



Cornell Law School
Gender Justice Clinic

**SERVICE
WOMEN'S
ACTION
NETWORK**



 **Equality Now**
A just world for women and girls.

**Submission to the United Nations Committee against Torture regarding
the Periodic Review of the United States of America**

List of Issues Prior to Reporting (LOIPR)

June 2016

Submitted by

Cornell Law School's Gender Justice Clinic

Equality Now

Service Women's Action Network (SWAN)

For further information about this submission please contact:

Sharon Pia Hickey

genderjustice@cornell.edu

+1 (607) 255 5483

Cornell Law School's Gender Justice Clinic works on cases and projects that contribute to local, global, and transnational efforts to combat gender violence and discrimination. **Equality Now** is a legal advocacy organization that promotes and protects the human rights of women and girls around the world. The **Service Women's Action Network (SWAN)** supports, defends, and empowers servicewomen and women veterans through advocacy initiatives and community programs.

SEXUAL VIOLENCE IN THE U.S. MILITARY

Committee against Torture Submission: List of Issues Prior to Reporting (LOIPR)

United States of America

Submitted by

Cornell Law School's Gender Justice Clinic

Equality Now

Service Women's Action Network (SWAN)

June 2016

I. Issue summary.

1. Sexual violence and rape in the U.S. military is perpetrated at alarming rates and—as the Committee against Torture (CAT Committee) recognized in its 2014 concluding observations on the third to fifth periodic reports of the United States—violates service members' right to be free from torture and cruel, inhuman, or degrading treatment.¹
2. Despite recent reforms, the U.S. military continues to systematically fail 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 for reporting the abuse to military authorities. Service members may be discharged as a result of the sexual abuse they suffered, and may be denied veterans' benefits as a result. In addition, service members are barred from seeking civil or constitutional remedies in federal (civilian) courts against the military for its failure to adequately prevent and address the sexual violence they experienced.
3. Since the CAT Committee issued its concluding observations in 2014, the situation for military service members has not substantially improved.² Throughout the fiscal year 2015, there were

6,083 reports of intra-military sexual assault or rape in the U.S. military: a decrease of 1% since fiscal year 2014.³ The number of reports represents a fraction of actual incidents of sexual violence in the U.S. military as, according to a study commissioned by the U.S. Department of Defense (DoD), an estimated 20,300 service members were sexually assaulted in 2014 (approximately 10,600 men and 9,600 women).⁴ An estimated 86% of victims did not report the crime, making the actual number of sexual assaults in the U.S. military difficult to determine.⁵ The number of men and women who experience sexual violence in the U.S. military is disproportionate relative to the civilian population, and female service members are disproportionately targeted compared to male service members.⁶

4. This submission will focus on the issues surrounding sexual assault in the U.S. military that the CAT Committee highlighted in its 2014 concluding observations. These issues include: failure to ensure access to justice, including failure to investigate and prosecute instances of sexual assault; retaliation against service members for reporting sexual assault; termination of service members' careers after sexual assault; and denial of access to veterans' benefits.⁷ The submission outlines some relevant legal and policy changes that the United States has undertaken since 2014 and explains why these changes are not sufficient or adequate to fulfill the United States' obligations under the Convention Against Torture (CAT). Finally, the submission provides recommendations for questions to the United States that the CAT Committee might consider including in its List of Issues.

II. The United States fails to ensure access to justice for service members who experience sexual violence, including by failing to impartially investigate and prosecute sexual violence against service members.

5. Under the military justice system, commanders have historically had broad power to determine whether to prosecute a claim of sexual violence, which has presented systemic barriers to survivors' ability to achieve impartial and meaningful redress. When commanders determine that there is sufficient evidence of a sexual assault or connected offense that warrants discipline, the possible actions are—in descending order of severity—preferral of court-martial

charges, nonjudicial punishment, administrative discharge, and other adverse administrative action.⁸

