) some of the effects of the alleged facts persist to date, including the alleged absence of an adequate investigation by civil authorities to investigate and punish those responsible; and damage to the health of the alleged victims. Having regard for all these considerations, the Commission finds that the petition was filed within a reasonable period of time, in accordance with Article 32(2) of the Commission's Rules of Procedure.

VII. ANALYSIS OF COLORABLE CLAIM

46. The Commission notes that this petition is primarily about complaints of sexual abuse suffered by the alleged victims while they were serving in the U.S. military. These complaints are made in the context of the alleged systemic failure of the State to protect the alleged victims from such abuse, or to ensure access to adequate legal redress, regarding the complaints of sexual abuse.

47. The State argues that the petition is manifestly groundless because it contains inaccurate statements on the facts; and because the alleged acts of sexual violence and harassment constituted private conduct and do not render the U.S. liable under international law. The petitioners rebutted the State's allegations over the facts; and asserted that the State is liable for the acts of the perpetrators, given (a) the official role that military leadership plays in preventing and responding to crimes committed by its service members; and (b) these service members operate in a position of power on behalf of the State, and therefore, any violations committed by them are attributable to the State.

48. Firstly, regarding the contentions over the statement of facts, the Commission considers that such claims are most appropriately dealt with at the merits stage of this procedure, for they require an assessment of the evidence submitted by both parties. Therefore, the Commission will express its views on these matters within the findings of fact at the merits stage.

49. Concerning the State's responsibility under international law for the acts of sexual violence perpetrated by military personnel on and off service, the Commission stresses that regardless of whether the perpetrators acted in an individual or official capacity, the State has an obligation under Article XVIII of the American Declaration to provide for an effective remedy to any person who claims that their rights have been violated. Indeed, Article XVIII establishes that all persons are entitled to access judicial remedies when they have suffered human rights violations, which is understood to encompass: the right of every individual to go to a tribunal when any of his or her rights have been violated; to obtain a judicial investigation conducted by a competent, impartial and independent tribunal that establishes whether or not a violation has taken place; and the corresponding right to obtain reparations for the harm suffered.¹⁵

50. Further, the Commission notes that the petitioners assert that the U.S. Military fosters a culture of impunity, which impedes survivors of sexual violence from obtaining legal redress. They also argue that the reports of sexual violence in the Military often result in retaliations against survivors. The Commission has established that a State is responsible for human rights violations if the illicit acts have been committed with the participation, support or tolerance of State agents, or if it has been the result of lack of compliance by the State with its obligations to reasonably prevent human rights violations, and to investigate, identify and punish the people responsible, as well as to offer an adequate reparation for the damages caused to the victim or their family.¹⁶ Indeed, State's failure to properly prosecute and punish sexual violence can provide "*a form of encouragement and/or de facto permission*" of these acts.¹⁷ Thus, the United States' liability in the present matter might be compromised for the toleration and lack of prevention of the acts of sexual violence within its military forces.

¹⁵ IACHR, Report no. 80/11. Case 12.626. Merits. Jessica Lenahan (Gonzales) et al. United States. July 21, 2011, para. 172.

¹⁶ IACHR, Report No. 170/17, Case 11.227. Merits. Members and activist of the Patriotic Union. Colombia. 6 December 2017, para. 1436, citing IACHR, Report No. 65/01. Case 11.073. Merits. Juan Humberto Sánchez. Honduras. 6 March 2001, para. 88.

¹⁷ U.N. Special Rapporteur on violence against women, its causes and consequences, Thematic Report on *State responsibility for eliminating violence against women*, A/HRC/23/49. 14 May 2013, para. 27, citing Committee Against Torture, General Comment No. 2: Implementation of article 2 by States parties, CAT/C/GC/2, 24 January 2008.

51. In particular, the duty of due diligence in the prevention and investigation of sexual and gender-based violence (“SGBV”) arises from the provision of Article II (right to equality before the law), as the Commission and other bodies have recognized that violence against women is an extreme form of gender discrimination.¹⁸ And, specifically, the Committee of the Convention on the Elimination of All Forms of Discrimination against Women (hereinafter “CEDAW Committee”) has acknowledged that sexual violence disproportionately affects women, and it is perpetuated on the basis of stereotypical gender roles.¹⁹ Even when committed against men and persons with diverse gender identity, sexual violence entails a gender dimension, as it is often based on the “*actual or perceived non-conformity with socially determined gender roles.*”²⁰

52. In this regard, the CEDAW Committee has construed the obligation to eliminate discrimination against women as the State’s duty to adopt measures to “*eradicate prejudices, stereotypes and practices that are the root cause of gender-based violence against women.*”²¹ In this way, Article II of the American Declaration requires that States address structural discrimination and eradicate gender stereotypes within its institutions. In the view of the CEDAW Committee, States

[...] must also eliminate institutional practices and individual conduct and behaviours of public officials that constitute gender-based violence against women or tolerate such violence and which provide a context for lack of or for a negligent response. These include adequate investigation and sanctions for inefficiency, complicity and negligence by public authorities responsible for registration, prevention or investigation of this violence or for providing services to victims/survivors. Appropriate measures to modify or eradicate customs and practices that constitute discrimination against women, including those that justify or promote gender-based violence against women, must also be taken at this level.

