

SEXUAL VIOLENCE IN THE U.S. MILITARY

Submission to the United Nations Human Rights Committee
List of Issues Prior to Reporting (LOIPR)
United States of America

Submitted by
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Cornell Law School's Gender Justice Clinic works on cases and projects that contribute to local, global, and transnational efforts to address gender violence and discrimination.

I. ISSUE SUMMARY

1. Sexual violence is perpetrated in the U.S. military at alarming rates. In the 2017 fiscal year, there were 6,769 reports of sexual assault against service members, an increase of 9.7% from the previous year.¹ The number of reports represents a fraction of all incidents of sexual violence in the military, as most survivors do not report the crime. The U.S. Department of Defense (DoD) estimates that 14,900 active duty service members experienced sexual assault in 2016, nearly 60% of whom did not report their assault.² Actual rates of sexual violence are difficult to determine and likely exceed these estimates.³ Although both men and women are victims of military sexual violence, female service members are disproportionately targeted compared with male service members.⁴ Many factors contribute to the high prevalence of sexual violence in the U.S. military, ranging from a hierarchic and command-driven structure to a culture that promotes masculine traits of power and control to a persistent pattern of underreporting and impunity.⁵ As discussed in more detail below, the United States

government's laws and policies fail to adequately prevent and address the problem of sexual violence in the military and the impunity that exists for these acts.

2. Most military sexual assault survivors are effectively restricted to seeking redress within the military justice system. Legislative changes adopted at the end of 2014 required the Secretary of Defense to establish a process for consulting with victims of military sexual offenses occurring in the United States to solicit the victim's preference regarding whether the offence shall be prosecuted by a military or civilian court.⁶ However, the victim's preference is not binding on a commander in making a disposition determination.⁷ Also, in practice, most survivors are not informed about their right to be consulted and do not have an opportunity to share their views.⁸ Survivors are also barred by judicial doctrine from bringing civil rights or personal injury claims against the military or military officials in civilian federal courts.⁹ Sexual assault survivors who were unable to achieve redress through the military thus find themselves once again denied a meaningful remedy.

3. Under the military justice system, commanders in the accused's chain of command have broad power to determine whether to prosecute a claim of sexual violence, which presents systematic barriers to survivors' ability to achieve impartial redress. When commanders determine that there is sufficient evidence of a sexual assault or related offence that warrants discipline, they have discretion to refer the case for prosecution or alternatively, for some types of sexual assault, to impose a non-judicial or administrative punishment.¹⁰ In referring a case to court marshal, the commander becomes the convening authority with responsibility for key decisions, from appointing jury members to adding or dismissing charges to approving or rejecting plea deals.¹¹ Although recent legislative changes created procedures for superior authorities to review a commander's decision not to refer a sexual assault offense to court marshal and removed the commander's power to reverse a conviction for sexual assault,¹² commanders retain the authority to make critical initial disposition determinations and to modify a sentence in certain circumstances.¹³

4. Commanders' discretion to decide, prosecute, and punish sexual assault cases impedes survivors' access to justice in several ways. Commanders are not impartial. They may have

close working and personal relationships with the accused, and in some cases supervise both the accused and the survivor.¹⁴ They are not attorneys, are not subject to the ethical rules governing lawyers, and generally have no substantial legal training in handling sexual abuse cases.¹⁵ Additionally, commanders are evaluated according to how successfully they are carrying out their mission, not on providing redress to individual survivors of sexual assault. They may be unable to devote adequate time and attention to sexual assault complaints and may face a tension between their duty to carry out justice and their responsibility for preserving unit cohesion and interest in avoiding potential negative consequences to their own career.¹⁶ Commanders' inherent conflict of interest and partiality compromises the military's ability to afford meaningful redress to survivors of sexual violence.