6. In 2014, the CAT Committee recommended that the United States “should increase its efforts to prevent and eradicate sexual violence in the military by taking effective measures to . . . [e]nsure prompt, impartial and effective investigations of all allegations of sexual violence.”⁹ In its one-year follow-up report to the CAT Committee, the United States did not respond to the CAT Committee’s recommendations regarding sexual violence in the U.S. military.¹⁰
7. In 2014 and 2015, the U.S. Congress enacted legislative changes to allow procedures for superior competent authorities to review a commander’s decision not to refer a sexual assault offense to court martial. Further, commanders may no longer consider the general military character of the accused when deciding how to dispose of offenses.¹¹
8. Nevertheless, commanders in the chain of command continue to have the authority to make initial sexual assault and rape disposition decisions, including initiating a nonjudicial or administrative punishment for some types of sexual assault.¹² And, while commanders can no longer overturn a conviction for sexual assault, they retain the authority to modify a sentence pursuant to a pre-trial agreement or if trial counsel recommends reduction of the sentence due to the accused’s substantial assistance.¹³
9. As such, the policy changes adopted in 2014 and 2015 do not adequately address the CAT Committee’s concerns about “prompt, impartial and effective investigations” of allegations of military sexual assault, for several reasons:
 - 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;
 - 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 or punishment-related decision. Although commanders can ask military lawyers for guidance, they may order dispositions contrary to the advice of legal counsel; and

- 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 time and attention needed to render proper disposition or punishment-related decisions.¹⁴

10. Further, service members are barred from seeking civil or constitutional remedies in federal courts against the U.S. military for its failure to adequately prevent and address the sexual violence they experienced. The U.S. Supreme Court has held that servicewomen and men may not seek a remedy against the government in civilian courts “where the injuries arise out of or are in the course of activity incident to [military] service.”¹⁵ 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.¹⁶ Thus, sexual assault survivors who were unable to achieve redress through the military system have found themselves once again denied a meaningful remedy.¹⁷

III. The United States fails to prevent retaliation against service members who report sexual violence.

11. Surveys commissioned by the DoD show that fear of personal or professional retaliation prevents service members from reporting sexual violence to military authorities.¹⁸ This is a well-founded fear, as DoD studies consistently find that most survivors who report sexual violence to military authorities suffer retaliation.¹⁹
12. Retaliation against service members who report sexual violence ranges from threats to safety and life, physical assault, vandalism, and harassment to menial work assignments, “loss of promotion opportunities, disciplinary action including discharge, and even criminal charges.”²⁰

13. In 2014, the CAT Committee recommended that the United States increase its efforts to prevent and eradicate sexual assault in the United States military by “[e]nsuring that, in practice, complainants and witnesses are protected from any acts of retaliation or reprisals, including intimidation, related to their complain[t] or testimony.”²¹
14. In April 2016, the DoD released the *DoD Retaliation Prevention and Response Strategy: Regarding Sexual Assault and Harassment Reports* (the Strategy).²² While it is unclear how the DoD will implement the Strategy, the Strategy is an important step towards acknowledging that retaliation occurs against those who report sexual assault and harassment in the military and that there is a need to improve the way in which the military addresses that retaliation. In 2014, U.S. Congress also adopted legislation that directed the Secretary of Defense to establish Special Victims’ Counsel (SVC) for victims of sexual assault in the U.S. military.²³ These SVCs can provide support to victims in several ways, including by providing “[l]egal consultation regarding potential criminal liability of the victim stemming from or in relation to the circumstances surrounding the alleged sex-related offense and the victim’s right to seek military defense services.”²⁴
15. Nevertheless, these actions do not fully address the retaliation concerns raised by victims of sexual assault in the U.S. military. As a result, these changes fall short of the United States’ obligations under CAT in the following ways:
 - The Strategy does not address the informal professional downgrading of a victim—to, for example, a less prestigious posting or a post with less responsibility—that sometimes occurs following a complaint of sexual assault or harassment;
 - Service members cannot access non-military courts to adjudicate claims related to retaliation, even when either the Inspector General’s office—which is charged with handling reprisal claims—or a commander-directed investigation does not adequately investigate or pursue retaliation claims; and
 - The Strategy does not address or remove the threat of retaliatory charges of often-minor misconduct brought against victims when they report sexual violence. Reporting sexual violence can result in criminal charges against the victim or administrative penalties that can lead to denials of promotions or eventual involuntary discharge,

which have severe repercussions for a service member's career both inside and outside the military.²⁵ As a result, some lawyers and SVCs have advised victims of sexual assault in the U.S. military to not report sexual violence if they were involved in minor infractions at the time of the assault.²⁶

IV. The United States fails to prevent the termination of service members' military careers for reporting sexual violence and does not ensure such service members receive equal access to veterans' benefits.

