



Cornell University

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SEXUAL VIOLENCE IN THE U.S. MILITARY

Submission to the United Nations Universal Periodic Review of

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Founded in 2009, the Avon Global Center for Women and Justice at Cornell Law School works with judges, legal professionals, governmental and non-governmental organizations to improve access to justice in an effort to eliminate violence against women and girls. The Global Gender Justice Clinic, a law school clinical course, works on human rights cases and projects that contribute to local, global, and transnational efforts to combat gender

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violence and discrimination. The Avon Global Center for Women and Justice and Global Gender Justice Clinic do not hold UN ECOSOC consultative status.

I. SUMMARY

1. The U.S. military justice system systematically fails to investigate and prosecute cases of sexual violence against its service members. Servicemen and women who report incidents of sexual violence are denied their right to due process and redress, and are frequently subjected to retaliation, stigma and harassment within the military. Under the military system, the commander has broad power to determine whether to investigate and prosecute a claim of sexual violence, which presents systemic barriers to survivors' ability to achieve impartial and meaningful redress. In many instances, claims are not investigated, or when investigated, the perpetrators receive minimal or no punishment. Further, reporting the unwanted sexual contact sometimes leads to the termination of servicemen and women's military careers. In addition, service members are barred from seeking civil or constitutional remedies in federal courts against the military for its failure to adequately prevent and address the sexual violence they experienced.
2. The U.S. government's laws and policies have not gone far enough to address the problem of sexual violence in the military and the culture of impunity that exists for these acts. While the U.S. Department of Defense (DoD) has attempted to institute prevention strategies against sexual assault in the military, it lacks a comprehensive framework to oversee compliance and ensure effective implementation of those strategies.¹ The DoD has failed to implement relevant laws passed by Congress or to enact sufficiently effective measures to remedy these acts of sexual violence, despite a sharp rise of incidents in the U.S. military.²
3. By failing to address these concerns, the U.S. violates military servicemen and women's rights under international law. In particular, this submission addresses the right to due process and equal protection under the law; the right to an effective remedy; the right to life, liberty and security of person; the right to equality and nondiscrimination; the right to be free of torture and inhuman or degrading treatment; the right to health; and the right to work.
4. The U.S. government should take steps to eradicate sexual violence within the military, ensure servicemen and women's access to justice and improve military

accountability systems, including removing the decision to prosecute sexual assault allegations from the Chain of Command and providing for the possibility of civil relief in U.S. federal courts.

II. LEGAL FRAMEWORK

5. With regard to the issues described in detail below, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) are particularly relevant. The United States is a party to the ICCPR and CAT, and it is a signatory of the ICESCR and CEDAW, which obligates it to refrain from any action that would defeat the object and purpose of the treaties.
6. At the time of the first review, the United States supported recommendations that highlight prior commitments in regards to civil rights and discrimination.³ It agreed to continue efforts to undertake all necessary measures to ensure fair and equal treatment of all persons, regardless of their sex, race, religion, color, creed, sexual orientation, gender identity or disability.⁴

III. U.S. COMPLIANCE WITH ITS INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

Sexual violence in the U.S. military and failure to provide meaningful remedies for survivors

7. According to the Department of Defense's most recent study, 5,518 military women and men experienced some type of unwanted sexual contact in the last year alone.⁵ While both men and women can be targets of sexual violence, female service members are disproportionately subjected to sexual assault.⁶ Sexual violence in the U.S. military⁷ is prompted by numerous factors, ranging from a very hierarchic and Command driven structure, to a culture that promote masculine traits of power and control, and a pattern of underreporting and impunity.⁸ Consequently, this has resulted in several dignitary harms to survivor's human rights, including their health. Military Sexual Trauma (MST)⁹ impacts veterans in several ways ranging from mental health problems, to physical health symptoms and conditions, as well as difficulties readjusting to everyday life after discharge, according to the Department of Veteran Affairs (DVA).¹⁰ The DVA has identified Post-traumatic stress disorder (PTSD) and depression, anxiety, adjustment and substance use disorders, as the top mental health diagnoses associated with MST.¹¹