5. The United States has also failed to prevent retaliation against service members who report sexual violence. DoD surveys have consistently found that high numbers of respondents perceived experiencing retaliation for reporting sexual assault.¹⁷ Human Rights Watch found that service members who report are 12 times as likely to experience retaliation as to see their abuser convicted of a sexual offense.¹⁸ Retaliation against service members who report sexual violence ranges from threats to safety and life, physical assault, ostracism, and harassment, to various forms of professional retaliation including “lost promotions or opportunities to train, loss of awards, lost privileges, demotions, a change in job duties, disciplinary actions, mental health referrals, and administrative discharge.”¹⁹ Victims who report may face punishment for minor “collateral misconduct,” such as underage drinking or conduct unbecoming an officer, which only came to the military's attention because of the victim's report of sexual assault.²⁰

6. After survivors leave the military, they continue to face discrimination and government refusal to address the harms they have suffered. Service members who suffer from post-traumatic stress disorder (PTSD) based on military sexual trauma (MST) are entitled to receive disability compensation. However, because survivors face particular challenges in reporting and documenting assault when it occurs, they may not be able to produce the evidence that is usually required to support a benefits claim.²¹ Although the U.S. Veterans Benefits Administration (VBA) has provided guidance to ensure a “liberal approach” to

evidence in MST cases, a Department of Veterans Affairs Inspector General report found in August 2018 that nearly half of denied MST-related claims – an estimated 1,300 claims in 2017 – were not handled according to VBA policy.²² This improper processing may have led to the denial of hundreds of valid claims. In response, the VBA agreed to review all MST benefits claims that were denied from October 2016 to June 2018.²³ However, the United States must also ensure that meaningful institutional reforms are put into place to ensure that survivors with MST-related PTSD have equal access to benefits to which they are entitled.²⁴

II. ICCPR LEGAL FRAMEWORK

7. The United States' systematic failure to adequately prevent and respond to military sexual assault violates service members' rights under the International Covenant on Civil and Political Rights (ICCPR). The ICCPR specifically requires States Parties to respect and ensure all Covenant rights without distinction on the basis of sex (article 2.1), to take necessary steps to adopt laws or other measures to give effect to these rights (article 2.2), and to ensure that individuals whose rights are violated have an effective remedy (article 2.3). It also obligates States to ensure the equal rights of men and women to the enjoyment of all Covenant rights (article 3). It further guarantees the right of everyone to equality before the courts and tribunals and to a fair trial (article 14), as well as the right to equality before the law, equal protection of the law, and protection from discrimination on any ground, including sex (article 26). The ICCPR also enshrines the right of everyone to liberty and security of person (article 9), and it provides that no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment (article 7).

8. In General Comment No. 28, the Human Rights Committee affirmed that “to assess compliance with article 7 of the Covenant . . . the Committee needs to be provided information on national laws and practice with regard to . . . violence against women, including rape” and “legal remedies, for women whose rights under article 7 have been violated.”²⁵ The Committee further noted in General Comment No. 20, that implementation of article 7 includes taking meaningful “administrative, judicial and other measures . . . to prevent and punish acts of torture and cruel, inhuman and degrading treatment”²⁶ and stated

that victims must be provided with an effective remedy, including by ensuring that “complaints [are] investigated promptly and impartially by competent authorities.”²⁷

9. The Committee has also recognized in General Comment No. 18 that “nondiscrimination, together with equality before the law and equal protection of the law constitute a basic and general principle with regard to the protection of human rights”²⁸ and that discrimination includes “any distinction, exclusion, restriction or preference which is based on any ground . . . and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on equal footing, of all rights and freedoms.”²⁹ The Committee emphasized in General Comment No. 13 that the right to equality before the courts under article 14 includes “equal access to the courts.”³⁰ In General Comment No. 32, it stated that that “[a]ccess to the administration of justice must effectively be guaranteed in all cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice.”³¹
10. In its 2014 Concluding Observations on the Fourth Report of the United States, the Committee affirmed that gender-based violence and a State party’s failure to act with due diligence to prevent and respond to it violate the rights to nondiscrimination, equality of the law, security of person, and freedom from torture and cruel inhuman and degrading treatment under the ICCPR. Specifically, it expressed concern that “victims of domestic violence face obstacles to obtaining remedies, and that law enforcement authorities are not legally required to act with due diligence to protect victims of domestic violence, and often inadequately respond to such cases (arts. 3, 7, 9, and 26).”³² The United States’ failure to act with due diligence to protect victims of military sexual assault and to respond adequately to such violence similarly violates articles 2, 3, 7, 9, and 26 of the ICCPR.