16. As outlined in the previous section, reporting sexual assault sometimes leads to the termination of servicemen and women's military careers. Some victims of sexual assault receive an "Other Than Honorable" discharge from the military for "misconduct" related to the assault, such as underage drinking or unauthorized leave.²⁷ This discharge categorization denies victims access to healthcare and other financial and educational assistance, and it may also prevent them from attaining other employment, particularly inside the federal government.²⁸ Other sexual assault victims experiencing trauma are discharged for mental health conditions or a "personality disorder," impacting their eligibility to receive veterans' benefits.²⁹
17. In 2014, the CAT Committee recommended that the United States "[e]nsure equal access to disability compensation to veterans who are survivors of military sexual assault."³⁰
18. Since that time, the U.S. Congress adopted the National Defense Authorization Act for Fiscal Year 2015, which directs the secretaries of the military branches to establish confidential review boards "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 the discharge or separation of the individual from the Armed Forces on the grounds that the terms or characterization were adversely affected by the individual being the victim of such an offense."³¹
19. It is unclear whether this legislative change has had any positive impact on victims. To date, only the Army has publicly taken action to acknowledge the need to establish specific

procedures for victims of sexual assault in these confidential review boards.³² The Navy and Air Force have both indicated that victims must present credible evidence of their sexual assault when requesting a change of discharge categorization, such that the burden for establishing sexual assault during these reviews remains on the victim.³³ Additionally, while the U.S. military insists that there is no discrimination in the granting of veterans' benefits, the most recent study available—from the Government Accountability Office in 2014—found that disability benefit claims for Post-Traumatic Stress Disorder (PTSD) related to sexual violence are granted at a significantly lower rate than claims based on PTSD not related to sexual violence.³⁴

V. Recommended Questions.

20. Given the continued 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 CAT Committee pose the following questions to the United States in its List of Issues:
 - i. How does the United States justify the fact that the prosecution rate of rape/sexual assault allegations is significantly lower in the military justice system compared to the civilian justice system?
 - ii. 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 ensure redress for victims when military investigations and prosecutions fail, given that victims are currently unable to access civil or constitutional remedies in civilian courts? What mechanisms for independent monitoring have been put in place to oversee the military's responses to sexual violence committed in its ranks?
 - iii. 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 survivors of sexual assault are informally downgraded, such that they may have less responsibility or are in less prestigious postings?

- iv. How are the new procedures for reviewing the discharge status of victims of sexual assault operating in all branches of the military, and what percentage of challenged discharges have been amended in the applicant's favor since the adoption of these procedures? Why does the U.S. Department of Veterans Affairs continue to grant benefits for PTSD related to sexual violence at significantly lower rates than claims based on PTSD not related to sexual violence?

¹ United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) Dec. 10, 1984, Arts. 1, 2, 16; CAT Committee, *Concluding Observations: United States of America*, para. 30, U.N. Doc. CAT/C/USA/CO/3-5 (Nov. 20, 2014).

² Further, according to a 13-month investigation into the U.S. military's 2014–2016 sexual assault prevention strategy, the Government Accountability Office found that the DoD's 18 prevention-based activities lacked clarity and measurable targets, and that the DoD considered only 2 of the 18 activities implemented. U.S. Government Accountability Office, *Sexual Assault, Actions Needed to Improve DOD's Prevention Strategy and to Help Ensure it is Effectively Implemented* (2015), available at <http://www.gao.gov/products/GAO-16-61>.

³ Department of Defense Sexual Assault Prevention and Response Office, *Fiscal Year 2015 Annual Report on Sexual Assault in the Military* 7 (2016), available at http://www.sapr.mil/public/docs/reports/FY15_Annual/FY15_Annual_Report_on_Sexual_Assault_in_the_Military.pdf.

⁴ RAND Corporation, *Sexual Assault and Sexual Harassment in the U.S. Military: Highlights from the 2014 RAND Military Workplace Study* (2015), available at http://www.rand.org/pubs/research_briefs/RB9841.html.

⁵ See Protect Our Defenders, *Facts on United States Military Sexual Violence: Statistics from the 2014 DoD SAPR Annual Report and the RAND Military Workplace Study* (2015), available at http://protectourdefenders.com/downloads/Military_Sexual_Violence_Fact_Sheet_Final_150710.pdf; see also U.N. Human Rights Council, *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Ms. Rashida Manjoo—Addendum—Mission to the United States of America*, para. 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.”), available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.26.Add.5_AEV.pdf.

⁶ See Department of Defense Sexual Assault Prevention and Response Office, *Fiscal Year 2013 Annual Report on Sexual Assault in the Military* 46 (2014), available at http://sapr.mil/public/docs/reports/FY13_DoD_SAPRO_Annual_Report_on_Sexual_Assault.pdf; Joachim Hagopian, *Sexual Assault against Women in the U.S. Armed Forces*, Global Research (Mar. 23, 2014), <http://www.globalresearch.ca/sexual-assault-against-women-in-the-us-armedforces/5374784>. See also Stella Cernak, *Sexual Assault and Rape in the Military: The Invisible Victims of International Gender Crimes at the Front Lines*, 22 Michigan Journal of Gender and Law 207, 210 n 5 (2015).

