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## **SEXUAL VIOLENCE IN THE U.S. MILITARY**

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Submitted by

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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 violence and discrimination. Established in 2007, SWAN supports, defends, and empowers servicewomen and women veterans through advocacy initiatives and community programs. SWAN, Cornell Law School's 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 impartially prosecute cases of sexual violence against its service members. Servicewomen and men 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 prosecute a claim of sexual violence, which presents systemic barriers to survivors' ability to achieve impartial and meaningful redress. 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 at the unit level.<sup>1</sup> The DoD has failed to enact sufficiently effective measures to remedy these acts of sexual violence, despite a sharp rise of incidents in the U.S. military.<sup>2</sup>
3. By failing to address these concerns, the U.S. violates military servicewomen and men'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 from torture and inhuman or degrading treatment; the right to health; and the right to work.
4. The U.S. government should pursue further institutional reforms to eradicate sexual violence within the military, ensure servicemen and women's access to justice and improve military accountability systems, including by removing the decision to

prosecute sexual assault allegations from the chain of command [*term explained in ¶ 9*] and providing for the possibility of a remedy in U.S. federal courts.

## **II. LEGAL FRAMEWORK**

5. The following international conventions are particularly relevant 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). 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 regard to civil rights and discrimination.<sup>3</sup> 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.<sup>4</sup>

## **III. U.S. COMPLIANCE WITH ITS INTERNATIONAL HUMAN RIGHTS OBLIGATIONS: SEXUAL VIOLENCE IN THE U.S. MILITARY AND THE FAILURE TO PROVIDE MEANINGFUL REMEDIES FOR SURVIVORS**

7. According to the DoD's most recent study, 5,983 military women and men have experienced some type of unwanted sexual contact in the last year alone.<sup>5</sup> While both men and women can be targets of sexual violence, female service members are disproportionately subjected to sexual assault.<sup>6</sup> Sexual violence in the U.S. military<sup>7</sup> is prompted by numerous factors, ranging from a very hierarchic and command-driven structure to a culture that promotes masculine traits of power and control to a pattern of underreporting and impunity.<sup>8</sup> This has resulted in several dignitary harms to survivors' human rights, including their right to health. The Department of Veteran Affairs (DVA) has stated that Military Sexual Trauma (MST)<sup>9</sup> impacts veterans in several ways: causing mental health problems, physical health symptoms and conditions, and difficulties readjusting to everyday life after discharge.<sup>10</sup> Furthermore, 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.<sup>11</sup>

8. Although an endemic problem, the DoD has been slow to respond to the issue of sexual violence and rape in the United States military. The United States' inaction and inadequate policies to address incidents of sexual violence in the military foster a culture of impunity where perpetrators feel free to assault service members because there is no threat of punishment.<sup>12</sup>
9. The United States military investigates, prosecutes and punishes criminal allegations by and against its members.<sup>13</sup> Within this system, survivors have the option to report incidents of rape and sexual violence to either their unit leadership or, more recently, to certain individuals outside of their unit. Reports are processed through either the restricted reporting system, which ensures confidentiality but does not provide a judicial remedy, or through the unrestricted reporting system which allows for investigation and possible prosecution.<sup>14</sup> Although unrestricted reports are referred outside the unit to military law enforcement for investigation, it is the accused's unit supervisor, otherwise known as the "chain of command," who ultimately decides how a case is resolved.
10. When a service member reports an incident through the unrestricted reporting system, the military justice system provides that a commander in the accused's chain of command possesses the power to determine whether a case will be referred to the military judicial system for prosecution.<sup>15</sup> Under recent changes to DoD policy, a commander with a rank of grade O-6 (colonel or Navy captain) or higher is authorized to decide initial disposition action, and has the power to administratively dispose of the case.<sup>16</sup> This 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.
11. Giving command broad discretion and power to decide, prosecute and punish violates due process and equal protection of the law.<sup>17</sup> In particular, continuing to provide commanders in the chain of command with the authority to make sexual violence disposition decisions is problematic because of the following three reasons, as outlined by Service Women's Action Network (SWAN):<sup>18</sup>
  - 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. Although

commanders can ask military lawyers for guidance, they have ultimate authority to make disposition decisions, including ordering dispositions contrary to the advice of legal counsel.