III. OTHER UN BODY RECOMMENDATIONS

11. The Committee Against Torture (CAT Committee) has recognized that sexual violence and rape in the U.S. military violates service members’ right to be free from torture and cruel, inhuman, or degrading treatment. In its 2014, concluding observations on the third to fifth periodic reports of the United States, the CAT Committee expressed concern “about the high

prevalence of sexual violence, including rape, and the alleged failure of the DoD to adequately prevent and address military sexual assaults of both men and women serving in the armed forces (arts. 2, 12, 13, and 16).³³ It called upon the United States to:

increase its efforts to prevent and eradicate sexual violence in the military by taking effective measures to:

- (a) Ensure prompt, impartial and effective investigation of all allegations of sexual violence;
- (b) Ensure that, in practice, complaints and witnesses are protected from any acts of retaliation or reprisals, including intimidation, related to their complain [sic] or testimony;
- (c) Ensure that equal access to disability compensation to veterans who are survivors of military sexual assault.³⁴

12. During the United States' University Periodic Review (UPR) at the U.N. Human Rights Council in 2015, two states recommended that the United States do more to prevent and prosecute sexual violence in the U.S. military, including by removing prosecutorial decision-making powers from the chain of command.³⁵ Slovenia recommended that the U.S. redouble its "efforts to prevent sexual violence in the military and ensure effective prosecution of offenders and redress for victims."³⁶ Denmark recommended that the United States "improve access to justice, including due process and redress, for victims of sexual violence in the military; this would include removing from the chain of command the decision about whether to prosecute cases of alleged assault."³⁷

13. In a 2011 report on her mission to the United States, the UN Special Rapporteur on Violence Against Women examined the problem of sexual harassment and assault in the U.S. military in detail.³⁸ She urged the United States to:

- (a) Ensure the effective of a no-tolerance policy for rape, sexual assault and sexual harassments in the military, ensure adequate investigation of all allegations by an independent authority and allow victims to bring claims against the military when damages arise out of negligent or wrongful acts.
- (b) Ensure the effective implementation of training for all SAPRO [Sexual Assault Prevention and Response Office of the DoD] employees, including Victim Advocates, SARC's [Sexual Assault Response Coordinators], investigators and health professionals. Furthermore, the role and authority of the SARC's should be strengthened beyond their current advisory role.
- (c) Enable more female-only and service specific in-patient PTSD and MST programs within the VA, to ensure victims a safe place to privately seek assistance without threats of further harassing behavior. Furthermore,

mandatory and routine training on the specific issues facing women veterans should be instituted for all VA staff. The VA should also extend evidentiary relief to victims claiming in-service sexual assault and accept their testimony as main proof to support a diagnosis of PTSD.³⁹

IV. RECOMMENDED QUESTIONS

14. Given the widespread sexual violence in the U.S. military and the U.S. government's failure to enact and implement policies and legislation that fully address the shortcomings of the current military justice system, specifically regarding the partiality of command and barriers for survivors to seek redress, we recommend that the Human Rights Committee pose the following questions to the United States in its List of Issues:

- (a) How will the United States ensure impartiality in its investigation, prosecution, and adjudication of cases involving sexual violence in the U.S. military? How does the United States provide redress for victims when military investigations and prosecutions fail, given that victims are currently unable to access civil or constitutional remedies in civilian courts?
- (b) How is the United States ensuring that charges of minor misconduct are not brought against victims of sexual violence, including as a form of retaliation? In what ways is the United States addressing complaints about instances where the work positions of sexual assault survivors are informally downgraded?
- (c) What steps is the United States taking to address the institutional issues that resulted in the improper handling of claims for disability benefits that were related to military sexual trauma, and to ensure that survivors who suffer from post-traumatic stress disorder resulting from military sexual trauma receive the support to which they are entitled?

V. SUGGESTED RECOMMENDATIONS

15. Therefore, the United States should be urged to:

- (a) undertake all necessary means to prevent sexual violence in the U.S. military and to ensure a safe working environment;

- (b) ensure impartial and effective investigation, prosecution, and redress of sexual violence allegations by removing authority over case dispositions, adjudication, and punishment from the chain of command;
- (c) provide access to U.S. federal courts so that survivors of sexual assault may seek effective remedies when the military violates their rights;
- (d) effectively implement the prohibition of retaliation against service members who report unwanted sexual conduct and hold violators accountable; and
- (e) ensure that survivors who experience PTSD related to military sexual violence have meaningful access to the treatment and support they need and are not denied benefits because of unreasonable evidentiary burdens or institutional problems.

ENDNOTES

¹ Department of Defense, *Fiscal Year 2017 Department of Defense Annual Report on Sexual Assault in the Military*, 3 (April 2018) (hereinafter 2017 DoD Report), available at http://sapr.mil/public/docs/reports/FY17_Annual/DoD_FY17_Annual_Report_on_Sexual_Assault_in_the_Military.pdf.