⁷ CAT Committee *Concluding Observations*, *supra* note 1, at para. 30.

⁸ Department of Defense Sexual Assault Prevention and Response Office, *Fiscal Year 2015 Annual Report on Sexual Assault in the Military—Appendix B: Statistical Data on Sexual Assault* 21 (2016),

available at http://www.sapr.mil/public/docs/reports/FY15_Annual/Appendix_B_Statistical_Data_on_Sexual_Assault.pdf. Commanders might initiate court martial charges if they believe that a sexual assault charge is substantiated. Preferral of court martial charges can result in a trial, a discharge or resignation in lieu of court martial, or dismissal of charges. If the case proceeds to trial, the accused may be convicted of a charge or acquitted. If the accused is convicted, they may be punished by one or more of the following: confinement; reduction in rank; fine or forfeiture of some pay; punitive discharge or dismissal; restriction of free movement; hard labor without confinement; or reprimand. The accused might also be required to register as a sex offender. *Id.* at 24. Commanders might issue nonjudicial punishments according to Article 15 of the Uniform Code of Military Justice (UCMJ) if there is evidence supporting a minor offense under the UCMJ. *Id.* at 27. Nonjudicial punishments may include one or more of the following: confinement; reduction in rank; forfeiture of some pay; restriction of free movement; extra duty; or reprimand. *Id.* If a commander determines that the evidence does not support initiating a court martial or nonjudicial punishment, an accused may be subject to administrative discharge under one of three categorizations: Honorable, General, or Under Other Than Honorable Conditions (UOTHC). *Id.* at 28. General and UOTHC discharges might limit the accused's access to DoD and Department of Veterans Affairs benefits. *Id.* Adverse administrative actions are the least severe form of discipline, encompassing Letters of Reprimand, Letters of Admonishment, and Letters of Counseling. *Id.* at 28.

⁹ *CAT Committee Concluding Observations*, *supra* note 1, at para. 30(a). Similarly, in the United States' 2014 Universal Periodic Review, two countries raised the issue of access to justice for victims of sexual violence in the U.S. military. Denmark recommended that the United States "[i]mprove 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 . . ." Slovenia urged the United States to "[r]edouble efforts to prevent sexual violence in the military and ensure effective prosecution of offenders and redress for victims . . ." U.N. Human Rights Council, *Report of the Working Group on the Universal Periodic Review—United States of America*, para. 176.289, U.N. Doc. A/HRC/30/1220 (July 20, 2015). The United States supported Slovenia's recommendation among others, in part, ". . . insofar as they recommend upholding international obligations, and as consistent with domestic law and policy. We reject certain premises in these recommendations, which constitute unsubstantiated accusations of ongoing serious violations of international law." U.N. Human Rights Council, *Report of the Working Group on the Universal Periodic Review—United States of America, Addendum*, para. 14, U.N. Doc. A/HRC/30/12/Add. (Sept. 14, 2015). In response to Denmark's recommendation, the U.S. Government stated that "[the DoD] has established victim-representation programs for sexual assault victims eligible for legal assistance, consistent with the findings of an independent study concluding that removing proceedings from the chain of command was not needed to improve the situation of victims." *Id.* at para. 15. According to Protect Our Defenders—a national organization dedicated to addressing rape and sexual assault in the U.S. military—the panel who conducted the independent study mentioned by the United States in response to Denmark's recommendation was "handpicked by those who oppose removing the handling of these crimes from the chain of command and staffed solely by Pentagon personnel, elected to support the status quo and arrived at the conclusion they were designed to reach." Protect Our Defenders, *Protect Our Defenders Responds to Pentagon's Sexual Assault Panel Findings that Support the Status Quo* (June 30, 2014), <http://www.protectourdefenders.com/press-release-protectour-defenders-responds-to-pentagons-sexual-assault-panel-findings-that-support-the-status-quo/>.

¹⁰ CAT Committee, *Concluding Observations on the Combined Third to Fifth Periodic Reports of the United States of America—Addendum—Information Received from the United States of America on Follow-Up to the Concluding Observations*, U.N. Doc. CAT/C/USA/CO/3-5/Add.1 (Jan. 14, 2016), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/005/39/PDF/G1600539.pdf?OpenElement>. The United States instead emphasized—in relation to other matters—that the Uniform Code of Military Justice enshrines due process in the military justice system. *Id.*

¹¹ David Vergun, *Legislation changes UCMJ for victims of sexual assault*, U.S. Army (Jan. 7, 2015), https://www.army.mil/article/140807/Legislation_changes_UCMJ_for_victims_of_sexual___/.