8. Although an endemic problem, the Department of Defense has been slow to respond to the issue of sexual violence and rape in the United States Military. The United States' inaction and policies to address incidents of sexual violence in the military fosters a culture of impunity where perpetrators feel free to assault service members because there is no threat of punishment.¹²
9. The United States military investigates, prosecutes and punishes criminal allegations by and against its members.¹³ Within this system, survivors are given the option to report incidents of sexual violence through either a "restricted" or "unrestricted" reporting system.¹⁴ The restricted reporting system is confidential and allows survivors to receive needed medical attention, but it does not provide a judicial remedy. On the other hand, the unrestricted reporting system allows for possible prosecution but requires the survivor to report the incident to his or her supervisors, otherwise known as the "Chain of Command." The Manual for Courts-Martial (MCM)¹⁵ currently maintains that the officer who determines whether or not a criminal case is referred to the military justice system for investigation and prosecution is the immediate commander in the accused service member's Chain of Command.¹⁶ This obvious conflict of interest prevents the survivor as well as the accused from receiving impartial and unbiased treatment from the Chain of Command. In contrast, in the civilian criminal justice system, independent prosecutors bring cases to trial.
10. Requiring survivors to report to the Chain of Command and giving Command broad discretion and power to decide whether to investigate, prosecute, punish violates due process and equal protection of the law.¹⁷ In particular, delegating the authority to make sexual violence case disposition decisions to junior commanders in the Chain of Command is problematic because of the following four reasons:
 - i. Commanders are not impartial. They have personal knowledge of and working or personal relationships with the accused. In some cases, the accused and the victim both work for the commander making the disposition decision.
 - ii. Most commanders are not lawyers and have no substantial legal training or experience in handling sexual violence cases. Sexual violence cases are complex and involve complicated rules of evidence, confusing or conflicting witness statements, and severely traumatized victims. Most commanders have not dealt with enough of these cases to render a proper disposition decision.
 - iii. Lower-level commanders do not have military lawyers to advise them. In most services, lawyers do not appear on staff until the officer is a Brigade

commander or General Officer. Without proper legal counsel, commanders cannot be sure they are interpreting investigations properly or complying with all aspects of military law when making disposition decisions.

- iv. Commanders are operationally focused. Many times mission requirements, operational tempo, training, workups, and deployments can create a situation where commanders are unable to devote the proper time and attention needed to rendering proper disposition decisions.¹⁸
11. The requirement that survivors report their abuse to their Commander and the broad authority given to Commanders in determining how to respond has deterred many servicemen and women from reporting sexual assaults and deprived many others of their right to an effective remedy. In a significant number of cases, perpetrators have received a non-judicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ), which evades referring the perpetrator to court martial and is intended to apply only to “minor offenses.”¹⁹ In other cases, perpetrators have been tried for the lesser offence of adultery under Article 134 of the UCMJ instead of rape under Article 120. Even when a case is tried and a perpetrator found guilty, the Chain of Command possesses the authority to overturn a verdict or to grant a different punishment from the one recommended by the judge at trial. On the basis of Article 15, Military Command is able to interfere with the impartiality of criminal investigations by preventing individuals from being prosecuted, overturning guilty verdicts, and shortening sentences of convicted perpetrators.²⁰ Moreover, there is no appeal process available to survivors when their cases are not investigated and prosecuted.
12. Further, if the perpetrators are in the victims’ Chain of Command, reporting the incident can seem impossible and survivors often feel that they need to make a choice between their military career and seeking justice.²¹ Survivors explained how perpetrators often exert control over victims, and are likely to outrank them.²² Many survivors fear retaliation from their supervisors or fellow service members for reporting incidents of sexual violence. In numerous instances, service members have been subject to harassment, shame and stigma for reporting incidents of abuse. Some servicemen and women who report sexual violence have been downgraded in rank, denied promotions, stripped off their security clearance, or discharged (sometimes dishonorably).²³ In certain cases where survivors were transferred, members of the victims’ Commands called victims’ new supervisors to inform them of survivors’ “misbehavior”, thereby destroying their reputation and ensuring that the harassment and stigmatization against the service member continued.²⁴

13. Additionally, survivors of sexual assault in the military are barred from bringing civil rights or personal injury claims against the military or military officials in civilian federal courts. The U.S. Supreme Court has held that courts may not provide a remedy for injuries to servicemen and women “where the injuries arise out of or are in the course of activity that is incident to [military] service.”²⁵ Lower courts have applied this precedent to dismiss several recent class action cases brought by service members who were subjected to sexual violence while in the military. Thus sexual assault survivors who were unable to achieve redress through the military system have found themselves once again denied a meaningful remedy.

IV. CONCLUSION AND RECOMMENDATIONS

14. The United States has not taken adequate measures, whether it is legislative, administrative, or judicial, to prevent acts of sexual assault in the military. In cases where an act of sexual assault has already been committed in the military, the U.S. oftentimes fails to promptly and impartially investigate, prosecute and effectively redress the assault and causes to violate servicemen and women’s rights under international law.
15. Therefore, the U.S. should be urged to:
 - i. ensure impartial and effective investigation, prosecution and redress of the allegation of sexual violence by removing the decision whether to investigate, prosecute, and punish alleged perpetrators from the survivors’ or perpetrators’ Chain of Command;
 - ii. provide access to U.S. federal courts so that survivors of sexual assault may seek civil remedies when the military violates their rights;
 - iii. establish a reporting mechanism that is independent of the Chain of Command for reporting incidents of sexual violence;
 - iv. adopt laws and policies to prohibit retaliation against service members who report unwanted sexual contact;
 - v. undertake all necessary means to prevent sexual harassment and to ensure a safe working environment.