² *Id.*, at 9.

³ See U.N. Human Rights Council, Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Addendum, Mission to the United States of America, ¶ 24, U.N. Doc. A/HRC/17/26/Add.5 (June 1, 2011) (“Because most cases of sexual assault in the military go unreported, accurate statistics are not available.”).

⁴ *Id.* at 8. Appendix B: Statistical Data on Sexual Assault, Department of Defense, *Fiscal Year 2017 Department of Defense Annual Report on Sexual Assault in the Military* 8 (April 2018) (noting that 82% of survivors who reported military sexual assault were women), available at

http://www.sapr.mil/public/docs/reports/FY17_Annual/Appendix_B_Statistical_Data_on_Sexual_Assault.pdf

⁵ See U.N. Human Rights Council, Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Addendum, Mission to the United States of America, ¶ 27, U.N. Doc. A/HRC/17/26/Add.5 (June 1, 2011).

⁶ 10 U.S.C. § 1044e note; see David Vergun, *Legislation Changes UCMJ for Victims of Sexual Assault*, Army News Service, Jan. 7, 2015, available at

https://www.army.mil/article/140807/Legislation_changes_UCMJ_for_victims_of_sexual___/.

⁷ 10 U.S.C. § 1044e note.

⁸ See Tom Vanden Brook, *Military Fails to Advise Victims of Sexual Assault of Civilian Court Option, Advocates Say*, USA Today, June 10, 2018, available at <https://www.usatoday.com/story/news/politics/2018/06/10/military-sex-assault-victims-not-told-right-civilian-trial/686503002>.

⁹ The U.S. Supreme Court has held that courts may not provide a remedy for injuries to servicewomen and men “where the injuries arise out of or are in the course of activity that is incident to [military] service.” *Feres v. United States*, 340 U.S. 135, 146 (1950); *United States v. Stanley*, 483 U.S. 669, 693 (1987). Lower courts have applied this precedent to dismiss several recent class action cases brought by service members who were subjected to sexual violence in the U.S. military. *Cioca v. Rumsfeld*, 11-CV-00151 (E.D. Va. Dec. 9, 2011); *Cioca v. Rumsfeld*, 720 F.3d 505 (4th Cir. 2013); *Klay v. Panetta*, 924 F. Supp. 2d 8 (D.D.C. 2013); *Klay v. Panetta*, No. 13-5081 (D.C. Cir. 2014).

¹⁰ See Department of Defense, Victim and Witness Assistance Council, Military Justice Overview, <http://vwac.defense.gov/military.aspx> (last visited Jan. 8, 2019) (“Unlike civilian communities, military commanders exercise discretion in deciding whether an offense should be charged and how the offenders should be punished.”).

¹¹ Protect Our Defenders, Nine Roadblocks to Justice (last updated 2018) (last visited Jan. 13, 2018) (hereinafter Protect Our Defenders Nine Roadblocks), at <https://www.protectourdefenders.com/roadblocks-to-justice/>; Protect Our Defenders, Policy Statement (last visited Jan. 13, 2018) (hereinafter Protect our Defenders Policy Statement), at <https://www.protectourdefenders.com/protect-our-defenders-policy-priorities/>.

¹² See Vergun, *supra* note 6.

¹³ Department of Defense, *supra* note 11.

¹⁴ See Service Women’s Action Network, *Briefing Paper: Department of Defense (DoD) Annual Report on Sexual Assault in the Military, Fiscal Year (FY) 2011*, 2 (2012).

¹⁵ See *id.*; Protect Our Defenders Nine Roadblocks, *supra* note 10; Protect Our Defenders Policy Statement, *supra* note 10.

¹⁶ Service Women’s Action Network, *supra* note 14, at 2; Protect Our Defenders Nine Roadblocks, *supra* note 10;

¹⁷ 2017 DoD Report, *supra* note 1 at 102 (finding that 41% of respondents perceived experiencing retaliation as a result of reporting sexual violence); Andrew R. Morral et al., RAND Corporation, *Sexual Assault and Sexual Harassment in the U.S. Military*, Volume 2, Estimated for the Department of Defense Service Members from the 2014 RAND Military Workplace Study 73-74 (2016) (finding that 62% of women who reported sexual assault perceived experiencing at least one form of retaliation or adverse employment action), available at https://www.rand.org/pubs/research_reports/RR870z2-1.html; Natalie A. Namrow et al., *2015 Military Investigation and Justice Experience Survey (MIJES): Overview Report* 9 (2016) (finding that 68% of respondents perceived at least one instance of professional reprisal, ostracism, or maltreatment as a result of reporting sexual assault to military authorities), available at http://www.sapr.mil/public/docs/reports/FY16_Annual/Annex_2_2016_MIJES_Report.pdf.