- iii. 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.
12. The broad authority given to commanders in determining how to respond has deterred many servicewomen and men from reporting sexual assaults and deprived many others of their right to an effective remedy. In a 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.”<sup>19</sup> 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.<sup>20</sup> Moreover, there is no appeal process available to survivors when their cases are not prosecuted. Additionally, DoD policy allows officers in the military to resign in lieu of courts martial (RILO).<sup>21</sup> This option prevents a case from proceeding to trial as accused service members are given the option to quit their jobs without being held accountable in a court of law.
  13. 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.<sup>22</sup> Survivors have explained how perpetrators frequently exert control over victims, and are likely to outrank them.<sup>23</sup> 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 of their security clearance, or discharged (sometimes dishonorably).<sup>24</sup> In certain cases where survivors were transferred, members of their commands called the survivors’ new supervisors to inform them of survivors’ “misbehavior,” thereby destroying their reputation and perpetrating the harassment and stigmatization against the service member.<sup>25</sup>
  14. Additionally, survivors of sexual violence 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 servicewomen and men “where the injuries arise out of or are in the

course of activity that is incident to [military] service.”<sup>26</sup> 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.<sup>27</sup> 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**

15. The United States has not taken adequate legislative, administrative, or judicial measures to prevent acts of sexual violence 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 prosecute and effectively redress the assault and thereby violates servicemen and women’s rights under international law.
  
16. Therefore, the U.S. should be urged to:
  - i. undertake all necessary means to prevent sexual violence and to ensure a safe working environment;
  - ii. ensure impartial and effective prosecution and redress of sexual violence allegations by removing the decision whether to prosecute and punish alleged perpetrators from the chain of command;
  - iii. provide access to U.S. federal courts so that survivors of sexual assault may seek effective remedies when the military violates their rights;
  - iv. adopt laws and policies to effectively implement the prohibition of retaliation against service members who report unwanted sexual contact; and
  - v. eliminate the use of RILOs in order to increase accountability among officers for criminal offenses.

## ENDNOTES

<sup>1</sup> 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>.

<sup>2</sup> 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), p. 45, available at: [http://sapr.mil/public/docs/reports/FY13\\_DoD\\_SAPRO\\_Annual\\_Report\\_on\\_Sexual\\_Assault.pdf](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.

<sup>3</sup> 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.

<sup>4</sup> 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.

<sup>5</sup> Department of Defense, SAPRO, “Report to the President of the United States on Sexual Assault Prevention and Response,” (2014), p. 95, available at: [http://sapr.mil/public/docs/reports/FY14\\_POTUS/FY14\\_DoD\\_Report\\_to\\_POTUS\\_SAPRO\\_Report.pdf](http://sapr.mil/public/docs/reports/FY14_POTUS/FY14_DoD_Report_to_POTUS_SAPRO_Report.pdf).

<sup>6</sup> 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. Department of Defense, SAPRO, “Fiscal Year 2013 Annual Report on Sexual Assault in the Military,” (2014), p. 46, available at: [http://sapr.mil/public/docs/reports/FY13\\_DoD\\_SAPRO\\_Annual\\_Report\\_on\\_Sexual\\_Assault.pdf](http://sapr.mil/public/docs/reports/FY13_DoD_SAPRO_Annual_Report_on_Sexual_Assault.pdf);

<sup>7</sup> 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, ¶ 22. Likewise, the Committee on the Elimination of Discrimination against Women has identified rape and sexual violence as a form of torture, as have several U.N. Special Rapporteurs on Torture. CEDAW Committee, 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 21<sup>st</sup> 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.

<sup>8</sup> 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.

<sup>9</sup> 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.

<sup>10</sup> By demoting servicemen and women’s ranks or discharging service members in response to their reports of sexual violence, the U.S. violates their right to work, which is safeguarded in Article 23 of the UDHR and Article 7 of the 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.

<sup>11</sup> 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.

<sup>12</sup> 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. Article 3 of the UDHR and Articles 6 and 9 (1) of the 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 guarantee “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 ¶ 58; General Comment 6 at ¶ 5.

<sup>13</sup> 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.”

<sup>14</sup> 32 C.F.R. § 635.28.