¹² Department of Defense *Fiscal Year 2015 Appendix B*, *supra* note 8, at 18.

¹³ National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702(d)(2) (2013).

¹⁴ See Service Women's Action Network, *Briefing Paper: Department of Defense (DoD) Annual Report on Sexual Assault in the Military: Fiscal Year 2011*, 2–3 (2012), available at http://servicewomen.org/wp-content/uploads/2012/04/SAPRO-briefingreport-4_17_12.pdf.

¹⁵ *Feres v. United States*, 340 U.S. 135, 146 (1950); *United States v. Stanley*, 483 U.S. 669, 693 (1987).

¹⁶ *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).

¹⁷ The U.S. military insists that keeping cases in the military justice system as opposed to the civilian system increases the likelihood that victims will have access to justice. However, a recent report claims that the Pentagon omitted or incorrectly described the steps taken by civilian authorities to prosecute sexual violence to help defeat a bill that would strip senior military officers of their power to decide whether to prosecute cases of sexual assault. Protect Our Defenders, *Debunked: Fact-Checking the Pentagon's Claims Regarding Military Justice* (2016), available at http://protectourdefenders.com/downloads/debunked/POD_Debunked_Report.pdf.

¹⁸ See, e.g., 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* 29 (2016), available at http://www.rand.org/content/dam/rand/pubs/research_reports/RR800/RR870z2-1/RAND_RR870z2-1.pdf. See generally Human Rights Watch, *Embattled: Retaliation Against Sexual Assault Survivors in the U.S. Military* (2015), available at https://www.hrw.org/sites/default/files/report_pdf/us0515militaryweb.pdf.

¹⁹ *Id.* This survey found that 62% of respondents who reported sexual violence faced retaliation. As this survey only included active service members, rates of retaliation may be even higher among service members who voluntarily or involuntarily left the military after reporting sexual violence. See also Defense Manpower Data Center, *2015 Military Investigation and Justice Experience Survey (MIJES): Overview Report* vii, 100–103 (2016), available at http://sapr.mil/public/docs/reports/FY15_Annual/Annex_3_2015_MIJES_Report.pdf. This 2015 DoD-commissioned survey found 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. Of those that filed complaints about retaliation, 63% said that the situation continued or got worse for them, and 42% reported that they were told or encouraged “to drop the issue.” *Id.* at vii, 104.

²⁰ Protect our Defenders, *Protect Our Defenders and Human Rights Watch Release Report on Retaliation of Military Sexual Assault Survivors* (May 18, 2015), <http://www.protectourdefenders.com/press-release-protect-our-defenders-and-human-rights-watch-release-report-on-retaliation-of-military-sexual-assault-survivors/>.

²¹ *CAT Committee Concluding Observations*, *supra* note 1, at para. 30(b).

²² *DoD Retaliation Prevention and Response Strategy*, *supra* note 21.

²³ 10 U.S.C. § 1044e (2014).

²⁴ *Id.*

²⁵ *Embattled*, *supra* note 18, at 58–59.

²⁶ *Id.* at 57–58.

²⁷ Human Rights Watch, *Booted: Lack of Recourse for Wrongfully Discharged US Military Rape Survivors* 23 (2016), available at <https://www.hrw.org/report/2016/05/19/booted/lack-recourse-wrongfully-discharged-us-military-rape-survivors>.

²⁸ *Id.*

²⁹ *Id.* at 27.

³⁰ CAT Committee Concluding Observations, *supra* note 1, at para. 30(c).

³¹ National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 547 (2014).

³² Secretary of the Army, *Army Directive 2015-29 (Confidential Reviews of Characterization of Terms of Discharge of Members of the Army Who are Victims of Sexual Offenses)* (Aug. 6, 2015), available at http://www.apd.army.mil/pdffiles/ad2015_29.pdf; *Booted*, *supra* note 28, at 92.

³³ *Booted*, *supra* note 28, at 92.

³⁴ Government Accountability Office, *Military Sexual Trauma: Improvements Made, but VA Can Do More to Track and Improve the Consistency of Disability Claim Decisions* (2014), available at <http://www.gao.gov/assets/670/663964.pdf>; American Civil Liberties Union, *Battle for Benefits: VA Discrimination Against Survivors of Military Sexual Trauma 1* (2013), available at <https://www.aclu.org/sites/default/files/assets/lib13-mst-report-11062013.pdf#page=3>.