ENDNOTES

¹ See United States Government Accountability Office, *Testimony Before the Subcommittee on National Security and Foreign Affairs, Committee on Oversight and Government Reform, House of Representatives, “Military Personnel Preliminary Observations on DoD’s and the Coast Guard’s Sexual Assault Prevention and Response Programs,”* 7/31/2008, available at: <http://www.gao.gov/assets/130/120948.html>.

² In its 2013 Annual Report on Sexual Assault in the Military, the Department of Defense noted that there were 5,061 reports of sexual assault in the military between 2013 and 2014, a nearly fifty percent increase across all services over the same period a year earlier. Department of Defense, SAPRO, “Fiscal Year 2013 Annual Report on Sexual Assault in the Military,” (2014), pg. 45, available at: http://sapr.mil/public/docs/reports/FY13_DoD_SAPRO_Annual_Report_on_Sexual_Assault.pdf. The actual incidence of sexual assaults in the military is impossible to determine, however, as most cases are never reported. See UN Human Rights Council, Report of the Special Rapporteur on violence against women, its causes and consequences, Addendum, Mission to the United States of America, June 6, 2011, UN Doc. A/HRC/17/26/Add.5, ¶ 24.

³ See Human Rights Council, Report of the Working Group on the Universal Periodic Review - U.S.A. (2011), UN Doc. A/HRC/16/11, 4 January 2011, Recommendation 116, at p. 21.

⁴ See Human Rights Council, Report of the Working Group on the Universal Periodic Review - U.S.A. Addendum (2011), UN Doc. A/HRC/16/11/Add.1, 8 March 2011 at p. 2.

⁵ See Department of Defense, SAPRO, “Fiscal Year 2013 Annual Report on Sexual Assault in the Military,” (2014), pg. 45, available at: http://sapr.mil/public/docs/reports/FY13_DoD_SAPRO_Annual_Report_on_Sexual_Assault.pdf.

⁶ In its 2013 Annual Report on Sexual Assault in the Military, the Department of Defense noted that there was a 19.1/1000 report rate of sexual assault in the military by women service members between 2013 and 2014, compared to 0.7/1000 reports by servicemen. See Department of Defense, SAPRO, “Fiscal Year 2013 Annual Report on Sexual Assault in the Military,” (2014), pg. 46, available at: http://sapr.mil/public/docs/reports/FY13_DoD_SAPRO_Annual_Report_on_Sexual_Assault.pdf;

Sexual violence in the U.S. military constitutes as a form of torture, which is prohibited by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). In its General Comment 2, the Committee against Torture explicitly addresses “rape or sexual violence” as a form of torture and ill-treatment; Committee Against Torture General Comment, para. 22. Likewise, the Committee on the Elimination of Discrimination against Women has identified rape and sexual violence as a form of torture⁷, as have several U.N. Special Rapporteurs on Torture; CEDAW, General Recommendation No. 19 at ¶ 7; Commission on Human Rights (1986), ‘Report by the Special Rapporteur, Mr P Kooijmans’, UN Doc. E/CN.4/1986/15, 19 February 1986 at p. 26; Commission on Human Rights (1992), ‘Forty-Eighth Session, Summary Record of the 21st Meeting (Oral Statement of Special Rapporteur Kooijmans)’, UN Doc. E/CN.4/1992/SR.21, 11 February 1992 at ¶ 35; UN Commission on Human Rights (1995), ‘Report of the Special Rapporteur, Mr. Nigel S. Rodley, Submitted Pursuant to Commission on Human Rights Resolution 1992/32’, UN Doc. E/CN.4/1995/34, 12 January 1995 at ¶¶ 15-24; UN General Assembly (2008), ‘Manfred Nowak 2008 Report’, at ¶¶ 26 and 34-36.

⁸ See UN Human Rights Council, Report of the Special Rapporteur on violence against women, its causes and consequences, Addendum, Mission to the United States of America, June 6, 2011, UN Doc. A/HRC/17/26/Add.5, ¶ 27.