<sup>15</sup> Department Of Defense: Victim And Witness Assistance Program, Military Justice Overview, available at <http://vwac.defense.gov/military.aspx>.

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<sup>16</sup> Department of Defense, Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases (Apr. 20, 2012), available at [http://www.dod.gov/dodgc/images/withhold\\_authority.pdf](http://www.dod.gov/dodgc/images/withhold_authority.pdf).

<sup>17</sup> See ICCPR, Arts. 14, 26; UDHR, Arts. 7, 8.

<sup>18</sup> See Service Women's Action Network, Briefing Paper: Department of Defense (DoD) Annual Report on Sexual Assault in the Military, Fiscal Year 2011, p. 2-3 (2012), available at: [http://servicewomen.org/wp-content/uploads/2012/04/SAPRO-briefing-report-4\\_17\\_12.pdf](http://servicewomen.org/wp-content/uploads/2012/04/SAPRO-briefing-report-4_17_12.pdf).

<sup>19</sup> Part V § 1 (e), MCM 2012, p. V1.

<sup>20</sup> For example, Amy Lockhart joined the Navy in 1997 and is still on active duty. She was raped by a co-worker after attending a party at the end of a two-week training program. Two weeks later during a Disciplinary Review Board hearing, Lockhart's command threatened to charge her with fraternization with a co-worker and said he had a sworn statement from her perpetrator admitting to having sex with her. Lockhart denied the charges and explained that she could not have consented to sex with the individual because she was passed out. Instead of giving her information about reporting her sexual assault, command demoted Petitioner Lockhart and she lost her Captain status. Command then threatened to charge Petitioner Lockhart with adultery if she pressed forward with the case. See First Amen. Compl., *Cioca v. Rumsfeld*, 11-CV-00151 (E.D. Va. Sep. 6, 2011), p. 30-31, available at: <http://www.scribd.com/doc/109560203/First-Amended-Complaint-Cioca-v-Rumsfeld>.

<sup>21</sup> See *supra* note 18, p. 4.

<sup>22</sup> 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.

<sup>23</sup> *Id.*

<sup>24</sup> For example, after reporting the rape, survivor Galla faced retaliation from her chain of command. She was not allowed to work in enclosed spaces with male colleagues, a restriction her superiors claimed was for her own protection. This limitation not only made it difficult for her to do her job, but left her feeling ostracized from her shipmates. Galla began to receive negative performance evaluations and was eventually told by her commander that it would be best for "morale" if she left the ship. She transferred to a duty station on land, but the retaliation continued when her new chain of command learned about the rape and the ongoing investigation. Suffering from post-traumatic stress disorder, Galla was singled out for drug and alcohol tests and was accused of using her rape as an excuse for poor job performance. One member of her new command told her that the rape was only "five minutes of her life" and she needed to "get over it already." In the face of such harassment and ostracism, Galla accepted her superiors' offer of immediate separation from the Navy in 2005. See *Klay v. Panetta*, No. 13-5081 (D.C. Cir. 2014), p. 3, available at: [http://www.cadc.uscourts.gov/internet/opinions.nsf/67264765DD69534285257D19004FB04A/\\$file/13-5081-1503369.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/67264765DD69534285257D19004FB04A/$file/13-5081-1503369.pdf). The retaliation faced by servicemen and women who report acts of sexual violence amounts to a violation of their right to protection from interference with privacy, honor and reputation. Under Article 17 of the ICCPR, the U.S. is obligated to ensure that no one shall be subjected to arbitrary or unlawful interferences with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation, and that everyone has the right to the protection of the law against such interference or attacks. 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.

<sup>25</sup> For example, in September of 2002, Corpsman Schmidt was reassigned, but his former command told his new location that he was a snitch. This led to continued physical and verbal abuse. See First Amen. Compl., *Cioca v. Rumsfeld*, 11-CV-00151 (E.D. Va. Sep. 6, 2011), ¶ 111, available at: <http://www.scribd.com/doc/109560203/First-Amended-Complaint-Cioca-v-Rumsfeld>.

<sup>26</sup> *Feres v. United States*, 340 U.S. 135, 146 (1950); *United States v. Stanley*, 483 U.S. 669, 693 (1987).

<sup>27</sup> *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).