53. In the context of military forces deployed in armed conflicts and post-conflict settings, the United Nations Security Council (hereinafter “UNSC”) has addressed the mainstreaming of gender perspective through its agenda on Women, Peace, and Security. In its resolution 2467 (2019) the UNSC reiterated

[...] its demand for the complete cessation with immediate effect by all parties to armed conflict of all acts of sexual violence and its call for these parties to make and implement specific time-bound commitments to combat sexual violence, which should include, inter alia, issuance of clear orders through chains of command and development of codes of conduct prohibiting sexual violence and establishment of related enforcement procedures to ensure accountability for breaching these orders, commitments by individual commanders, investigation of all credible allegations [...]²²

54. Consequently, whether in the context of deployment of armed forces in conflict areas or outside them, States have an obligation under Articles II and XVIII of the American Declaration to not only prosecute and punish sexual violence, but to adopt affirmative measures to prevent it through orders of chain of command and eradication of gender stereotypes in the Military.

¹⁸ CEDAW, General Recommendation 35: On Gender-Based Violence Against Women, Updating General Recommendation No. 19, CEDAW/C/GC/35, 14 July 2017, para. 21; IACHR, Report no. 80/11. Case 12.626. Merits. Jessica Lenahan (Gonzales) et al. United States. July 21, 2011, para. 162; U.N. Special Rapporteur on violence against women, its causes and consequences, Thematic Report on *Rape as a grave, systematic and widespread human rights violation, a crime and a manifestation of gender-based violence against women and girls, and its prevention*, A/HRC/47/26, 19 April 2021, para. 9.

¹⁹ CEDAW, General Recommendation 19: Violence Against Women, CEDAW/C/1992/L1/Add15, 1992, paras. 6 and 11 [updated by General Recommendation 35].

²⁰ Committee Against Torture, General Comment No. 2: Implementation of article 2 by States parties, CAT/C/GC/2, 24 January 2008, para. 22, in which the Committee states that “*Men are also subject to certain gendered violations of the Convention such as rape or sexual violence and abuse. Both men and women and boys and girls may be subject to violations of the Convention on the basis of their actual or perceived.*”

²¹ CEDAW, General Recommendation 35: On Gender-Based Violence Against Women, Updating General Recommendation No. 19, CEDAW/C/GC/35, 14 July 2017, para. 26.

²² UNSC, Res. 2467 (2019), S/RES/2467 (2019), 23 April 2019, resolution no. 1.

55. In addition, the Commission observes that several UN human rights bodies have addressed the U.S. with concerns regarding the context of sexual violence in the armed forces. In 2011, the then UN Special Rapporteur on Violence Against Women concluded that sexual violence and harassment in the military has become a pervasive form of violence against women in the U.S.²³ She identified some its causes to be “*a very hierarchic and command driven structure, to a culture that promotes masculine traits of power and control, and a pattern of underreporting and impunity.*”²⁴ In turn, she found that the underreporting of sexual violence was due to the fact that perpetrators often outrank the victims, and reporting barriers, like lack of confidentiality, fear of retaliation.²⁵

56. For its part, the UN Committee Against Torture has also recommended the U.S. to conduct prompt, impartial and effective investigations on all acts of sexual violence reported in the military, as well to ensure that complainants and witnesses are protected from retaliation²⁶. Also, during its Universal Periodic Reviews carried in 2015 and 2020 before the UN Human Rights Council, three States recommended the U.S. to address the issue of sexual violence in the military,²⁷ to adopt measures to prevent sexual violence in the army and to grant access to justice to survivors.²⁸

57. Therefore, the Commission considers that the allegations concerning retaliations for reporting acts of sexual violence within the army must be analyzed in the merits stage. Moreover, if proven that the discharges were based in the reporting of sexual violence, and that some of the discharges of the alleged victims were based on their sexual orientation; those actions could amount to a form of discrimination prohibited by Articles II, IV, v and XVI of the American Declaration.

58. In light of these considerations and after examining the elements of fact and law submitted by the parties, the IACHR concludes that this petition is not manifestly unfounded. Therefore, the Commission considers that the allegations of sexual abuse, lack of due diligence in the investigation of these allegations, and the retaliations over reporting the incidents, if proven, could constitute violations of Articles I (Right to personal security), II (Right to equality before law), IV (Right to freedom of investigation, opinion, expression and dissemination), V (Right to protection of honor and private life), XIV (Right to work), XVIII (Right to a fair trial), and XXIV (Right of petition) of the American Declaration.

VIII. DECISION

1. To find the instant petition admissible in relation to Articles I, II, IV, V, XIV, XVIII and XXIV of the American Declaration; and

2. To notify the parties of this decision; to continue with the analysis on the merits; and to publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 9th day of the month of September, 2022. (Signed:) Julissa Mantilla Falcón, President; Margarette May Macaulay, Second Vice President; Joel Hernández, and Roberta Clarke, Commissioners.

²³ UN Special Rapporteur on violence against Women, its causes and consequences, Report on her Mission to the United States, A/HRC/17/26/Add.5, 6 June 2006, para. 22.

²⁴ UN Special Rapporteur on violence against Women, its causes and consequences, Report on her Mission to the United States, A/HRC/17/26/Add.5, 6 June 2006, para. 27.

²⁵ UN Special Rapporteur on violence against Women, its causes and consequences, Report on her Mission to the United States, A/HRC/17/26/Add.5, 6 June 2006, para. 28.

²⁶ CAT, Concluding observations on the combined third to fifth periodic reports of the United States of America, CAT/C/USA/CO/3-5, 19 December 2014, para. 30.

²⁷ Human Rights Council, Report of the Working Group on the Universal Periodic Review, A/HRC/46/15, 15 December 2020, recommendation no. 26.240 by Israel.

²⁸ Human Rights Council, Report of the Working Group on the Universal Periodic Review, A/HRC/30/12, 27 July 2015, recommendations no. 176.258 by Slovenia and 176.289 by Denmark.