



Human Rights Committee
c/o Kate Fox Principi, Secretary of the Human Rights Committee
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Via e-mail: kfox@ohchr.org

Re: List of Issues for the United States - 107th session of the Committee (11-28 March 2013)

21 December 2012

Distinguished Committee members:

We respectfully submit this letter in advance of the Human Rights Committee's (the Committee) development of a List of Issues at its 107th session prior to its review of the United States' compliance with the International Covenant on Civil and Political Rights (ICCPR) at its 109th session. Equality Now and the Service Women's Action Network (SWAN) are writing to express our concern about the discrimination and inequality faced by women in the United States military. This letter will focus on continued violations against women and survivors of gender-based violence in the U.S. military, in particular the high rates of sexual assault and the inadequate remedies available to survivors of sexual assault, in violation of Articles 2(1) (non-discrimination), 2(3) (right to an effective remedy), 3 (equality between men and women) and 26 (equal protection under the law) of the ICCPR.

Equality Now is an international human rights organization with ECOSOC status working to protect and promote the rights of women and girls worldwide since 1992, including through our membership network comprised of individuals and organizations in over 160 countries. SWAN is a non-partisan non-profit civil rights organization founded and led by women veterans that works to transform military culture by securing equal opportunity and freedom to serve without discrimination, harassment or assault; and to reform veterans' services to ensure high quality health care and benefits for women veterans and their families.

High rates of sexual assault and lack of perpetrator accountability

Approximately 19,000 sexual assaults take place in the U.S. military each year.¹ Military sexual trauma (MST), defined as rape, sexual assault, and sexual harassment, is fueled by the widespread gender-based discrimination within the U.S. military and exacerbated by U.S. military policies and practices. These policies and practices (1) victim-blame, (2) don't allow for the civil remedies available to non-military (civilian) Americans, and (3) fail to hold perpetrators accountable. In military units where sexual harassment is tolerated or initiated by senior officers, incidents of rape triple or quadruple.²

According to the U.S. Department of Defense, discriminatory practices in the U.S. military should be dealt with through the chain of command, and "attempts should always be made to solve the problem at the lowest possible level." Servicewomen raped by fellow servicemembers rarely obtain justice: approximately only 1 out of every 100 sexual assaults in the military results in the conviction of the

perpetrator.³ This is due to the multitude of obstacles rape survivors face in pursuing justice, including in reporting the crime, getting a thorough and impartial investigation, and seeing their assailant face appropriate charges and punishment. MST survivors don't report their assaults for several reasons: a 2010 survey of servicemembers found that 67% of women didn't report their assault because they felt "uncomfortable" reporting the assault, 54% feared reprisals from reporting, and 46% had heard about negative experiences others had gone through after reporting.⁴

Instead of an independent party, an officer within the perpetrator's chain-of-command is charged with investigating sexual assault complaints and is given an enormous amount of discretion. This discretion leads to conflicts of interest and abuse of power, especially as both the survivor and perpetrator may be under the same officer's command. Commanders also have an incentive to downplay or cover-up sexual assaults happening within their chain-of-command, as these crimes reflect poorly on the unit.

In its last review of the United States in 2006, this Committee called on the United States to "take all steps necessary...to ensure the equality of women before the law and equal protection of the law, as well as effective protection against discrimination [which includes sexual assault and harassment] on the ground of sex." (CCPR/C/USA/CO/3/Rev.1, para. 28). More recently, in her June 2011 report, the UN Special Rapporteur on violence against women recommended that the United States "[e]nsure the effective implementation of a no-tolerance policy for rape, sexual assault and sexual harassments in the military, [and] ensure adequate investigation of all allegations by an independent authority." (A/HRC/17/26/Add.5, IV(B)(a)).

In its fourth periodic report to the Human Rights Committee for this session, the United States reiterated its position that "[t]he chain of command is the primary and preferred channel for identifying and correcting discriminatory practices" including sexual harassment.⁵ This approach is problematic. The continued prevalence of sexual assault and harassment of servicewomen and impunity for perpetrators violates women's equal rights under Article 3 and their right to non-discrimination under Article 2(a) of the ICCPR. To address this issue and prevent future assaults, the United States must demonstrate through action that it takes these crimes seriously. The current structure of the military justice system allows officers within the perpetrator's chain of command to wield undue (and unmonitored) influence over sexual assault cases. We hope the Committee will raise the urgent need to reform the military justice system, as the United Kingdom and Canada have recently done, so that professional military prosecutors are responsible for investigating and prosecuting MST cases.