¹⁸ Human Rights Watch, *Embattled: Retaliation Against Sexual Assault Survivors in the U.S. Military*, Summary (2015), available at <https://www.hrw.org/report/2015/05/18/embattled/retaliation-against-sexual-assault-survivors-us-military#>.

¹⁹ *Id.* at 36; see also Protect our Defenders, *Protect Our Defenders and Human Rights Watch Release Report on Retaliation of Military Sexual Assault Survivors*, Press Release (May 18, 2015), available at <https://www.protectourdefenders.com/press-release-protect-our-defenders-and-human-rights-watch-release-report-on-retaliation-of-military-sexual-assault-survivors/>. The DoD did recently launch a Retaliation Prevention and Response

Strategy Implementation Plan to enforce implementation of retaliation reforms, but it is unclear how effective the plan will be. 2017 DoD Report, *supra* note 1, at 4.

²⁰ Human Rights Watch, *supra* note 18, at 57-58.

²¹ Department of Veterans Affairs, Office of Inspector General, Veterans Benefits Administration Denied Posttraumatic Stress Disorder Claims Related to Military Sexual Trauma, i (Aug. 21, 2018) (noting that survivors of military sexual assault experience particular challenges to reporting including “reluctance to submit a report when the perpetrator is a superior officer, concerns about negative implications for performance reports, worries about punishment for collateral misconduct, and the perception of an unresponsive military chain of command”), *available at* <https://www.va.gov/oig/pubs/VAOIG-17-05248-241>.

²² Department of Veterans Affairs, *supra* note 21. Errors included failing to order required medical exams, neglecting to check to request private treatment records or to see whether a report about the assault had been filed, and denying claims based on contradictory evidence. *Id.* at ii. The mistakes were caused by a variety of factors, including inadequate training, lack of reviewer specialization, lack of an additional level of review, and discontinuation of special focused reviews. *Id.* at iii.

²³ Leo Shane II, *Report: VA May Have Mishandled Thousands of Sexual Assault Cases*, Military Times, Aug. 21, 2018, *available at* <https://www.militarytimes.com/veterans/2018/08/21/report-va-may-have-mishandled-thousands-of-sexual-assault-cases/>.

²⁴ In August 2018, Congress enacted legislation that provided a discretionary framework for a pilot program to assess the feasibility and advisability of using outpatient programs to treat current service members who are MST-related PTSD, including through treatment for substance abuse, depression, or other issues relating to such conditions. John S. McCain Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232 § 702. This framework is promising, but it remains to be seen whether and how the program will be developed and implemented.

²⁵ General Comment No. 28, ¶ 11.

²⁶ General Comment No. 20, ¶ 8.

²⁷ *Id.* ¶ 14.

²⁸ General Comment No. 18, ¶ 1.

²⁹ *Id.* ¶ 7.

³⁰ General Comment No. 13, ¶ 3.

³¹ General Comment No. 32, ¶ 9.

³² Human Rights Committee, Concluding observations on the fourth periodic report of the United States of America, ¶ 16, UN Doc. CCPR/USA/CO/4 (Apr. 23, 2014), *available at* https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FUSA%2FCO%2F4.

³³ Committee Against Torture, Concluding observations on the third to fifth periodic reports of the United States of America, ¶ 30, UN Doc. CAT/C/USA/CO/3-5 (Dec. 19, 2014), *available at* https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fUSA%2fCO%2f3-5&Lang=en.

³⁴ *Id.*

³⁵ Human Rights Council, Report of the Working Group on the Universal Periodic Review: United States of America, U.N. Doc. A/HRC/30/12, ¶¶ 176.258, 176.289 (July 20, 2015), *available at* <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/159/71/PDF/G1515971.pdf?OpenElement>.

³⁶ *Id.* ¶ 176.258.

³⁷ *Id.* ¶ 176.289.

³⁸ U.N. Human Rights Council, *supra* note 3, ¶¶ 22-31.

³⁹ *Id.* ¶ 28.