⁹ The VA defines MST as “psychological trauma which [...] resulted from a physical assault of a sexual nature, battery of a sexual nature, or sexual harassment which occurred while the veteran was serving on active duty for training”. “Sexual assault” is the term used by the DoD to denote contact sex crimes against adults. “MST” and “Sexual assault” are two different terms which describe different phenomena.

¹⁰ By demoting servicemen and women's ranks or discharging service members in response to their reports of sexual violence, the U.S. violates of their right to work, which is safeguarded in art. 23 UDHR and article 7 ICESCR. Additionally, military service members subject to sexual violence and harassment during the course of their employment with the U.S. military are prevented from working under proper conditions and having access to a safe and non-discriminatory workplace. Further, because military service members are often required to live on military bases and in U.S. military-provided housing, the U.S. military is under a heightened obligation to ensure that survivors are being protected from violence within their homes. Plus, as some service members work and live in the same locations, the military bases should be considered their homes and the U.S. should adopt far going policies to prevent sexual violence in the U.S. military.

¹¹ See UN Human Rights Council, Report of the Special Rapporteur on violence against women, its causes and consequences, Addendum, Mission to the United States of America, June 6, 2011, UN Doc. A/HRC/17/26/Add.5, ¶ 31.

¹² By continuing to allow known sexual perpetrators to go unpunished - leading to situations where they are able to abuse multiple women before being stopped - the U.S. fails to meet its due diligence obligations to adopt necessary measures to prevent, eliminate, punish and protect servicemen and women from the criminal acts of other individuals. Art. 3 UDHR and art. 6 and 9.1 ICCPR recognize and safeguard the right to life and the right to security of person; The Human Rights Committee has interpreted Article 6 ICCPR to mean that it guarantees "the right to protection of life," and obligates States parties to "adopt positive measures" to ensure this right. Human Rights Committee General Comment 35 at para. 58; General Comment 6 at ¶ 5.

¹³ The United States Constitution authorized the creation of a military justice system. Article I, Section 8 permits the U.S. Congress to *"make rules for the government and regulation of the land and naval forces."*

¹⁴ 32 C.F.R. § 635.28.

¹⁵ The Manual for Courts-Martial (MCM) is the official guide to the conduct of courts-martial in the United States military. The MCM details and expands on the military law in the Uniform Code of Military Justice (UCMJ).

¹⁶ The accused's Command is also in charge of whether the accused will face pre-trial detention. This poses the similar issues as Command often does not detain the offender and he is free to commit additional offenses while awaiting trial. Instead, this determination should be left to a judicial officer who is more equipped to make this determination.

¹⁷ As protected under art. 14 and 26 ICCPR; Art. 7, 8 and 10 UDHR.

¹⁸ See Service Women's Action Network, Briefing Paper: Department of Defense (DoD) Annual Report on Sexual Assault in the Military, Fiscal Year (FY) 2011, 2-3 (2012).

¹⁹ Part V § 1 (e), MCM 2012, p. V1.

²⁰ Art. 15 (d) UCMJ states that *"the officer who imposes the punishment authorized in subsection (b), or his successor in command, may, at any time, suspend probationally any part or amount of the unexecuted punishment imposed and may suspend probationally a reduction in grade or forfeiture imposed under subsection (b), whether or not executed. In addition, he may, at any time, remit or mitigate any part or amount of the unexecuted punishment imposed and may set aside in whole or in part the punishment, whether executed or unexecuted, and restore all rights, privileges and property affected. He may also mitigate reduction in grade to forfeiture or detention of pay."*

²¹ See UN Human Rights Council, Report of the Special Rapporteur on violence against women, its causes and consequences, Addendum, Mission to the United States of America, June 6, 2011, UN Doc. A/HRC/17/26/Add.5, ¶ 27.

²² *Id.*

²³ For example, survivor Albertson was revoked her security clearance and downgraded her work assignments after Command forced her to disclose the medications she took for her trauma. See Avon Global Center for Women and Justice's petition to the Inter-American Commission on Human Rights (2014), p. 9, available at: <http://www.lawschool.cornell.edu/academics/clinicalprogram/int-human-rights/upload/IACHR-US-Military-Submission-FINAL.pdf>.

²⁴ For example, when survivor Schmidt was reassigned, his former Command told his new location that he was a "snitch", which led to further physical and verbal abuse. See Avon Global Center for Women and Justice's petition to the Inter-American Commission on Human Rights (2014), p. 12, available at: <http://www.lawschool.cornell.edu/academics/clinicalprogram/int-human-rights/upload/IACHR-US-Military-Submission-FINAL.pdf>.

²⁵ Judgment of the United States Court of Appeals for the Fourth District, July 23, 2013, ¶¶ 23-24 (citing to *Feres v. United States*, 340 U.S. 135, 146 (1950)).