Sexual assault survivors unable to access civil remedies

Unlike civilians, members of the military cannot seek to hold their employer – the U.S. military - accountable through civil litigation for failing to protect them from sexual assault or harassment. In *Feres v. United States* (1950),⁶ the Supreme Court ruled that the U.S. government is not liable under the Federal Tort Claims Act for injuries to members of the military "where the injuries arise out of or are in the course of activity incident to service." U.S. courts have continued to define the phrase "incident to service" broadly to mean almost anything that happens to an individual while serving in the military, including rape.⁷

While the *Feres* decision itself addresses only tort claims, it ultimately laid the foundation for a far broader doctrine of immunity, barring discrimination claims under both Title VII of the Civil Rights Act and the U.S. Constitution on the premise that, "[t]he special status of the military has required... two systems of justice, to some extent parallel: one for civilians and one for military personnel."

In place of a civil judiciary, each military branch maintains a Board for the Correction of Military Records (BCMR) authorized to remedy unjust personnel actions, including discrimination and harassment, as well as to review allegations of retaliation for reporting offenses. Grievances, however, must first be filed through the Office of the Inspector General (IG), which may decide summarily whether or not a

complaint merits further attention, yielding remarkably few full investigations. According to a recent Government Accountability Office (GAO) study, the IG fully investigated only 29% of all reprisal complaints between 2006 and 2011, and substantiated only a fifth of those investigated. As a result, only 6% of all complainants during this time period ultimately obtained the findings necessary to petition the Board for a remedy.

The Board, moreover, is considerably limited in the relief it can grant. Unlike federal judges, BCMR members are not authorized to award compensatory or punitive damages or to approve settlements. Members, in fact, are not actually judges or attorneys, and need not even necessarily be trained in military law and procedures; they are simply civilian DoD employees who convene on an *ad hoc* basis in addition to their full-time employment duties.

While U.S. courts have pointed to the potential for civil claims to undermine “[t]he need for unhesitating and decisive action by military officers,” civilian employees of the Department of Defense (DoD) are free to bring such claims, as may military contractors sue their employers for injuries arising out of sexual assault or harassment. There is no defensible reason to grant this right to certain DoD employees while excluding others.

The Special Rapporteur on violence against women addressed this issue in her 2011 report, and called on the United States to “allow victims to bring claims against the military when damages arise out of negligent or wrongful acts.” (A/HRC/17/26/Add.5, IV(B)(a)). Particularly when combined with the low prosecution and conviction rates within the military justice system for these crimes, the lack of access to civil remedies violates MST survivors’ right to an effective remedy under Article 2(c) and equal protection against discrimination under Article 26 of the ICCPR. We hope the Committee will urge the United States to allow MST survivors to access civil remedies so that they, like civilians, can hold their employer – the U.S. military – accountable for sexual harassment and assault.

Female sexual assault survivors unable to access necessary services

MST causes the same rates of Post-Traumatic Stress Disorder (PTSD) in women veterans as combat does in men.⁸ However, MST survivors face particular challenges in accessing disability benefits from the Department of Veterans Affairs (VA) as VA employees often disbelieve survivors’ accounts of assault – even when backed up by physician’s reports – and require evidence from other sources that corroborate the survivor’s account. Unlike many other military-related causes of PTSD, MST survivors must submit corroborating evidence in the form of law enforcement or counseling records, pregnancy or STD tests, and statements from fellow servicemembers in order to access treatment and benefits for MST cases. Thus, MST survivors are subject to a higher evidentiary standard than almost any other PTSD claimants. Tellingly, from 2008 – 2010 only 32% of PTSD claims related to sexual assault were approved by the VA, while 54% of overall PTSD claims were approved.⁹ In addition, female survivors of MST were more likely to receive lower compensation ratings from the VA than men, which means they receive fewer benefits.¹⁰

After her country visit to the United States, the Special Rapporteur on violence against women specifically addressed this issue and called on the United States to “extend evidentiary relief to victims claiming in-service sexual assault and accept their testimony as main proof to support a diagnosis of PTSD.” (A/HRC/17/26/Add.5, IV(B)(c)). The current system, which results in fewer MST PTSD claims being granted and female survivors of MST being awarded lower compensation ratings than male survivors, violates female MST survivors’ right to equality, including the right to protection and assistance for victims of gender-based violence, under Article 3 of the ICCPR. We hope the Committee will call on the United States to provide survivors suffering from PTSD stemming from their sexual assault with the services they need to recover from their trauma by lowering the unnecessarily high evidentiary burden they face in order to prove their assault to access disability benefits.

Suggested Questions to the State Party

We would respectfully urge the Committee to raise with the United States government during its review the following questions:

- 1) What actions is the government taking to address the high rates of sexual assault and harassment within the military?
- 2) What are the government's plans to reform the military justice system to ensure that perpetrators of sexual violence are held accountable and that victims are protected against retaliation for reporting offenses?
- 3) What is the government doing to ensure that survivors of MST have access to effective remedies, including civil litigation?
- 4) How does the government plan to ensure that MST survivors throughout the country are granted the services they need to recover, including sufficient disability benefits?

Proposed Recommendations

We also urge the Committee to consider the following recommendations to the United States government:

- 1) As recommended by the Special Rapporteur on violence against women, “[e]nsure the effective implementation of a no-tolerance policy for rape, sexual assault and sexual harassments in the military, [and] ensure adequate investigation of all allegations by an independent authority” instead of through the perpetrator’s chain of command (A/HRC/17/26/Add.5, IV(B)(a)).
- 2) Enact measures to ensure that survivors of MST can bring civil claims against the military for failing to take adequate measures to prevent or address sexual harassment and assault.
- 3) Revise policies to accept the testimony of MST survivors as the main proof to support a diagnosis of PTSD to ensure that survivors can access the services they need to recover.

Thank you very much for your kind attention, and please do not hesitate to contact us if we can provide further information.

Sincerely,



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¹ Department of Defense, SAPRO, “Fiscal Year 2010 Annual Report on Sexual Assault in the Military,” (2011), available at:

http://www.sapr.mil/media/pdf/reports/DoD_Fiscal_Year_2010_Annual_Report_on_Sexual_Assault_in_the_Military.pdf.

² Anne G. Sadler et al., “Factors Associated with Women’s Risk of Rape in the Military Environment,” 43 *Am. J. Indus. Med.* 268 (2003).

³ There are an estimated 19,000 military sexual assaults each year, and there were 191 convictions for sexual assault in 2011. Department of Defense, SAPRO, “Fiscal Year 2011 Annual Report on Sexual Assault in the Military,” (2012), available at:

http://www.sapr.mil/media/pdf/reports/Department_of_Defense_Fiscal_Year_2011_Annual_Report_on_Sexual_Assault_in_the_Military.pdf.

⁴ Defense Manpower Data Center, “2010 Workplace and Gender Relations Survey of Active Duty Members: Overview Report on Sexual Assault” (2011), available at:

http://www.sapr.mil/media/pdf/research/DMDC_2010_WGRA_Overview_Report_of_Sexual_Assault.pdf.

⁵ “Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights,” *U.S. Department of State*, (2011), para. 109, available at:

<http://www.state.gov/j/drl/rls/179781.htm#i>.

⁶ 340 U.S. 135 (1950).

⁷ Last year, in *Cioca v. Rumsfeld* (2011), a U.S. Federal court judge dismissed the landmark case against two former defense secretaries brought by 28 servicewomen and men raped by active duty members of the military. US Fed. Ct. Eastern Dist. of VA, Civil Action No.: 1:11-cv-1 51-1.0-ICB, available at: <http://lawprofessors.typepad.com/files/cioca-dismissal-order.pdf>.

⁸ House Committee on Veterans’ Affairs, *Invisible Wounds: Examining the Disability Compensation Benefits Process for Victims of Military Sexual Trauma*, “Witness Testimony of Ms. Anu Bhagwati, Executive Director, Service Women’s Action Network,” 7/18/2012, available at: <http://veterans.house.gov/witness-testimony/ms-anu-bhagwati-0>, citing Maureen Murdoch, et al., “The Association between In-Service Sexual Harassment and Posttraumatic Stress Disorder among Compensation-Seeking Veterans,” *Military Medicine* 171, no. 2 (2006), 166-173.

⁹ In conjunction with the ACLU, SWAN filed a Freedom of Information Act (FOIA) request to obtain data concerning gender differences in compensation awarded for MST-related PTSD claims.

¹⁰ *Id.* Based on data analyzed for fiscal years 2008 – 2010, men are more likely than women to receive 70% and 100% ratings for MST-related PTSD claims.